

Creation, Innovation, and
Incentives

**The case for Intellectual
Property 2.0**

Outline

- The Research Question;
- On Incentives and Exclusivity in the Digital Environment: three Perspectives;
- A few tentative Conclusions (including on the role of Commons & Liability Rules);
- The Legislative Agenda;
- Conclusion;

The Question of Incentives

- Flash back: Turin Law School-Yale Law School conference back in 1999; the Lessig/Kronman exchange; is creativity over the net like kids playing with a new toy, which in the long run requires the incentive for creativity not to fizzle out?
- Lessig's replies in the subsequent years: the incentive is freedom from monopoly; is that so?
- A more persuasive rejoinder: for digitally networked creativity the issue of incentives has become comparatively trivial (Benkler 2002 and 2011)

Exclusivity in a Digital Environment: Three “*Thesen*”

- While keeping the assumption that Innovation and Creativity are a Public Good, I make three submissions:
- 1. in the Digital Environment the Incentive of Exclusivity is **not always** required to promote creativity and innovation;
- 2. in the Digital Environment Exclusivity often backfires, i.e. rather than functioning as an incentive brings innovation and creativity to a screeching halt;
- 3. In the Digital Environment a Third Paradigm of Creativity and Innovation is emerging, for which the crucial issue is neither exclusivity (and incentives?) but rather infrastructure, interoperability and Ostrom’s common pool resources;

A Bit more on the Overarching Assumption

- Innovation and Creativity is not Manna; it is a Public Good;
- So its no-rivalry and non-excludability features, which lead to failure of the market in providing the good, can be:
 - Either overcome by Property (Exclusive **Rights**);
 - Or by Procurement and Patronage;
- So for the provision of the Public Good we need one of the three **Ps**
 - Even though I will later qualify this statement by claiming that in the Third Paradigm I advocate we need the Potential for Property subject to Registration (**PPR**) rather than the full **P** of Property

1 in the Digital Environment the Incentive of Exclusivity is **not always** required

- The route to reach the suggested conclusion here:
- Change in social basis of creativity; 99% Amateurs (Auteri); UGC and all that;
- The little chart Y. Benkler (2004) : The matrix of economic choices may be designed as follows:

	Market	Non market
• decentralized	price	X
• centralized	firm	regulation

1 Exclusivity not a Must: continued

- Wikipedia compared to British Encyclopedia (but also – and more significantly – to Encarta);
- Not only Amateurs, also Professionals using business models not based on exclusivity:
 - Open source software;
 - Arctic Monkeys;
 - In the long run, we are all Grateful Dead

1 Exclusivity not a Must: continued

- ... which leads to Copyright 2.0: Lessig by Default;
- BUT
 - If we care about legacy enterprises, as Bertani 2012 does, then we may give them legacy Copyright 1.0 subject to registration in a global digital registry; and even
 - go all the way to give them special protection (e.g. by fighting on line piracy, blocking OCH and so on)

2. in the Digital Environment

Exclusivity often backfires

- Two Test beds:
- A) Public Sector Information (or Government Open Data): a little debate with Hanss Ullrich in Brussels January 2012 (LAPSI);
- B) Patents:
 - Biotech;
 - Upstream embargo; with a footnote concerning Saudi Arabian SARS virus and Dutch Patent: MTAs and all that
 - Protection of discrete complementary inputs: e.g. ESTs, rather than of the end product; anticommons;

Exclusivity Backfiring: Continued

- C) Why am I bringing in Biotech when I am speaking about Digital? Well,
 - for once in both cases IP protection over information is sought;
 - The issue is the same: IP protection over discrete complementary inputs is creating the same anti-commons problems in Biotech as well as in Digital (compare ESTs with mobile phone wars, from Research in Motion to Apple Samsung and Motorola);
 - The way out is the same: contractually reconstructed commons (Reichmann 2008), cooperation over the net, shift from property to liability rules, as we shall see below

3. In the Digital Environment a Third Paradigm of Creativity and Innovation is emerging

- We all know that Digital is infinite, perfect, costless copies; but have we drawn all the consequences from the fact that Digital is not only non-rival in consumption but also in **production**?
- Non-rivalry in production in **proprietary, market based business models**:
 - surviving in the form of squared exclusivity, DRM, contractual restrictions; for Microsoft, the labels & Hollywood (and Bollywood) the danger comes from breaches to exclusivity; the reaction: holding ISPs liable and controlling “the pipes” (the infrastructure);
- Non-rivalry in production in **open models**:
- Google Maps; LBS; matching data sets; not only mash-ups and Wikipedia;
 - Incidentally University of Oxford Conference “The Future of Finance”, May 2013 says the same for financial innovation (Authers FT June 1-2, 2013);
 - A remark for future use: enough with contract law, scholars must start to deal with unilateral acts, promises, gifts: from market exchange to sharing;

The Third Paradigm

- Sharing is on the way up: see the little chart again
- Crowdsourcing;
- The cost of technology is much lower (end of the plant);
- In Sharing, Communities, Communication, Reputational Capital; here, while it is clear that Exclusivity is not the incentive (self-defeating) it may well be that the issue of incentives may be trivial;
- harnessing the potential of non-rivalry in production;
 - Direct licensing and TC;
 - Authorisation to use fragments;
 - “matching” as the opposite of stacking, to the extent interoperability is guaranteed

Exclusivity and Property out, Commons and Liability in

- Not only in the copyright field; also at the hard core of patents and technology;
- What is TPGRFA?
- Contracting into liability again: from Merges (1996) to microbial commons and MIT Media Lab;
- Crucial pre-condition: interop, infrastructure and Ostrom's common pool resources
- The demise of PPP; or the Third Paradigm requires a different P (PPR)

A Legislative Agenda for IP 2.0: Copyright

- Copyright:
- We still have legacy businesses; so they may opt-in ancient Copyright 1.0 (Indian Reservation, global on line register);
- Otherwise Lessig-by-default; coyright 2.0
- Therefore (not a EU copyright code) but Berne II;
- The hard nut to crack: peaceful coexistence
- CRMOS;
- Infrastructure;
- ISPs

A Legislative Agenda for IP 2.0: Patent

- No automatic injunctions;
- Better Mix with liability rules;
- Commons, TPGRFA and immunities (Brazilian Government Proposals);
- Registration is already required; may

WHY THIS IS NOT HAPPENING?

- **Quite simple: Mancur Olson, *The Logic of Collective Action*, 1965**
- **Now this means that the lobby of horse carriage owners is holding up railways;**
- **Incidentally, this may be good for US firms (for a very short while), but it is a disaster for the EU economy**

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