

Piracy in the Licensing Economy

Social Science Research Centre Berlin (Wissenschaftszentrum WZB)

in collaboration with

Centre for Intellectual Property Policy & Management, Bournemouth University (www.cippm.org.uk)

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‘Piracy’ is a label for the unauthorised use of material claimed under intellectual property laws. The concept has been in circulation for alleged patent and copyright infringements since the 18th century, and is currently experiencing a revival as a rhetorical tool in debates about the legitimacy of property claims to information. Accelerating piracy rates can be seen as an undesirable concomitant of technological progress, in particular of digital advances in the Information Society. Piracy may also be an inevitable response to intellectual property congestion where many cultural, technological or competitive innovations clash with intellectual estates already claimed as property.

In recent policy debate, the concept of piracy is set in three contexts: (1) Pirated *consumption* of intellectual property is particularly virulent in the software and audio-visual industries (recordings, games, videos). Up to half of products used in these sectors are said to be illegitimate.¹ (2) Piracy as an allegation against dubious *commercial competitors* is used by pharmaceutical firms with reference to manufacturers of generic drugs that are chemically equivalent to patented compounds. In the electronics and semi-conductor industries, piracy may denote the extraction of sensitive information guarded as trade secrets. In fashion, piracy refers to copying the look and feel of seasonal collections. (3) Finally, piracy is used as a charge against the *appropriation of indigenous knowledge* by multinational companies, as in the term biopiracy.

The counter-concept to piracy is the licence, the permitted use of material claimed as property against a royalty fee. Many multinational firms such as AOL TimeWarner, Bertelsmann, Disney, Coca Cola, McDonalds, Monsanto, Pfizer, Microsoft, IBM, Universal, Sony appear to anticipate a world based on licensing agreements. Licences are deemed good business practice in “extracting value from intellectual property”. Consultants Rivette and Kline suggest that patent licensing produces “largely free

cash flow ... To match that sort of net revenue stream, IBM would have to sell roughly \$20 billion worth of additional products each year, or an amount equal to one-fourth its worldwide sales.”ⁱⁱ However, this is not a one way bet. To preserve freedom of action in a licensing economy, firms often strategically stack patents for cross-licensing purposes.

Monsanto’s CEO Robert Shapiro drew a more radical conclusion in an interview in the Harvard Business Review in 1997:

“Nobody really wants to own carpet; they just want to walk on it. What would happen if Monsanto or the carpet manufacturer owned that carpet and promised to come in and remove it when it required replacing? ... We’re starting to look at all our products and ask, What is it people really need to buy? Do they need the stuff or just its function?”ⁱⁱⁱ

Monsanto’s “terminator gene” that rendered seeds infertile after cropping was in line with such thinking. A licensing economy is also reflected in current efforts in the entertainment and software industries to install digital rights management (DRM) or trusted (TCPA) systems under the protection of digital copyright law criminalising circumvention technologies.

The proposed workshop invites contributions about the tensions between the intellectual property licence and the notion of piracy in specific sites, such as music, games, fashion, software, semiconductors, biotechnology or indigenous knowledge.

April 2003, Martin Kretschmer (mkretsch@bournemouth.ac.uk)

ⁱ European Commission (1998) Green Paper “Combating Counterfeiting and Piracy in the Single Market”, Business Software Alliance (www.bsa.org), International Federation of the Phonographic Industries, IFPI (www.ifpi.org).

ⁱⁱ Kevin G. Rivette and David Kline, *Rembrandts in the Attic: Unlocking the hidden value of patents*, Harvard Business School Press, 2000, p. 6. IBM is leading the global patent race with an annual portfolio of about 2000 granted patents. Across the patent sector, licensing revenues increased between 1989 and 1999 from \$15 billion to \$110 billion.

ⁱⁱⁱ Joan Magretta, “Growth Through Global Sustainability: An Interview with Monsanto’s CEO, Robert B. Shapiro,” *Harvard Business Review* (January-February 1997): pp. 79-88, at 83.