

Abstract for Information Law 2012 Conference

Human Cells, DNA, and Intellectual Property Law

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Given the imperative to protect genetic privacy rights, some scholars have argued for the equivalent of property rights over our “individual genomes,” that is, the portion of the genome unique to each individual. Koepsell, for example, envisions “positive laws that *create new rights* over our individual genes.”¹ Such rights will also ensure that an individual can share in the bounty that might come from any medical research done on those cells. Ideally, a property right regime will more securely protect privacy and also ensure that the “owner” of this genetic information could strike a bargain with the scientific community.

The primary theme of this paper centers on the normative case against such ownership rights in human cells and the DNA segments isolated from those cells despite the apparent logic of this reasoning. After all, why not let someone contract with researchers himself to explore and exploit the information contained in his cells? However, it is difficult to justify such rights from a social welfare perspective given the intractable obstacles to research that would be created. We also contend that the researchers who isolate DNA sequences from genetic material do not have a valid ownership claim to those sequences primarily because they remain products of nature. They do have a right to patent the application of their discoveries such as diagnostic methods that do not merely reflect nature (provided they meet the requirements of methods patents).² The ethical reasoning supporting this conclusion is based primarily on Lockean and utilitarian grounds. Recognition of these broad gene patents is inconsistent with the Lockean paradigm because a gene patent does not measure up to Locke’s sufficiency proviso (despite the labor involved in the work of isolating DNA sequences). These patents also create disutilities and high transaction costs throughout the value chain. Property rights should be applied more prudently in order to balance the need to reward innovation with the need for open research unencumbered by entangled patent “thickets.”

¹ David Koepsell, *Who Owns You: The Corporate Gold Rush to Patent Your Genes* (Oxford: Wiley-Blackwell, 2009), p. 167.

² Those criteria have been articulated in *Bilski v. Kappos* 130 S. Ct. 1238 (2010).