

The Upside to Intellectual Property's Downside

Intellectual property law exists because exclusive private rights provide an incentive to innovate. This is the traditional upside of intellectual property: the production of valuable information goods that society would otherwise never see. In turn, too much intellectual property protection is typically viewed as counterproductive, as too much control in the hands of private rightsholders can create more artificial scarcity than the incentive effect warrants. Such overprotection not only denies the public access to the innovation without a corresponding gain in incentive, but it also retards future innovation by making it more difficult for follow-on innovators to make use of existing products. This is the traditional downside of intellectual property: reduced production and impeded innovation.

This article turns the traditional discussion on its head and shows that intellectual property's putative costs can actually be benefits. It does so by questioning the discussion's underlying assumption that innovation is always good. This assumption is usually valid, but not always; there are certain industries that society prefers to suppress. If intellectual property reduces production and impedes innovation in those industries, then its protection would be a net gain for society. We examine a handful of such industries (tax planning, biotech, fashion, and pornography) and demonstrate that bringing (or keeping) them under the intellectual property umbrella may be the best way to stifle them -- an approach that confounds the scholarly consensus. In short, we describe the circumstances under which intellectual property's downside can become society's upside.

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