

Inventors' Rights

by Sophie Harnay

Employees are the primary inventors, but they are often deprived of their rights by legal strategies that capture their expertise. In response, new forms of resistance are emerging, based on open access.

Reviewed: Christian Bessy, *L'expropriation par le droit : propriété intellectuelle, valeur et travail*, Paris, éditions de l'EHESS, 2022, 240 pp., €20.

One thing is clear from the outset: Christian Bessy's book raises some key issues. It examines the expansion of intellectual property rights (IPR) in recent decades and their implications, particularly for workers. The author develops an original and stimulating theory on this subject, contributing to current social science thinking on how generalized appropriation underpins the dynamics of contemporary capitalism, and providing a useful counterpoint to a number of recent analyses on similar themes¹.

¹ On the question of scientific ownership and the sharing of research profits between scientists and industry, see for example, G. Galvez-Behar (2020), *Posséder la science. La propriété scientifique au temps du capitalisme industriel*, Éditions de l'EHESS, 2020; for a discussion of proprietary tradition, P. Crétois (2020), *La part commune, Critique de la propriété privée*, Éditions Amsterdam; on the role of large law firms in the legal transformation of numerous assets (such as land or knowledge) into capital, see K. Pistor (2018), *The Code of Capital: How the Law Creates Wealth and Inequality*, Princeton University Press.

Appropriation of inventions vs. expropriation of inventors

The book uses a reasoned approach to highlight the contemporary tension between a growing movement of generalized appropriation of "things hitherto considered inappropriable (such as living things)" (p. 12), and the associated new forms of expropriation of inventors and creative work. This tension is revealed in two stages. First, the book makes an in-depth analysis of "the increase in IPR [which] bears witness to the development of capitalism, as it seeks new sources of profit by transforming into active capital securities previously considered as technological assets, to be valued through licensing agreements, or as elements of creator status" (p. 15), which is analyzed as the consequence of "growing corporate interest in intellectual property rights, which enable them to boost their intangible capital and competitiveness" (p. 9). One of the book's key contributions is to empirically document the contemporary financialization of intellectual property, the development of a patent market and the leading role played by "legal intermediaries". Second, the author sets out to demonstrate how the current dynamic involving the appropriation of intellectual creation is accompanied by a movement to expropriate the wealth created by the workers of innovation, so that "what was supposed to protect the creator's property has enabled its expropriation" (p. 17). Ultimately, the book shows that "to create intellectual property is paradoxically to create a right to transfer property and exploit its value on the market" (*ibid.*).

The book takes a multidisciplinary approach, combining economic, legal, sociological and historical analyses. This choice of methodology has the advantage of not reducing intellectual property law to a "simple exogenous incentive rule defined by macro-actors such as legislators, administrations and judges", as is often the case in standard economic analyses. In contrast, the author's stated aim is to develop "a more endogenous conception of law, defined in part by the very actors it seeks to regulate". In line with this objective, the book borrows from the socioeconomics of markets, to study the social construction of the patent market; from the sociology of law, to study the legal professions; and from Williamson's neo-institutionalist economics, to study private orders for dispute resolution (see chapter 5). More generally, it follows an approach based on applied social science, as the book draws on and extends the results of several surveys (quantitative and qualitative) that Bessy has carried out over the last three decades. In this respect, it makes an important empirical contribution to better

understanding the emergence and dynamics of "intellectual capitalism" (p. 22) in the case of France.

The evolution of patent valuation conventions, the economization of intellectual creation, and patent law

From a theoretical point of view, the book draws heavily on the framework of convention theory, where the concept of convention is very precisely defined "in the sense of an informal, self-emerging inter-subjective agreement" (p. 49)². The core idea is that, depending on the era, patents are based on different conventions for valuing intellectual creations, "which support their institutionalization and reinforce each other, although they can also sometimes come into tension" (*Ibid.*). These conventions evolve in line with the nature of the actors involved, the ways in which patents are used and disseminated, and the underlying conceptions of business and innovation. In this regard, one of the book's key contributions is to show how the evolution of valuation conventions over time has led to the transformation of IPR into marketable assets and, ultimately, to the creation of a patent market.

While it is likely that attributing the economization of patents solely to evolving valuation conventions overlooks other factors that may explain their changing nature, convention-based analysis sheds light on the phenomenon of the financialization of IPR in all its complexity (p. 70 ff), coupled with the emergence and strategies of new actors on the intellectual property market. However, the direction of causality is a matter of debate: are evolving valuation conventions responsible for the change in the nature of patents, or is it rather the latter, reciprocally, that is causing conventions to evolve?

² For an overview of the economics of convention and the diversity of its areas of study, see *Dictionnaire des conventions – autour des travaux d'Olivier Favereau*, Ph. Batifoulier, F. Bessis, A. Ghirardello, G. de Larquier, Delphine Remillon (ed.), Presses universitaires du Septentrion (2016).

The key role of legal intermediaries in transforming intellectual property law

Another of the book's important contributions is to highlight the pivotal role played by the legal professions in shaping the patent market. Contrary to the dominant conception of the rule of law in economics, most often seen as an exogenous constraint imposed on agents and over which they have no influence, the author stresses the importance of an endogenous conception of law, constructed by and for actors, as part of an "interactive process between the enactment of legal rules and the 'regulatory' devices invented by actors in their field of activity" (p. 88). The author gives an accurate description of the active role played by legal intermediaries in the gradual development of European patent law: while largely created on the initiative of the European Commission and the EU Member States, it is also (or above all) the result of negotiations between numerous actors who have broadly contributed to defining the conventions of patentability and appropriation in the various technological fields: legal professions (in particular major international law firms and patent attorneys), private actors (industry representatives), examiners and judges at the European Patent Office (EPO), scholarly societies, regulatory authorities, public administrations, associations and NGOs. These various actors, in their capacity as "institutional entrepreneurs", endeavored to steer the negotiations in a direction favorable to their own views—or interests.

In highlighting the key role of legal intermediaries, the author is inevitably prompted to turn his attention to the market for legal services produced by legal intermediaries and, in an innovative way, to its interactions with the patent market. For example, he gives a detailed account of how the regular reconfiguration of competitive and cooperative relations between lawyers and industrial property attorneys (IPAs) in the legal services market is directly involved in the development and evolution of the patent market.

As a result, the analysis focuses on the supply of legal services, at the expense of a study of demand, which is arguably a key factor in understanding the functioning and evolution of the market. The internationalization of the activity of legal intermediaries is also given little attention in the analysis, at the risk of underestimating the influence of major international law firms on French legal and economic institutions, and the processes involved in shaping valuation conventions in the field of intellectual property.

Intellectual property law as a mechanism for expropriating creative workers

The book ends with a discussion of the impact of IPR policy on the appropriation of employees' inventions, in a context where over 90% of patented inventions are now made by salaried inventors, and where employers deploy a variety of legal and judicial strategies to expropriate employees' creative work and capture their expertise.

In addition to reserving patent rights for themselves and generally limiting forms of co-ownership, employers are forcing employees to make their knowledge explicit through codification and knowledge appropriation mechanisms, against a backdrop of labor market reconfiguration characterized by increasing employee mobility, technological acceleration, and the emergence of "micro-workers" on digital platforms. Above all, the shift from a "secrecy regime" to a "property regime", the increased flexibility of the workforce in companies, and the introduction of a pro-patent policy in the civil service are at the root of a growing number of disputes, usually between employees who feel they are not paid enough for their inventions and their employers. The author makes a detailed analysis of these disputes, which are settled by conciliation before the National Commission for Employee Inventions (CNIS) or through litigation in the courts. First, his study of CNIS decisions reveals the central role played by this joint mediation body made up of non-professional judges: analyzed as an "intermediary of the law, linking different sources of normativity and highlighting the importance of professional circles in defining the rules governing work and employment" (p.), it contributes in particular to developing the criteria and agreements used to determine the financial compensation awarded, taking into account company practices and the specific investments made by the parties. Second, based on statistical analysis of litigation brought before the French regional courts (TGI), based on 123 decisions handed down between 2001 and 2018 and coded according to the nature of the dispute, the amount of compensation and the characteristics and categories of companies and employee inventors, the author has drawn up an original typology of disputes, reflecting the diversity of production configurations and IPR award agreements.

In France, these findings highlight the twofold movement that typifies the dynamics of contemporary intellectual capitalism: the growing appropriation of creative work and the expropriation of workers through the legal mechanisms of

intellectual property. However, little is said about how actors are responding to these two processes, with the exception of a brief mention of alternative movements' criticism of the capitalization of IPR (chapter 1) and a few isolated references to the development of open innovation (chapter 2, p. 74). Yet it seems to us that one of the responses to the dual movement of appropriation/expropriation of creative work today is centered on developing institutions based on open access, free sharing of rights, collaborative forms of organization and, more broadly, the questioning of the traditional model of ownership and enclosure.

Although it may still appear limited, this protest nonetheless raises the question of its relationship with the model of intellectual capitalism described in the book. How, then, can we explain the fact that certain conventions relating to appropriation (or, more accurately, non-appropriation) are now gaining ground in a growing number of communities (particularly academic)? What impact can we expect to see from the current commitment of certain legal intermediaries to alternative means of protecting intellectual creation? And can this commitment accompany a new evolution in intellectual property valuation conventions, which would put an end to "IPR bidding contests" (p. 240) and the "expropriation of the most vulnerable workers" (*ibid.*) that marks the book's conclusion? These are just a few of the questions that Christian Bessy's book helps to address, thereby offering new avenues to explore.

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