

# SCRIPT-ed

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## **The Mystery of Intellectual Capital: A Prospectus**

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### **Abstract**

*This article looks at new ideas to provide access to intellectual capital based on models that are already producing results in developing countries in land-based capital.*

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## **1. Introduction**

Hernando de Soto's implementation of the idea of expanding ownership regimes in the developing world, and thus increasing the availability of land-based capital to the poor, is working. The time is ripe to explore ways to provide access to intellectual capital, which holds tremendous opportunities and wealth which are yet untapped. There are numerous, frequently parallel, transnational systems of intellectual property protection, generally involving registration, in some centralized manner, of the ownership of the expression of ideas. These systems developed over time, and have liberated intellectual capital in the Western world. They are an ever-increasing source of new wealth for innovators and economies. Although sometimes currently unwieldy, current regimes have generated unprecedented expanding markets for intellectual capital and its products.

It is time to develop a mechanism to determine the extent of untapped intellectual capital in the developing world, to trace whether and to what extent systems may already exist which may capture through existing documentation the ownership of intellectual products, and the manner in which that capital could be better liberated to the benefit of individuals and nations. I propose that this be added as a fruitful new endeavor for the already successful implementation of de Soto's current work. By uncovering existing local, extra-legal methods of intellectual property protection where they exist, or developing where they do not, and integrating IP protection within the local, cultural framework as well as international treaties, we can encourage and reward innovation, and liberate intellectual capital previously either preserved through secretiveness, or cast into the public domain without compensation.

## **2. Background**

Hernando de Soto's groundbreaking work,<sup>1</sup> which has shown through concrete study and practical application the truth of a simple idea, has brought millions into a worldwide economy and given hope to impoverished people around the world. The simple idea is that people want to own that which they build on and improve, and that if economic systems don't recognize that occupation and improvement of land creates rights to ownership which should be legally recognized, then underground economies will prevent the full development of capital markets, and ensure that chronically impoverished people will remain so. This insight has given new hope to a sort of Jeffersonian ideal of land-ownership, cultivation, improvement and credit that enables underground systems of occupation to become *bona fide* systems of legal ownership.

De Soto's successful implementation of the Lockean theory that occupation and improvement gives previously unrealized value above and beyond often Byzantine methods of land registration and tenancy, has bridged a gap between theory and practice. It is empirical proof also of the metaphysical reality of the right of ownership that flows from the necessary and sufficient relations among persons and real property. In other words, we may now comfortably conclude that the *a priori* nature of ownership by occupation, labor and improvement should be recognized by

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<sup>1</sup> De Soto, H. *The Mystery of Capital*, New York, Basic Books (2000).

legal systems, and that legal systems which fail to recognize this do so at their own risk.<sup>2</sup>

This innovation is working successfully in emerging and developing markets to legitimize previously vast underground economies and bring their players into the mainstream capital markets. Hitherto unrealized billions of dollars worth of untapped capital has been uncovered. The United Nations has recently appointed de Soto and Madeleine Albright to head the new “High Level Commission on Legal Empowerment and The Poor,” with the strong support of Kofi Annan, who stated that de Soto “is absolutely right, that we need to rethink how we capture economic growth and development.”

Billions of dollars of capital was tied up in land whose value, combined with the value of improvement and labor, was previously kept out of official capital markets out of habit, tradition, and legal systems that lacked grounding in pre-legal facts of ownership. De Soto’s approach to releasing “dead” capital, through reforming legal institutions, has worked. If this trend continues, then the markets of developing countries and their untold hundreds of millions of impoverished people will have access to capital they may never have otherwise been able to realize. But what of those who lack even occupation, improvement, or labor on land? Or what of those whose improvements and innovation are less tangible than a plot of corn, or a successful stall for selling handcrafted goods? What of the impoverished, modern day, developing world’s Thomas Edison who lacks any capital but good ideas?

### **3. Less Tangible Capital**

In most of the developed world, capital has changed dramatically in the last few decades. While bricks and mortar are valuable as assets against which individuals and companies may borrow, and which may be sold in bankruptcy in case of failure, perhaps the most valuable assets in developed markets are less tangible. Intellectual capital, broadly defined, is the stock of assets often recognized by devices such as copyrights, trade secrets, patents and trademarks. The value of most modern corporations is tied up to a large degree in these sorts of assets, rather than land, and has only within the last hundred years been exploited effectively (though maybe not always efficiently) by the creation of complex schemes of intellectual property protection.

It seems unlikely that potential vast untapped intellectual capital can be successfully realized by plunking down Western systems of intellectual property protection in the poorest nations on earth. This is largely because U.S.- and European- style intellectual property (IP) regimes may no longer themselves be efficient, requiring complicated searching and registration, or expensive litigation in some cases. I suggest that untapped intellectual capital in the developing world needs to be treated like the vast untapped capital which de Soto is uncovering, and such an extension of de Soto’s project will help expand developing markets into world-wide markets.

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<sup>2</sup> De Soto, H. "Dead capital and the poor", 21(1) *SAIS Review* 21 (2001).

#### **4. Current IP Regimes**

In many ways, it is much easier to exert ownership over land than over ideas. This is true all over the world due to the nature of land versus that of ideas. This is so even despite complex systems of intellectual property protection which have been created to encourage innovation, and provide legally recognized systems of ownership for the fruits of ideas. Ideas are ephemeral. Once expressed, they are generally easily copied. Ideas are generally only valuable, however, when expressed, through some physical product like a book, machine, business plan, or trade name. In a world without intellectual property protection, neighbors are free to copy one's expressions, and create competing products, machines, businesses, or even trade names, which are in all respects identical to the original. On the other hand, when one delimits one's property with a fence, or some other recognized border, and defends that border even before laws come to recognize that occupation as 'legal,' the mere facts of possession can survive as long as the occupier continues to successfully establish those facts of possession. There is simply no equivalent to this with intellectual "property."

In fact, at least a quarter of the world has lived until the past couple decades without any intellectual property regime, and markets seemed to grow, if not necessarily flourish. But the phenomenal growth and strength of economies which are now largely dependant upon regimes of IP protection suggests that there is capital in ideas which, when defended efficiently, may yield even more capital hitherto untapped than even ownership of land.

In the Western world, three major forms of intellectual property protection have been developed: copyright, patent and trademark. These legal schemes are radically different in form, accessibility, scope and ease of securing and defense. The long-standing division among the three schemes has been, roughly, that copyrights are available for expressions and patents are available for inventions (products). Names have been afforded trademark protection. All of these schemes depend now on registration systems managed by governments, although there are some remnants of common law protection for expressions, inventions, products and names that are still recognized. The current net effect of the present western IP regime is that the value of a company like Coca-Cola® is tied up more in its trademark and trade secret formula, as well as its numerous patented forms of manufacture, than in its facilities. The value of Microsoft® is in its thousands of patents more than in its bricks and mortar. Dreamworks SKG® was able to leverage its sale on the value not of any building, but rather on its copyrighted stock of movies and the promise for future box-office sales of yet unrealized ideas. Companies like this, and individuals who run them, enter the capital markets with far more assets than a simple auditing of their physical assets would recognize.

Developing markets surely hold untapped intellectual capital that could be unleashed by developing workable IP regimes fitting to their particular histories, markets, customs and economies. That capital will be freed in ways which also cooperate rather than undermine modern western IP regimes, and which provide fresh, new reserves of wealth for even those without ownership of land, but who have innovative ideas and entrepreneurial ambition.

## **5. A Proposal for Fieldwork and Implementation**

It is highly unlikely that there is no hidden intellectual capital in the developing world. It could be that intellectual capital in the developing world is not worth trying to free because capital tied up with land is more efficient to liberate. These possibilities must be acknowledged, however unlikely they seem. The strength and wealth of economies whose IP products are well protected seems to argue for at least exploring the current status of potentially untapped intellectual capital.

One exciting possibility is that nascent forms of intellectual property protection may already exist in extra-legal methods of registration, protecting local business names, trade secrets, inventions or works of authorship, and that governments may learn by empirical study of these local schemes, and help free intellectual capital by recognizing their value and formalizing them. Or it may be the case that no such schemes exist, and that vast untapped markets of intellectual capital could be forged by creation of new legal regimes, consistent with local and national customs, values and laws, and in harmony with national markets, so that people with land and ideas, or even with just ideas, can share with the developed world new means of lifting themselves out of poverty previously unavailable or unexploited.

Consider the African farmer who develops a totally new tool for harvesting his crops. Without some form of protection, his only gain will be increased profit through increased ease or efficiency in harvesting. It may be that culture or tradition already affords some extralegal protection or remuneration for such an innovation shared with the community, or it may be that no such remuneration or protection exists. Creation of legal IP schemes, or recognition of existing methods, consistent with local culture and tradition, yet capable of being synchronized with international standards, should grant new and useful credit to innovators such as our hypothetical African farmer. It is worth exploring and testing this probability. The lessons of liberating capital in the form of real property should be extended to the realm of intellectual capital.

As with the work de Soto is already doing, on the ground in developing nations with teams of experts, discovering current systems of land occupation, exploitation, registration and ownership, and devising suggested means of reorganization of those schemes consistent with the proven thesis that legal ownership ought to be granted to responsible squatters because this frees up untapped capital -- the same should be done with intellectual capital. Teams of experts in the area of IP law and theory should be sent into developing countries to explore current regimes of IP recognition and protection, if they exist, and consult with governments to devise means of regularizing protection of intellectual capital, and freeing it for use by economically disenfranchised innovators. Moreover, because of the international nature of IP and the existence of organizations such as WIPO, this should be done in a way which is cooperative with WIPO states and their standards.

## **6. Conclusion**

Intellectual capital is the new frontier for capital in the developed world. Natural resources such as land or minerals will eventually be fully exploited. Only innovation can keep economies with fully exploited or limited natural resources growing. There is no natural limit to future markets based upon intellectual capital, and even while capital in land is being liberated by implementing de Soto's ideas, the mystery and

future of *intellectual capital* needs to be prepared for as fertile ground and perhaps the final frontier for the global economy's unlimited future growth.

I propose it is time to:

- Develop a field-work protocol to investigate, in an existing engagement in a developing country, whether and what forms of protection might exist for intellectual capital
- Determine the extent to which existing schemes, if they exist extra-legally, might be implemented efficiently through legal systems
- Determine the value of untapped intellectual capital and consult with governments as to how to liberate that capital efficiently, and in ways which will accord with the world economy in intellectual property
- Replicate this process for suitable economies in the developing world.