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Do We Have Too Many Intellectual Property Rights?

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THE EIGHTH ANNUAL HONORABLE HELEN WILSON NIES MEMORIAL LECTURE IN INTELLECTUAL PROPERTY LAW

DO WE HAVE TOO MANY INTELLECTUAL PROPERTY RIGHTS?*

HON. RICHARD A. POSNER**

INTRODUCTION[1]

Good afternoon and welcome to the Annual Nies Lecture in Intellectual Property Law. This year we are particularly honored to have as our guest speaker Judge Richard Posner, one of the most distinguished figures and best-known legal scholars in our country and abroad. After his graduation from Harvard Law School, Judge Posner worked for several years in Washington D.C., as a clerk to Justice Brennan, as an assistant to Commissioner Elman of the Federal Trade Commission, as an assistant to Solicitor General Thurgood Marshall, and as general counsel to President Johnson's Task Force on Communication Policy. Judge Posner began his academic career at Stanford in 1968. One year later, he moved to the University of Chicago where he taught as full time faculty until 1981, when he was appointed to the U.S. Court of Appeals for the Seventh Circuit, and where he still teaches as a Senior Lecturer in Law. As one of the best-known figures in law and economics, Judge Posner has contributed to all areas of law throughout his career: jurisprudence, law and literature, constitutional interpretation, criminal law, labor law, and of course intellectual

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* Audiotape of the Eighth Annual Honorable Helen Wilson Nies Memorial Lecture in Intellectual Property Law, held at Marquette University Law School (March 28, 2005) (on file with the *Marquette Intellectual Property Law Review*). The lecture is delivered each spring semester by a nationally recognized scholar in the field of intellectual property law.

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1. Professor Irene Calboli, Marquette University Law School, provided introductory remarks.

property. Judge Posner has written more than thirty-eight books, and more than three hundred law review articles and book reviews. Please join me in warmly thanking Judge Posner for coming to Marquette University Law School today.

LECTURE

Thank you very much Professor Calboli and Dean Kearney. It is a pleasure to be here and an honor to be asked to give this Nies lecture. I'll try not to speak for too long, and thus leave time for questions.

What I'm going to talk about is the phenomenon of "propertization" (of intellectual property), that is, taking some valuable resource, in this case an intellectual resource broadly understood, and making it a private property. When I say by way of title, "Do We Have Too Many Intellectual Property Rights?" this should be understood to mean "Are we over-propertizing intellectual property?" I think there is a danger of that, and that is what I want to focus on, with particular reference to copyrights and patents. Though copyrights and patents are not the only forms of intellectual property, they are probably the most important and I will focus on them, indeed with a somewhat greater emphasis on copyrights than patents.

I think it is very useful when thinking about intellectual property to start with physical property—indeed I think professors who teach the law of physical property should also teach intellectual property, and vice versa, because the continuity between these two forms of property are important and striking; but the differences are also illuminating. One error that the courts and Congress can fall into is moving too quickly from the principles of physical property to those of intellectual property. For when we think of intellectual property and the model of physical property we are struck by three differences. First, intellectual property rights tend to be limited in duration—twenty years for most patent rights and life plus seventy years for copyrights owned by individuals. There are forms of intellectual property—or maybe quasi-intellectual property—that do not have durational limitations; I'll just mention them very quickly. One of them is trademarks. I realize that Professor Calboli is a specialist in trademark law but actually I do not regard trademarks as intellectual property. They are identifiers. They are compact ways of identifying the source of a product and they do not create any right beyond the right to have an unambiguous identifier of your goods so that consumers are not confused. Another exception to the durational limitation of intellectual property is trade secrets, but

trade secrets are intellectual property in only a special sense, because in the main trade secret law only allows you to enforce tort law and contract law against efforts to appropriate some secret process or method that you have. As long as copiers and imitators avoid violating tort law or contract law, they can take your secret: for example by reverse engineering, with impunity. There are other forms of intellectual property also, but I do not have time to discuss them. An important one is the right of publicity—that is, the right of a celebrity to have the exclusive commercial use of his or her name. There is also a doctrine of misappropriation, which allows some limited protection for ideas that are not patentable or copyrightable.

But if one limits one's attention to copyrights and patents as the most important intellectual property rights, then it is correct and important that they have a time limitation. There are also significant scope limitations in intellectual property rights. You cannot copyright every form of expression, every piece of art, every musical work, and so on. What are called "ideas" are excluded from copyright protection. They usually are not ideas in the scientific sense; they are mainly stock characters, familiar plots, and so on. They may be very important dimensions of a very creative work, but they are not copyrightable. In the case of patents, fundamental ideas—basic research—are not patentable. So there are, durational limitations and scope limitation and also the concept of fair use, particularly in copyright, but also, though usually not called by that name, in patents. Fair use allows some appropriation of intellectual property without the permission of the owner—unlicensed copying that is nevertheless lawful.

In these three respects intellectual property is really quite different from physical property. In physical property, we don't have durational limitations. You own your house, your wristwatch, your clothing, and so on, in perpetuity. There is no real scope limitation. There is very little in the way of physical property that cannot be owned. Some things cannot be owned, for example illegal products; but generally we do not think that there are important areas of physical property that are out of bounds. Nor have we a robust concept of fair use of physical property. You cannot get into your neighbor's car, drive it around the block, return it to the neighbor, and say, "Well, I know I didn't have your permission to take this joy ride, but it was a short ride. It didn't interfere significantly with your use of your property." The only real exception I can think of to the absence of a fair use doctrine in the law physical property is what is called a "trespass by necessity." If, for example, you veered off the road in order to avoid hitting a child, and

veered onto the adjacent private property, that trespass would be considered justified. That would be an example of an appropriation, obviously very limited, of private property without permission or compensation, which nevertheless would be privileged.

The effect of these three limitations on intellectual property that do not have significant counterparts in physical property is that there is a significant public domain of intellectual property, that is, a significant area of unappropriated and unappropriatable property—a mass of valuable ideas and expressions that are available for anybody to borrow, copy, use, freely but not exclusively. We do have a public domain in physical property; we have public lands, but they are public domain in a special sense, the sense of being owned by the government rather than individuals or private firms. Still it is owned, and treated as property. The government decides whether you will be permitted on its public lands; it charges fees for access, for example to national parks. The government may have different pricing policies but, basically, government-owned property is administered and regulated like, and subject to similar legal regimes as, privately owned property. There is relatively little physical property that people are permitted to use but not allowed to establish a property right in.

The big difference then between physical and intellectual property is that the law insists that there be a large public domain of intellectual property. Why is this? The way to approach the answer is to ask: Why is it that we have private ownership of physical property? What are the benefits of such a regime? Why do we not have a big public domain in physical property? Why do we not communalize property?

There are two answers to this series of questions that I find persuasive. The first is the desirability of limiting congestion. If you think about how people use highways, and contrast a toll-way with an unlimited access highway, although everybody is sensitive to the delays on a congested highway and nobody likes it, when you decide whether to drive to work rather than take the train all you care about, if you are a normally self-interested person, is the delay *you* will experience; you do not worry about the delay *your* use of the highway will impose on the other drivers. It is because of unlimited access to a physical facility, like a highway, that people do not consider the effect of their own behavior on the convenience of the other users, producing a congestion problem. But if you have a toll road—that is, if someone owns the highway and treats it as property—the owner will fix the toll at a level that will bring about an optimal degree of congestion. Optimal in the sense that on the one hand you do not want to have so little use of the highway that

everybody speeds along with no delay and there are very few users, but on the other hand you do not want everybody crawling because there is so much use. So you fix a toll, which you can vary by the time of the day, and so on, that will optimize congestion. That is an advantage of private property.

The other advantage, which is probably the one that is most familiar, is that with private property, people have an incentive to invest in developing the property—to make it as valuable as it can be made—because they get to enjoy the benefits of that investment. They reap where they have sown. If you had a situation in which anyone was free to come along and harvest the crops that you had planted, you would not have any incentive to plant. If we want people to invest for the future, to we have to give them property rights.

The implication of this analysis is that everything should be owned. If everything is owned by someone, then we get the optimal degree of congestion and we get the optimal investment in creating future values. The question is; why does this reasoning not apply equally to intellectual property? Why should we place limitations on ownership in an effort to create a public domain? One reason has to do with costs of transacting. In a dynamic society the first owner of a piece of property is not necessarily the last. Values change, people change, and so on, and it may turn out that the property is more valuable in a different use. That is extremely common. So we need a system of transfers, sales, or in short transactions, in order to make sure that property can gravitate to its most valuable use. In the case of physical property that is ordinarily unproblematic. We know who owns a particular property; we see the property, it is visible, and it is also recorded in public registries. Knowing what the property is and who owns it, one can straightforwardly transact with the owner and thus shift the property into a more valuable use. In the case of intellectual property, the process of transacting and thus shifting the property into more valuable uses is much more complicated, and there are various reasons for that.

One is simply the *invisibility* of intellectual property. You cannot see an idea, and if you do not have a clear sense of what the property is it is very difficult to transact in it. Intellectual property is indefinite in time as well as in space. We do not have the same detailed registry of ideas and works of expression that we have in the case of physical property, with its Uniform Commercial Code registries of chattels and its land-title registries for real property. True, whenever a new work is created and copyright is sought, with some exceptions, the work is deposited in the Library of Congress; but there is no way to search the

Library of Congress to find out whether some particular expression that you would like to use has been used in the past. With patents, there is, of course, the patent recording system, and in principle one can search the files of the patent office to find out whether your invention has been anticipated, but this is often extremely difficult to do. In the case of software, for example it is very difficult for Patent and Trademark Office to index software so that someone who has invented a piece of software can find out whether he has been anticipated. So transacting is difficult in the case of intellectual property and the more difficult transacting is the more society might want to bypass the property rights system and allow someone to use a piece of property without transacting. I will give some illustrations in a moment.

A second reason that we don't want to have universal propertization of intellectual property as of physical property is that there is a greater monopoly potential for intellectual property, precisely because there are no spatial limits on a piece of such property. We don't worry terribly about someone monopolizing the manufacture wheels. Wheels are easy to build and there are many potential manufacturers; but on the other hand the *idea* of the wheel must have been invented by someone, many thousands of years ago (maybe a number of someones at more or less the same time), and if the idea of the wheel could be property there would be an enormous monopoly potential. This links up with the previous point about transaction costs because the more people that have to obtain a license in order to use an idea the greater the total costs of transacting. If everybody who wants to manufacture a wheel had to get a license from the patentee of the idea, the aggregate transaction costs would be enormous.

A third reason is the public-good aspect of intellectual property. This requires just a word of explanation. When the economists talk about a "public good" they do not mean something owned by the government; they mean something that more than one person can use at the same time without reducing the value of the product to the other users. If I have a hammock, for example, a physical good, you cannot have a hundred people lying in the hammock with me. The hammock is thus a private good in the economic sense, and this would be true even if it were owned by the government. But while multiple uses impose costs in the case of physical property, this is not true in the case of intellectual property. A hundred people, or for that matter a million people, can be reading the same book at the same time. They are not occupying the same physical space, however. They are consuming the same intellectual property without reducing the value of that property to

anybody else. This makes the meaning of theft—or piracy—very different in the intellectual property than in the physical property domain. This is a point that owners of intellectual property have successfully concealed by managing to appropriate the term "piracy," which of course has very negative connotations, to describe unauthorized copying, even though there is a huge difference between copying someone's intellectual property and taking someone's physical property.

To illustrate, computer operating systems are widely copied without the authorization of the owner and without any compensation to him. That is described as "piracy," it is copyright infringement, and it can be patent infringement as well because software is patentable as well as copyrightable. But actually suppose that people who copy an operating system are mainly people who could not afford to, and would not, buy the operating system from the producer—maybe they live in the third world. That means that the producer is not actually losing any sales as a result of this unauthorized copying.

That is very different from the situation where someone goes into a Rolls Royce showroom and steals a Rolls Royce. The fact that he could not afford to pay for it does not mean that he is not inflicting harm on the company; he is, because the property that he is taking is unavailable to be sold to someone else. But however many people copy an operating system, that doesn't restrict the output of the producer of the operating system, except insofar as the people who do the copying actually could and would pay the producer's price if they could not copy. If only a few of the people who copied the program would have bought it, the producer actually benefits from the piracy because the more people who use the operating system the greater the market for applications programs that work with it, and he may produce such programs as well as the operating system.

This is not to say that rampant copying of copyrighted work cannot hurt copyright owners; of course it can. It depends on how much copying there is, who is doing the copying, how good the copies are, and so on. That is why we have this file-sharing controversy about to be argued in the Supreme Court; with very cheap, acoustically adequate, and rapid copying of popular music CDs the manufacturers of the CDs may be losing a substantial income. Infringement is something to think about, but it should not be equated to theft because of the difference between a public good and a private good.

A fourth difference between physical and intellectual property is that we assume in the case of physical property that if there are no

property rights very little of this property will actually be produced. It is costly: If you cannot charge for a house, who is going to build it? If you cannot charge for a wristwatch, who is going to incur the expense of making a wristwatch? Yet in the case of intellectual property we know that a great deal of intellectual property is produced even when there are no property rights in intellectual property at all. We know this because copyrights and patents came late in the history of the human race. They are relatively recent innovations, medieval or late medieval in the case of patents and eighteenth century in the case of copyrights in England. Before these legal regimes there was enormous production of intellectual property. Even today there are many ways in which people are induced to produce intellectual property without propertization. Professors write articles. The articles are copyrighted but the authors do not receive royalties or other fees. What we have in the academy is a patronage system: The professors are paid a salary to teach and to write, and thus part of their salary is really compensation for writing as in the old patronage systems where an author would have a patron who admired him and would pay him to write. Popular singers are concerned about file sharing. Yet before there were CDs—indeed, before there were recordings of any sort—there was popular music. People were creating it in great quantity and we know that an important source of income for singers and composers is live performances, which are not affected by file sharing.

A great deal of creative expression is "incentivized" by the non-pecuniary benefits that accrue to the creators, the satisfaction they get from creating. Van Gogh sold no paintings during his lifetime—not a happy person, he killed himself—but nevertheless he was driven to create non-marketable works by an inner pressure.

In short, propertization doesn't really have the same significance in intellectual property that it has in physical property. It has an important role to play, but not as important, and this helps to explain why there are limits to propertization of intellectual property and why we should be careful about erasing those limits.

There is a further, very important reason for distinguishing between the intellectual and the physical public domain. Ordinarily in the case of physical property we do not think of physical property being, so to speak, built on top of other physical property. You do not say, "I like your house. I'd like to build my house on top of your house." That does not make a lot of sense. However, most intellectual property builds upon intellectual property. Most of it is incremental. There are loads of illustrations. One is *West Side Story*, the Leonard Bernstein

musical; which came from *Pyramus and Thisbe*, a story by Ovid, via *Romeo and Juliet*. So this is incremental creation, building on what has gone before. If that is how intellectual property is characteristically created, you can see the importance of the public domain. If there is no public domain, then every creator of intellectual property is going to have to obtain multiple copyright licenses—but from whom? Look around for Ovid's descendants, to try to negotiate a license, if he has any descendants;" or did his rights escheat to the Roman Empire? What is the successor to the Roman Empire?

Let me illustrate the problems of excessive propertization of intellectual property by reference to the Sonny Bono Copyright Term Extension Act.[2] That was the statute upheld against constitutional challenge in the *Eldred* case.[3] The Act increased the length of the standard copyright term from the life of the author or other creator plus fifty years to life plus seventy years, so it tacked on twenty years to all unexpired copyrights, not only on works that had not been created yet but on all existing works as well. The result was a significant constriction of the public domain.

It is a statute with an absurd history. It became a sentimental favorite because Sonny Bono—who was killed in a skiing accident—was reported to have said that: "copyright should be forever." If copyright should be forever, well, just adding twenty years is not an issue. The real pressure for the extension came initially from the descendants—relatives, heirs, and so on—of George and Ira Gershwin and other very successful composers/writers of popular music in the twenties and thirties, whose copyrights were about to expire, and later from the Walt Disney Corporation, which was facing the imminent expiration of the Mickey Mouse copyright. So there was a lot of pressure behind the law, and it was passed.

I note in this connection a distortion in the political process. There is an asymmetry of interests whenever the choice is between propertization of intellectual property and maintenance of the public domain. The valuable intellectual goods that are protected by property rights, by copyrights or patents, generate large earnings for their owners, but goods that are in the public domain do not generate large earnings because they are freely copiable, driving the earnings on them down to the competitive level. Publishers of public domain works, not being able to copyright their works, tend to be rather thread-bare entrepreneurs;

2. 17 U.S.C. §§ 102-06 (1998).

3. Eldred v. Ashcroft, 537 U.S. 186 (2003).

lacking large profits, they can't lobby as effectively against an extension of copyright or patent terms, and the resulting shrinkage in the public domain, as the owners of such intellectual property rights can lobby for extensions.

In the patent area, we see this in the asymmetry of investments in lobbying and litigation of the manufacturers of branded—that is, patented—pharmaceutical products and the manufacturers of the generics, because the price and profit difference between a patented drug and its generic equivalent are enormous. After a drug becomes generic there is actually an interval in which the first generic manufacturer has some protection against competition from other generic manufacturers, but putting that aside the price of the generic will tend to be bid down to the manufacturing cost, not yielding any abnormal profits for the generic manufacturer; whereas before the patent expires the ratio of the price of the pharmaceutical to actual cost to the manufacturer may be very high. That's not a complete analysis because the pharmaceutical companies have large R&D and marketing expenses, but nevertheless when a drug patent is about to expire the potential cost to the patentee greatly exceeds the potential gains to the generics.

In any event, one of the problems created by the *Eldred* decision, upholding the Sonny Bono Act, was that the longer the copyright term is, the higher the cost of transacting with the original owner. Publishers who would like to publish public domain works and not have to deal with copyright owners, if they find themselves forced to do so because the public domain has shrunk and the works they were planning to publish in a year or two when the copyright expired are going to remain under copyright, will have to hunt up the copyright owner and negotiate with him. The older the copyright, the more difficult it is to find the copyright owner. You can look in a book and you'll see the name of the original copyright owner, but the book will not tell you, and there will be no easy way to find out, whether the copyright has been transferred, who the current owner is, and so on. If you do track down this person, you may find yourself in a difficult negotiation. It is one thing to have a regular market in stocks, real estate, personal property, and so forth in which one can transact with some confidence, but if someone unexpectedly shows up on your doorstep and says "You know, I've discovered that your great-grandfather wrote a book, it's been out of print for fifty years, but I think there might be a market and I'd like to publish it," what kind of negotiation is going to ensue? The person you have approached will not have any idea what a proper license fee is for

such a work, so transaction costs, already great in intellectual property as I have said, become greater the longer the copyright term. Remember that one reason there is a durational limitation on copyright is high transaction costs: The longer the duration, the greater those costs.

One way around this problem is to enlarge the boundaries of the fair use doctrine as currently understood, in recognition that the increase in the copyright term has increased transaction costs and so requires an adjustment, which would nevertheless be consistent with the spirit of the Sonny Bono Act. In the name of fair use the law should say to people who want to publish what they hoped would soon be in the public domain but turns out by virtue of the Act to be still under copyright, "If you make a reasonable search for the copyright owner, and you can't find him, you can go ahead and publish the work without permission and without having to compensate the copyright owner. The work will be deemed to have entered the public domain." And to the copyright owners the law would say, "If you want to protect your copyright, you should make sure that it is registered somewhere so that people who want to publish any work that you own will be able to search in the registry and discover your name and address." If that were the rule, we would see private registries spring up in which people who had copyrights would register them and thus maintain their rights.

The reason this approach would be quite consistent with the extension of the copyright term by the Sonny Bono Act is that the purpose of the Act was to protect *valuable* copyrights. Very few old copyrights are valuable. We know that because in the old days, before the copyright term was measured from the life of the creator of the work, if you wanted to keep your copyright beyond its initial term, you had to pay a renewal fee. The fee was exceedingly modest, yet the vast majority of copyrights were not renewed. Most copyrights lose their value very rapidly. So there would be no great loss to anybody if we made it somewhat easier for publishers to publish old though still copyrighted works without the permission of the owner. The owners of those copyrights that are valuable—copyrights that would have been renewed under the old regime—will have every incentive to register their copyrights in order to be protected against the fair use doctrine.

I have somewhat slighted the patent area, so in closing let me address briefly a counterpart problem in patent to the copyright problem I have been discussing. In copyright, because of the Sonny Bono Act and other developments as well, there is a kind of congestion of copyrights. That is, there are a lot of old copyrights that are not

really worth much, but if you have to negotiate with the copyright owners it creates difficulties for current publishers because the public domain has shrunk. There has been a similar development in patents. In the late 1970s it was feared that the American economy was falling behind the economies of Europe and Japan because of insufficient technological innovation. That fear was almost certainly wrong, but it was widespread and one consequence was the creation in the early 1980s of a new court—the U.S. Court of Appeals for the Federal Circuit. It is actually the successor to the Court of Claims, but it was given something new, a monopoly of patent appeals. It would be, subject only to Supreme Court review, the authoritative interpreter of the patent laws.

Partly because of the concern at the time with what was believed to be insufficient American scientific technological innovation, and partly because a court that has a monopoly on a particular law is likely to see itself as promoter of that law, the Federal Circuit from the beginning became much more friendly to patent claims than had been true when the regional federal courts of appeals decided patent appeals. Patents were much more likely to be upheld against challenges of validity in the years following the creation of the Federal Circuit, and that continues right up to the present. As a result, because patents are more likely to be held valid, there has been a very great increase in the number of patents granted.

One particularly important development in the Federal Circuit was the recognition of a class of patents called "business method patents," which are not technology, but instead are ideas for better ways of doing business. In the old days, such ideas would have been thought non-patentable, would have been considered the kind of normal business innovation that is driven by incentives that did not depend on propertization. A number of what would have in the olden days been thought dubious improvements in business method have been granted patents and those patents have been upheld, with the result that when a firm now contemplates making a new product or adopting a new method of doing business, it confronts a much larger array of existing patents than in the old days—a veritable thicket of patents. What this means is that firms incur additional expenses in negotiating for patent licenses. Some companies have realized that a company's patent portfolio can be an independent source of profit, even if the company doesn't manufacture anything.

A striking feature of the patent system is that you can obtain a patent simply on the basis of a drawing and a set of specifications. You do not have to have made the product or the process that you are

seeking the patent for; you don't even need to have made a prototype. You do have to satisfy the Patent Office that your drawing, your blueprint, could be used to make a real thing, but you don't have to have made it. You can have imaginative people grinding out patent applications at a great rate, the company obtains the patents, and now it looks around and when it seems someone with a new product related to the subject of its patent it writes a letter to the producer saying, "Oh, by the way, we have noticed you are planning to make this or that, and you are actually infringing our patent but we don't like litigation and so for a modest fee we'll license our patent to you." This kind of business strategy creates impediments to inventions. Instead of stimulating invention, the lax standard of the patent office may be creating incentives for strategic uses of intellectual property that end up making invention more costly, more burdensome, thus reducing the rate and distorting the direction of incentive activity. It is another example of how increasing propertization, whether through increasing the length of the property right or the scope of the property right, can actually impair the economic goals that underlie the intellectual property laws.