

Copyright: a 'civilisational challenge'?

Tom Graves
May 2002

A Soul Dynamics White Paper
Reference: TG_hsf611_copyright

The notion of copyright - an asserted right to 'own' and receive recompense for a product of the mind - is one of the core concepts of the law of intellectual property, which also includes similar legal notions such as patents, trademarks, designs and circuit layouts. [1] Copyright law has been established for some centuries in most 'Western' countries: for example, it is explicitly defined and referenced in the US Constitution:

The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. [2]

The key phrase here is "for limited Times": for the US the original period for copyrights was 14 years. However, over the past 40 years, it has been repeatedly extended, most recently by the Copyright Term Extension Act 1998: at present, works copyrighted by individuals gain exclusive protection for 'life of author plus 70 years', whilst works made by or for corporations (referred to as 'works made for hire' [3]) are protected for 95 years. [4] Apparently one of the major reasons why Disney Corporation in particular lobbied for the latest 20-year increase was to protect its ownership of Mickey Mouse, which was due to go out of copyright in 2003. [5] The WIPO (World Intellectual Property Organisation) agreements essentially extend the applicability of US intellectual-property law worldwide - though with the notable exception of the European Union, which at present has still not ratified the WIPO agreement.

The effect is that intellectual property is being treated as if it is in permanent ownership. Yet this is in direct contradiction to the original intention of the law, which recognised the need for balance of rights between creators and the wider public, and also acknowledged the importance of the public domain, from which ultimately ideas arise, and hence to which they must eventually return - and return sooner rather than later. Tim O'Reilly, CEO of the O'Reilly publishing group, emphasised this point in an open letter to Amazon's Jeff Bezos, about the latter's attempt to patent a software business-method:

There are more than a few similarities between sustainable farming (versus resource exploitation) and technological innovation that are worth meditating upon. You may gain short-term advantage by taking as much as you can from the soil without regard to building it up again, but eventually your soil quality will decline, and you'll find yourselves having to spend more and more on added fertilizer. [6]

Just how much the public domain, in all its forms, is being eroded by such processes has been the subject of many recent books, most notably David Bollier's "Silent Theft". [7] Bollier, a senior fellow at the Norman Lear Center at the University of Southern California, argues that the repeated extensions of copyright duration, and attempts to use copyright law to claim exclusive 'ownership' of public facts, are typical examples of arbitrary - and for the most part indefensible - 'enclosure of the commons'. This use of unbalanced law for private interests - *quid pro nihilo*, as another lawyer, Chris Sprigman, puts it [8] - dates back to at least the middle of the eighteenth century, whence arose the rhyme that Bollier quotes in his book, and uses to head his website:

We hang the man and flog the woman
That steal the goose from off the common
But let the greater villain loose
That steals the common from the goose. [9]

Quietly, but firmly, the issue is becoming a kind of 'civilisational challenge', in futures terms. The assumption that intellectual property can be exactly equated with the current concept of physical property - in other words, permanent right of ownership without responsibility, 'the

right to exploit a resource, without reference to others, either in the present or elsewhere' - is beginning to be called into question. At present, few have noticed the corollary - that the present concept of physical property is ultimately no more defensible than that of intellectual property - but the rumblings can be seen in many different places, even in mainstream business. Tim O'Reilly quotes one interesting example:

I started hunting on the Internet. My Holy Grail was a 1993 copy of Lotus Improv 2.0 for Windows 3.1. After a lot of searching I found somebody who had an old copy, and I bought it for \$75. I'm pleased to report that it runs like a champ under Windows 98.

Unfortunately, that's the end of the story. I'm legally prohibited from making copies of Improv for my friends and coworkers. Improv is protected by copyright, and even though Lotus no longer sells or supports the product, that protection still holds. This is a kind of crime against society. [¹⁰]

Dave Winer, one of the stalwarts of the software industry, puts his view of the issue in inimitable fashion:

A lightning bolt

Is business the purpose of our civilization, or does civilization have some other purpose that business supports?

Do our lives have any meaning beyond that which we produce for sale, and that which we purchase for consumption?

It's not a visionary question, I'm asking about the world we live in right now.

In one model, developers create products and convince us to want them. In the other model, they figure out what people want and compete to sell it to them.

The entertainment industry wants the first model. In fact, for much of my life, they've had their way. With other industries it's not so clear. Software went through this, and came out devastated. Perhaps the only way to rebuild is to adopt the other model.

Learn what people want to do, and create products that satisfy the wants.

If the entertainment industry followed that model (these need names), they wouldn't have hesitated over Napster. It was clear the people wanted it. Now figure out how to give it to them.

Two fundamentally different approaches. Long-term only one works, imho. [¹¹]

Winer's perspective is strictly pragmatic, that of a developer of commercial software. Although his much-syndicated weblogs indicate that he is widely read, and very widely connected to many different industries, he rarely questions the basic worldview of American business. Both models above assume that there can only be 'product', to be sold within some kind of market: alternate reasons to work or models of interpersonal transactions are not considered.

As his comment "it's not a visionary question" above indicates, to him, and to many others, the primary concern is that of commercial 'freedom to innovate', versus protection of the 'rights' - monopoly 'ownership' of intellectual property - of existing businesses; or, to frame it another way, between those who believe in access (for common gain), and those who believe in control (for personal gain). It's on this issue that a major argument is developing, again in the US, over several items of proposed legislation, such as CARP (Copyright Arbitration Royalty Panel [¹²], which would kill off the fledgling Internet-radio industry in favour of existing broadcasters and the entertainment industry [¹³]) and, especially, the CBDTPA (Consumer Broadband and Digital Television Promotion Act [¹⁴], which would require all technologies capable of viewing or copying copyrighted content - including the entire Internet - to include 'digital rights management' facilities approved by US content producers). The arguments over the latter issue have been described as 'war', [¹⁵] and seem

likely only to get more heated, as the entertainment industries' complaints about 'theft' and 'piracy' clash with the drive for innovation - "what people want", as Winer put it:

Hollywood was uncomfortable with Silicon Valley's penchant for coming up with products like TiVo, the commercial-jumping digital video recorder that threatened their television production businesses. "That was a very nice presentation," a studio chief reportedly told a contingent from TiVo after sitting through a demo. "Now go set yourselves on fire." [16]

and the technological realities and social implications of providing totally 'leak-proof' protection:

Disney is asking Silicon Valley to design PCs that can sniff every piece of incoming content--including e-mails--for watermarks. "There is a thing in the computer called the CPU, the central processing unit, right?" says Preston Padden, Disney's chief Washington lobbyist. "All the bytes go through there, and we're looking to come up with reasonably standardized watermark detection [that] can effectively read for watermarks on all the content coming through." Naturally, Silicon Valley is horrified. "Think of all the billions of e-mails that you would have to check," fumes Grove [CEO of Intel]. "Not only are you going to slow down everybody's transmission, but you're going to be guilty of an incredible privacy violation which is more or less equivalent to requiring the U.S. post office to steam open every piece of mail." [17]

At the business level, the combatants seem aware only of their own interests, but miss a crucial point. "So what we have here is a game of chicken: unless somebody flinches, both sides stand to lose", writes Leonard in his *Fortune* article: neither side seems to be aware that the most likely one to lose in any of their scenarios is the 'consumer' - their own customer. Doc Searls, a well-known commentator on the IT industries, comments:

Simply put, Disney is interested in maintaining the powerlessness of The Consumer. Michael Eisner and his congressional puppets want to dismantle the Net for one single reason: it's a platform for markets where demand has just as much power as supply. What's really scary for Mr. Eisner isn't The Consumer paying the bill for Intel's products. It's the fact that the Net makes The Consumer into a real, in-your-face customer. [18]

Doc Searls was one of the co-authors of the Cluetrain Manifesto, which argues that "markets are conversations", and that social and technological changes - the openness of the Internet being a key factor - mean that the old model of mass-markets, of rigidly controlled and exploited 'pipelines' from 'producer' to 'consumer', is no longer working, and no longer acceptable:

if you only have time for one clue this year, this is the one to get...
we are not seats or eyeballs or end users or consumers
we are human beings - and our reach exceeds your grasp.
get used to it. [19]

David Weinberger, another of the Cluetrain Manifesto authors, argues that whilst business in general, and the entertainment industry in particular, regards the Internet as just another medium that they can own and control, and subject to 'business as usual' marketing tactics and 'digital rights management', it's instead far better understood as a *place* - a kind of virtual space in which people interact as people:

Web pages create Web space. This is exactly how lived space works in the real world, although it's harder to see because the abstract idea of measured space is ready to leap into our thinking at inappropriate times.

Measured space is the same everywhere; that is its essence. Lived space is different everywhere; that is its nature. What makes lived space different everywhere you look? Things. Lived space is made by the things in it. Downtown is where the business buildings are. The recreational area is where the parkland is. The "combat zone," as we called it in Boston, is where the triple-X movie houses are. Move the porn shops into the parks and the business buildings into the combat zone and lived space will be thoroughly changed – while abstract, measured space isn't touched in the slightest.

Things make space. Things present themselves in terms of their emotional quality. Put things together and you're beginning to build *places* that have their own affective qualities. Lived space consists of places.

The space of the Web is itself full of places – some like meadows, some like drainage ditches, but all full of character and meaning. The Web is a place. [20]

Despite the wishes of business and the entertainment industry, this 'place' exists only because of a sense of simplicity and openness. 'Digital Rights Management' is immensely complex and expensive: absolute control of a song-file or an e-book delivered electronically requires special servers, secure connections and, usually, purpose-built hardware for every step of every transaction or interaction. [21] By comparison, openness is cheap, and relatively simple: a server, a 'client' such as a browser, and some means to store and view or play the content. Technologically speaking, the complexities of digital rights management are rapidly reaching the point of diminishing returns: at which point the supposed reason for 'controlling' or 'owning' information disappears - bringing into question the concept, and value, of 'owning' or withholding that information in the first place.

The issue is generic rather than specific to the Internet, but it's been concealed for the past century or so by the ability of the 'content providers' to control the media-'pipe', because of the costs of producing compared to the costs of 'consuming'. The advent of earlier copy/reproduce technologies, such as duplicators, photocopiers, cassette-recorders and VCRs, repeatedly put pressure on that control; but the existence of the Internet has radically changed the balance to a much more open field - a 'market as conversation', in which far, far more people can play, and for which there are strong social pressures to ensure that everyone *can* play. [22] As Doc Searls indicates in another of his *Linux Journal* articles, the Internet embodies, and depends on, "three simple virtues":

1. Nobody owns it
2. Everybody can use it
3. Anybody can improve it

In the first two respects, the Net is very much a force of nature, like the Sun, the wind and the core of the Earth. In the third respect it is profoundly human. Combine all three and you get what Craig Burton describes as a constantly expanding hollow sphere comprised of everything and everybody "on" it. Across its empty middle, all the ends are one click away from each other, no matter how big the sphere gets. [23]

In a later article, he argues that the Internet issues go deeper than that, beyond infrastructure to an 'innerstructure', "something that nobody can own and everybody can use". He draws on Stewart Brand's layered model of time and civilisation, from the Long Now Foundation, with layers rising upward from nature, through culture, governance, infrastructure, commerce and fashion to the surface of civilisation. [24]

That diagram sandwiches "infrastructure" between governance (which regulates it) and commerce (which depends on it). This also makes sense out of what I said

earlier about how infrastructure involves both government and business. But innerstructure is deeper than that. Like the core of the Earth, it's something nobody can own and everybody can use. Like the Earth's fertile surface, it derives much of its fertility from the life it supports. It includes all the layers from infrastructure on down to nature. [²⁵]

From a human perspective, this 'innerstructure' can, and must, be beyond private 'ownership' in order to carry out its civilisational function:

This concept should also help make sense out of the current battle between Silicon Valley and Hollywood. Jack Valenti of the MPAA, Michael Eisner of Disney and Hillary Rosen of the RIAA all sit up at the commerce and fashion layers of civilization and call on government to regulate the Net's infrastructure. They see that infrastructure entirely in terms of commerce and governance. Technologists and friends of technology, such as Lawrence Lessig, who deeply understand the Net and its role in civilization, see the commons as public infrastructure that sits on internet innerstructure.

So what's happening here isn't a clash of cultures. It's the failure of one culture to understand the deeper nature of technologies we all share--ones whose purposes are entirely and unselfishly supportive and that have no secrets. And it's the job of the other culture to make that nature clear. [²⁶]

Yet the distinctions between these 'layers of time and civilisation' are arbitrary: ultimately they are all the same, and hence the models used to understand and work with them must also be the same, or at the very least closely interwoven. It's this point that is glossed over, time and again, in all these arguments over who owns what, over how it should be controlled, and for whose benefit. Hollywood complains about 'theft' and 'piracy', failing to understand that from the deeper perspective *its own* activities can only be described as theft by piracy from the greater commons. As Dave Winer indicated, there are two choices here: control, or openness. One leads, without any doubt, to the slow strangulation of every aspect of human civilisation; the other leads... somewhere. Just where that somewhere will be is up to each one of us.

¹ Definitions from IP Australia website.

² US Constitution, Article I, Section 8.

³ An interesting addition to a US bill on satellite broadcasting (unrelated to the music industry! - and attached *after* passing Congress but before being signed into law), effectively defines all recorded music as 'work made for hire': copyright thus automatically resides with the record-company rather than the musicians - a major source of contention for most 'star' performers.

⁴ Chris Sprigman, "FindLaw's Writ - Sprigman: The Mouse That Ate The Public Domain", http://writ.news.findlaw.com/commentary/20020305_sprigman.html [accessed 8 March 2002]

⁵ Ibid.

⁶ Tim O'Reilly, February 2000, quoted in his article "O'Reilly Network Weblogs: Open Source and the Obligation to Recycle", <http://www.oreillynet.com/lpt/wlg/968> [accessed 17 Apr 2002]. O'Reilly is a major publisher of computer books, especially on open-source software.

⁷ David Bollier, "Silent Theft: the private plunder of our common wealth", 2002.

⁸ Chris Sprigman, op. cit.

⁹ David Bollier, op. cit., 'Introduction', and <http://www.silenttheft.com/> [accessed 1 May 2002]

¹⁰ Simson Garfinkel, 'Copyrights and Wrongs', *Boston Globe*, 1998, quoted in Tim O'Reilly, op.cit.

¹¹ Dave Winer, Scripting News, <http://scriptingnews.userland.com/> [accessed 9 May 02] ('imho': acronym for 'in my humble opinion'). A 20-year veteran of the personal-computer software industry, Winer's company UserLand creates and maintains software for weblogging and community-managed websites, such as Radio UserLand, Manila and Frontier.

¹² US Copyright Office, 'Copyright Arbitration Royalty Panels and Licensing Information', <http://www.loc.gov/copyright/carp/> [accessed 17 May 2002]

-
- ¹³ Doc Searls, "Arbitron Throws The Book At CARP", *Linux Journal*, <http://www.linuxjournal.com/article.php?sid=5951> [accessed 17 May 2002]
- ¹⁴ 'CBDTPA: Consumer Broadband and Digital Television Promotion Act', <http://www.politechbot.com/docs/cbdtpa/hollings.s2048.032102.html> [accessed 17 May 2002]
- ¹⁵ Devin Leonard, 'This Is War', *Fortune*, http://www.fortune.com/indext.jhtml?channel=print_article.jhtml&doc_id=207975 [accessed 15 May 2002]
- ¹⁶ *Ibid.*
- ¹⁷ *Ibid.*
- ¹⁸ Doc Searls, 'Biting The Hand That Beats You', *Linux Journal*, <http://www.linuxjournal.com/article.php?sid=5930&mode=thread&order=0> [accessed 17 May 2002]
- ¹⁹ 'The Cluetrain Manifesto', <http://www.cluetrain.com/> [accessed 17 May 2002]
- ²⁰ David Weinberger, "Small Pieces Loosely Joined", Chapter 2, 'Space', <http://www.smallpieces.com/content/chapter2.html> [accessed 17 May 2002]
- ²¹ See, for example, the Adobe site (<http://www.adobe.com>) for digital rights management for Acrobat PDF files, or the Microsoft site (http://www.microsoft.com/ebooks/das/instro_dist.asp [accessed 19 Feb 2002]) for information on their Digital Asset Server.
- ²² For example, legislation is currently being promoted in Peru to mandate open-source software for all state agencies, on grounds of "free access to public information by the citizen; permanence of public data; security of the State and citizens". Microsoft's representatives strongly objected to this, and were roundly rebuffed: see http://www.opensource.org/docs/peru_and_ms.html [accessed 17 May 2002]
- ²³ Doc Searls, 'Setting fire to Hollywood's plans for the Net: the GeekPAC story', *Linux Journal*, <http://www.linuxjournal.com/article.php?sid=6033> [accessed 17 May 2002]
- ²⁴ Stewart Brand, 'Layers of Time', <http://www.longnow.org/about/speedlayers.htm> [accessed 17 May 2002]
- ²⁵ Doc Searls, 'Is Linux Infrastructure? Or Is It Deeper Than That?', *Linux Journal*, 15 May 2002, <http://www.linuxjournal.com/article.php?sid=6074> [accessed 15 May 2002]
- ²⁶ *Ibid.*