

*The New Cognitive Property:  
Human Capital, Knowledge Creation, and the Reach of Intellectual Property*

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Human capital is a dynamic, self-replenishing resource. Unlike other natural resources that become endangered by overuse, pollution, and free riding, human capital is endangered when it is under-used, isolated, and controlled. This article argues that contemporary policy is grounded in the conviction that not only the outputs of innovation - artistic expressions, scientific methods, and technological advances - but also the inputs of innovation - people, their skills, experience, knowledge, professional relationships, creative and entrepreneurial energies, and the potential for innovating - are subject to control and propertization. In other words, we now face a reality of not only the expansion of intellectual property but also cognitive property. This article introduces the field of human capital law and its evolution. Regulatory and contractual controls on human capital - post-employment restrictions including non-competition contracts, non-solicitation, non-poaching, and anti-dealing agreements; pre-innovation assignment agreements of patents, copyright, as well as non-patentable and non-copyrightable ideas; and confidentiality and non-disclosure agreements and trade secrets enforcement against former insiders - are among the fastest growing frontiers of market battles. These regimes heavily shape industrial competition, regionally and globally, and through this web of extensively employed mechanisms, skill and knowledge that have traditionally been deemed public in intellectual property law have become proprietary. The expansion of controls over human capital has thus become the blind spot of intellectual property debates.

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