

Intellectual property on the Internet

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We are students of this area since the laws governing IP in the post-industrial area are of particular importance if our innovative entrepreneurs are to protect their work.

Today competitive advantage globally for our SMEs is based on knowledge. But knowledge as Intellectual property cannot be protected. Know how can be protected but this is more how to do things.

Hence on the Internet we need to be aware of how we can protect our knowledge based innovation.

Originally access to the Internet was via static devices, desktop computers and laptops. More and more today mobile phones are allowing access to the Internet and some of the products we may produce.

For example with the Internet as a set of enabling technologies, new business methods are being developed and inventors and companies are seeking protection under Intellectual Property laws.

The main idea in trying to protect our innovations on the Internet is so that the inventors etc can benefit economically. And since the Internet can create seemingly unlimited opportunities for us then we need this protection to ensure competitive advantage in the local and global markets.

On the Internet today copyrights, trademarks and patents are the subject of vigorous and increasingly successful efforts.

The Internet has forced modifications of traditional IP rights and these consist of reinforcing methods of controlling information use.

The IP regime of the Internet will also allow proprietary control over access to information by leveraging such control to achieve a broad range of restrictions which will reshape the ways in which our interactions are structured.

Hence it will adapt IP existing law and we will need new legal doctrines to assist.

Copyright

Copyright traditionally conferred limited rights on authors and their assignees i.e. it controlled copying, distribution and public performance or display of work containing original expression.

Copyright did not include the proprietor's right to control access or private use of an already purchased copy.

The copyright owner also had the right to control preparation of most derivative works but no right to control fair use of derivatives.

Copyright did not extend to facts and ideas in the public domain on methods of operation or process.

However, on the Internet copyright as applied to digital works gives much greater control over access to and use of the copyrighted material.

Technologies of distribution give copyright owners new legal grounds to claim the right to control access and use.

For example the US courts concluded that the reproduction in RAM that occurs automatically whenever a digital work is accessed constitutes legally recognisable copying.

This means that copyright can even affect the process of searching for and finding information. The impact of this on owners of search engines is critical.

Copyright law historically gave limitations and exceptions designed to prevent the owner's exclusive rights from becoming access and use rights and to avoid the accompanying risk of private censorship and constraint of the public domain.

Hence, within many systems the judicial fair use doctrine has excused/allowed many uses of copyright content e.g. scholarly or critical comment etc on the grounds that such uses are socially benefitting.

To prevent copyright from regulating competition in markets with open source standards, the US courts have concluded that reverse engineering to discover if products can interoperate is a fair use.

The EU has specifically authorised exceptions, temporary acts of reproduction which are transient for example closing the transmission in a network between two parties by a provider.

With the advent of digital media technologies and information networks the traditional system of copyright limitations and exceptions are being whittled away.

For example, in the US one of the measures of fair use is, if it were widespread, would it affect the potential market for the work? Note again the accent on the market.

So much so that the copyright owners are arguing that in the light of copying digital files the law should no longer allow persons to copy digital works as fair use or otherwise.

The EU attempted to preserve the traditional exceptions allowing copying for personal and non-commercial use. The major copyright industries opposed this on the grounds that all copying represents a potential commercial transaction.

The EU's final version authorises such copying only if it is neither directly nor indirectly commercial and then only if the rights holders receive fair compensation.

Copyright on its own will not directly provide the required protection. Hence the industry has turned to accompanying methods – encryption.

And in addition persistent access controls capable of making and imposing a fractional fee for each act of access and use.

Unlike the copyright law, these controls can be applied as well to works already in the public domain or to material with factual or technical content that cannot be copyrighted.

In an access regime based on technology the user receives a license, not ownership, of the copies and may only use as permitted.

The copyright owner seeks to prohibit the uses permitted by copyright law, such as reverse engineering and each critical comment of the work via the use of 'click wrap' licenses.

Today encryption technologies and contractual restrictions create the potential for enormous flexibility in strengthening the markets for copyright content.

These online contracts are rigid and self-enforcing and do not recognize or permit negotiations or equitable exceptions.

But these contracts may not work on their own. If the distribution is based on technological access that can be circumvented these contracts may be legally un-enforceable.

Hence the copyright industry has been attempting to get legislation to support these techno-contracts.

They have secured an international commitment to additional legal protection for technological protection via the WIPO Copyright Treaty which gives member states substantial flexibility in implementation.

In the US the Digital Millennium Copyright Act (DMCA) of 1998 bars the circumvention of access control technologies and also forbids the manufacture and distribution of circumvention devices.

However the DMCA does not forbid circumvention of usage control (as distinct from access control) where necessary to engage in conduct allowed by the copyright law. However the device ban effectively bars the circumvention of usage control.

The DMCA exempts reverse engineering and certain levels of research from the conduct and device bans, but these exceptions are far narrower than traditional fair use of copyright law.

The US's Uniform Computer Information Transition Act (UCITA) will in effect confirm that consumers assert these restrictions and legitimize the technological controls, if passed.

Packets

In the offline world patents have traditionally been available only for industrial innovation.

Patent law respected the boundaries that separated applied sciences and technology from theoretical science on one hand and commerce on the other.

Long standing law precluded, for example, patent protection for math formulae, mental processes and methods of doing business.

In this post-industrial age the barriers that separated patentable from non-patentable subject matter are crumbling.

In the new US patent system the new post-industrial patents include everything from the methods of doing business to online interactions.

The US court has declared that an invention is protectable if it “accomplishes a useful, concrete and tangible result” even if that result is simply the transformation of data.

For example landmark decisions were made by the US Appeal Courts – one on a profit allocation system for financial accounts and a method of generating billing accounts.

The US Patent Office has issued patents for non-technical innovation ranging from a model for economic privatization to a method of targeting Internet banner advertising to the ridiculous - of using an infant's posterior to paint.

Within the US a certain amount of disgust has prompted limited procedural reforms designed to enable interested parties to submit relevant prior art and request the Patent Office to re-examine issued patents.

Proposed legislation would create an opportunity to directly oppose issued patents and would erect additional substantive hurdles to the issues of patents for computer-implemented innovation.

The EU Patent Office has expressly declined to extend patent cover to business methods and other post-industrial subject matter.

The EU has proposed a directive that would allow software patents only for inventions of a technical nature but not business methods.

It is still too early to gauge the impact of post-industrial patenting on the emerging information economy, though some expansion of the subject matter is inevitable.

But it is important to appreciate that no previous patent regime has had the potential to vest private parties with the comparable degree of control over the conduct of commerce, competition and communication.

We can consider ourselves victims and mourn the loss of the freedom to use copyright on patent post-industrial products but we need to also produce such products for the global market and we will need this protection.

We thank you.

References

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