Title: The Big Steal: Ideology, Interest, and the Undoing of Intellectual Property

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SUMMARY			
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Abstract:

This chapter discusses ways to strengthen intellectual property (IP) rights to support a robust innovation ecosystem. It highlights the need for legal reforms in copyright and patent law to ensure fair compensation for creators. The discussion critiques broad interpretations of fair use and Digital Millennium Copyright Act (DMCA) safe harbors, which have weakened copyright enforcement. Recently, courts are increasingly rejecting fair use defenses in commercial cases, signaling a shift toward stronger IP protections. The chapter also addresses the impact of weakened patent injunctions on innovation and investment. It argues that restoring the ability to enforce patents through injunctions would create a fairer market. Legislative changes, such as modifying DMCA provisions and strengthening patent enforcement, are recommended to balance the interests of innovators and platforms. Ultimately, the author calls for a policy shift to restore IP security and promote sustainable innovation.

Chapters in the Book:

Part 5- Remaking IP Rights
Chapter 17- Reinvigorating IP Rights and the Innovation Ecosystem (p.338-347)

Summary

17. Reinvigorating IP Rights and the Innovation Ecosystem

The following chapter will suggest ways to strengthen IP protections in a constructive manner. The goal should be to promote a robust innovation ecosystem that benefits the public. Specific proposals for changes to copyright and patent law to restore confidence in IP rights will be discussed. Ultimately, strengthening legal security of IP would give market stakeholders more freedom to devise efficient structures for innovation. These changes would create a scenario where every market player, innovators, creators, investors, and entities supporting commercialization, benefit significantly. Furthermore, the proposals are administratively straightforward and focus on restoring foundational elements of a property-rights system.

17.1. Copyright: Enabling Markets in Digital Content

At the onset of the digital economy, it was believed that strong copyright enforcement would hinder internet growth by imposing costs and risks on platforms. This view has been reflected in copyright jurisprudence since that time. Courts have broadly interpreted fair use and Digital Millenium Copyright Act (DMCA)[1] safe harbour, reducing the practical significance of copyright protection, especially with advancements in copying and content transmission. The DMCA safe harbour allows digital platforms to avoid liability for mass infringement if they follow basic precautions against widespread pirated content. Similarly, the expansive application of fair use, particularly transformative use, risks undermining the derivative right of copyright owners and encourages mass infringement. Furthermore, some generative AI developers are leveraging the fair use defence to use content without compensating authors. At the onset of the digital economy in creative works, relaxed copyright enforcement was thought to support internet growth and avoid costly disputes between rights holders and platforms. However, the rise of licensed streaming services like iTunes, Netflix, and Amazon, speaks against the belief that copyright enforcement would impede digital platform functionality.

Even in market segments where courts have explicitly exempted certain limited uses of proprietary content, (e.g., Google Books), platforms have secured consent from copyright holders for broader usage. Importantly, micro-licensing for digital images and collective licensing for music show that mass licensing of copyright-protected works is feasible. Thus, copyright protections are possible without hindering content dissemination. Furthermore, technologies for obtaining consent, tracking usage, and securing payment demonstrate that robust copyright enforcement would not raise transaction costs or harm the digital economy. Put differently, no persuasive argument exists to suggest that robust enforcement of copyright in digital content environments would raise transaction costs that would stifle the digital economy.

In fact, precisely the opposite might be true. Enforcing copyright more strongly could foster more complete markets and ensure creators receive fair compensation for use of their content. There are emerging developments suggesting the market is moving toward restoring property rights in creative content, with digital platforms offering remuneration to individual creators. Certain digital content platforms already provide remuneration to individual creators. However, these individuals can only capture the full value of their content in a secure copyright environment. In general, a narrower interpretation of fair use and the DMCA exemptions would allow creators to bargain more equitably with digital platforms. However, current copyright laws unintentionally shift wealth from content creators to consumers, undermining the infrastructure needed for a sustainable content ecosystem.

17.1.1. Fair Use Denfense

In the case of the fair use defense, courts have already rejected fair use defenses when infringers use it for self-serving commercial purposes. An example case can be seen in Amazon against book publishers. In this case, the publishers argued that the use of captions in Audible's services infringed copyright. Amazon, on the other hand claimed fair use. However, Amazon's argument ignored the fact that its use of captions diverted licensing income from the rights holders. While the case was settled in the end, it was mainly a victory for the copyright owners, because Amazon agreed to pay the publishers. Ultimately, this suggests that Amazon lacked

[1] See Chapter 3, 5, 6, 12 and 17 for further information.

confidence in winning a full trial with its fair use defence. Amazon's lack of confidence was probably well-founded.

In recent years, courts have increasingly rejected fair use defences by for-profit entities that rely on using others' content for their business models. For example, in *Fox News Network v. TVEyes*, the court rejected a fair use defence for a service offering clips of televised broadcasts to paying subscribers. Similarly, in *Dr. Seuss Enterprises v. ComicMix LLC* and *McGucken v. Pub Ocean Ltd.* the courts ruled against a fair use defence because the use was not transformative. In *Warhol Foundation v. Goldsmith*, the Supreme Court denied a fair use defence in a case involving a Warhol illustration based on a photograph, as the use deprived the original artist of licensing income. Clearly there is a growing trend among courts to limit the near-reflexive acceptance of fair use defenses that has characterized much of copyright jurisprudence.

17.1.2. DMCA Safe Harbour

In the case of the Section 512(c) safe harbor, there are no current indications that courts or legislators are reconsidering the broad interpretation which benefits infringers. However, the Copyright Office has acknowledged the need for change to better balance the interests of copyright owners and digital platforms. In a 2020 study, it was emphasized that certain judicial interpretations of the safe harbour do not align with the original Congressional intent. The study concluded that the notice-and-takedown mechanism is "unbalanced" and fails to adequately protect copyright owners against mass infringement. Despite advances in legitimate content delivery, the Copyright Office stated that the scale of online copyright infringement and the ineffectiveness of Section 512[2] notices remain major problems.

In addition, the Copyright Office report linked widespread user infringement on digital platforms to overly broad judicial interpretations of the Section 512 safe harbour. Using diplomatic language, the report also suggested that currently, the knowledge requirements for online service providers may be narrower than Congress intended. In the same fashion, the report criticized court decisions that conflated red-flag knowledge with actual knowledge[3], making it difficult to fail the red-flag test. Furthermore, the Copyright Office clearly stated that online service providers must act on red-flag or actual knowledge.

To address these issues, the report recommended courts reconsider certain DMCA safe harbour interpretations and discussed modifications, including a "notice and stay down" mechanism. In the end, such a "stay-down" obligation would require platforms to take reasonable efforts to prevent repeated uploads of infringing content.

In summary, if policymakers wish to restore a level playing field, they must use legislation to narrow the DMCA safe harbor in order to counteract courts' broad interpretation of this exemption. This type of legislative intervention would restore secure property rights and support a more complete infrastructure for efficiently financing digital content.

17.2. Patents: Restoring the Injunction Backstop

In any market economy with secure property rights, the injunction remedy is a crucial instrument. It provides the legal basis for resource allocation through supply and demand forces. If the holder of an asset cannot credibly stop unauthorized use through legal means, then the asset's pricing will be discounted to reflect the effective lack of exclusivity. This in turn will lead to inefficient transactions and discourage investment. In the end, a lack of injunctive relief against adjudicated infringers discourages innovation investment, unless innovators can deter unauthorized use through other means. Unfortunately, this is the current state of affairs in the U.S. patent system. Since the 2006 *eBay Inc. v. MercExchange LLC* decision, companies in the U.S. have faced reduced availability of injunctions in patent litigation. The reduction in injunctive relief has affected patent licensing entities, holders of standard-essential patents, and patent holders of single components in multi-component products.

Oftentimes, it is argued that the *eBay* decision does not adversely impact the innovation ecosystem because patent owners can still collect damages from adjudicated infringers. This is unpersuasive for three main reasons. First, securing damages involves lengthy, costly litigation, and patent owners often do not

[2] Section 512 of the DMCA establishes safe harbors that shield online service providers from liability for user-generated copyright infringement, provided they meet specific conditions.

[3] Red flag knowledge refers to a service provider's awareness of obvious copyright infringement based on apparent facts or circumstances, even without specific knowledge of individual violations.

recover legal fees, especially those without sufficient resources. Second, without the threat of a "shutdown" injunction, infringers with adequate resources may prefer to incur legal fees and avoid licensing. Third, in a system denying injunctions, reasonable royalty determinations are negatively affected. This is because in this system, royalties are discounted due to the patent owners lacking a credible litigation threat. Ultimately, the lack of injunctive relief under the *eBay* regime impacts patent licensing negotiations, as infringers face minimal risk. Consequently, well-resourced infringers may exploit the low likelihood of injunctions by using patented technology anyway. In the end, this creates an incentive to infringe, especially for smaller entities or entities in rapidly advancing industries. This state of affairs contradicts the fundamental purpose of the patent system.

Assuming the Supreme Court is unwilling to reverse *eBay*, the simplest step is a legislative amendment. It is essential to establish a presumption of irreparable harm upon proving patent validity and infringement. Ultimately, this would also align with the existing four-factor test for injunctions under *eBay*, ensuring a more consistent application of injunctive relief. In fact, Congress made a similar change to the federal trademark statute in 2021, providing a presumption of irreparable injury upon a finding of likely trademark infringement. Such a change is unlikely to increase patent trolling, because courts already have tools to prevent the abuse of the patent system (such as fee-shifting). Moreover, courts would still be able to delay injunctions in exceptional cases involving public interest, such as public health or national security. A similar legal system is already in place in Germany.

17.3. Concluding Thoughts

It is widely understood that private interests often seek economic advantages by securing and expanding legal entitlements from the state, including IP rights. Many believe the pursuit of broader IP rights reflects an effort to capture monopoly rents at the public's expense. However, recent efforts to narrow IP rights in the U.S. innovation economy challenge this view. Aggregators and distributors have successfully reduced IP protections to lower technology input costs, benefiting their businesses. These actions create barriers for innovators and artists who rely on IP rights for returns on investment. To protect innovation, the public interest requires restoring security in IP rights through policy changes that ensures a strong foundation for today's knowledge economy.