Proceedings Symposium "A New Feudalism of Ideas?"
Centre for Intellectual Property Policy & Management
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Note: These proceedings are edited transcriptions of contributions based on notes taken by Julia Fallon and Gurminder Panesar (MA/LLM Intellectual Property Management). A special issue on the topic of the symposium is in preperation (eds. Martin Kretschmer & Peter Drahos).

OPEN SESSION:

Lee Marshall, Department of Sociology, University College Worcester

A Taxonomy of Piracy

The ownership of rights is now more important to the major players in the music industry than the production of actual music. However, the word 'piracy' is a label given to a very disparate and diverse number of practices. Large scale commercial piracy in the manufacturing and distribution of counterfeit products differs significantly from the current moral panic concerning Napster and MP3, or the earlier panic about home taping. There are several distinct forms of piracy, each with its own history and economic and social rationales while at the same time sharing certain characteristics, notably the infringement of copyright in sound recordings. In this contribution, I shall offer a taxonomy of 'pirate' activities in the music industry, based on an analysis of contemporary documents and interviews with the legitimate music industry, pirates and listeners.

(1) Pirates and Counterfeiters

Counterfeit recordings, i.e. copied products that pretend to be or resemble the original release, are the most widespread form of piracy, but take on different characteristics in different parts of the world. This section looks at the effects of piracy in the developed world, in Eastern Europe and in Asia. It will investigate record industry claims that counterfeiting is orchestrated by organised crime gangs and discuss the Mafia's role in piracy. The chapter also looks at the new development of CDR piracy, which the industry currently sees as its biggest problem in this field.

(2) Bootleggers

Bootlegging, i.e. the unauthorised recording of live performances, is the smallest form of piracy but arguably the most interesting. This section will give a broad overview of the

bootlegging phenomenon and discuss the production and consumption of bootlegs. In particular, it highlights the extreme efforts of the recording industry to prevent bootlegs despite their negligible impact on the economics of the industry.

(3) Home tapers and tape traders

Home taping became the major issue for the industry during the 1980s when tape to tape recorders became widespread. This section provides detail on the most significant legal case for home taping, which was ironically not brought by the recording industry against tape manufacturers, but by the film industry against video recorder manufacturer Sony. This case enshrined the right (in the US) to 'timeshift' recordings for personal use. Such a concept is being eroded because of the developments on the internet, and they will be discussed further in the following chapter. This chapter shall examine public attitudes to home taping, the record industry's attempts to gain a levy on recording equipment/media, the furore over Digital Audio Tape (DAT) and now CDR.

(4) Downloaders

The future of music copyright in the face of new technological possibilities on the internet is currently the most salient issue in this area. This section will offer a detailed analysis of MP3 and Napster *et al*. It will contextualise the current debates by discussing historical examples of when new technology has threatened copyright principles (such as the invention of radio) and discuss the legislation that has been introduced by the US and EU to combat online piracy.

Finally, it is argued that despite the obvious differences in the types of problem posed by the different types of piracy, the music industry's response has been remarkably similar in all cases. In particular, the industry has centred its arguments not on economics but on aesthetics, claiming that piracy is bad for art and artists. Yet despite these campaigns, forms of piracy remain high. This section offers details of some of the less successful campaigns, and asks why they failed. There is an ideological understanding of music, and rock music in particular, that separates it from commercial interests and celebrates illegality. The music industry cannot successfully assert its property rights through technological or legal measures, but only by convincing individuals that copying infringing files is wrong. In the context of the digital environment, this dialectic will evolve neither into revolution nor feudalism but into a kind of musical guerrilla warfare involving publicity stunts and hit-and-run legal cases.

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Millie Taylor, Performing Arts, King Alfred's Winchester

Performing Arts – copyright authorship and commercial exploitation of IP in universities

M.Taylor initiated a discussion concerning the management of IP in academic institutions, using the example of devised theatre.

IP is not really used in performing arts and devised theatre (where a group of people create an event, often containing inmprovised elements). There is no system of recording authorship of performances, nor is there a system for exploiting the performances for the performers. Universities now apply pressure to clarify the ownership situation.

Apart from authorship of the performance itself, authorship of videos and audio recordings of performances (creative contribution of camera, sound design etc) is subject to much discussion within the performing arts world at the moment.

Paul Heald - The problems could be solved by consensus by contract.
MT – Most performing artists do not sign or use contracts.
This ties in with Lee Marshall's point that formalising a performance for commercial exploitation creates an ideological tension, and Friedemann Kawohl's claim that the abstract work character imposed by copyright law is at variance with contemporary cultural practices.

There was widespread scepticism about the suitability and viability of commercial exploitation of IP in the context of a university environment. Bill Maughan's points about the funding of public goods were raised.

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Paul Heald, Allen Post Professor of Law, University of Georgia, USA

Public Interest Issues in IP Law

P.Heald is involved in promoting public interest based opposition to the tidal wave of IP culture, which is threatening to engulf the USA. Congress, for example, did not consider the impact of copyright term extension on the users – only on the owners.

Most IP academics support attempts to actively reshape the law in accordance with public interest considerations. The problem is that public interest arguments cannot be easily organised into a lobby group, defending significant economic interests. Database legislation, however, was significantly improved through critical academic intervention.

PH highlights the rise of 'IP clinics' which take up concerns raised by users of IP. PH is actively involved in such initiatives.

It is felt that as the economic force behind the expansion of IP rights continues, opposition will continue to intensify. PH argues that IP *revolution* is the most likely of the three alternatives posed in the symposium, and at the very least, lobbying, if sufficiently intense, will result in IP *retreat*.

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Nikolaus Thumm
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Strategic Objectives of Patenting

N.Thumm argues that strategic uses of patenting are becoming increasingly important. "Patenting is a tool to make money" and firms are spending increasing amounts on portfolio analysis. Patenting can be a lifeline for a company; not only can it be used to keep competitors at a safe distance, it can also provide a firm with a competitive advantage that can lead to expansion and increased profits.

There are two basic types of patenting strategy that can be adopted: defensive or offensive. As a result of strategic patent portfolio development, we may end up with "portfolio wars". It is extremely difficult to accurately document patent strategies empirically due to the reluctance of patent managers to disclose such sensitive information to researchers. But "if there is smoke, there is bound to be fire".

Strategic use of patents could result in cross-licensing, patenting pools, mergers and acquisitions, and even attempts to pay competitors to leave the field. This behaviour could be seen as anti-competitive. Policy makers need to ensure that competition law plays a full part in shaping the patent system of the future. The patent system evolved in order to promote innovation and development through disclosure and shared information. Without a level playing field, the patent system will be undermined by those who benefit from it the most. As a logical consequence, the increasing role of competition law could possibly lead to an IP retreat.

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Puay Tang, Science and Technology Policy Research Unit (SPRU), University of Sussex

Business Method Software Patents

P.Tang reported findings from a survey carried out with small and medium sized software businesses (study commissioned by European Commission, Directorate-General Enterprise; co-authors John Adams and Daniel Paré).

The research found that these companies used confidentiality and copyright as protection from competition; patents were mostly bottom of their list. Most firms didn't feel that patents would increase their chances of attracting venture capital (nor did they consider it necessary to have patents in order to attract venture capitalists) – as opposed to the view often held in the US and Japan. Business method patents are thought to stifle creativity and innovation.

The software industry will not benefit from software patenting because it is such a fast developing area; new technology is likely to have overtaken its predecessor by the time it has obtained patent protection, effectively rendering any such protection useless or obsolete.

Innovation may be slowed down because innovators have limited access to the relevant prior art technologies; inadvertent infringements are a threat.

Typical of the attitudes expressed is the following quote (Patent Protection of Computer Software p. 63): “Fast moving businesses, like almost all SME software businesses, work and grow at such as rate that following up their own legal rights is a distraction. You can make more money, faster, by just doing something else and getting on with it. The only possible exception is if a big company steals an idea and proceeds to make a lot of money from it - but your chances of bringing a big company to book on this is effectively zero.”

The respondents believed that it is not a good enough reason to adopt software patenting just because the USA have chosen to take that path. The USA has led the way by adopting a patent ‘anything under the Sun’ approach, however such an approach has more disadvantages than advantages.

Importantly, there is the threat that patent offices may become incapable of dealing with the increasing number of patent applications. The more applications that are filed the less certainty there can be as to a patent’s validity. This may be due to the overworking of patent examiners and insufficient attention paid to each application. Eventually, the backlog will be felt most in the courts, where the only real winners are the highly paid lawyers. If protection continues to be afforded to increasingly dubious patent applications (as in the USA), it will be the patent system which will lose out in the long run.

Currently the US Patent and Trademark Office (USPTO) is seeing a decline in business method patent applications partly due to the general feeling of inevitability of expensive challenges to patent validity. If this trend continues business method patents will become merely a theoretical threat, and the memory of such patents will eventually be confined to ‘Room 101’. This suggests that IP feudalism is less of a possibility than would otherwise have been the case.

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Michael Blakeney, Herchel Smith Professor, Queen Mary IP Institute, Univ. of London

Traditional Knowledge (Indigenous Rights)

M.Blakeney gave an account of a case study involving a special type of rice grown in Mali. The Malian rice, which is bacterial blight resistant, had been selected and preserved by Malian rice producers, but researchers from the University of California Davis (UCD) subsequently obtained a patent to the rice. Following mediation, UCD offered scholarships to the indigenous people of Mali in return for the use of their knowledge.

Should such a case fall within the scope of patent protection, or are there arguments for a different '*sui generis*' protection? MB argues that the idea of awarding patent protection to 'inventions' involving traditional knowledge (if they can technically be called inventions) is incompatible with the patent system in its current form. IP law is supposed to be forward looking rather than offering rewards for accomplishments of the past.

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Alan Story, Kent Law School, University of Canterbury

"What does IP mean to you in your daily life?"

Alan Story offers a critique of the essay competition launched by the World Intellectual Property Organization (WIPO) and introduces a counter-competition under the same title whose organisation committee he co-chairs with Lee Marshall:

See www.wipout.net
for more information.

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