

The Sociology of Law in Corporate Capitalism: the Example of Software

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Methodology for Sociology of Law in the Economy

- **Examine both Structures and Practices**
political economy + sociology of action
- **Structures – the ‘code of capital’ (Pistor)**
Transnational financialised corporate capitalism
- **Private Law building blocks - property, contract, tort**
Business organisations: corporations, partnerships, cooperatives
Financial instruments: shares, debt, mortgages, derivatives
Intellectual property rights: copyright, patents, brand names
- **Public Law**
Tax & fiscal law
Regulation: competition, utilities, finance, energy, ecology, food
originated especially in US early 20C
‘regulatory state’ since 1980s (privatisation)
- **‘Market friendly’ - private rights take priority**

Sociology of Action: Lawyering Practices

- **Lawyers mediate between**

Spheres of **power**: public (politics) & private (economic action)

Sites for the formulation, application & interpretation of law

Levels of law: infranational, national, international, supranational

Types of law: hard/soft, legislation/adjudication

- **Lawyering Practices: exploiting indeterminacy of rules**

Linguistic: meaning is contextual

technical language: ‘cognitive community’ *habitus*- Bourdieu

Abstract/general rules application to specific situation

Normative rules: teleological interpretation – desirable meaning

- **Critique of formalist view of law**

Law does not provide certainty – it is fluid and contested

Lawyers compete for ‘le droit de dire le droit’ (Bourdieu)

- **The Power of Law**

capacity to amass & deploy legal resources dominates discourses

accepted meanings shape material socio-economic practices

Software

- **Key technology of post-industrial capitalism**
scientific rationality + creativity - new expertise
solitary concentration + interchange of ideas – teamwork
continuous process of development, testing, refinement, extension
publicly funded research
collective, social process – appropriated for private exploitation
Central to cultural, social & economic practices
Immense power of AI
- **Contestations over Intellectual Property**
program = instructions for machine, not human communication
fell between copyright & patent paradigms
corporate lawyers achieved both copyright & patent protection
continuing conflicts: emulation, decompilation
law become weapon of competition
programmers' revolt: Stallman and 'copyleft'
Open Source: based on/transformation of copyright
enables public-private collaboration

Property, Contract and Control

- **Control over Competition**

Microsoft licenses Windows to OEMs to boost size & share of PC market
Contracts can control permitted uses, *only between parties*
Can restrict decompilation & reverse engineering
Mass market for software products & applications based on property rights
Software firms all agree, though battle over scope of protection

- **Control over Use and Users: the EULA (End User Licensing Agreement)**

Transaction characterised as a licence, independent of sales contract
Shrink-wrap/ click-through to indicate acceptance
Aims to control permitted uses – but which uses need permission?
Restricts resale of the copy – likely permitted by ‘first sale’ rule?
Permits copying needed to operate the program -- implicit in sale?
Regulates other (permitted?) uses – reverse engineering etc.
Users also agree to grant rights – especially to collect data

- **Software Applications Monetise Global Social Networks**

Applications supplied to users ‘free’ create ‘platform economy’
Control of the Code enables appropriation of value from transactions
Amplified by algorithms that channel social interactions

- **Rise of the Software-based Giant TNCs**

Apple, Microsoft, Alphabet, Amazon, Nvidia, Meta in top Ten TNCs (market cap)

IPRs in Finance and Tax

- **The Fetishisation of Intellectual Work as Private Property**
Private property = ‘right to exclude’, IPRs create scarcity in ideas
Appropriation of publicly funded & social research
Economic justification: encouraging investment & commercialisation
Accumulation of software & patent portfolios for financialisation
Financiers dominate direction of software development
- **IPRs and Tax Avoidance**
Digitalisation exacerbates fundamental flaws in international tax rules
Ownership of intangibles attributed to low-taxed intermediary entities
 TNCs reduce tax in host and defer tax in home countries
 less need for physical presence, no taxable presence where sales made
- **Undermining the Source Tax Base**
Payments of fees for IP licensing & services deductible from business profits
Channelled via conduits (e.g. in NL) to havens (e.g. Bermuda)
Income from sales attributed to low-taxed affiliate (e.g. Ireland)
e.g. Double-Irish Dutch Sandwich (Google)

Legal Trickery to Avoid Withholding Tax (WT) at Source

- **WT on Royalties**

royalties include payments for the ‘right to use’ copyright

OECD Commentary 1992: right to use software is not right to use copyright

Text included as ‘relevant’ in UN Model Commentary 1997

2011 addition: ‘some members are of the view that may constitute royalties’

UN 2021: ‘large minority’ consider payments for software are royalties

UN 2023: agree new version of model article – but needs inclusion in treaties

- **National Courts follow OECD Commentary**

Arguments advanced on behalf of software TNCs

India Supreme Court: *Engineering Analysis* (2021) resolution of many cases

OECD authoritative, India’s reservation imprecise

Kenya High Court: *Seven Seas* (2021): cites OECD Commentary & Indian SC

- **Payments for Digitalised Services**

Can be attributed to non-resident affiliate

Many treaties allow WT on ‘fees for technical & professional services’
interpreted to require human intervention

UN Model article 12A (2017), 12B ‘automated digital services’ 2021

- **Comprehensive Reform Needed**

OECD/G20 project on ‘base erosion & profit shifting’ (BEPS)
(that’s another story!)

Thank You