

# Project on Commercializing Innovation

Hoover Institution, Stanford University

## PROJECT SUMMARY

Our project addresses a fundamental problem – that is, too many deals or business models either are getting unduly frustrated or are not getting done in the first place. Recent efforts to weaken our patent system have in effect erected improper regulatory and other obstacles that threaten innovation and its commercialization.

The predominant approach to patents offered by other projects in academia – which is gaining traction in courts and regulatory and legislative circles – is increased reliance on government discretion and avoidance or derogation of property rights and contracts. These other projects push policies based on the unrealistic assumption that the government bodies implementing those policies will do so in a way that will purely maximize social welfare, as if government regulators are somehow immune from political pressure.

The landscape is crowded by these numerous efforts, which are each focused on government regulation of markets as a tool for implementing distributive justice and displacing market actors with government decision makers (sometimes purportedly to solve market failures). Some of these existing projects are at top universities – consider the projects or centers presently operating in the law schools at Harvard, Yale, Stanford, NYU, Columbia, Duke, Berkeley, and American. Each is financed with about five to ten million dollars. Additional financing for the policy objectives of the other existing projects is readily available from a number of similarly-leaning sources, such as the MacArthur Foundation, the Rockefeller Foundation, George Soros, and others. These are joined by similarly disposed non-governmental organizations, such as the Public Patent Foundation, the Electronic Frontier Foundation, Creative Commons, the Consumer Project on Technology, and the Software Freedom Law Center.

We bring a uniquely market-oriented approach to commercializing innovation. We explore the set of legal and business relationships that help technology get developed and deployed, rapidly and broadly. We focus on how strong patents promote the essential market for commercializing innovation in a way that will ethically and sustainably foster scientific progress and economic development. Our research combines academic approaches from the fields of law, economics, and political science with practitioner tools from the fields of intellectual property, business associations, litigation, and transactions, to provide a unique blend of practical approaches that are grounded in theory, and in keeping with mainstream values of both sides of the political isle. Our work is distinctive in that it advocates strong enforcement of property rights and contracts and studies solutions that enhance coordination in a way that ultimately improves both the creation and commercialization of innovation. Focused on the way a rising tide lifts all boats, our work concentrates on systems that help all players, both large and small, to better further innovation, competition, and economic growth.

Our project serves as a focal point around which all of those interested in the many aspects of innovation commercialization can coordinate with each other. What is more, we provide a unique forum for improved dialog between academia and business that also can better inform policy makers.

Deliverables include:

- Academic Publications
- Conferences
- Legal and Business Practitioner Publications
- Policy Position Papers
- White Papers
- Expert Testimony before Congressional and Agency Hearings
- Amicus Curiae Briefs
- Op-Eds
- Media Appearances

We have an established track record producing in each of the above-listed areas, with copies available on request and, in many cases, on the web at [www.law.wustl.edu/kiEFF](http://www.law.wustl.edu/kiEFF).

## RESEARCHERS

In addition to other affiliates, the core researchers include:

- Stephen Haber, co-investigator, Peter and Helen Bing Senior Fellow at the Hoover Institution and A.A. and Jeanne Welch Milligan Professor in the School of Humanities and Sciences
- F. Scott Kieff, primary investigator, Research Fellow at the Hoover Institution and Professor of Law at Washington University School of Law
- Troy A. Paredes, co-investigator, Professor of Law at Washington University School of Law

## DETAILED TOPICS

We focus on market-oriented, property-rights approaches to innovation, including the study of entrepreneurship, corporate governance, banking, finance, economic development, intellectual property, antitrust, bankruptcy, and related areas. We explore the ways in which property rights and private ordering can promote enterprise, research and development, competition, economic growth, and capital formation. In each area, we employ systems-based, comparative analyses of institutions such as laws, rules, and norms, and organizations such as communities, firms, and government agencies. We study theory as well as practice, to develop real world problem-solving strategies and tactics, including tool kits and best practices. Our joint work has the following five core components.

Intellectual Property and Innovation: The first component focuses on the United States intellectual property system and the various ways the private and public sectors can work to facilitate the complex processes of innovation and its commercialization. For example, we explore the ways in which recent Supreme Court patent cases and the recent House and Senate bills on so-called patent reform all inject a greater degree of administrative discretion and flexibility into the patent system. A problem with these changes is that flexibility of this type suffers a fatal Achilles Heel because it leaves the intellectual property system particularly exposed to the powerful influence of lobbyists and regulatory capture. In so doing, it can convert our intellectual property system, which was designed to promote competition and innovation, into one that stifles both.

Corporate Governance and Securities Regulation: The second component focuses on the ways in which individuals can order their private affairs within collective organizations, or firms, and the ways in which governments can regulate securities markets. For example, we explore the ways in which the federal government cracked down on corporate America and Wall Street when it adopted important portions of the Sarbanes-Oxley Act. Recognizing the risk that the U.S. could lose its competitive edge in financial markets because of an overly-burdensome regulatory regime and excessive litigation, we study the actual impact of recent changes in the regulation of capital markets in general as well as several particular areas such as hedge funds, executive compensation, and board-CEO relations.

Property Rights, Finance, and Developing Economies: The third component studies the role of property rights in various intangible assets in the developing world. For example, we explore the ways in which property rights in bank charters, contracts, debt instruments, and shareholder equities have all been eroded in Mexico, resulting in there being practically no banking system in the entire country. As another example, while countries like India, Argentina, and Brazil, which have extensive manufacturing facilities that would require payments to holders of biotechnology patents, are aggressively pushing efforts in the U.N. to attack drug patents, more successful developing countries in Africa, like Botswana and Malawi, are working tirelessly to help strengthen the rule of law by enforcing property rights in intangibles like contracts and IP. Predictable enforcement of property rights in intangibles can be key to fostering economic growth and development, especially in the less developed countries of the world.

Antitrust: The fourth component studies market structure and performance in assessing how antitrust regimes can best promote competition. For example, recent actions in the European Union as well as the United States at the interface between antitrust and intellectual property have demonstrated the way flexible enforcement of antitrust can suffer the Achilles Heel of being too responsive to interest group lobbying, if not fashion. The purpose of antitrust laws is to protect against a large player dominating a market through unreasonable restraints on competition to cause higher prices or lower quality goods and services. But a company's dominant market share is not, alone, anticompetitive. Sound theory and practice teaches regulators to instead focus on whether the company's behavior causes actual economic harm to consumers. This requires regulators to consider tough questions of technology and economics.

Bankruptcy: The fifth component studies how the possibility of bankruptcy can influence the way business deals are structured, even at the earliest stages of a venture. For example, bankruptcy proceedings do not compromise fundamentally the value of most tangible assets; tangible assets generally retain their value both during and after bankruptcy proceedings. Intellectual property assets are typically most valuable when they carry a credible threat of injunction. But the delay and coordination problems inherent in the bankruptcy system can leave a debtor's IP rights under-enforced against infringers, even if the debtor-in-possession or trustee-in-bankruptcy has the proper incentive to pursue actively the enforcement of the debtor's IP rights in bankruptcy. Further, there is some risk that a major transaction over the debtor's IP could fail to occur in bankruptcy. Consequently, the bankruptcy process itself potentially can eliminate all, or at least a substantial portion, of the value of IP rights. Our project studies techniques for mitigating these risks, such as through the use of special purpose vehicles to hold title to IP assets, as well as for putting these risks to everyone's collective advantage, such as through private ordering solutions to the so-called anticommons problems.

## **INVOLVEMENT WITH THE REAL WORLD**

Most governmental hearings and academic conference are looking to benefit from the full range of serious academic study. Nevertheless, the sheer number of other existing projects sometimes causes the market-oriented ideas that can be contributed by our work to be overlooked. One of our goals is to help ensure that the market-oriented approach is heard.

We benefit from an ongoing dialogue with real world practitioners in government, law, business, and finance. This dialogue helps us identify problems, challenges our ideas, and tests our proposed solutions. Practitioners further improve our academic research by contributing important data and case studies.

In addition, our project benefits greatly from the financial support of diverse donors who, wanting to help the Project's existing voice, make targeted but unrestricted donations to support this independent academic work. Funds are expended in strict adherence to Stanford University guidelines for academic research and generally cover ordinary costs such as faculty release time, "summer-ninths" research support and honoraria, travel to conferences and hearings, and administrative matters.

Our project is non-partisan and does not act on the behalf of or at the direction of any business or political entity; and each item it generates represents only the independent academic views of the authors named thereon.

For more information contact: [kieff@hoover.stanford.edu](mailto:kieff@hoover.stanford.edu), or 650-723-3678; or visit [www.innovation.hoover.org](http://www.innovation.hoover.org).