Techological Costs as Law

In Intellectual Property

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Intellectual property (IP) laws can change in substantive scope when technology changes. Such laws often contain hidden dependencies that link legal scope to external technological developments. This dynamic occurs when IP laws are premised upon unarticulated assumptions about technological feasibility. Many current IP laws implicitly depend upon transitory technological limitations in this way and may thus be vulnerable to subtle technologically-induced shifts in substantive scope. This is the problem of “technological dependence.”

This Article’s model reveals previously unobserved technological dependencies in IP law. Such dependencies arise because “technological costs” are playing an under-acknowledged, and implicit, role in regulating IP goods alongside positive law. This is different than the usual view of costs, which are generally understood as passive manifestations of inefficiency, and not as performing any functional role. IP law implicitly depends upon activities being costly, such as it being difficult to reproduce copyrighted works, to balance competing goals, for example, the incentive to create IP goods balanced against access to existing goods. When emerging technologies render these activities significantly less costly, IP regulatory equilibria can become destabilized. This lens also reveals a new class of “policy levers” to calibrate IP laws by selectively reducing activity costs.

This same model illuminates the way in which costs can implicitly protect core IP values. Costs constrain activities. However, it may actually be important to some societal group’s core interests that certain activities that are currently costly remain costly. Emerging technologies tend to reduce costs, and such costs may have been implicitly protecting IP values in ways that we might not fully understand until after they are gone. This is the problem of “technological erosion” of IP values. This raises a provocative question: should we think of there being unwritten IP rights “embedded” in the technological limits of an earlier era?

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