The Bridges of “IP County”: Bringing Creative Works to Market

GMU – Center for the Protection of IP, 7th Annual Conf. Oct. 4, 2019
Prof. Robert Merges
UC Berkeley
“From the lab or studio, to extensive development, to branding and distribution, intellectual property empowers the inventors, artists, manufacturers, retailers, and marketing professionals who contribute to flourishing economies.”
Main Themes

• Bridges along the “IP Value Chain”
  – From idea to finished product

• How does IP law affect the locus of creative work?
  – Contracting and organizational forms
Compensation for Creators

• Not a simple incentive story

• Depends in part on where creative people fit in the organizational pattern/contracting chain
  – Employee creators
  – Small teams
  – Independent contractor creators
First generation theories

• “Recoupment” or “Appropriability” was the key

• Implicit sequence: (1) Up-front investment; (2) Revenue earned
Profiting from technological innovation: Implications for integration, collaboration, licensing and public policy

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3. 1. Regimes of appropriability

A regime of appropriability refers to the environmental factors, excluding firm and market structure, that govern an innovator’s ability to capture the profits generated by an innovation.
APPROPRIATING THE RETURNS FROM INDUSTRIAL R & D

by

Richard C. Levin
Alvin K. Klevorick
Richard R. Nelson
Sidney G. Winter

February 1988
Ideas → Finished Product → Market

Money → Finished Product → Market
Ideas

$ Money

Finished Product

Market

Sunk Costs
The “L-Shaped” Marginal Cost Curve
Model 1: Seller has a property right in the product that is traded
Model 2 Adds Complexity

• Components, not products
• Value chain/dis-integrated production
• Distribution is often of crucial importance
Ideas

Money

Prototype

Development, Scale-Up, Production, Distribution

Big

Market
Development, Scale Up, Production, Distribution

Property rights: patents, TMs, ©, etc.
Model 1 vs. Model 2: Key Differences

• Model 2: Investments in development, scale-up, distribution, branding, etc. are added to basic incentive story of Model 1

• Leads to a focus on patent portfolios, rather than the older (and simplistic) 1 patent, 1 product, market monopoly model
IP and Capital Formation

- A new focus in the literature on the economics of IP rights

• Using unique data on all first-time applications filed at the U.S. Patent Office since 2001, we find that startups that win the patent “lottery” by drawing lenient examiners have, on average, 55% higher employment growth and 80% higher sales growth five years later. Patent winners also pursue more, and higher quality, follow-on innovation. **Winning a first patent boosts a startup’s subsequent growth and innovation by facilitating access to funding from VCs, banks, and public investors.**
PATENTS AS SIGNALS FOR STARTUP FINANCING*

Annamaria Conti†
Jerry Thursby‡
Marie Thursby§
Germany and France

• **High Technology Entrepreneurs and the Patent System: Results of the 2008 Berkeley Patent Survey**

Empirical findings

• 1332 startups (1998-2008), primarily in software and biotech industries

• Average firm holds 4.7 patents and applications, with the average venture-backed firm holding 18.7 patents and applications
Patents important for startup financing

- 67% of broadest group of survey respondents said patents were important to at least one financial investor in the startup

- 73% of venture capital-backed startups said this
Implications for Law/Policy

• Pay attention to role of IP rights in transactions (contracting) and the unique place of creative professionals in industry “ecosystems”

• Role of finance and distribution are highlighted
Why help “creative professionals”? 

• Much of the literature in IP law emphasizes the rights of users, consumers, “the public domain,” etc.

• But a few of us believe in the traditional account of IP law as especially concerned with the “care and feeding” of creatives.
JUSTIFYING INTELLECTUAL PROPERTY

ROBERT P. MERGES

HARVARD UNIVERSITY PRESS
Cambridge, Massachusetts
London, England
2011
Justifying IP

• Chapter 7: Creative Professionals, Corporate Ownership, and Transaction Costs

• Teams and group production

• Large companies in the creative ecosystem of various industries
Component production: specialized teams

• Do they need to be integrated into a larger group – high transaction costs if they are independent company?

• Or are the transaction costs manageable enough for them to be an independent company? [Slight policy preference for this?]
Uniquely adapted input

Modular design: more generic input

Seller      Buyer(s)
Comparing Two Creative Tasks in the Film Ecosystem

- Large scale animation (Disney, Studio Ghibli etc.)
- Title sequence studios
Nickelodean Animation Team
Imaginary Forces is a creative company specializing in visual storytelling and brand strategy. We make design-driven content for a wide range of partners and projects.
Two special problems

• Failed product companies, patent litigation, and patent trolls

• Technology platforms and creative professionals: market power in online platform industries
Patent Markets and Innovation in the Era of Big Platform Companies

Robert P. Merges
Platform Companies and Innovation

• Big platform companies often invest in in-house R&D departments
  – Google
  – Amazon: A9 Labs

• They also acquire many smaller, innovative companies – “exit by acquisition” and “acqui-hiring”

Rediscovering the benefits of integration in the platform era

Lower transaction costs (esp. regarding “tacit knowledge”)
Adjusting policies to (slightly?) favor independent teams

• Benefits of multiple, rivalrous sources of new ideas/R&D

• Autonomy of small teams as an independent value?
Figure 1: Mapping Patents into Product Markets
Patent markets

- Idea factories, failed startups, “orphan technologies” and corporate spinoffs

- Can they help maintain more rivalrous sources of innovation in the platform era?
A’s Invention/Patent Timeline

- **A Invents/Drafts and Files Patent App.**
- **A Receives Patent**
- **A Drops Out of Product Market**
- **A Wins Infringement Suit vs. B**

B’s Product Development Timeline

- **B’s Final Integrated Product**
- **A’s Patented Contribution**

Year 1, Y2, Y3, Y4, Y5, Y11
What about markets for creative expression (copyrighted works)?

- **Signs of Hope**
  - US: *Music Modernization Act*
  - New statutory collective rights organization for music composition owners for streaming, downloads, etc.
  - Europe: Copyright Directive of 2019
The Collective shall be governed by a Board of Directors consisting of 14 voting members and 3 non-voting members. 10 voting members represent music publishers; the other four voting members will be professional songwriters who have retained their exclusive rights.

• MMA: “The act is favorable to musicians and **should increase payments to many Songwriters and Producers.**”

• https://www.careersinmusic.com/music-modernization-act/
And then there is pharma . . .
And then there is pharma . . .

From 1997 through 2016, medical marketing expanded substantially, and spending increased from $17.7 to $29.9 billion, with direct-to-consumer advertising for prescription drugs and health services accounting for the most rapid growth, and pharmaceutical marketing to health professionals accounting for most promotional spending.

Antitrust suit alleging pricing conspiracy survives motion to dismiss
Senator Warren: Affordable Drug Manufacturing Act

- Establishes an Office of Drug Manufacturing within HHS charged with lowering prices, increasing competition, and addressing shortages in the market for prescription drugs.

- Mostly aimed at generic drugs; but Warren website includes this: “We should crack down on rampant abuse of the patent and regulatory system . . . .”