

# **Releasing the Productive Potential of Intellectual Property: Governance and Value Creation Processes**

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In most mature economies, exploitation of intellectual property (IP) is legally protected through the use of intellectual property rights (IPRs). Although the number of patents and copyrights has grown steadily since the 1890s (Andersen 2001), in recent years, the pace at which firms, individuals and the public sector are using IPRs to privatize knowledge-based assets is accelerating. Because IPRs provide access to IP and the competitive advantages associated with it, the growing importance of knowledge-based assets for value creation processes has been accompanied by recognition that IPRs represent strategic assets for those who hold and control them.

The mainstream literature on IPR value creation processes assumes that all inventors, whether individuals or firms, are autonomous and rational profit-maximizing agents. It does not recognise the specific nature of productive knowledge, power-relationships in bargaining situations and the socially embedded nature of inventors' behaviour. It also fails to account for both the difficulties associated with technological interdependence, strategic interaction and collaboration in competitive markets and the opportunity costs of using the IPR system as a strategic instrument. However, understanding the processes by which IP value is created and released requires understanding of the nature and role of IPRs in governing these processes at the corporate and sectoral levels of analysis. This includes examination of the various structures of IPR ownership and control, taking into account not only single rights but also portfolios of rights in innovation systems, licensing possibilities, and modes of interaction. In this context, it is a problem that the current law and economics analysis of IPRs equates competition with perfect competition and monopoly with pure monopoly because the architecture of the intellectual property system is a hybrid structure of them both.

In this paper, we examine the interrelationship between the systems governing the ownership and control of IP and the processes by which the value of IP is realised and diffused. The significance of IPR governance is derived from the degree to which ownership of IP is related to control because when ownership and control over the use of IP are divided, governance becomes centrally important.<sup>3</sup> IPR governance structures range from simple to complex ownership and licensing arrangements. They shape both the productive potential of the IP they protect and the processes by which

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<sup>3</sup> Berle and Means (1932) were the first to draw attention to the separation of ownership and control in the modern American publicly-traded enterprise, the potential for abuse of managerial power and the consequent role of effective governance to assure that the interests of dispersed shareholder-owners were prioritised. Since that time, a vast literature on corporate governance has developed to address this and related questions.

the value of IP is realized and distributed. With recognition of the growing contribution of IP to performance effectiveness and the emergence of alternative forms of intellectual property right (IPR) arrangements, the role of governance in IPR regimes has become increasingly important. However, little is known about the social and economic performance of alternative IPR systems (i.e., how the IPR system creates value and how that value is distributed; and the degree to which the IPR system accomplishes its productive objectives). Little also is known about the appropriate design of the IPR system (i.e., the optimal type and number of exclusive rights conferred; length of protection obtained; type and scope of knowledge protected; laws governing licensing arrangements; costs and procedures associated with obtaining and holding rights; and types and costs of remedies for infringements).

### Objective and contribution of paper

Focusing on patents and copyrights, this paper examines the rationale, objectives, operation and performance of alternative systems of IPR governance. In our analysis, the interrelated issues of ownership and control and the creation and distribution of rents from IP are critical because satisfaction with distribution is required for continued participation in the IPR regime; and the appropriation of rent requires ownership. Our objective is to better understand the role of governance in IPR regimes; its influence on the quality of relationships among stakeholders within the system; and its contribution to the processes of value creation, realization, distribution and innovation. We aim to better understand the dynamic interrelationships that underpin the value creation and distribution processes and to design policy aimed at improving the effectiveness of these systems and hence the performance of the corporate and sectoral systems of which they are a part.

Section one describes the alternative forms of IPR governance. Section two examines the potential sources of IPR value to their holders in terms of the market and non-market advantages and strategic potential they offer. Section three considers more closely the value creation and distribution processes using the case of copyright protection in the recorded music industry to illuminate the dynamic relationships and processes further. Finally, Section four draws conclusions from the previous analysis, identifies policy implications and outlines avenues for future research.