

TOWARD AN OPTIMAL REGIME FOR JOINT OWNERSHIP IN PATENT AND COPYRIGHT LAW

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Collaboration is a hallmark of modern intellectual property. The age of the "heroic lone inventor," such as Alexander Graham Bell and Thomas Edison, is long gone. Today, inventions are more likely to be the result of corporate R&D projects or research teams at universities, rather than a lone tinkerer working out of a garage. Moreover, increased specialization among scientific disciplines makes it difficult for any single researcher to know enough to work alone.

Likewise, collaboration plays an important role in creating a wide variety of works protected by copyright law, such as motion pictures, music compositions, sound recordings, and computer software. Technological developments like the personal computer and the Internet also have made new works easier and less expensive to create. This "digital revolution" has resulted in a proliferation of works created by multiple authors, including open source software, Wikipedia articles, and documents and other data files that can be accessed and modified by numerous remote users through groupware.

However, the collaborative creation of IP can result in problematic issues regarding the joint ownership of IP rights and the attendant abilities to use, license, and exclude others. For example, courts have described joint owners of a patent as being "at the mercy of each other" in litigation, as infringement claims can only be brought by all co-owners. In contrast, for copyrights, any co-owner can bring an infringement suit, but a license granted by another co-owner (at least prospectively) will bar the claim. Moreover, patent and copyright law differ on whether a co-owner must account to the remaining co-owners for profits obtained through licensing or use.

In this paper, I contend that neither patent law nor copyright law represents an optimal approach for protecting valuable IP rights that are jointly owned. For patents, the default rules grant each patent co-owner enormous leverage over the remaining co-owners, as an individual "holdout" can prevent litigation and freely grant licenses, yet is not obligated to account to the other co-owners for any licensing revenues. On balance, copyright law does a better job at protecting all co-owners' interests. However, the existing copyright regime still contains several pitfalls, including the possibility of "retroactive" licenses that extinguish pending infringement claims and potentially high transaction costs associated with the accounting remedy.

Ultimately, I argue that the rights and obligations of joint owners of patents and copyrights should be harmonized into a unitary system of default rules for both forms of IP. Specifically, I contend that an optimal joint ownership regime would generally follow the copyright model, but with several modifications. These modifications would include a prohibition against "retroactive" licenses and a fiduciary duty among co-owners to avoid waste for works and inventions that are intended to be commercially exploited. Finally, if joint ownership proves unworkable, I argue that co-owners should be able to exercise the common law right to partition that is available to tenants in common of real property.