

Notice Externalities and Development of Intangible Resources

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The emergence of intangible resources such as intellectual property shines the spotlight on a previously unrecognized market failure: what we call “notice externalities.” Land rights systems and institutions generally provide reliable notice at relatively modest cost, enabling exclusionary rights to spur efficient investment in real estate development. Property boundaries, right structures, and neighbors with whom resource developers might have to deal with in resolving resource and land use conflicts can usually be identified relatively easily. Therefore, claiming of land resources does not usually impose substantial or wide-ranging external costs upon others. Effective notice is a far greater challenge when the resources in question are intangible. Such resources can be difficult to navigate because of the amorphous nature of intangible boundaries, the challenge of capturing the scope of an intangible asset through textual claims or artistic renderings, the difficulty in determining whether an intangible resource is already “owned” (unlike tangible assets, the non-rivalrous nature of intangibles means that they many people can possess them simultaneously without affecting others’ use of the resource), and the complex rights associated with intangibles (e.g., patent’s doctrine of equivalents; copyright’s fair use doctrine). Furthermore, the incentives of those claiming intellectual property are not necessarily aligned with the social interest. Notice information is a public good. Private parties tend to under-provide public goods because they do not appropriate the full value of their investments. Moreover, inventors and creators can sometimes benefit from claiming amorphous rights and keeping others in the dark about their intellectual property. This article explores the principal causes of notice failure in the development of intangible resources and offers a broad, multi-faceted framework for diagnosing the causes of notice failure and internalizing, counteracting, and otherwise addressing the adverse effects.

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