

Against Intellectual Monopoly

By Michele Boldrin & David K. Levine

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Reviewed by Keith Thompson

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Suffolk University Law School

In today's global economy, copyrights and patents have become commonplace and are viewed as a necessary evil that must be tolerated in order to reap the benefits of invention and creativity.¹ Yet, in the recently published book, Against Intellectual Monopoly, Michele Boldrin and David K. Levine examine whether IP rights are necessary at all and if the social costs that these protections create outweigh the perceived benefits.² Boldrin and Levin use examples from multiple industries, both recent and from the past, to present their case. Their argument methodically and logically moves toward a final conclusion that creators' property rights can be well protected in the absence of "intellectual property" and copyrights and patents do not increase innovation or creation.³

Boldrin and Levin preface their argument with the story of James Watt and how he used the U.S. intellectual property system for the steam engine. After creating his steam engine, Watt secured a patent on his design and then spent a majority of his time fending off rival inventors rather than improving his invention with further innovations. His patent blocked the production of other more powerful and efficient engines. Further, his patent not only impeded competition but also hampered improvements on his own engine. Due to the high price charged by Watt and his business partner, it was not until after the expiration of their patent that better and more

¹ World Patent Report, A Statistical Review (2008), available at http://www.wipo.int/ipstats/en/statistics/patents/wipo_pub_931.html#a11. In 2006, the total number of patent applications filed across the world is estimated to be around 1.76 million. Id.

² Michele Boldrin & David K. Levine, Against Intellectual Monopoly (Cambridge University Press 2008).

³ Id. at 7.

efficient steam engines were produced and adopted by the public.⁴ The authors offer this anecdote as a typical example of how patents are acquired much after the innovation has taken place and used mainly as a tool to quell competition and charge high prices. Thus, they refer to intellectual property – copyrights and patents – as “intellectual monopoly” highlighting the idea that this reduction in competition leads to a monopoly over all copies of an idea.⁵

The authors are both economists and understandably present their argument from an economic perspective; to truly benefit from their analysis the reader must think of the issues in similar terms. While at certain points throughout the book, it is necessary for the reader to have a basic understanding of some economic principals these situations are few and far between. For the most part, Boldrin and Levin, thankfully, are skilled at using laymen’s terminology and aptly provide an overview of the economic theory they are expounding and then a summary to help the reader whose eyes may have glazed over during the overly technical passages; the reader does not need an advanced degree in economics to grasp the crux of the arguments.

Boldrin and Levin appreciate that their idea that copyrights and patents are unnecessary may seem radical to many readers. Accordingly, they use examples from the software industry and copyrightable media such as books, newspapers, music, and even pornography to show that most innovation takes place without the protection offered by intellectual property. In other words, creation comes when competition is high. Software is an industry known for high levels of innovation, yet Boldrin and Levine present evidence that almost none of these innovations took place under the protection of intellectual property.⁶

The major theme proffered by the authors in regard to other copyrightable media is that protection from intellectual property rights is not needed due to the advantage gained by being

⁴ Id. at 49.

⁵ Id. at 8.

⁶ Id. at 15.

first to market. This argument is compelling from a social benefit perspective, but not so from the viewpoint of personal rights. The authors use J. K. Rowling's *Harry Potter and the Half-Blood Prince* as an example.⁷ They concede that if Rowling had to sell her books to a publisher without the benefit of copyright she would make less revenue, but what she would make would still be enough of an incentive considering her previous occupation as a part-time teacher. While this argument may be difficult for some to swallow, their argument becomes more forceful when you realize their point emphasizes the benefit she would receive from being first to market and any authors following with similar books would be seen as copycats from the customer's perspective.

One of the major themes of the book can be summed up in the statement, “[i]ntellectual monopoly is not a cause of innovation, but rather an unwelcome consequence of it.”⁸ This statement is well supported by the historical evidence presented which begins with the industrial revolution and then examines specific industries such as agriculture, financial markets, fashion design and sports. In each these industries, Boldrin and Levine make clear that the major advancements and innovations came without the protection of patents. Their argument is most compelling and most important to the world as it pertains to the agriculture industry. Their explanation, which is clear and substantiated with data, leads the reader to the conclusion that major increases in crop yields through the last century have all come without the protection of intellectual property. Technology used to develop new plant varieties led to increased crop yields without intellectual property protection. It is when focused in areas such as this that the author's reasoning for the eradication of intellectual property for the overall benefit of society is most convincing.

⁷ See *Initial Print Runs for Harry Potter and the Half-Blood Prince*, available at <http://www.veritasrum.com/books/book6/>.

⁸ *Id.* at 17.

In addition to Boldrin and Levine's argument that intellectual property suppresses competition and therefore innovation, the authors look at current business practices surrounding patents. They extend the idea that, "patents beget yet other patents to defend against existing patents."⁹ This is supported by examples, statistics, and statements from prominent business executives. Some particularly startling statistics are that Nokia owns over 12,000 patents and Microsoft gains over 1,000 patents each month. This takes up massive amounts of time and money that could be spent on new innovations or increasing production efficiency which are benefits passed on to the customer. The majority of patents owned by major corporations are "defensive patents" used to block entry from new competitors and to be pooled with the patents of other companies, which is a form of collusion. Thus, the authors successfully describe how patents are currently being used to stifle competition and innovation rather than as an incentive to new inventors in the practical as well as theoretical sense.

Especially startling is the book's explanation of the use of "submarine patents." The book describes this as the filing of a useless patent on a very broad idea and then delaying the process by continuing to file amendments. By the time someone actually puts in the time and effort to make something useful from the idea, the original patent has been awarded and the owner of that patent is able to demand licensing fees from the creator of the useful product. An example of this is George Selden who applied for a patent on a "road engine" in 1879 and delayed the process until 1895. During this time the automobile industry was already growing but when the patent was awarded in 1895, because it was so broad, he was able to demand licensing fees on every automobile sold.

To further make their point, the authors also successfully argue that the effect of the Sonny Bono Copyright Term Extension Act of 1998 (CTEA) was mainly an increase in revenues

⁹ Id. at 73.

for major corporations, not an increase in artistic production. The Act essentially extended the term of a copyright by 40%, adding years onto the end of a copyright term. Yet, those additional years have very little economic value for the original author; “those extra years are equivalent to increasing [the original author’s] expected revenue of a hefty .33 percent.”¹⁰ Boldrin and Levine then go on to examine the point of this act if it only increases the revenues of the artist by less than one percent. The answer lies in the ownership; large media companies who own the rights to characters or pieces of work long after the author has died use these extra years to continue earning royalties. Again, the authors point out that the effect of the protection afforded to intellectual property rights is once again to increase revenues for large corporations and to stifle competition rather than spurring creation by original authors.

The authors also include a great commentary on intellectual property rights and the pharmaceutical industry. Some argue that the pharmaceutical industry makes an important case for heavy intellectual property protection due to the exorbitant costs for research and development in brining a new drug to market.¹¹ Also, the time spent in testing and gaining approval for pharmaceutical drugs after being awarded the patent reduces the amount of usable time for the patent. Additionally, the prevalence of generic drug producers, who are always ready to sell the product much closer to marginal cost than the initial producers as soon as the patent expires. Yet, Boldrin and Levine argue that the case for patents in the pharmaceutical industry is much weaker than one might think. While the issues in this particular industry are quite complicated, the authors present a clear and well reasoned case. It is surprising that most useful drugs come from universities funded by public money and over half of the top-selling drugs around the world were not created under pharmaceutical patents. Most of the drugs that

¹⁰ Boldrin & Levine, *supra* note 2 at 100.

¹¹ Boldrin & Levine, *supra* note 2 at 213. “The pharmaceutical industry is the poster child of every intellectual monopoly supporter.” *Id.*

come to market are merely copies of already existing medicines adding slight improvements. After reading this book the reader is not able to say that the pharmaceutical industry would be better off without patents, yet one could be convinced that these rights are not as important as the lobbyists and major corporations would have you believe.

While some of the points made in the book are a bit hard to accept, the majority of the arguments are well reasoned, supported by facts, and result in an eye-opening conclusion. Even though it is written from an economic perspective, many of the points and chapters make this book an interesting read for IP lawyers and law students. Most interesting to the economic-minded reader would be the chapters on creation and innovation under competition and how competition works. For the legal-minded reader there are great historical examples of the use of patents and copyrights, the section on the unintended impact of the well-meaning CTEA is thought provoking from a policy making perspective.