

PART 1 – THE NEW DIGITAL ENVIRONMENT

FROM MOUSTACHES TO MY SPACES

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In 1919 Marcel Duchamp pencilled a moustache on a postcard sized image of the 'Mona Lisa'. Many people were outraged, including a few artists, but others were amused. Was it art? Was it sacrilege? Could it be both? Today, millions of people are making digital sounds and pictures, often using and parodying existing material, and distributing the results on the Web. Is it art? Few people care.

Two year's earlier Duchamp had taken a men's urinal manufactured by the New York J L Mott Ironworks, signed it R Mutt and sent it to a gallery. The original urinal has been lost but later, authentic copies sell for about \$1.5 million.

It is possible that the postcard is not a postcard at all, but Duchamp's own original likeness.¹ If so, it is not a copy but part of the parody. These are deep waters.

As far as I know, nobody ever sued Duchamp for infringing their copyright or design rights.

Fast forward 90 years. In January 2007 the Chinese Government found itself in the kind of dilemma that is typical worldwide as all governments seek to formulate a sensible intellectual property (IP) policy for the modern world. When is parody permissible? Is it acceptable to make a spoof, which an innocent person might mistake for the original, or is it morally and commercially unacceptable?

¹ For many years, it was thought that Duchamp had bought a postcard and drawn on it. Then it was suggested that Duchamp had drawn a copy of the Mona Lisa to imitate a postcard, and then drawn on that.

One Beijing Ministry made a robust statement that China's intellectual property laws would follow 'international norms'. Another Ministry declared that anyone making egao (恶搞) and showing it online must get approval from the Government. Strictly speaking, of course a Government can do this under WIPO's international legal norms. But international social norms would suggest a more open attitude. Hu Ge's Steamed Bun and the Bus series are a traditional form of fun all around the world, from naughty schoolboys to the artistic avant garde.

Where do we draw the line between freedom and infringement? What should be governed by social norms and what by copyright laws? And what, indeed, by rules on confidentiality and privacy?

It is notable that, when Duchamp was working, copyright terms in both France and America were relatively short and the rights owners did not pursue their infringements. Today, terms are longer. The copies of *Urinal* are still in copyright. The parody of the *Mona Lisa* is protected by French copyright law until 2038, 70 years after his death.

The public debate on copyright in China really consists of two debates. There is a high-level, practical debate about enforcement. In this, China is fulfilling worldwide, World Trade Organisation (WTO) based priorities to enforce IP rights. America, Japan and the European Union (EU) are equally focussed on enforcing the law in cases where the legitimate rights owner is suffering economic damage.

There is another debate about what the laws should be. This debate addresses the costs and benefits of IP, where a private gain to the rights-holder is less than the social cost to the public. This is the most important debate, although the discussions are more muted.

Both debates are important. IP laws cover the relationship between free creativity and restricted property: how we get access to ideas, how we have ideas, how we share ideas and how we make money out of ideas. Beijing's inclusion of IP in the city's 11th Five Year Plan is welcome.

Over 45% of America's assets are in intellectual property. Over 60% of new jobs in America require the employee to exercise his or her creativity in ways that qualify for intellectual property. This is the reality of what I call the creative economy.

Since I first visited Shanghai in 1979, China's growth has been astonishing, averaging 9.4% annual GDP growth. In 1979, it accounted for under 1% of the world's economy. Last year, it accounted for 4%. Foreign trade has jumped from \$20.6 billion to \$851 billion. Five centuries ago, China's economy was the world's largest. Nothing is certain but many observers predict China's own forecasts for 2050 are too modest and that China may become the world's biggest economy again.

It is interesting to ask, what should China's policy be on the restricted ownership of intellectual assets?

I believe we need a new approach, taking account of both cultural and economic principles. You will not be surprised to hear that I believe the way forward lies through a better understanding of creativity and innovation. In the past 10 years we have learnt a great deal about creativity. ITR has developed some principles about the creative process and a policy audit.²

We have also developed the Adelphi Charter on Creativity, Innovation and Intellectual Property.³

The importance of the creative economy is not limited to the core industries, or indeed to any one single group of industries. It is based on a way of working that is found in almost all industries. Likewise, intellectual property law is not unique to any particular industries, but is applicable to every industry and indeed to everyone in society.

The growth of the creative economy has meant IP laws have moved centre stage of the global economy. In the 1980s, IP was a marginal factor in most economies and of little concern to most policy-makers. 20 years later, it is a central and important factor in almost all economic activity.

But the politicians are only just beginning to grasp this. Many are still ignorant of the basic principles of IP. This lack of understanding is a problem, not only because IP is now economically very important but

² The ITR Creative Consultants Ltd is a London-based consulting company.

³ See the Adelphi Charter website <<http://www.adelphicharter.org>> at 12 November 2007.

because IP deals with the very stuff of politics: the boundary line between what is public and what is private. What is being fought over is how we live and work together, how we get access to knowledge and how we gain rewards.

The battles around this line can be vigorous. On the one hand, there are increasing demands for more IP rights, more patentability and stricter enforcement (led by the American and Japanese Governments). On the other hand, there are substantial trends in the opposite direction: towards more open access, more collaboration and more relaxed licensing, led by developing countries in alliance with many artists, scientists and Internet groups worldwide. Ironically, while the American Government is the most active advocate of stronger IP, American academia and activists are the strongest advocates of the public domain. Europe lies in the middle. Each group (the defenders of private property and the defenders of the public domain) get daily more passionate and more entrenched in their views.

These debates are fundamentally about the role of public regulation. IP is law but it operates as a means of regulating private ownership.

Let me illustrate the problem with some examples. The Internet which is one of the most remarkable tools the world has ever known for sharing information and knowledge, and for allowing us to make contact with other people and with what they are saying, writing and making. It is continually offering up new possibilities, new ideas, new friendships, new networks and new businesses.

But it presents a challenge. The Internet is a massive copying machine. It works because it allows us to upload and download, copy and share, on a massive scale. If we apply the laws that regulate, say, copying printed books to copying Web files, then we will strangle the Web.

The nature of the Web means it is a major threat to businesses that depend on restricted access and restricted copying. The music recording industry has been worst hit and has made some pessimistic forecasts about the effect of on-line copying on profitability. Sales of recorded music are falling fast. The Internet is not the only reason why this is happening (sales of classical music have also plummeted) but it is undeniably part of the reason.

I suspect nobody knows the Internet's real impact on these industries but it is possible to make some comments.

One, the possibility of infringement is immense but, two, it is increasingly accepted (for example, by Time Warner's recent activities in China) that the best solution, alongside sensible laws sensibly enforced, is better business models. Meanwhile, companies should be moderate in their use of Digital Rights Management (DRM).

I believe the quantity and quality of music being composed and performed will not decline (although the quantity of music being recorded may decrease). The nature of musical forms, compositions and performances, and the way we listen to music, will change but not by much. Most companies will survive. Some will decline to be replaced by others. My feeling is that these outcomes are evolutionary rather than revolutionary and I would be hard pressed to say if they are positive or negative.

From a policy-makers' perspective, we must take the long view and base our policies on the public interest. It is vital at this stage to protect the Internet's essential freedoms. We must also enable people to be rewarded for their work and investment. What is the right balance between freedom and enforcement? How do we answer that question?

Another topical Internet issue is webcasting. I have to admit to a special interest: I was recently chairman of a London webcasting company. I believe that the proposed World Intellectual Property Organisation (WIPO) Treaty on webcasting is not only against the interest of webcasters, it is against the interests of the public. In the words of James Love, Executive Director of the US-based Knowledge Ecology International, the proposal is 'an effort to radically change the ownership of information and knowledge goods, based upon who transmits information, rather than who creates the work.'

If we extend this logic further, he asks, 'should we grant an intellectual property right to Amazon Books because it makes books available to the public?' The webcasting treaty would extend protection over distribution systems like the Internet which merely transmit other people's material – including material in the public domain. That must be wrong. Again, how do we decide?

The WIPO standing committee on copyright (SCCR) has met over several years to discuss if, and how, a treaty should be formulated. Typically, with IP policy-making the discussion of 'how' has tended to overwhelm the 'if'. The SCCR's June 2007 meeting failed to reach a resolution which, given the profound differences of opinion, and the absence of hard evidence, is probably a welcome result. The Knowledge Ecology International blog said the 'The negotiation over the broadcast treaty has mirrored and sometimes driven the larger changes in the culture at WIPO. When the negotiations began, it was simply about responding to demands from a powerful right-owner group, the broadcasters, for expanded commercial rights. As the discussions continued, civil society NGOs criticised the treaty for its potential harm to the Internet. Several country delegations began to ask deeper questions about the rationale for the treaty, and examined ways to limit the scope and nature of the treaty. In the end, the broadcasters demanded too much, and made too few concessions, for the treaty to move forward. Delegates at WIPO were no longer willing to ignore issues of access to knowledge, or the control of anti-competitive practices.'⁴

These examples all turn on the balance of rights-holders' exclusive rights and public access.

I have a proposal. I always believe that you have to ask the right question to get the right answer. If you ask the wrong question, you never get the right answer.

The question I want to ask is this: Is the system of IP that we had in place at the end of the 20th century the right one, the most appropriate one, for the 21st century? What is the right way to regulate ideas in the 21st century?

To answer this we have to ask the most critical question of all: what is IP for? This question seldom gets asked. There is a phrase, 'the elephant in the room', indicating something very big and very important but also very embarrassing which everyone pretends isn't there. 'What is the purpose of IP?' is a very big question that is too often ignored.

⁴ See <http://www.keionline.org/index.php?option=com_jd-wp&Itemid=39&p=71> at 13 November 2007.

What is the answer? IP laws provide a means to establish and protect one's exclusive rights. We need them to provide incentives and rewards which, as everyone knows, are an essential part of the economic value chain. We need them to ensure our business contracts are solid and robust. When I licence a film on DVD, both I and the licensee need to have a common understanding which underpins what is being licensed and how the licence will be enforced.

There is a second purpose which is built-in to every IP law but which some observers find counter-intuitive and secondary. This is that the laws enable people to have access to what has been created. For example, all patent systems require the patent to be published so that others can see what has been invented and how it works. All copyrights come with limitations and exceptions that, from society's point of view, are just as important as the rights themselves. All patents and copyrights have limited terms, although some American copyright terms are now practically infinite.

But these two objectives – linking incentives, rewards and access – are not the whole answer to the question, 'What is IP for?' There is another level, which can be described as the politics of IP. Why do we need these things – incentives, rewards, access? And, when they are in conflict, as they often are, how do we decide what to do? Which should predominate? Is there a public interest involved? Faced with formulating the right copyright policy for, say, digital media, how do we ensure the public interest is served?

This question elicits some interesting answers. Many people, especially those responsible for major investments have a simple ideology. It is based on the belief that we have a basic, absolute right to our ideas, to the output of our brain, to our expressions and that we have a right to charge others compensation if they want to use our ideas. In this world, incentives and rewards must always take priority, must always trump access.

This argument has a sound economic base. As I have shown, an increasing percentage of global business depends on IP. The evidence is compelling not only in the companies' revenue figures in their profit-and-loss accounts but in their asset figures in their balance sheets. It is understandable that governments, who are keen to make their

economies more competitive and protect jobs, believe these intellectual assets must be protected as much as possible and at all costs. This attitude can be summed up in the phrase, 'the more IP the better' (that is, the stronger the rights, the stronger the economy).

But there is another approach which puts access over and above incentives and rewards. This approach is based on three arguments. First, access to existing data, ideas and knowledge is the starting point of all new ideas. Second, Europe, US and Japan industrialised successfully in the 19th and 20th centuries when their copyright and patent laws were weak, and many developing countries claim, as they industrialise, that they would also benefit from similarly weak laws. Third, many major initiatives continue to benefit from either weak laws or open licences: for example, Free and Open Source Software, the World Wide Web, the Global Positioning System (GPS) and the map of the human genome.

The argument here is that IP certainly offers incentives and rewards but does so at the cost of slowing down and inhibiting other work. The reluctance of the US not to adopt the Rome Convention's related rights for broadcasting, or to follow the European model for protecting databases, provides provocative evidence for this argument.

These points have implications for all countries, large and small, because creativity and the creative industries are inherently international in scope and so every government faces the same issue. Ideas are born nomads.

So, what is the best way forward? I want to suggest a new answer to the question, What is IP for? It is based on what we know about the creative economy.

The phrase, creative economy, emphasises creativity's economic and financial aspects. But it is equally a cultural and social phenomenon. The social and economic work hand in hand.

How did the creative economy come about? Its origins lie in the arts and culture and in their recent promotion of their economic worth. Technology is certainly a major factor, especially TV, the computer and the Internet. Equally important, I believe, are some fundamental demographic trends, such as increased population sizes, increased levels of immigration, the spread of open, liberal societies, globalisation, free

speech, the spread of mass education, and the growth in people's disposable income which has created new markets for art and design.

What has emerged is a new freedom for the individual to have, share and enjoy new ideas. A freedom to make their ideas central to their lives. To use their ideas to build up their own personality and identity. To build up their own status. To build up their earning power. And to turn these assets into their own creative capital.

It is risky to generalise about creative people but it is probably true to say they are usually independent thinkers, and often immersed in the personal and subjective. They are empirical and curious about novelty. They are often determined; at least if they're successful.

They are sometimes criticised in the same manner as the Confucians described the Taoists for being 'irresponsible hermits' (a description that was not intended to be a compliment). Are they irresponsible? I am reminded of W B Yeats' remark, 'In dreams begins responsibility'. He meant, I believe, that only when we explore dreams and fantasies at a deep, private, personal, level, and when we know what is possible, can we really assume responsibility for our choices. Creative people need to fantasise, need to be aware of all possibilities. And, yes, creative people do like to break the rules. They have to break the rules. Without rule-breaking, nothing new happens. Hermits? Sometimes. Equally, they can be very sociable and gregarious when they want to be.

Of course, these things have always been true. Some people have always been creative, such as professional artists, writers and composers, and have flourished in some places, such as cultural institutions. So what has changed?

The point is this. Creativity is no longer restricted to such people or to such special, dedicated places. It is now the favoured activity of millions of people and can be found almost everywhere: at home, at work, in schools, in small groups, on the street and, of course, in cyberspace. The numbers of people thinking about and using other people's ideas and creating their own ideas – ideas that may be copyrightable or patentable – can no longer be counted in thousands but in many millions. Creativity is now part of daily life for millions of people.

We can see the emergence of three concentric spheres of creativity. First, the business of producing and distributing commercial work (such books, films, TV programmes), which often requires large financial investments.

Then, alongside and overlapping, are two new spheres: a sphere of people, often working collaboratively, who are willing for others to use their work for non-commercial purposes; and an even larger group of countless people who are exploring ideas, sounds and images, and creating work with little thought of its commercial value or, to be more precise, of claiming any exclusive rights over it.

These three spheres, together, must be the basis for IP in the 21st century. We need to recognise each spheres' characteristics – and their differences. Each must accept each other. Professionals must accept users not merely as consumers but as people with basic rights and inclinations to create. We need a system which maximises access, which is everyone's interest, and which also enables rights holders to have a reasonable reward from their work.

I am therefore proposing that we use IP law as a means of regulating the creative economy. We can see some immediate implications.

Laws on intellectual property should not be seen as ends in themselves but as means of achieving social, cultural and economic goals.

Governments should place creativity and innovation as the objective of all IP laws. All laws should be tested against this objective, and the tests should be open, rigorous and independent. All laws should be required to be shown to support people's basic rights and economic well-being. Intellectual property protection should not be extended over abstract ideas, facts and data.

There are obvious inclinations for international governance within WIPO, WTO and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as well as the United Nations Educational, Scientific and Cultural Organisation (UNESCO).

Some of these principles are taken from the new Adelphi Charter on Creativity, Innovation and Intellectual Property which was drawn up in 2005. The Charter was prepared by an international commission of artists, scientists, lawyers, Internet experts, consumer representatives and

business people (including musician Gilberto Gil who is Brazil's Minister of Culture; Nobel laureate Sir John Sulston; and Lawrence Lessig, Chair of Creative Commons). It sets out principles for the public regulation of IP in the public interest, based firmly on creativity and innovation.

Duchamp's genius was to take ordinary objects and create an art object or art experience. He wanted art that was not 'retinal' (his word for art that was purely visual) but had its own life and its own history. He called it ready-made art although he never quite fixed his definition of ready-made. He enjoyed ambiguity.

The opposite of Duchamp's ready-made art are those words and pictures that people stick on fridges. They have no life and no history. But the phrases and lines that result are equally creative, even if they do not score as art.

The words and pictures on MySpace are in the same spirit. Everything is original, and qualifies as copyright material. Nothing is original in the sense of being *sui generis*. Yet, there are occasions, even here, where moral rights are useful and where financial benefits may be available.

All these lines, objects and images are caught by copyright although few people want to protect their work. If someone likes it, that's a cause for celebration. 'Come in' sounds nicer than 'keep out'.

This creativity, intertwined with rewards, is the core of the creative economy. How they work together affect how we use our creative imagination, and how each country will develop, socially and economically, in the coming years.

