

PROTECTIONIST VS OPEN IP REGIMES IN SOCIAL ENTERPRISES

By: Michelle Walker

In a Harvard Business Review blog post, Kimberly Tripp (2013) writes that getting bigger, or scaling up, is not necessarily the optimal goal for all social enterprises. Her argument asserts that multiplying impact is the more rational goal. One of the ways that Tripp (2013) suggests multiplying impact might happen is that “entrepreneurs...prove that their goal is much more than size by transferring control to local ownership.” The control she is referencing is control over the programs and administration of a model program.

Her essential point is that a model that works should be disseminated to any local organization that wants it to implement it as they see fit. However, this raises some serious questions of implementation and ownership. The first are reputational concerns: will other organizations be faithful enough to the model for impact, will they deliver services with the same values and commitment of the originating organization, and can the leadership of the adopting organization sustain the programming (Bradach, 2003)? For innovations arising from federal research or contracts, the U. S. Supreme Court ruled that intellectual property (IP) developed with federal funds remains the IP of the named inventor/author, not the organization for whom they work, unless it is expressly assigned by the inventor/author (Board of Trustees of Leland Stanford Junior University vs Roche Molecular Systems Inc as cited in Bloom, June/July 2001). So what happens if the social enterprise is not clearly the owner of the IP that Tripp suggests should be freely distributed? Assuming that an intervention, program, or tool that has impact in solving a social problem does not come with the same IP rights as any product or service developed by industry devalues the investment of human, financial, and knowledge into the development of a model that works.

The focus of this paper is the intersection of the intellectual property rights debate with social enterprise and the diffusion of innovations that work for solving social problems. If social enterprise is innovation to solve social problems, then the debate over whether IP law is a mechanism to foster innovation or is an impediment to it is an important one. The alternative to the traditional protections of IP law is open source, sometimes referred to as open innovation. If IP laws hamper innovation, then the social enterprise sector, in theory, should aim to work outside of that legal framework to achieve its goals. Social enterprises would skew towards open source as the preferred IP framework. If, instead, IP laws foster innovation, then social enterprises should maximize

their rights in property in the marketplace through close control or licensing. We'll examine, by looking at four social enterprise organizations, how their scaling efforts are related to their intellectual property control and assess what else might impact intellectual property decisions. The four organizations are College Summit, KIPP, Manchester Bidwell Corporation, and Creative Commons.

In the United States, intellectual property consists of four defined protections: copyright, patent, trade secret, and trademark/servicemark. The most relevant to our discussion are the copyright and patent since they comprise the majority of intellectual property market exchanges. Definitions of these rights are important to understanding what follows.

1. Copyright: protects the expression of facts or ideas in a work of original authorship, i.e., books, training manuals, computer programs, databases, once they are in any tangible form of expression. Non-commercial fair uses of copyrighted works are generally considered teaching, criticism, comment, news reporting, scholarship, and research. (Akin, Gump, Strauss, Hauer & Feld, 2007)
2. Patents: covers and new, useful, and non-obvious process or product and must be registered with the U.S. Patent and Trademark Office; patents require vetting through patent examiners. (Clowney, 2011)

Throughout the remainder of the paper, intellectual property or the abbreviation IP refers only to these two legal forms. Briefly, let's look at the two paradigms as pathways to innovation.

Bloom succinctly summarizes the argument in favor of IP as a spur to innovation with "what is available to everyone is of interest to no one" (May 2011, p. 4). He is oversimplifying the point, but as Clowney (2011) and Maskus (2010) point out, there are significant free-rider problems when innovation and intellectual property are not regulated. Maskus also describes a market failure where "unregulated markets may not provide enough lead time...to build a market position that generates sufficient returns on investment and...innovation" (2010, p.14). He mentions neglected diseases as one example of where weak patent systems deter investment and innovation. It is a deterrent because innovators cannot be guaranteed to recoup their costs. In short, IP proponents argue that a lack of a market to generate return on investment deters inventors/authors from creating new products, processes, or original works, and thus are critical to incentivizing innovation.

The term open source is predominately used to describe a revolution in the software programming industry where developers create software and its source code collectively. They then license their work as "free" for further creation and distribution. The

movement is a critical response to the expansion of copyright law that is aimed at protecting software and its underlying code. Today the open source movement goes beyond software and seeks to spur innovation by putting knowledge freely in the hands of the public (Mandrusiak, 2010, p. 304).

Proponents of open source argue that copyrights stifle innovations through extended proprietary terms. Open source is critical of patents, too. Lemley posits “broad patents granted to initial inventors can lock up or retard improvements needed to take a new field from interesting lab results to commercial viability” (as cited by Mandrusiak, 2010, p. 311). Mandrusiak (2010, p. 312) points out that the biggest damper on innovation is the high transaction cost of licensing and the complexities of the legal negotiation when several parties are involved. In an example of pharmaceutical research hampered by patent protection, Mandrusiak (2010, p. 313) argues convincingly that the real lose is the public since they will not gain access to a potential cure. This is the key to the open source argument—shared knowledge is better for public well being because it eliminates costly barriers to would-be innovators.

Ultimately, the efficiency of IP is an economic argument. The best economic summary of the divide “boils down to the issue of fixed costs versus marginal costs” (The Econophysics Blog, 2007). “In economics, marginal cost is the rate of change of costs” and “industries often...have substantial fixed costs...incurred in order to produce the goods or services in question” which “aren’t usually adequately reflected in marginal costs” (The Econophysics Blog, 2007). Social enterprises, like industry, have fixed and marginal costs in delivering their programs. Acting as rational entities, social enterprises should seek to optimize their costs versus revenue, which suggests that they would lean toward open source paradigms for gathering and sharing innovation since open source is free. However, that assumes that the singular motivation for a social enterprise to create the innovation is to place it in public hands. What we find in the four firms examined are practices that span the continuum of IP regimes.

There is no obvious or accessible data on how broadly either the intellectual property or open source paradigm is used in scaling social enterprise. Further, the literature on IP in scaling and innovation diffusion in the social sector is minimal. The assessment of College Summit and KIPP’s use of IP comes from case studies and their websites. The review of the approach taken by Manchester Bidwell Corporation comes from personal experience as a staff member and an interview with William Strickland, Jr., Founder and CEO, on February 22, 2012. Information on Creative Commons comes from its website and the publication *The Power of Open*.

Bridgespan’s summary of College Summit highlights the centralized control of the organization and earned revenue as key factors in its growth. They describe College

Summit as having a branch structure where each location has an executive director or manager and local staff, but each branch reports to headquarters in Washington, D.C. (The Bridgespan Group, 2004, p. 3). Key pieces of the organization's infrastructure are controlled by the D.C. office, "including curriculum development, business development, fundraising, marketing, advocacy, and technology" (The Bridgespan Group, 2004, p. 7). The Bridgespan case study indicates that there is some potential for local sites to have some discretion in the future, like funding their own office space, but that "[College Summit's] also need(s) a set of things that can't change" (2004, p. 8). College Summit's model leads it to prefer to close sites that are not performing to expectations in order to focus on successful sites (The Bridgespan Group, 2004, p. 13). They purposefully use fee-for-service as a way to keep partners and students engaged (The Bridgespan Group, 2004, p. 10) supporting the idea that if it is free it is not regarded as valuable.

College Summit seems to have created an organization system that hinders development of new, potentially innovative solutions, either locally or nationally since most everything emanates from the central office. There is no discussion of how College Summit analyzes sites that they have closed for what could have been done differently, but generally administrative strength and organizational adaptation comes from empowered, local leadership in the form of boards or advisory committees. The centralized model of College Summit does not seem to be flexible in this regard and does not take into account that though they serve college capable students, the schools and communities in which those students learn and live are unique.

What has this meant for scaling the organization? Between 1993 and 2003, "nearly 5,000 students had passed through the program" (The Bridgespan Group, 2004, p. 3). The companion statistic is that each year 200,000 capable students fail to enroll in college. In the ten years in which College Summit served 5,000 students, 2,000,000 students were not enrolling in higher education. According to Bornstein, College Summit had a budget of nearly \$4 million (USD) in 2002 and had plans to "expand to 14 cities by 2009 and raise \$17 million in new funds by 2006" (2007, loc. 3405-3513). According to its website, in 2013 they served 180 schools in 12 states and now serve 50,000 student annually, which is one quarter of the college capable who are at risk of not enrolling (College Summit, 2013). The annual tax return College Summit submits to the U.S. Internal Revenue Service (a.k.a 990), which is posted on their website, shows annual expenses of more than \$19 million dollars (College Summit, 2013), nearly 500% growth since 2002. The growth is impressive, both in terms of the number of students served and the expansion of the organization. But, what is not clear is the quality of the impact and whether a more flexible model would allow for more students served for the same amount of support.

The method settled on by KIPP is a licensee approach. Essentially the KIPP name is used as a brand to help secure a charter for a school. The licensing organization then signs

an agreement enabling it to use the KIPP name with the provision that the KIPP Foundation can “inspect the school, review its results, and call for ‘corrective action’” (Husock, 2006, p. 11), including termination of the agreement. This model puts KIPP into the role of central knowledge management. The head office takes successful curricula and methods from within the KIPP network, standardizes them, and repackages them for use by other KIPP schools (Husock, 2006). This choice works for KIPP because the theory of change for KIPP is not standardized curriculum, but results-oriented teaching.

The model utilized by KIPP is clearly dependent on IP, particularly the adherence to the Five Pillars and that sharing of marks and copyrights as outlined in the license agreement (Husock, 2006, pp. 22-31). The flow of information goes back-and-forth in the KIPP model, which allows for feedback and internal innovation, but only within the KIPP network. In all other aspects, it is a closed system with new ideas entering the KIPP system via new employees or school leaders. Continuous internal development of IP is still capital intensive, in that human and financial resources are the primary source of innovation, but in this model there is the expectation that each site is engaged in generating innovative content/tools/processes that will be shared across the network, and only within the KIPP network, as part of the licensee arrangement. Although it is not IP being capitalized on in the open market, it is retained to continue to add value to the KIPP brand on the theory that KIPP schools produce greater-than-average achievement results.

How has the KIPP model scaled? KIPP began as two schools serving 5th-8th grades in 1995 (Husock, 2006, p. 1). In 2001, the model grew to 5 schools through the support of The Pisces Foundation (Husock, 2006, p. 13). This was followed by 42 more by 2005; KIPP schools were then in 15 states and Washington, D.C. (Husock, 2006, p. 13). The 45 schools in operation in 2005 enrolled more than 9,000 students and were demonstrating academic achievement above average (Husock, 2006, p. 17). Husock states that by 2010 KIPP wanted to expand to 100 schools and 35,000 students (2006, p. 17). According to the KIPP Foundation website (2013), there were 99 KIPP schools serving 26,000 students in the fall of 2011. They have had more than 100% growth since 2005, but below organizational goals.

At Manchester Bidwell Corporation (MBC) the model is far more open. I asked William “Bill” Strickland, Jr. a number of questions related to Tripp’s blog post (2013) regarding ‘sharing’ intellectual property. Strickland’s colorful response boiled down to this: you should always sell your intellectual property (personal communication, February 22, 2013). However, Strickland is not exactly doing that with his IP and he says it came about because of his frustration with his Board’s desire to be restrictive and protect the IP of MBC (personal communication, February 22, 2013). It was clear in our discussion that the wasted time and money on contracts and negotiating intellectual property was, to

Strickland, antithetical to his whole purpose of transforming lives through arts and vocational training (personal communication, February 22, 2013).

Strickland decided to create a separate organization, the National Center for Arts and Technology (NCAT), which serves as a consultancy organization for parties interested in opening a facility modeled on the MBC programs. There are four steps in any NCAT replication process: cultivation, feasibility, planning, and operations. Strickland said that at any point up until operations either party can walk away from the process and each phase of the process has a fixed price for the services of those phases.

Essentially, the three NCAT staff members are contracted to launch a new organization for a group of interested parties. Strickland and his team are closely involved in helping to select the staff leadership and board for each replicated organization with the right values and vision. The NCAT team also provides support for securing initial capital and suggesting programming ideas based on local needs. Once a replication enters the operations phase, it is tied to MBC and NCAT only through a similar naming convention (i.e. Bayview Center for Arts and Technology) and a shared set of core values. Long before the doors open, the new organization has already been given all of the curricula it would need to run the programs that the Pittsburgh center has, but each city is encouraged to tailor its offerings to the local market and local issues (personal communication, February 22, 2013). This regime is best described as some-rights reserved IP.

Has Strickland's openness to sharing helped to spread his model? He says that what has motivated him from the very beginning has never been about owning the solution to problems, but, rather, that he did not waste time making change happen. The first replication site opened in late 2004 in San Francisco, CA. In 2013, there are six operational replication sites and three in planning that are likely to open in the next 18 months (Strickland, personal communication, February 22, 2013). There are 14 other cities/regions in either the cultivation or feasibility stages.

In our conversation, Strickland says he still holds to his long-term vision of having at least two centers in every state (personal communication, February 22, 2013). He is candid about the reality that his model has been replicated without going through the official NCAT process creating some issues for the group reputation, but given his priority for solving problems, that IP infringement is not a trade off he cares to worry about (personal communication, February 22, 2013). One downside, he says, is that his method has not been good at capturing learning from the new sites so that all sites can learn, because there is no formal connection other than via the brand (personal communication, February 22, 2013). According to the 2012 IRS 990, NCAT has assets of \$626,824 and Strickland says that NCAT is not tracking the number of people served by the replications nor have they implemented a process to track and enforce fidelity to the values of the MBC/NCAT brand.

Creative Commons is an organization whose vision most aligns with the concept of social innovation diffusion. The vision behind Creative Commons is to enable “the sharing and use of creativity and knowledge through free legal tools” (Creative Commons, 2013). This is an interesting take on the historical nature of copyright. Copyrighting is a free legal protection for the author to assign to their work, but not free to an end user if there are engaged in anything outside the scope of fair use. Creative Commons suggests that copyright can be more powerful for generating knowledge when used in a “some rights reserved” manner rather than the “all rights reserved” manner of historical copyright protections. However, the creative Commons copyright has not been tested in court, so it has yet to prove that it is a viable alternative or corollary to existing copyright law (Mandrusiak, 2010).

Creative Commons differentiates itself from the other organizations by virtue of its notion of what scale means. In the Creative Commons paradigm, all knowledge is accessible and free to be utilized to create more knowledge, ideas, and solutions. Scale, for Creative Commons, is the proliferation of its copyright system through author usage. This kind of scale via author dissemination is a business model that does not require Creative Commons to expand in order to have people adopt or participate in their theory of change. The publication *The Power of Open* states it rather elegantly:

We build infrastructure at Creative Commons. Our users build the commons itself. We are working to increase the adoption of our tools, to support and listen to our users, and to serve as a trusted steward of interoperable commons infrastructure. (2011, p. 4)

They claim hundreds of millions of works have been copyrighted with their licenses and that versions of their license have been ported to 50 jurisdictions (Creative Commons, 2013).

However, that itself is not a measure of whether more knowledge, ideas, or solutions, i.e. innovation, has been created and disseminated to solve social problems. *The Power of Open* share some stories of success, but they are the successes of the open source copyright utilized by other organizations in their own mission attainment, not necessarily the work of Creative Commons. That distinction may not matter, but it makes measuring the impact of the Creative Commons paradigm difficult. The only available information related to the scale of Creative Commons is that it has a staff of about 20 people.

All of the organizations analyzed are considered successful social enterprises and all are operating under different intellectual property regimes and innovation processes. It is inconclusive from this scan of basic information whether intellectual property or open

source impacts the spread of innovation in the social sector. There are four observations that stand out and invite further research.

First, an organization's decision to capitalize on IP seems to be tied to the social entrepreneurs values and personal theory about creating broad social change. For Strickland, there was a desire to monetize the IP, but conflicts with his governing board over how to do it efficiently and effectively led him to an alternative platform for dissemination of the model. This raises the question of the role of governing boards in managing the IP assets of a social enterprise: are they responsible from a fiduciary aspect to oversee these assets like they do the fungible and capital assets?

Second, organizations that capitalize on intellectual property seem to collect more data and invest in assessment. This may be tied to having to justify the efficacy of the innovation in order to scale, though data is only evident in two of the four organizations that have gone to scale. Alternatively, some social enterprises may value data more than others in how they make decisions.

Third, if assets are any indicator of success, then this very limited review shows that scaling favors those with closely held intellectual property. However, it is possible that assets of replicating or downstream organizations in the open source model have generated their own IP assets that are of greater value in terms of potential fee-for-service revenue or impact to solve a social problem.

Finally, open source seems to be correlated with smaller and potentially more nimble organizations. The size is likely related to the fact that by sharing their intellectual property, open source regimes do not add staff to spread innovation. It is not known if they use their smaller staff size to their advantage in course correction and implementing more ideas for more innovation. However, smaller staff sizes inherently have a more limited pool of intellectual capital in the form of knowledge assets, thus the larger organizations with protectionist regimes have larger pools of staff knowledge assets. There is no evidence, though, that this is an innovation advantage in this small, surface examination of social enterprises.

Although Tripp (2013) makes a thought provoking philosophical argument in her blog post, there is no clear answer that open intellectual property is the best method for diffusing innovation to solve social problems. This topic may become particularly important as we consider new hybrid organizations and the ramifications of adding their patents and copyright to the market. Further, the rising in new modes of supporting social enterprises through social impact bonds, program related investments, and other impact investing tools may lead to greater scrutiny of IP ownership and the potential problem of fractionalized property rights if the ownership is not clearly assigned at the outset. There is

Walker

Philanthropic Consulting

value in looking more closely at intellectual property's role in innovation and scaling in the nonprofit sector and in our understanding of the values and motivations of social entrepreneurs.