

Intellectual Privateers

Intellectual property rights in the “digital age”

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The scope of intellectual property rights – both the powers used to prosecute infringement and the level of harassment that many people receive to pay to use “intellectual property” – has grown in tandem with the mass adoption of the Internet. In the digital domain the rights given to the holders of intellectual property rights represent a modern equivalent of the rights given to privateers during the early phases of Western colonialism five hundred years ago, and as a result our own rights to produce, copy and distribute information are diminished. In this paper we look at this process, and at the effect this has on the “information commons”.

As governments around the world, spurred on by the World Intellectual Property Organisation, consider tightening the rules further with mechanisms such as software patents and copy protection systems, the ability of the public to use information freely is diminishing. This “freedom” doesn’t just include the ability to copy or redistribute the information, but also, irrespective of their personal wealth, to access information that is essential to their health, well-being, and to the functioning of society. As more and more functions of society are privatised (e.g., health services), and as more areas of society’s common spaces are given over to private control (e.g., shopping centres/malls), the creeping restrictions of intellectual property rights have important consequences for our rights.

In this paper we highlight the step-change that “technologically mediated” (that is, computer controlled) information access has both on our existing rights to access information, and on our ability to create and share culture in general.

“Intellectual Property Rights”

For thousands of years, since humans made the first stone tools, people have copied and borrowed from each others’ work and as a result the knowledge and creativity of humankind has been enriched. Today, in the name of protecting “intellectual property rights”¹, we are locking up knowledge using technological and legal locks to prevent not only illegitimate access, but also access which (e.g., for a paper copy) would normally be possible (e.g. photocopying, reading without payment, sharing with others, etc.).

The organisation that takes the lead role in this process globally is the World Intellectual Property Organisation (or *WIPO* – see the box on the right). In individual states, as well as the government which enforces the various world treaties on intellectual property created by WIPO, there are also a wide range of lobbying organisations that represent the legal and financial interests of what is now known as the “intellectual rights industry”.

In the past the extension of intellectual property rights has not had a significant impact on culture

What is WIPO?

WIPO, the *World Intellectual Property Organisation*², is one of the cornerstones – along with the *World Trade Organisation* (WTO)³, the *World Bank*⁴ and the *International Monetary Fund* (IMF)⁵ – of world trade. In order



to be able to design products in one country, make them in a second and sell them in a third, you must have the same legal protection applied to the designs and manufacturing technologies in all those states. This is what WIPO does through its global treaties on intellectual property rights.

WIPO was created in 1967, “to encourage creative activity, to promote the protection of intellectual property throughout the world”, but with the rise of globalisation, and latterly the Internet, intellectual property rights (IPRs) have taken on a far more important role within the global economy.

Today IPRs are a way to enforce the economic dominance of (mostly Western) corporations over the use of their information, products and devices around the world. The conditional linking of world trade and development programmes to membership of WIPO (e.g., in 2005, Afghanistan was one of the most recent countries to join) means that IPRs are a means of enforcing control over the activities of individuals and whole states in the private interests of those who hold the rights.

50 years ago, when IPRs were related to the animated image of *Mickey Mouse* or the lyric to the song *Happy Birthday*, and the lack of a global IPR framework meant that no one state could dominate another, this issue wasn’t so important. Today, with drugs, human genes and the designs of almost all technological tools subject to the aggressive control of IPRs by the large corporations who own them, and the fact that these rules are remotely enforceable around the globe, IPRs have become a form of economic expropriation; they enable the rich to extract a tax on “knowledge”. For this reason there is a growing resistance to both IPRs and WIPO’s role in their development and enforcement.

Types of “intellectual property”

Writing a guide to IPRs for an international audience is very difficult; whilst WIPO set minimum international standards some states enforce tighter standards than WIPO. It's for this reason that, throughout this paper, we link to *Wikipedia* articles as these often have sub-pages that relate to specific countries.

The list below outlines different types of intellectual property rights that people may regularly encounter:

Copyright

*Copyright*⁶ is the most commonly used and pervasive of IPRs. Copyright (usually identified by the '©' symbol) extends to any creative work that can be clearly identified (e.g., a book, an image or picture, or even emails) that a person or group of people create. Different periods of protection apply in different states – in the UK copyright exists for 70 years after the death of the author, but where the author is not identified it is 70 years from the date of production.



A related protection is the copyright over multimedia works (e.g., music recordings or films). **(P)** The rights over recordings (usually identified by the '©' symbol) exist for 50 years after the date of production or the date of first broadcast/performance.

An implicit part of copyright are the “fair dealing rights” that members of the public have to access and copy/record the protect work – *this is dealt with later in relation to the effects of technology on fair dealing rights*. Any copying or distribution that is beyond that permitted by fair dealing is unlawful, and the holder of the copyright can sue for damages through the courts.

Trademark

*Trademark*⁷ is a protection applied to names, symbols and images used to identify products or brands. Trademarks operate in different categories of trade, and the use of a protected name or symbol in the same area of trade constitutes “passing-off” – which can be stopped through the courts, and the owner of the trademark can also claim damages. Once registered trademarks continue whilst the owner maintains the registration (by paying a regular fee) and actively protects the use of their trademark by preventing passing-off. It's the context for the use of trademarks that is important – for example, if you are making a clear criticism of the company identified by the trademark that is not passing off, but making an exact parody of the company's work could be.



Trademarks are usually formally registered, and get the '®' trademark symbol after the mark. In some states, such as the USA, trademarks can be used before formal registration if identified with the 'TM' symbol.

Patent

*Patents*⁸ are a right to exploit a new invention, granted for a specific period, in return for the technological designs for the device being released. Originally patents were granted as a means to ensure the development of new technologies – because it meant that the owner could be sure of making their money back on their investment. But today the scope of patents, which has now extended to living organisms and computer software, grant enormous

economic advantages to those holding the patent to control the use of their products and the rights of the users to adapt or alter them.

Today, almost every part of our lives is now open to patent control. The most common way we experience this is the incompatibility between devices – such as DVD players, because inclusion of “interoperability” requires the manufacturer to pay a license to use another's technology (which is why it's the more expensive gadgets that have better interoperability).

Design Right

*Industrial Design Rights*⁹ (or “registered designs”) relate to the design, style, colour or other features of a product rather than its technical design. The purpose of the design right is to protect the brand or style identification of a product so that others cannot create and sell imitations of that product (for example, designer jeans and other clothing). In the UK, design rights last up to 25 years.

Related Rights

*Related rights*¹⁰ are something that apply to many aspects of the use of protected work, but has special relevance to the multimedia and broadcast industry.

Database Right

The *database right*¹¹ was a measure introduced within the European Union in 1996 that gives protection to the use of information contained in computer records. The database right gives the owner the ability to take action to stop the use of substantial extracts of their database being used for other purposes (for example, where someone reads a product database from a web site and then wants to sell it on). For most people database rights are not an issue, but for campaigners, who may wish to use data from a database as part of their work, it could potentially lead to claims for use of the information.

Plant Breeder's Rights

Some states give *rights to plant breeders*¹² over the varieties that they produce – however this right is wholly separate from the protection of genetically modified crops using conventional patents.

Trade Secrets

Some states (e.g. the USA) give legal recognition to *trade secrets*¹³, not so much as a matter of intellectual property, but as commercially confidential information which a corporate body has a right not to disclose publicly. This is not a practice regulated globally, and so the protection given to commercially confidential information varies from state to state.

Geographical Indication

As part of the WTO's *Trade-Related Aspects of Intellectual Property Rights*, or *TRIPS*, agreement, special “*geographic recognition*”¹⁴ and protection can be given to products originating from certain areas – such as drinks, food and other products.

because, to some extent, copying, piracy, and the creation of “derivative works”¹⁵ (new creations based upon previous creative works) were implicit in the way society used its collective creativity. Today, with the growing use of computer systems to both transmit and display information, and to control access to information systems and to other machines/devices, the control of information can become *absolute*. As a result the process of creation – and in a sense, the evolution of our culture – is stopped by the process of technological mediation of the information we receive.

Technically the information that is subject to these “digital rights management”¹⁶ or “copy protection”¹⁷ schemes is not wholly inaccessible; computers are programmable, and so those with the right skills could unscramble the information and make programs that could read this data. However the act of breaking or “circumventing” technological protection measures is in itself an even more serious breach of intellectual rights than the breach of copyright because, even where the information is subject to “fair dealing rights” (see below), it is a breach of the technical or software patents that the data has been locked up with (for a longer discussion of IPRs and computer systems see the Free Range Community-Linux Training Centre's information sheet J1, *Thinking Outside the Cage*¹⁸).

Privateering and “fair dealing rights”

*Privateering*¹⁹ was a practise that was common in the early phases of European colonialism, about 500 years ago. In order to expand their influence government gave mercenaries the legal right to attack and plunder the trade routes and ports of opposing nations – an act which in any other circumstances would be piracy. Now we come to the present day, and although it might appear absurd the use of the term “privateering” is equally valid to the extension of intellectual property rights in society today. However, rather than just extracting wealth from foreign states, modern intellectual rights are a means to extract wealth from the state's own citizens too.



Ultimately the root of the problem is this: As the power of intellectual property rights has grown over the last fifty years so the economic returns to rights-holders have grown too; in turn this economic power has been used to lobby politicians and international forums to tighten the framework for intellectual property rights further; as the global return from intellectual property rights is now worth many billions, only a very small percentage increase in the coverage of intellectual property rights increases the level of income significantly; this means that, for the corporations who hold the largest portfolios rights, funding the activities of the groups lobbying for tighter rights now pays for itself when the new framework takes effect. ***In short, it's a vicious circle that exploits society.***

The bulk of the intellectual property that the average person comes into contact with each day relates to the mass media industry and consumer products. These industries have been changed immensely because of a new technological trend that has arisen over the past decade – *technological convergence*²⁰. No longer is a computer a large plastic box with a glass-fronted screen on top of it. Computers are everywhere; at some level they form the control centres of most consumer electronic devices, and increasingly they're talking to each other. What this means is that the hardware – *the electronics* – is becoming transparent to the information that we push through it.

For the individual it means that computer software is becoming more critical to the way we live our lives because of the influence that these machines have over us. Whoever has the ability to control the computers, and decide how they work (or not work, through built-in obsolescence or incompatibility), has the means to control the users of modern consumer technology. Also, as companies merge to form global corporations, and intellectual property becomes one of the most important assets of a company, the power of the intellectual property rights framework is being concentrated among an ever smaller number of organisations.

The first casualty of this process has been “fair dealing rights”²¹. It is practically impossible to permit every use of copyrighted material, and it would be damaging to the well-being of society to strictly enforce copyright, and so the principle of “fair dealing” has been pragmatically developed in law. However, as fair dealing works contrary to the principle of extended intellectual property rights, it has been progressively squeezed through successive revisions of intellectual property law – both by WIPO and the European Union.

In the UK, fair dealing allows any person to make a single copy of a “reasonable proportion” of literary, dramatic, musical and artistic works for “research and private study” and “criticism, review and news reporting”. However, whilst a few years ago the definition of “a person” was rather broad, in 2003 the law was changed and only “non-commercial” uses are permitted to use fair dealing rights.

In addition the use of both live and recorded musical works by the public – for parties or in local pubs and clubs – was also tightened and now all venues must have performance licenses, and the Performing Rights Society²² (or PRS – a private organisation) polices copyright law on behalf of the rights holders who subscribe to it. Over the last few years the PRS has opportunistically sent thousands of threatening, quasi-legal letters to individuals and small businesses in the UK in order to try and extort money from them for the playing of music on their premises. The actions of the PRS in the UK are not abnormal; if we look at the recent report²³ from the Brennan Center for Justice²⁴ in the USA, such intimidatory practices are becoming routine within the IP-protection lobby.

The "Information Commons"

The concept of "The Commons"²⁵ is something that is part of many cultures around the globe, although in the West it has largely been abolished by the creeping effect of property rights. "The Commons" are those things that are essential to the maintenance of human society, and which have no specified owner, but are managed for the interests of all by society – for example, the rights of common over land, fisheries, etc. In the "Information Age"²⁶ we can view this concept as encompassing *The Information Commons*²⁷. Where technological or economic restraints threaten to exclude sections of human society from the ability to take part in political, social or cultural expression, the essential elements of our culture must be protected in order to preserve the creative and cultural freedom for all.

At it's very simplest The Information Commons (see the report²⁸ from the Freedom of Expression Policy Project²⁹ for examples and further information) are represented by the wealth of information that has fallen out of copyright into the public domain³⁰ – at present initiatives such as Project Gutenberg³¹, ibiblio³², the On-line Books Library³³ and the Classic Books Library³⁴ all provide access to public domain publications. Beyond this we can look to the growing "free culture movement"³⁵, and the development of *open licenses* – such as the Creative Commons³⁶ or Gnu³⁷ licenses – that cover a range of documentation, images and other information, and which permit the reuse of the information by the public on either a partly or wholly free basis.

Of course the sources above mostly relate to written or visual information, but recently we've seen the rise of the open hardware³⁸ and open design³⁹ movements; networks of skilled people around the globe working collaboratively to develop new technological systems, from consumer gadgets to renewable energy. Unlike traditional technologies, which are "closed" with patents or registered designs, open hardware allows the free use of designs on the condition that any improvements are fed back to the community of people using it. In this way technologies are able to evolve, improving over time, and are not subject to the same pressures for wholesale obsolescence and renewal (which tend to restrict the opportunity for progressive improvements) in order to maintain the market dominance of the organisation producing it.

What makes both open licensing and open hardware possible is the development of the Internet, and the ability this creates to share information and ideas. It is difficult for small groups, in a small area, to collect the required skills and resources to develop technical solutions to present-day problems, but using the Internet those with a common interest can work collaboratively to develop solutions. This is because, when networked collectively, they can have the equivalent time and resources to the research division of a mainstream multinational corporation.

The "Information Commons"

Most of those who criticise⁴⁰ and are leading the campaign against the extension of intellectual property rights do not oppose the concept of intellectual property rights as a whole; what they contest is the *unfettered right* of intellectual property without a reciprocal benefit to the community as a whole through fair dealing or other minimum standards to ensure that information, or technical control over the goods we utilise in our lives, is accessible to all.

Intellectual property rights represent the last, modern-day land grab of the last remaining "Commons"²⁵ that most people share today – *our thoughts*. If this continues unchecked then we will all be "intellectually impoverished" as a result of it. We must therefore unite not just to protect the "Information Commons"²⁷ (see the box on the left), but also to extend their reach and repair some of the damage that has already been caused by recent changes in intellectual property law.

It would be very easy just to ignore intellectual property rights, and fight the system by challenging the law – *but of course you're going to encounter difficulties, and most of all it doesn't really change their ability to exert control over our human culture*. Instead it's far more effective to beat them at their own game by developing our own, parallel body of "open" intellectual property – unencumbered by restrictive rights. This option is more economically damaging to the intellectual property industry because, faced with a choice between free and open content, many people would opt for the free choice. As Eben Moglen, a US professor of law, states in his "*dotCommunist Manifesto*"⁴¹ –

A Spectre is haunting multinational capitalism – the spectre of free information. All the powers of "globalism" have entered into an unholy alliance to exorcize this spectre: Microsoft and Disney, the World Trade Organization, the United States Congress and the European Commission.

Where are the advocates of freedom in the new digital society who have not been decried as pirates, anarchists, communists? Have we not seen that many of those hurling the epithets were merely thieves in power, whose talk of "intellectual property" was nothing more than an attempt to retain unjustifiable privileges in a society irrevocably changing?

For example, this document is made openly available for non-commercial purposes under a *Creative Commons*

license. This "freedom" doesn't just extend to

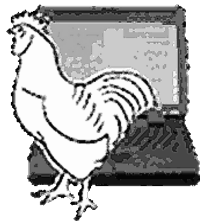


reading it – you can also copy, quote, re-distribute and translate this paper, for free, for any non-commercial purpose (and in fact, even for profit making purposes we will normally say "OK" in return for the appropriate recognition of the efforts of the Free Range Network in its production).

In an increasingly technological society this movement begins with the hardware itself. At

present a large part of the hardware around the globe is locked within intellectual property restrictions. Even so, there is a developing open design³⁹ movement that is seeking open alternatives to satisfy our need for hardware, and, more significantly, we have years of technological junk that we can mine; by developing their practical skills, people can learn to adapt and alter the large quantities of redundant technological scrap that already exists in society in order to create alternative technologies.

From bikes to computers, such groups are springing up around the globe (as described at length in Chris Carlsson's⁴² recent book on the "DIY culture" movement, *Nowtopia*⁴³ – new projects⁴⁴ are also being inspired by the book). The



Free range Network too, through its Community-Linux Training Centre⁴⁵ (CLTC) and Salvage Server⁴⁶ Projects is developing information and distance-learning materials that focus on manipulating redundant technology (e.g., the CLTC's recent outline on

recycling computers using free software, sheet J.4. *Upgrading Old Computers*⁴⁷)

Next, to run these information systems we need free software. Here we're in luck as the free software movement has, since the mid-1980s, been the model for how a free culture movement can develop. Although there are many options, and combinations for mixing free and proprietary systems, the wholly free operating system that most people use today is Gnu/Linux, around which many groups have come together to develop a range of wonderful programs. For information on making the transition from closed to free software see the CLTC's sheet J1. *Thinking Outside the Cage*¹⁸, and for more information of using Gnu/Linux systems see sheet J2. *The Gnu/Linux System*⁴⁸.

Together, having the machines and the programs, we can create a platform for receiving and distributing open information, as well as creating new open works. All it requires is the will to change from proprietary to open technological systems, and a willingness amongst individuals to share their work co-operatively rather than try to control it.

Official moves to change the system

It's in the interests of the world's richest nations to change the existing framework of intellectual property rights. After all, now that many of the richest nations have exported their manufacturing industries to poorer nations under the protection of the present framework, the license fees and profits from the exploitation of intellectual property make up a sizeable proportion of their foreign income

In October 2004, two of the largest developing economies – Argentina and Brazil – tabled a motion at the WIPO general assembly for the reform of the global intellectual property framework. Known as the *Geneva Declaration on the Future of the World Intellectual Property Organization*⁴⁹, it

clearly sets out the problems of the present system in the opening few paragraphs –

Humanity faces a global crisis in the governance of knowledge, technology and culture. The crisis is manifest in many ways.

- ◆ Without access to essential medicines, millions suffer and die;
- ◆ Morally repugnant inequality of access to education, knowledge and technology undermines development and social cohesion;
- ◆ Anticompetitive practices in the knowledge economy impose enormous costs on consumers and retard innovation;
- ◆ Authors, artists and inventors face mounting barriers to follow-on innovation;
- ◆ Concentrated ownership and control of knowledge, technology, biological resources and culture harm development, diversity and democratic institutions;
- ◆ Technological measures designed to enforce intellectual property rights in digital environments threaten core exceptions in copyright laws for disabled persons, libraries, educators, authors and consumers, and undermine privacy and freedom;
- ◆ Key mechanisms to compensate and support creative individuals and communities are unfair to both creative persons and consumers;
- ◆ Private interests misappropriate social and public goods, and lock up the public domain.

At the same time, there are astoundingly promising innovations in information, medical and other essential technologies, as well as in social movements and business models. We are witnessing highly successful campaigns for access to drugs for AIDS, scientific journals, genomic information and other databases, and hundreds of innovative collaborative efforts to create public goods, including the Internet, the World Wide Web, Wikipedia, the Creative Commons, GNU Linux and other free and open software projects, as well as distance education and medical research tools...

Humanity stands at a crossroads – a fork in our moral code and a test of our ability to adapt and grow. Will we evaluate, learn and profit from the best of these new ideas and opportunities, or will we respond to the most unimaginative pleas to suppress all of this in favour of intellectually weak, ideologically rigid, and sometimes brutally unfair and inefficient policies? Much will depend upon the future direction of the World Intellectual Property Organization (WIPO), a global body setting standards that regulate the production, distribution and use of knowledge.



Despite the positive reception⁵⁰ the declaration received, and the work of some organisations (such as the Free Software Foundation Europe⁵¹) to support the process, as yet the proposal hasn't moved very far. The industrialised nations, in whose interest the present system has been constructed, stand to lose too much should the reforms in the *Geneva Declaration* be carried out.

A Personal Response

In the absence of a negotiated settlement to change WIPO from the inside, pressure must come from the outside instead. As noted earlier, the best way people can do this is to try and use more open information and open technologies in their lives.

In the past, unjust actions by the state were responded to by the public through civil disobedience⁵². Today we face the same unjust restraints through the use of intellectual property rights. Whilst we can do what we can to use 'open' alternatives, there will be times when the unreasonable restrictions of intellectual property rights prevent us, as active citizens, from doing what we need to do in the interests of our community. In these cases it is clear that the exploitation of intellectual property should be actively resisted – bending or infringing the rights of the owner if that, in proportion to the obstruction the rights present, is the correct thing to do (which of course, must ultimately be a decision that rests with those involved). As Edward Burke said, “*All that's necessary for the forces of evil to win in the world is for enough good men to do nothing.*”

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