

IP v Innovation v Civil Rights:

Complexity of ownership

Intervention, monopoly and barriers to entry

Sum of the Parts problem

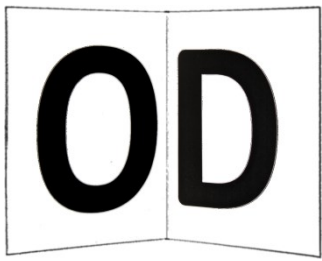
Knowledge Economy Paradox

Software: a unique challenge

Civil rights balance

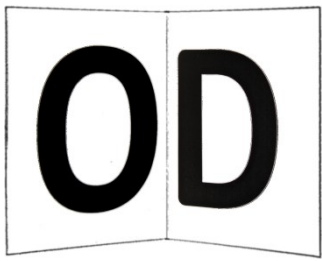
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A philosophical take...

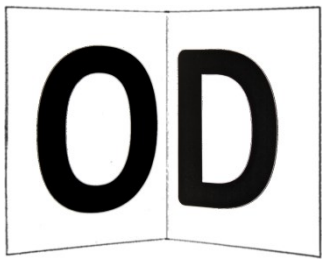
- 15 years software, SME -> Corp -> Start-up
- [EP1359778](#) (Sole Inventor) *"System method and station for use in secure comms."*
- Day job of trying to untangle online privacy and trust
- Also campaign for digital rights and against IP over-reach
 - “Copy-moderate”, not a copyright abolitionist
- Previously introduced as “insight on the enemy”
 - Are copyright reformists the enemies of creativity?
- Law vs Philosophy
 - Can get bogged-down with established principles
 - Law 101: IP rights are not a monopoly. ORLY?! – BlueTooth/LTE etc
- Evidence-based policy vs philosophy:
 - Who funds the evidence?
 - How to reason, when hard evidence hard to come by?
- Drive towards control structures: NTD, blocking etc. Collateral damage?
- Due process, vicarious liability, reverse onus, monitoring, blocking, discon.



Complexity of ownership

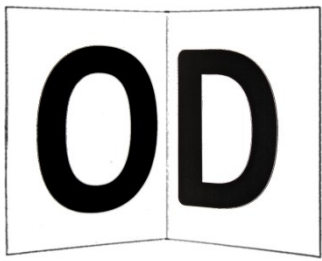
“Originality is undetected plagiarism” *William Ralph Inge*

- Law goes to great lengths to protect ownership, i.e. life + 70 yrs
- Culturally conditioned to see ownership in art
- Art is original to varying degrees...
 - ... and this goes beyond incidental inclusion
- Portraits and animals? That’s my camel!
 - Personal image (varies by culture, religion), sensitive images, “self-harm”, confidence
 - Street photography, very interesting modern debate (DPA v Art)
- Photographs:
 - Other people’s non-protected works
 - Can’t © useful articles, photographs of buildings, clothing etc
 - Incidental inclusion
- Music style vs unique work – objective test, but styles can be copied
- *Elastic Jurisdiction, Unlicensing* , false licensing (“innocent” 3rd party, authenticity)
- One size (classes aside) fits all law: copyright
 - Developing “natural” “rights” : tagging (FB), favouriting (Flickr)



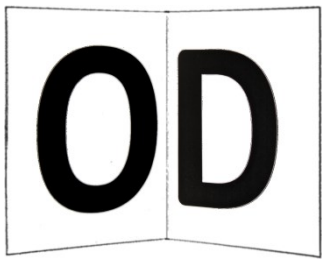
Intervention and investment

- Copyright (+ all IP) protection market intervention -> monopoly(!)
- Digital landscape v different to industrial (pre-industrial) IP heritage
- 1709: encourage investment in printing presses
 - Huge cost
 - 14 years + 14 years (if still alive)
 - Now: life plus 70 years, cost of printing and distribution tending towards zero
- Early patent laws: 10 years' protection
 - Stop “fast seconds”, investment with unproven market
 - Investment always huge throughout history (nb software)
 - Victorian-era factory or semiconductor fab plant
 - Now: protection still only 20 years
- Investment argument: blockbuster film vs typical drug
- Parkinson's law



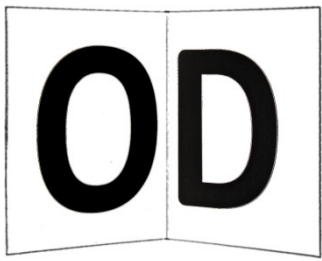
Barriers to entry

- Established tech cos have huge “defensive” portfolios
 - Employees encouraged to “disclose” anything and everything
- Risk and liability (mere conduit/safe harbour)
 - Fast notice-and-takedown (NTD) for live events
 - 24/7 requirement prevents live debate hosted by small tech cos
 - Blogger’s Holiday Dilemma
- US: web, process and software patents leads to e.g. Audience Monopoly
 - Investment in innovation no-longer needs capital, just an API
 - Few dominant players control the audience
 - New entrants can’t challenge
 - Smaller companies invest in apps and plug-ins
 - Big companies cherry-pick, then buy-out or crush
 - Subordination and glass ceilings, anti-competitive practices
- Barrier to innovation and corporate re-growth
 - Profiteering and inefficient, lazy businesses



Sum Of The Parts Problem

- Sum of the individual licensed IP components is way more than the value of the whole [end product]
- Microsoft rumoured asking for \$10-15 per Android device sold
 - More than some mobile CPUs!
- General tendency to over-value IPR with ubiquity, e.g. Comms (BlueTooth, LTE), file systems (FAT32)
 - Can introduce compatibility issues – drive non-standard solutions
- Also push to over-value IP when development costs overshadow market value (boardrooms in denial, don't want to admit loss)
- For smaller companies, costs more to challenge than pay license
 - £750,000 - [Gowers report](#), 2006
 - “Dream for Lawyers” Earl of Erroll during DE Bill debate
- Not good for consumers or *product* innovation
- Will lead to period of two-tier innovation, where underlying technology developing far faster than products (nb. temporary)

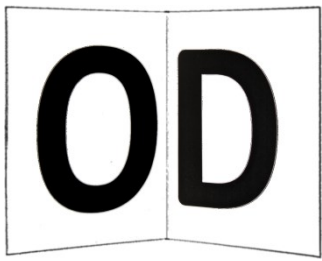


Knowledge Economy Paradox

Premise 1: knowledge sharing, and the ability to adapt and build on others' principles, ideas and works, is vital to the *process* of creation and innovation

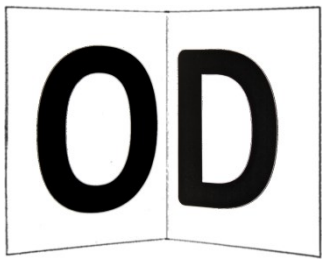
Premise 2: the ability to trade IP is vital to the *economics* of innovation

- Protected IP and closed platforms are controls that prevent knowledge sharing, adaption etc
- Paradox: what's best for long-term growth and innovation?
 - Challenge assertions made by pro-copyright “maximalists” about IP & Innovation
 - Early advancements in net tech and software made before IPRs asserted
 - Clay Shirky “*Coasian Floor*”:
 - IPRs don't encourage creators, they do encourage investment required
 - Linux, Apache, Spreadsheet(!)
 - First to market now often “fast ‘seconds’” – first to protect an “open” idea?
- Economic benefit of open WiFi
- Ripples & corrections: 4bn/year online ad industry in 2010? £1 -> £12/hr



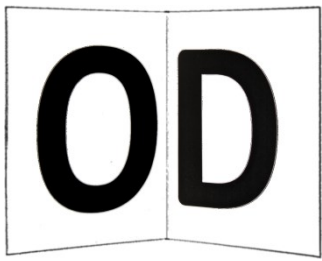
Software: a unique challenge

- Software is useful and essential - more like machinery than art, so should be protected by patents not ©
- Life + 70 years far too long for a market monopoly, especially where software has benefit to society
- No “inventive step” test for copyright
- Detection hard, prior art hard to prove in closed source
 - Complexity, cost, trust
- Problem of “Infectious” copyright: API - a derivative?
- BUT – no analogy to a “generics market”
- Can’t simply allow “binary copies” of product
 - Physical goods and pharmaceuticals: still a cost to clone
 - Inventor still competes in the market
 - Exhaustion, services and trademarks as certificate of origin or quality*
 - Reverse engineering.



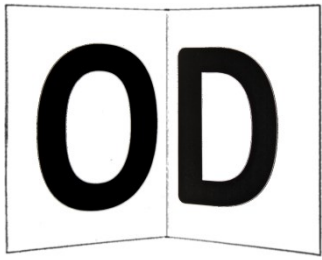
Software: a unique challenge (2)

- Patents – inventive step test, obvious to a skilled software engineer, novel to a patent office clerk
- USPO 7028023 - doubly-linked list, granted 2006. Coded by me 1997 (+1,000s others before)
 - Thankfully stuck down, but at what cost?
- Typical software product: number of “discrete parts” off the scale
 - Sum Of The Parts Problem
- Cost of innovation trivial compared to e.g. pharmaceuticals or semiconductors
 - 20 year monopoly for trivial investment?
- Web “process” patents: pace of technology so fast that only the first to market will ever compete (leading to Audience Monopoly)
- Tools, etc: licensing growth to meet today’s innovation cycle:
 - Informal educational use/self-taught
 - personal sharing > micro-business > SME > corp



Civil rights balance

- Copyright generally flawed, free-for-all equally flawed (K-E paradox)
- Even those arguing from moral perspectives face conflict:
 - Free to share vs artists' moral rights
- Civil liberties arguments misrepresented, copyright extensions & windfalls
- Verisign, Sovereignty Creep & Richard O'Dwyer extradition
 - Where does it stop, ICANN? What about new TLDs? Gambling? Abortion advice?
- “Blocking doesn’t work” explored
- Myth of competing with free
 - Bandwidth and servers cost money, delicate symbiosis enthusiast - criminal (£) - chancer (£)
- Librarians: “if they didn’t already exist, libraries couldn’t be created today”
- As with most problems with no clear answers, solution will lie in a murky compromise. Either way, price correction overdue, £4bn UK online ad spend
- Copy-moderate policy:
 - Much-reduced copyright term lengths
 - No civil or criminal penalties for personal copying
 - Accept person-to-person sharing where no commercial entity or advertiser
- Focus on those who **profit** from commercial-scale IPR infringement (+ due process)



Open Digital Policy Organisation

Digital businesses of all sizes have a keen interest in policy direction. Many want to capitalise, some want to protect existing business models in an era of change, others are concerned about data security and data protection in an increasingly complex area.

We believe the long term interests of all internet users are actually rather closely aligned. The internet gives consumers a powerful voice. Given open platforms, open networks, and regulation only where regulation is truly needed, consumers will reward businesses who act with their interests at heart, and similarly avoid corporations who persistently break consumer trust; whilst consumers continue to enjoy new and innovative products.

We develop digital policy in an open manner, bringing together recognised experts to participate in public discussion and consultations; publishing all our research for free, under a Creative Commons license, so that others are free to study, dissect and build on our work.

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