Imitation is the Sincerest Form of Flattery: A Critical Analysis of Against Intellectual Monopoly

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Against Intellectual Monopoly by Boldrin and Levine (“B&L”) makes the case that intellectual property does not promote innovation or lead to greater economic growth, by highlighting numerous examples from industries in which innovation increased without patent or copyright protection. The authors also argue that companies only try to obtain an intellectual monopoly after the well runs dry as a way to sit on their laurels and profit from past inventions by prohibiting competition. Therefore, patents and copyrights do not stimulate new inventions but instead reward past inventions.

The purpose of property rights is to reduce conflicts and to encourage production based on the premise that there would not be sufficient incentive to produce if others could free-ride off of the production of others. Intellectual property is different than owning something physical, such as a dog, in that, someone lending you his dog means he no longer has the dog, whereas sharing an idea with someone else does not mean the owner no longer has the idea. Similarly, the issue of whether an idea can be stolen is also important to the authors’ argument. Stealing someone’s physical property results in deprivation, where the thief deprives the owner of his product by redistributing it to himself. “Stealing” someone’s idea, however, doesn’t deprive the owner of his idea, rather instead of exclusive use, someone else has it as well. If theft is taking your property without consent, then by making a copy of your property, I didn’t take anything from you; you still have it.

Boldrin and Levine discuss the “double-edged sword” of intellectual monopoly (B&L 2008: 11). The tradeoff inherent in intellectual monopoly is that, if producers are
rewarded a temporary government monopoly for innovations, this may encourage innovation. On the other hand, the existence of patents and copyrights increases the costs of creating a good, thereby lowering the amount of new entries into the field. The goal of a patent is to encourage new innovation by allowing the inventor to limit competition. This makes individual consumers worse off, but society better off since there will be greater investment in innovations. There is a trade-off between having newer innovations at higher prices or having more affordable redundant goods. Unfortunately, as the authors point out, intellectual monopoly encourages firms to create more patents but not necessarily more products.

Boldrin and Levine discuss the pornography industry to demonstrate that weak enforcement of copyright yields greater production. Porn lacks the legislative protection of copyrights because it is met with moral opprobrium. Inarguably, the porn industry churns out more videos and at a cheaper cost than Hollywood. Furthermore, "online pornographers are usually the first to exploit new technologies--from video-streaming and fee-based subscriptions to pop-up ads and electronic billing (B&L 2008: 41).

Then there is the issue of whether an idea has economic value. If I build a car, it has value, since people are able to drive to work faster than if they had to ride on a horse. But having the idea of a car and not producing it has no value since people’s life hasn’t changed. It’s the car that has value, not the idea of a car. Or, if I say to Professor Hummel that I didn’t write a great critical review but had an idea that I did, it’s likely he wouldn’t accept such a response and reward me for my idea.

Boldrin and Levine provide empirical evidence showing that plenty of innovations and inventions existed without patent or copyright protection. Open-source
software doesn’t have patent protections, yet this is a thriving market. Linux is an operating system without patent protection and has 25% of the market share (B&L 2008: 20). The open source webserver Apache have 68% of the market, while webservers that aren’t open source and have patent protection, such as Microsoft and the Sun has significantly fewer customers. Microsoft has 31% and Sun has only 3% of the market (B&L 2008: 21). In fact, Apache’s market share is increasing.

These examples highlight that patents and copyrights often have very little (if any) effect on encouraging innovations and that there were more innovations in areas with no intellectual monopoly than the opposite. A reason for the exponential growth of Silicon Valley is because California, as opposed to Massachusetts (home of Route 128), doesn’t enforce trade-secrets, where past employees can’t reveal information to the competitors they now work for. The problem with trade secret laws is that they don’t take advantage of spillover effects. As Boldrin and Levine point out, “large advances are generally built out of many small innovations. The process of innovation is greatly enhanced when innovators share information, enabling other innovators to bootstrap off of their advances. Because under competition all competitors can imitate, and so benefit from the innovation of everyone else, the incentive to share information is strong.” (B&L 2008: 155).

Boldrine and Levine mention the benefit of collaborative advantage that firms get by sharing information. Collaborative advantage is where, by sharing information, the inventor increases the odds of having competitors make improvements on his invention, thereby making the inventor better off by being able to sell a better product at a reduced
cost. An example of collaborative advantage is the Cornish steam power engine that was not patented and ended up being improved by competitors.

Another important area the authors tackle is the pharmaceutical industry. Several points are made. The first is that countries in which there are no patent protections actually end up controlling a larger share of the world’s drug market than countries that do. While the U.S, U.K. and France have patent protection, Switzerland and Germany (up until 1877) didn’t have patent protection for their products. In 1862 British firms controlled about 50% of the world market and France had 40%. By 1873, German companies had 50% of the market and the French and British each had 13%-17% of the market (B&L 2008: 247). Even though there were patent protections for British companies to produce chemical products, most of the market share was dominated by countries that didn’t have patent protection. Lack of patent protection didn’t prevent German companies from innovating. In fact, the chemical industry of the U.S. was so underdeveloped that during WWI, the U.S. was forced to import dyes from Germany.

In addition to not suffering economic consequences, countries that had no (or weak) patent protection had the most innovation, while the countries with patent protection innovated less. 20 of the 46 top selling drugs were created without patents, and out of the 26 remaining, 4 were discovered by accident and then patented (B&L 2008: 259-260).

Advocates of intellectual property argue that drug patents are necessary because the industry has large fixed costs. It takes a lot of resources and investment to find and create new drugs. Without patent protection, drug companies wouldn’t want to take the risk of losing all the money they spent on research. However, the authors argue that
advertising and marketing will allow better capture of revenue than patenting and that drug research should be subsidized. Furthermore, there are numerous fields which require large fixed costs and whose products can be easily replicated, yet this doesn’t discourage people from entering the market and competing. The existence of Dunkin Donuts didn’t discourage the creation of Starbucks.

Boldrin and Levine mention that the cost of clinical trials amounts to 80% or more of the total cost of developing a new drug (B&L 2008: 268). According to Boldrin and Levine, clinical trials are a public good since the costs of paying for the clinical trials are high, but the cost of sending out the information to others is low. This means that once the health risks of a new drug is revealed, competitors can benefit from this information without having to pay for the clinical trial themselves. Boldrin and Levine recommend that a government agency like the NIH pays for clinical trials lessening the need for patents.

Since Boldrin and Levine mention how patents are a form of rent-seeking, it’s strange that they would advocate government spending as a way to solve the problem in the pharmaceutical industry. The problem with having the government pay for research is it would lead to rent-seeking. The type of research could be determined by those with political pull. According to Richard Gilbert, “It is not clear that any agency, even one as informed as the NIH, would have opportunities and demand possessed by private firms and eliciting this information from private firms would be difficult” (Gilbert 2009: 425).

Since a lot of the justifications for intellectual property is to protect the work of the creator, Boldrin and Levine mention ways that creators of works can protect their creation without patents and copyrights. The first-mover advantage is where the early
bird gets the worm. They argue that being the first to come up with a new invention gives the firm an advantage that those who copy his ideas lack. The first person to sell a product gets all the customers until competitors enter the market. It can take years until copycats are able to make and sell the product. Boldrin and Levine point out that many people who buy from a company are loyal and stay customers of that company. They point out that 80% of book sales are done within the first three months (B&L 2008: 158) and that according to Hugh, Moore, and Snyder, after a patent expires and generic drugs are available, the original drug is still able to charge a monopoly price and dominate 20% of the market (B&L 2008: 266).

While it’s harder to copy someone else’s innovations and come up with the technology to compete, making copies of a book are much easier and cheaper to do. A copy of a book is almost identical to the original, so wouldn’t there need to be a copyright to ensure that writers have incentives to create written works? The answer is that for a publisher to copy every book on the market is expensive. A person who just made copies of random books without figuring out the demand for them first would quickly go out of business. Copying books cost money, so the way to have these resources be profitable is to only copy books that are in high demand. If the incentive is to copy books that are already in high demand this means that the books themselves are popular and have sold millions of copies already, thus reimbursing the author before copies are made. While this argument is pretty sound, it’s not universally true. If a book has advance praise and popularity well before the book is released, then copiers don’t have to wait until the books have sold millions of copies to know that they will have a market for copies of the books. Are people who make copies of the 3-7th books of the Harry Potter series really
taking a risk by copying the book? Boldrin and Levine never address this possibility.

While patents are a clear violation of property rights, it’s highly unlikely that two people come up with the same book. For Boldrin and Levine to put copyrights within the same camp as patents and not make a distinction weakens their arguments. If their argument against intellectual property is that intellectual property discourages innovation and competition, how does this apply to copyrighted works? Patents often cover broad ideas, while copyrights protect people from making a carbon copy of an already existing product. For instance, Boldrin and Levine mention how in 1895 George Selden came up with a “road engine” and without actually creating it, merely patented the idea and then used the patent to collect 1.25% of all automobiles sold in the U.S., which he later sold for greater profits (B&L 2008: 93). Selden’s “submarine patent” didn’t add any production to the economy. Selden never created any automobiles and even if he did, someone else would have come up with the same idea in the near future. On the other hand, if J.K. Rowling never created Harry Potter, it’s highly unlikely that someone else would have. No monkey has ever actually churned out Hamlet.

John deLaubenfels mentions that forbidding copyrights undermines private contracts. Unlike patents, which don’t involve a contract that stipulates that the author will only sell the work on the condition that the buyer won’t make copies of it and distribute them, copyrights involve contracts between the buyer and seller. People engaged in a transaction have a right to sell their product under certain conditions and if the other party agrees and then breaks the contract they have committed fraud and should be penalized. Patents on the other hand don’t involve contracts between a seller and buyer.

While it’s important to distinguish between patents and copyrights, deLaubenfels
critique is flawed for a few reasons. One, as Boldrin and Levine point out, copyrights prevent both the copier from selling copies and the buyer from buying them. The author of the original work only had a contract with the person who bought his work (the copier) and not any potential customers of the person he sold his creative work to. Therefore, if copyright law should exist at all, only the person who bought the work from the original owner is bound by contract. Likewise, it should be legal to “pirate” software, and download music and movies since in such a case there was no contract. Someone who illegally downloads movies from the internet never had an agreement with the movie studio that he wouldn’t download. Just because someone tells you not to do something doesn’t mean you’re required to listen.

In conclusion, Against Intellectual Monopoly challenges the view that intellectual property is needed to encourage innovation. Increased patents and copyrights don’t lead to an increase in goods and services, but are lobbied by special interest groups as a way to profit off of past inventions instead of having to come up with new ones. Instead of big companies using resources going to production, they are devoted to lawsuits, lobbying to extend patent life and discourage new entries for fear of a lawsuit. Boldrin and Levine are right to call intellectual property for what it is—a monopoly. A monopoly is where competition is restricted due to state-sanctioned protection. The way to have more useful goods and services isn’t to restrict entry but to allow competition to flourish. As Frederick Bastiat understood, “competition is merely the absence of oppression.” For the sake of both respecting private property and productive economic growth, let’s end this oppression.
References

