Optimizing Piracy: Achieving Efficient Management of Intellectual Property Portfolios

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Abstract:
Optimizing Piracy attacks conventional wisdom regarding the infringement of intellectual property rights. As the piece argues, piracy can play a central role in the business models of many successful corporations. In advancing this assertion, the article examines the differences between material property and intellectual property - differences that have grown all the more pronounced with the spread of digital technology. As the article maintains, in the cyberage, reliance on legal enforcement to combat intellectual property piracy may be increasingly futile and harmful. Thus, the article makes a negative case against legal enforcement of intellectual property rights. Optimizing Piracy then advances a strong positive case against enforcement of intellectual property rights. Corporations (not to mention society) can garner tremendous value from certain levels of piracy and a multitude of mechanisms outside of legal enforcement can and should be utilized as an alternative means to achieve profit and growth in the information economy. As the evidence indicates, a variety of information-based industries can thrive not only despite, but because of, rampant piracy. All told, Optimizing Piracy does not call for an end to the availability of intellectual property protections. Instead, it dictates a more rational use of intellectual property laws to the strategic benefit of individual corporations, and, ultimately, to society.

Keywords: intellectual property, copyright, patent, trademark, entertainment law, ethics, information technology, digital, norms, piracy, Internet, cyberspace, music industry, Napster, Kazaa, Microsoft

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"In the beginning there was the Word, and the Word was with God, and the Word was God." [1] We have come a long way from this opening line to the Gospel according to John, as deification has morphed into reification. In 1987, the United States Supreme Court upheld a federal statute that reserved the use of the word 'Olympic' in certain contexts, whether commercial or non-profit, to the United States Olympic Committee.[1] [2] In the case, *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, [3] the Supreme Court affirmed a prohibition against an organization's use of the term "Gay Olympic Games."[2] The High Court's decision marked the first time that the use of a single word had gained intellectual property protection outside of the commercial sphere, regardless of any potential for consumer confusion.[3] [4,5,6,7,8] In short, it marked a fundamental expansion in the gamut of intellectual property protections.

The *San Francisco Arts & Athletics* case is emblematic of the manic intellectual property land grab currently occurring in the United States and around the world. [9, 10]

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[1] Section 110 of the Amateur Sports Act, 36 U.S.C. § 380, gave the United States Olympic Committee the right to prohibit commercial and promotional uses of the word 'Olympic' and related Olympic symbols. *Inter alia*, the statute provides Lanham Act remedies against "any person who uses for the purposes of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition" the word 'Olympic' or 'Olympiad.' [2]

[2] There are several levels of irony to Supreme Court's *SFAA* decision. First of all, the Court upheld a statute that had assigned ownership of the term Olympics to the *United States* Olympic Committee when it was the Greeks who "invented" the term. Secondly, the SFAA's Gay Olympics were probably more true to the original Olympics than their modern corporate incarnation, as they were strictly amateur rather than commercial, and they involved admittedly gay athletes much like the original games of the Olympiad. Finally, by creating a private property right in the word 'Olympic,' the Court effectively gave legal blessing to a system whereby popular groups supported by the majority, such as the Special Olympics, would still be entitled to use of the word Olympic while marginalized minority groups, such as the gay community, would be denied use of the word. In essence, the Court gave constitutional approval to an heuristic structure that withheld access from unpopular or marginalized social groups to the very words that constitute our language.

[3] While trademark law provides intellectual property protection to certain phrases and even single words, such protection is unavailable to generic terms, [4], and is typically limited to where consumer confusion might result, [5] (denying enforcement of trademark protection against uses of words that are not likely "to cause confusion, to cause mistake, or to deceive"), in the commercial sphere, [5, 6]. Of course, the consumer-confusion rationale of trademark law has already begun to fade as the courts have expanded the reach of trademark protection in recent years, as states have granted anti-dilution protections to certain "strong" trademarks, [3, 7], and as Congress has amended the Lanham Act to include special anti-dilution protection for famous marks, [8].

In the parlance of James Boyle, we are witnessing an intellectual property enclosure movement every bit as significant as the eighteenth century's enclosure of common lands. [11] Corporations are increasingly turning to intellectual property statutes to shield themselves from competition, obtain exclusive rights to intangible property, and protect the investments they have made towards the creation of valuable information, ideas, and innovations. Moreover, such firms are actively encouraging the United States Congress and courts to expand intellectual property enforcement. Examples abound. The United States Patent and Trademark Office faces a huge backlog in patent applications as biotech companies involved with the Human Genome Project have been rushing to patent DNA sequences that may have future value [12]; Internet companies have increasingly turned to business method patents to protect their operations from competition [13, 14];[4] database compilers have lobbied Congress heavily for bills such as the Collections of Information Antipiracy Act (the "CIAA")—an Act that grants intellectual property rights to databases lacking in sufficient originality and innovation to qualify for ordinary copyright protection [15, 16]; and the movie and music industries have turned to lawsuits to slow the dissemination of pirated versions of their products through the Internet [17, 18].

Indeed, over the past few years, intellectual property litigation has become high profile. Witness the publicity surrounding the Napster case [17], Amazon.com's litigation on its one-click business method patent [19, 20], the constitutional challenge to the Sonny Bono Copyright Term Extension Act [21] before the United States Supreme

[4] See, for example, Amazon.com's business method patent on one-click checkouts, [13], and Priceline.com's business method patent on reverse actions, [14].

Court, and the movie studios' efforts to enjoin individuals and entities from posting the crack to the DVD Content Scrambling System on the Internet. [18, 23]

The surging wave of intellectual property litigation is easy enough to explain. With the emergence of the service economy, the wealth of nations lies increasingly in the realm of information resources. Just as the manufacturing economy used to rely on property laws for the protection of investments, the service economy relies heavily upon the modern intellectual property regime to provide protection for investment in the development of information commodities. However, despite some success, the modern intellectual property regime has not proven entirely effectual in many areas of the economy. The shortcomings of the regime have grown particularly pronounced in recent years. We live in an era of increasing homologization of information and lowering costs of media relative to message. The rise of new technologies such as the CD burner, mp3 compression, and broadband Internet access has enabled ordinary people to circumvent intellectual property laws like never before.[5] [24] Consequently, litigation seeking to enforce intellectual property rights has burgeoned in recent years.

Admittedly, with the growth of the information economy, the value of companies increasingly resides in their intellectual property. However, extensive litigation seeking to enforce intellectual property rights is not necessarily the *sine qua non* of an information economy. Simply put, the tremendous pecuniary value of intellectual property resources does not necessarily dictate methodical and strict enforcement of intellectual property rights.

[5] At the same time, however, the advent of digital fingerprinting and increasingly effective Internet search engines could reduce the costs of detecting intellectual property infringement. [24]

The inclination for strict enforcement of intellectual property rights is quite natural: Corporations are reacting instinctively as if their intellectual property were material property. When your property is encroached upon, you sue. The logic is irrepressible: If someone else owns and possesses a parcel of land in fee simple absolute, you do not. When your chattel is stolen, you act to recover it; because if someone else owns and possesses it, you do not. Material property is rival and, at some level, indivisible; competition for its use is therefore a zero-sum game. Material property is, by its very nature, scarce. And its value derives precisely from its scarcity.

However, intellectual property is unlike material property. It is, quite simply, "different." [25] Almost two centuries ago, Thomas Jefferson expressed his skepticism for copyright and patent protections by noting the fundamental difference between material and intellectual property. As he wrote,

> If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. ***Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it.*** He who receives an idea from me receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density at any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. [26]

As Jefferson argued, intellectual property is a non-rival property form with expensive creation and cheap duplication costs. For example, the discovery of a vaccine

for a terminal illness may takes billions of dollars in research and development; but once it is discovered, duplication of that vaccine is comparatively inexpensive. Moreover, the peculiar characteristic of intellectual property—which Jefferson eloquently notes—is that no one possesses the less, because every other possesses the whole of it. When I allow you to duplicate my copy of Microsoft Word, I am no worse off because of it.[6] Instead of one person enjoying the utility of the program, two are now able to access it. In fact, because of network effects, I am actually *better off* now that more people are using the software. These inherent differences between material and intellectual property suggest that corporations should rely more heavily on non-legal, rather than legal, mechanisms in order to maximize the value of their intellectual property resources. Many corporations—particularly businesses unfamiliar with modern digital technology—are currently over-enforcing and over-litigating their intellectual property rights, very much to their own long-run detriment.

The differences between material property and intellectual property form the starting point of this analysis. The divergence continues to grow as digital technology has rendered null the need for intellectual property to acquire a physical manifestation. As a consequence of this growing divergence, reliance on legal enforcement to combat intellectual property piracy may be increasingly futile and harmful. Even more significantly, corporations can garner tremendous value from certain levels of piracy. Thus, there is both social value and real corporate value to be had from achieving an

[6] This is true to the extent that there is no caché value to the exclusive possession of a particular form of intellectual property. One could, of course, imagine the Mercedes Benz of intellectual property existing, a particular software program whose perceived value diminished with more people having access to it. However, such a situation is very much the exception rather than the rule because the value of intellectual property is frequently enhanced by familiarity rather than scarcity; many forms of intellectual property enjoy robust network effects, and many forms of intellectual property are highly utilitarian (see the universe of utility patents, for example).

optimal level of piracy of intellectual property resources. A multitude of mechanisms outside of legal enforcement can and should be utilized as an alternative means to achieve profit and growth in the information economy. As the evidence indicates, a variety of information-based industries can thrive not only despite, but *because of*, rampant piracy.

As a result, we need a more rigorous analysis of the conditions under which piracy makes sense to individual businesses. The following observations are based upon my initial work in the field:

First, reliance on legal sanctions should be limited to commercially competing business entities, not individual pirates that give product away at no cost. Peer-to-peer sharing systems are too easy to undermine, litigation against them (and individual file sharers) is too costly and ineffective, and the systems can and should be co-opted by content providers as a means to actually generate further demand for their product.

Second, piracy should only be combated through use of legal sanctions when the pirated products act as a market substitute for the product. When pirated products simply serve a market that the authentic good has not penetrated, fighting piracy does more harm than good. In the case of patented products, heavy intellectual property enforcement undermines political support for a harmonized international intellectual property regime. Additionally, profits are more easily and effectively secured through effective price discrimination rather than litigation. In the copyright arena, infiltration of pirated products into these markets can help fuel demand for the 'real' thing once a particular market achieves the necessary economic wealth to pay the prices demanded by the original producers of the content.

Third, in markets where product interest and demand is driven by advertising, the social construction of 'cool,' and notions of hip consumerism, authenticity is itself the value. As a result, markets where authenticity is itself the value benefit far less than other markets from concerted intellectual property enforcement. This is particularly the case in the entertainment and fashion industries.

Fourth, the advent of cyberspace and the digital revolution have rendered branding and its intellectual property analogue—trademark—more important and valuable than ever, especially vis-à-vis copyright. This is particularly true now that copyrighted content can be reproduced with such ease, scale, and low costs. After all, as a generally non-utile product,[7] copyrighted works frequently obtain their market value more from source than content.[8] Since protection of content has become increasingly futile, protection of source has taken on heightened importance—especially since that is where the true commercial value of copyrighted works frequently lies.

Fifth, the power of code and digital fences to reduce the need for heavy intellectual property protection has been exaggerated. Instead, the availability of a number of other devices, including network effects, price discrimination, and customization, has reduced the value of heavy intellectual property enforcement in a number of industries.

Finally, even in the absence of legal reform and heightened enforcement of intellectual property rights, the digital revolution will provide intellectual property creators with more, rather than fewer, opportunities for profit. In particular, an

[7] The universe of copyright software products is a major exception to this observation.
[8] Their artistic value, however, is quite another matter.

examination of the recent history of technological change and its impact on the music and movies industries highlights this point.

My conclusions are based upon more extensive research that will appear in my forthcoming article*, All Rights Reserved? Reassessing Copyright and Patent Enforcement in the Digital Age*. [27] They are far from comprehensive, but I hope that they provide a starting point for future work in the field. All told, I believe that an analysis of piracy and the conditions under which it makes sense will not call for an end to the availability of intellectual property protections secured by statutes. Instead, I believe that such work will help to advance a more rational use of intellectual property laws to the strategic benefit of individual corporations, and, ultimately, to society.

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