

Understanding Spillovers as Social Investments in the Capabilities of Others:
Implications for Intellectual Property

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Spillovers can be understood in economic terms as externalities and analyzed through economic theories generally concerned with internalizing externalities, but spillovers also may be understood more broadly to refer to positive third party effects. While I find the economics "jargon" and concepts (such as nonrivalry) helpful, especially when used to frame functional relationships, others find that economics is less helpful and obfuscating.

In this essay, I explore how the spillover concept may be connected with the capabilities approach of Amartya Sen and Martha Nussbaum as well as the social obligation theory of Greg Alexander. These authors write about how society is better off "investing" in the capabilities of individuals and groups. I argue that these investments are often made through legal structures that allocate surpluses and freedoms to access/use resources that are necessary to participation in socially valuable activities. It may be that such "social investments" in capabilities, including basic capabilities essential to survival and a good life but also to enhanced capabilities essential to a productive and/or engaged life, benefit society systemically in a manner functionally related to the spillover concept. Spillover can be understood as social investments in the capabilities of others.

This idea has broad implications for legal and economic theory generally, and it has implications for intellectual property law systems in particular. I will explore three related implications for intellectual property.

(i) "Progress in Science and the Useful Arts" may/should have a capabilities/participation component. In addition to our conventional understanding that focuses on the quantity and, to a lesser degree, quality of "outputs" (works and inventions), Progress may/should be understood to depend upon public capabilities to participate in both Science and the Useful Arts and various social activities that depend upon the "outputs" from Science and the Useful Arts.

(ii) Intellectual property laws, as well as other laws that regulate speech or information flow, fundamentally concern structured interdependence, in the sense that these laws mediate not only the relationship between producers and consumers of information/knowledge, but more importantly, the relationships between different interdependent social systems that depend upon information/knowledge—that is, most cultural, economic, political, and other social systems. The nonrival character of information/knowledge can be leveraged to build public capabilities to participate in

these systems, and it seems that many of the legal contours/doctrines concerned with access and use of inventions and works are concerned with such leveraging.

(iii) Spillovers present significant challenges for economics, especially microeconomic analysis. Economics may be most useful in framing functional relationships between different social systems and institutions; it may be helpful to integrate macroeconomic considerations that focus on systems performance and growth and perhaps better account for spillovers and the development of human capabilities.