

Toward an Optimal Regime For Joint Ownership of Intellectual Property

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Collaboration is a hallmark of modern intellectual property. 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 new works created by mass collaboration, such as open source software and Wiki websites, which can be created, accessed, and modified by numerous remote users.

But despite its importance, collaboration and the resulting joint ownership of intellectual property is a relatively under-studied and under-theorized area of IP law. In particular, joint ownership can present problematic issues regarding the owners' rights to use, license, and exclude others. Somewhat surprisingly, patent and copyright law differ substantially regarding co-owners' rights and obligations to each other, even though they have similar objectives—to promote the creation of new knowledge and works. For example, patent infringement claims can only be brought by all co-owners, and thus even a single co-owner can block an infringement suit. In contrast, for copyrights, any co-owner can bring an infringement suit, but a license from another co-owner—at least prospectively—will bar the claim.

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. Drawing on the existing literature regarding both game theory and default rules, this paper demonstrates that the current default rules governing joint ownership can create a suboptimal outcome for co-owners who seek to exploit their inventions and works.

Finally, this paper asserts that the rights and obligations of joint owners of intellectual property should be harmonized into a unitary system of default rules that would govern both patents and copyrights. Specifically, it contends that an optimal joint ownership regime would generally follow the copyright model, but with several significant modifications, such as a prohibition against "retroactive" licenses. And if joint ownership ultimately proves unworkable, co-owners should be able to avail themselves of the common law right to partition available to tenants-in-common of real property.

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