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**Intellectual Property Rights Are Becoming
Unbalanced in The United States**

Douglas E. Rosenthal

**Mr. Rosenthal is a partner in the Washington DC Office of
The Law Firm Constantine Cannon LLP
A Former Chief of the Foreign Commerce Section of the Antitrust Division of the U.S.
Department Justice, he has written three books and some four dozen articles about legal
topics, with a special emphasis on international and antitrust law and policy.**

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**For related considerations about the interface between antitrust and intellectual property,
see his article: **Do Intellectual Property Laws Promote Competition and Innovation?** *The
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The idea deserves challenge that a technologically advanced society needs sweeping intellectual property laws—that intellectual property is the keystone of political and economic development in the modern age. This idea was strong during the last half of the 19th Century. It lost ground during the first half of the 20th Century. It is now back, stronger than ever, becoming virtually a sectarian dogma in the past 30 years.

In 1776 the Declaration of Independence asserted that the three core values of proper government are the protection of “life, liberty, and the pursuit of happiness.” The pursuit of happiness, many of us understand to mean equality of opportunity—the right to be free of such impediments to self-fulfillment as discriminatory application of law, and to succeed by merit, unencumbered by distinctions of birth and heredity. In 1787, The U.S. Constitution, in its Fifth Amendment, dropped the pursuit of happiness and, in its place, elevated the right to own and keep property.

I think it no accident that nowhere in the Declaration is the word “property” to be found. Though a man of property, Thomas Jefferson valued equality of opportunity more highly. The Constitution reflects the more conservative, Federalist view of a man’s almost paramount right to protect the property he amasses or inherits. It also reflects the view of John Locke that democracy is best practiced by men of property. The populist response has been that equality of opportunity, the right to a fair choice to lift oneself from poverty and exploitation, requires access to knowledge and education as a critical path to

self-improvement, and that clearing this path often requires restrictions on the freedom of those with property and great power.

The right to equality of opportunity during these two centuries was seized as a rallying point by “nations” of ethnic, religious and racial minorities:

Armenians, Jews, Scots, Sicilians, Czechs, and hundreds of other communities all had common languages, shared traditions and customs and a sense of self, inextricably connected with membership in an unofficial nation. They understood life, liberty and equality to support and justify their right to self-determination—to nationhood. This powerful push to be part of a community which could protect its members, and give them self esteem is, like property vs. opportunity, a constant political issue of the 19th and 20th Centuries. As Isaiah Berlin has reminded us, nationalism started as a positive force. But we have seen its dark side in the intervening 200 years. Frequently, nations have built community by making war on their enemies—real or perceived—and the dark side of nationalism threatens democracy today, not unlike 70 years ago.

There is considerable agreement as we begin the 21st Century that life, liberty, property and equality of opportunity remain core values in civilized societies. The failure of communism and the sad experience of Weimar Germany teach that property also needs protecting to promote well-being. However, the success of any law or policy should be judged by how well it promotes a balance of these core values. Unbalanced pursuit of one or two of the four diminishes the rest.

Competition law and policy are supported because they promote freedom of economic choice in the market and protect property acquired by honest effort. Competition can do harm; it can exploit the weak and the poor, pollute our environment and undermine trust and well-being by encouraging greed, selfishness and insecurity.

The exercise of property rights can promote innovation—enhancing productivity and raising the prosperity of most of the people, their sense of freedom, security, well-being and opportunity. But property can be abused. Its concentration among a small number can add to the burdens of the poor and disadvantaged, and can choke off equality of opportunity, freedom, and even life itself -- for example, where expensive medicines that can save lives are not deployed to the poor in need. The way intellectual property in the United States today is protected may be doing more harm than good.

IP is expanding dramatically in the United States. According to an article in *The Economist*, about 75 percent of the value of publicly traded companies is comprised of intangible assets (essentially derived from intellectual property) as compared to 40 percent 20 years ago.¹

In important ways, intellectual property is very different from these more concrete property forms. While rights to tangible property change over time by law and custom, the degree of change is not so great as when new IP laws are adopted. Issues of ownership as to tangible property are not usually so difficult to determine – except in periods of mass theft, like the Holocaust, or the

¹ Kenneth Cukier – *A Market for Ideas: A Survey of Patents and Technology*. The Economist (Special Issue) October 22, 2005 at 3.

Japanese Internment in the Western United States and Canada, after the bombing of Pearl Harbor, because of the ownership right of a holder in due course. IP is a matter of more subjective judgment, with fewer clean boundaries. Reasonable people differ greatly about what is new, creative and worthwhile. Different governments at different times have had very different ideas about how broad and deep intellectual property rights need to be to promote innovation and consumer welfare while assuring inventors some reward for their inventiveness. This is not the case with respect to owning tangible property – once slaves were freed and women were emancipated.

Thomas Jefferson as Secretary of State in 1790 became the first official in the U.S. government responsible for reviewing patent applications. Although a prolific innovator himself, like his friend Benjamin Franklin, Jefferson never sought or received a patent. He had strong reservations about the “whole idea of patents.” [Cite to Bedini and Martin in Bridget McLaughlin’s The Patent System. As McLaughlin has observed, among Jefferson’s problems with patents, were that as:

“a strong proponent of equality among all people, he was not sure if it was fair or even constitutional to grant what was essentially a monopoly to an inventor who would then be able to grant the use of his idea only to those who could afford it. Inventors could keep useful tools and machines from the common people of whom Jefferson was such a protector. He often referred to patents as “embarrassments to the public,” meaning that someone being given exclusive rights to something by the government for some defined period of time was somewhat of an awkward concept (Martin 42). Jefferson himself paid royalties of his own accord on an idea for a mill to a man who would never be granted a patent for his plan “as a voluntary tribute to a person whose talents are constantly employed in endeavors to be useful to mankind” (quoted in Martin 43). He thought that monopolies could also “withhold technological progress from other inventors” by keeping new technology

that could spark ideas in others out of reach of those without a lot of money (Bedini 207). . . He did however, think that inventors should have exclusive rights to their inventions to an extent, stating that “an inventor ought to be allowed a right to the benefit of his invention for some certain time” (quoted in Martin 42). However, he believed that it was “equally certain it ought not to be perpetual; for to embarrass society with monopolies for every utensil existing, and in all the details of life, would be more injurious to them than had the supposed inventors never existed” (The Jeffersonian Cyclopedia, 679).

The first patent act was far more limited in scope and duration than today’s successor laws. As an OP-ED article published recently in *The New York Times* points out, Microsoft accomplished its monopoly in operating system software at a time when Microsoft opposed the patentability of software. At that time an internal memorandum from Bill Gates to senior staff is reported to have stated “if people had understood how patents would be granted when most of today’s ideas would be invented, and had taken out patents, the [software] industry would be at a complete standstill today.”² Like Jefferson, Gates worried that “some large company would patent some obvious thing” and use the patent to “take as much of our profits as they want.”

It is surprising how little empirical evidence there is to challenge the notions that Jefferson and the younger Bill Gates had that patents were often abused, often retarded innovation and often made the rich richer at the expense of the more productive and the less well off. Today Microsoft, now an established monopolist based on unlawful conduct in operating system and office productivity software, which has still not been corrected, holds more than 6,000 patents and is seeking several thousand new patents each year. Periodically,

² Timothy B. Lee, Adjunct Scholar, The Cato Institute, “A Patent Lie,” *New York Times* OP-ED, June 9, 2007 at A-29

Microsoft threatens patent enforcement war on open-source software. Microsoft asserts that it owns 235 patents which are infringed by free and open source software. Parloff, R. (2007). ("Microsoft Takes on the Free World," *Fortune Magazine*, June 14, 2007.)

OSS promotes product interoperability, lower cost software for consumers and has helped make low cost computers more widely available for education and general use in developing countries. It provides Microsoft with the only significant competition left in the operating system software market. If Microsoft were to seek to enforce these patents against the OSS Movement, it would fortunately, probably trigger massive retaliation by the friends of OSS. These friends include IBM, Oracle and several large financial, industrial and telecommunications customers who use OSS in their computer networks. IBM holds even more software and related patents than Microsoft. thus, in today's environment of bloated intellectual property rights, it is the threat of mutually assured destruction that prevents the adverse economic effects of a total patent wave. That is not a healthy dependency for modern society.

Microsoft has used the excuse of a property-taking of the software intellectual property rights it once eschewed, as the justification for non-compliance with both the watered-down U.S. Government antitrust consent decree entered 6 years ago and the European Commission's order of mandatory licensing imposed 3 years ago. According to the EC Commissioner for Competition Policy, Neelie Kroes, this is the first time in 50 years that the Commission has faced such non-compliance by a respondent. (Remarks to the

Antitrust Section of the American Bar Association, Washington, D.C., April 20, 2007.)

There is an important difference between U.S. and EC law with respect to a monopolist like Microsoft, which unilaterally refuses to share its code with competitors where it dominates an essential point of access between customers and suppliers. In the United States, as a result of dictum in a recent Supreme Court case, [**cite Trinko**] such a monopolist may not be required to provide interoperability by sharing patented information with competitors. This is so even if its monopoly is maintained and extended for anticompetitive purposes. In certain circumstances in Europe interoperability must be facilitated by the monopolist through required disclosure of information. The European rule is an important social protection against monopoly abuse and overbroad patent claims. Microsoft is challenging the European rule in a pending appeal to the European Court of First Instance. A decision is expected this September. If Microsoft wins, it will be a further heavy blow to consumer welfare, and a further bloating of intellectual property rights. It will also lay bare a serious inadequacy in antitrust enforcement.

One of the problems for antitrust in the 21st Century is that the legal issues involving high-tech products and services are becoming so complex and costly to analyze, let alone litigate, that enforcement agencies and courts find it increasingly difficult to get and to use the resources needed to do their job. Nowhere is this more true than in the interface between intellectual property claims and contrary antitrust claims.

One way to address this problem is to encourage the innovation and entrepreneurship of private antitrust claims, including class action claims. Skilled plaintiffs' lawyers are often willing to invest the resources and several have the expertise to bring cases seeking to stop the competitively suspect exercise of overbroad intellectual property rights. Over the past 80 years at least as much antitrust law generally has been made in private litigation as has been made by U.S. government enforcement. Regrettably, recent U.S. judicial decisions have severely restricted the rights and opportunities for private antitrust actions. This does not promote consumer welfare or effective law enforcement.

A further problem is that a company like Microsoft which, for years has been earning net profits from its software monopoly of \$1 billion a month may quite simply have more political power to resist the antitrust enforcement of governments than the governments have to require compliance. The very ability of governments effectively to enforce national law against aggressive monopolists in global markets is put in question.

A third way in which intellectual property differs from tangible property is that patent rights when legally challenged often prove invalid. In many litigations, asserted patents are either obvious, plagiarize or not useful. At some points in our history, almost half of the U.S. patents judicially challenged have been invalidated. The uncertainty of the validity of patent claims frequently deters small and medium-sized inventors and customers. I personally have known of individuals and companies with innovative ideas, some of which they patented, for which they were unable to obtain venture capital or other investment financing

because the technology they were pursuing might lead to products that would compete with giant companies like Microsoft or Phillips. The investors were afraid. Intellectual property rights can and do deter innovation.

Because we know so little about: (1) how short should be the term of monopolies granted to a patent holder to, on balance, promote innovation; (2) how broad the categories of patentable knowledge should be to, on balance, promote innovation; and (3) how broad or narrow the concept of obviousness used in granting patents should be to, on balance, promote innovation, we should not assume that the current system of broad patents accumulated by large companies in an orgy of applications and acquisitions is the optimum patent system. It is irresistible, being given the pleasurable opportunity to speak here in beautiful Lisbon, to remind people that Dr. Pangloss in *Candide*, who believes that all is for the best in the best of all possible worlds, was the creative product of Voltaire's indignation at the human tragedy of the Lisbon Earthquake in 1755. Many devout people of the day saw little reason to alleviate the suffering of the earthquake victims since, after all, the human disaster must have been the result of God's will. Analogously, the current elevation of intellectual property to hitherto unknown heights should not be ascribed to God's will in a best of all possible worlds.

The conservative Ninth Circuit Judge Alex Kozinski has said it well.

Overprotecting intellectual property is as harmful as under protecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new. Culture, like science and technology, grows by accretion, each new creator building on the works of those

who came before. Overprotection stifles the very creative forces it's supposed to nurture.³

Systems of title recordation for real estate, for registration of motor vehicles and for other personal property, arrangements for marking them and possessing them in a way which leads to a heavy presumption of ownership, create much less uncertainty about the ownership of real and personal property and make these traditional forms of property quite different from IP. Small property holders are always at a disadvantage in a legal system which favors the deep pocket litigant. Still, the chances of successfully litigating most tangible property disputes seems greater than the chances of the medium-size company with patents successfully litigating against the patent infringement claims of a giant corporation.

There are now more than 160 governments entitled to define their own patent law and policy—within the parameters of the World Trade Organization TRIPS Treaty. Why should many of these countries adopt the view of intellectual property ascendant in the United States, rather than the Jeffersonian or young Bill Gates view? Other than the TRIPS Treaty, which many WTO members now repent adhering to, there is no international law or policy fixing the scope or terms of global patent protection. If we are going to move in the direction of harmonization and balance, we will need more empirical evidence of what IP policy works best to promote the values we care about. The distinguished American economist, F. M. Scherer, has assembled some of the empirical evidence on how well intellectual property rights promote innovation as against

³ White v. Samsung, 989 F.2d 1512, 1513 (9th Cir. 1993).

market competition.⁴ He finds, for example, that AT&T and Microsoft were most innovative when faced with competition. Innovation declined when their rivals were foreclosed.

It has been decided by the Court of Appeals for the Federal Circuit, [**cite Xerox**] some U.S. District courts [**cite Broadcom v. Qualcomm**] and appears to be the current view of the Antitrust Division of the U.S. Department of Justice, that lawfully obtaining a patent or suite of patents implies a virtual presumption that refusing to license or licensing with restrictive provisions is a lawful exercise of the monopoly patent grant. Increasingly, there is little effective balancing between the consumer welfare values promoted by competition against those promoted by monopolists exercising intellectual property rights and insisting upon restrictive licenses to customers and potential competitors.

One of the many factors that has increased the power of intellectual property rights as against competition concerns is that many of the judges on The Federal Circuit Court of Appeals believe in the paramountcy of intellectual property laws. By statute, they have exclusive jurisdiction over patent appeals. This creates a special court with an institutional bias, very rare in the United States federal court system. Except perhaps for the U.S. Tax Court, the federal system is broadly committed to courts exercising general jurisdiction over the full range of justifiable disputes. By self-assertion of judicial prerogatives, this Court has given itself the right to decide conflicting claims between antitrust and

⁴ See the chapter by F.M. Scherer entitled “Technological Innovation and Monopolization” in a forthcoming volume on antitrust law edited by Dale Collins, Issues in Competition Law and Policy. ABA Section of Antitrust Law (2007).

intellectual property. Mostly, it legitimates broad restrictive patent licenses and, in difficult cases, **[Xerox]** reaches facile results in which IP trumps competition concerns. This arrogation of power has stacked the deck against sensible antitrust judicial decisions in this area.

Restrictive licenses are given too little enforcement scrutiny. A balance should be restored between IP and antitrust concerns. We must stop denying that those concerns may, and sometimes do conflict. While it is not favored today, the reasoning of the Ninth Circuit Court of Appeals in Image Technical Services v. Eastman Kodak is sound. It promotes such a proper and nuanced balance.

We started with the four core values of life, liberty, equality and property. Neither intellectual property nor competition law should value property or the market over human life. I have heard of respected antitrust lawyers saying that regulation of health care markets to save the poor who suffer from curable disease undermines competitive markets. Such casualness about human life should be unacceptable in the 21st Century. We have all heard about a corporation that learned from Amazon Tribes about traditional herbs with healing properties. The corporation then patented chemicals within those herbs without telling those who taught them, or sharing with them their royalties. This may be apocryphal, rather than a true story, but it shows how intellectual property can be used to take from people their right freely to use and enjoy their work—especially as Jefferson worried about, their work that is innovative.

The concept of markets in competition, when combined with intellectual property rights, may be used to justify restrictions on the dissemination of copyrighted information where people are unable to pay the price for it. However, if we are to promote greater equality of opportunity globally in the 21st Century, we may need to restrict markets and restrict the rights of holders of intellectual property to challenge interoperability of technologies to make them more generally accessible at lower costs. We may need to restrict intellectual property rights to promote the use of the World Wide Web and modern telecommunications, to make civilization's knowledge more accessible to all who crave access, and to facilitate their communication with each other to aid new understandings.

In the United States, cultural protection laws are widely viewed as an unjustified departure from competition rules. I disagree. Laws in countries like France and Canada which seek to preserve and promote the culture, language and traditions of a national community are not, primarily, a matter of economic protectionism. If we are to combat successfully the dark and vicious side of nationalism, the terror and the violence, we must learn to respect, to value, and to help nurture the positive side of distinctive national cultures. As Claude Levi-Strauss taught us in Tristes Tropiques, the extinction of a language or a culture, and extinctions occur frequently, is a blow to our humanity and the richness and variety of our world.

A brilliant and award-winning production of a play (actually a trilogy) by the greatest living playwright in the English language, Tom Stoppard, recently closed

on Broadway. Its title is *The Coast of Utopia*. It was inspired by, in Stoppard's words, the "presiding spirit" of Isaiah Berlin. The play focuses on leading Russian thinkers of the 19th Century—mostly liberal, some conservative, one an anarchist. The central figure is a somewhat tragic hero of Berlin's, Alexander Herzen. Some of them, but not Herzen, nor Ivan Turgenev, who also appears, believed in utopias. They thought freedom, equality or human happiness could be absolute obtainable goals of political action. Herzen and Turgenev were wealthy men. Like Jefferson, they respected property. But they were appalled by the idea that property rights should be put above life, liberty and equality. During the first time period covered in the two plays eighty percent of the people of Russia were themselves property, were serfs. Herzen and Turgenev did as much as anybody by their writings to persuade Tsar Alexander to free the serfs.

Neither Herzen nor Turgenev thought that utopias were obtainable. The coast of utopia might be a vision in the distance, but you could never reach or land on a utopia, nor should you want to. Utopias would disappoint everyone. Those who got their unilateral wishes would find them insufficient. Those whose wishes were overridden by the one great idea (Berlin's hedgehog) would feel oppressed. Herzen and Turgenev were "more human less doctrinaire" than the utopians that followed—like Lenin. They were losers in the sweep of history over Russia, but were more admirable than those who succeeded them and who established the Soviet Union.

In the 21st Century, we should learn the lesson that Isaiah Berlin taught. There are no utopias. Rampant intellectual property protection is no utopia.

Unbridled competition is no utopia. Economic and political nationalism is no utopia. Neither life, liberty nor equality alone is a utopia. If we are to advance, globally, the vision that the Founding Fathers of the American nation inscribed 200 years ago, that was affirmed 50 years ago by the founders of the European Union, we must balance these four core values and related legal doctrines like the general goal of “free and undistorted markets” with a focus on practical human welfare rather than ideological absolutism.

Thank you.