Intellectual Property II

Movements & Legal Cases

Developments Re: IPRs

- On the one hand: In recent years, some parties have expressed skepticism about the *justifiability* of IPRs and/or about what the *goal* of IPR protection ought to be → E.g., **Creative Commons** licensing, the **Pirate Party** movement, the **Free Software** movement.

- On the other: Supporters of conventional IPRs have been challenged to re-interpret/re-configure implementation of IPRs in view of technological developments → E.g., developments in case and statute law and in technological IPR protection.

"Pirates"

- Enthusiasts for the kind of low-cost, unencumbered information sharing made possible by ICT have sought to **reappropriate** the terms "pirate" and "piracy" (on the model of "queer," "dyke," "Tory").
- E.g., Pirate **political parties** have been organized in 40+ countries (as of 2018) and have even elected representatives to parliament (in Iceland and Germany)…

Logo of the Pirate Party of Sweden

Logo of The Pirate Bay

The Pirate Movement

The Pirate movement is an international political movement comprised of a variety of national parties and international organizations. So (no surprise) the aims of the movement are diverse (and perhaps not always entirely consistent). Some widely shared core issues include:

- Free sharing of knowledge (**open content**)
- Reform of copyright and patent law
- Information **privacy**
- **Transparency** as a means to preventing political and corporate corruption

"Free Software"

- An idea advocated by a large but loose-knit group of computer programmers who aim to allow people to copy, use, and modify their software.
- "Free," in this context, means freedom of use, not necessarily cost-free ("*free as in speech, not free as in beer*," Richard Stallman; *libre* rather *gratis*).
- Most commercial ("proprietary") software is sold as **object code** – code that can be run on a device, but which is not intelligible to or modifiable by the end user. **Source code** is kept secret…

Open Source Software

- …**Open source** software, by contrast, is software distributed and/or made public in source code (≈ end user readable and modifiable). I.e., developers effectively relinquish (some) creative and/or financial control over their creations.
- Often (financially) cheaper than proprietary software; empowers users by making code limitations/errors and backdoors accessible and (at least potentially) correctable.

  E.g., device drivers for **Linux** vs. device drivers for MS Windows…

- …But: Much free software is not easy for ordinary consumers to use. Often, only very limited user-level technical support is available.
- Also, since anyone can modify free software, there may be many versions and few standards, creating a difficult and confusing environment for nontechnical consumers and businesses.
- Also, since the financial incentives for open source development are minimal, development may simply be abandoned.

  Cf. GitHub "**abandonware**" – 98%+ of projects are never completed

GNU Project I

- First proposed by **Richard Stallman** in 1983.
- Goal: To give users freedom and control in the use of their computing devices by collaboratively developing and publishing software.
- GNU Public License gives everyone rights to freely run, copy, distribute, study, and modify software.

Stallman

GNU Project mascot

GNU Project II

- Began with a UNIX-like OS (**GNU Hurd** ≈ ancestor of Linux), a sophisticated text editor (**Emacs**), many compilers and utilities.
- Now: Hundreds of programs, thousands of software packages available as free software (with modifiable source code).
- Developed the concept of **copyleft***:* Others have a legal right to use, edit, and redistribute programs or code so long as the distribution terms do not change.

  Compare: CC "ShareAlike"

Should All Software Be Free?

- Open source software has produced all sorts of innovations and provides low-cost solutions in many domains (e.g., Apache web server).
- But recall the utilitarian argument for IPRs: Sharing may be morally praiseworthy, but how do open source developers actually *get paid*?

  Will developers motivated simply by sharing/status produce all of the software people need (i.e., the 'socially optimal' quantity and quality of software)?

IPRs and the Law

Some Significant IP Cases

Sony v. Universal City Studios (1984)

- SCOTUS finds that makers of a device with legitimate uses should not be penalized simply because some people may use it to infringe copyright.
- Specifically, the Court held that copying movies for later viewing was fair use under U.S. law…

…Arguments for fair use in *Sony*:

- Copied TV broadcast movies may be made for private, non-commercial use and generally are not kept after viewing.
- Movie studios did not demonstrate that they suffered significant financial harm. (N.B.: at least ca: 1984)
- Moreover, the studios had received substantial fees for broadcasting movies on TV, and the value of those fees depends on having a large audience who view for free.

Reverse Engineering: Game Platforms

- *Sega Enterprises Ltd. v. Accolade Inc*. (1992)
- *Atari Games v. Nintendo* (1992)
- *Sony Computer Entertainment, Inc. v. Connectix Corporation* (2000)

- In general, U.S. courts have ruled that reverse engineering does *not* violate copyright if the intention is not to copy the original work (the game systems), but to make *new creative works* (video games).

U.S. Digital Millennium Copyright Act (DMCA) 1998

- **Anti-Circumvention**: Prohibits making, distributing or using tools to circumvent **digital rights management** (DRM) protection systems (e.g., CSS used for commercial DVDs)
- But also includes protection from some copyright lawsuits for websites ("publishers") where users post potentially infringing material ("safe harbor")

A&M Records [*et al*.] v. Napster (2001)

- **Napster**: Originally a pioneering peer-to-peer (P2P) file sharing service geared especially toward sharing music files. I.e., files were *not* stored on Napster servers. Instead Napster, in effect, provided a real time *directory* of peers willing to share.
- Arguments for fair use in *Napster*: 1) Per *Sony*, individual entertainment use can be considered fair use.

  2) Did not hurt music industry sales, since users 'sampled' music on Napster and could buy a commercial CD if they liked it…

Recording Industry Association of America (RIAA) arguments *against* fair use in *Napster*:

- In law, “personal use” means *limited* use, not trading with thousands of strangers
- Songs and music are creative works and users were copying whole songs (not excerpts)
- In fact Napster severely hurt sales

Ninth Circuit Appeals Court ruled that sharing music via P2P file sharing violates copyright; Napster can be held liable for contributory infringement.

- Napster also argued that it could not be held responsible for the actions of its users (cf. *Sony*). It was essentially a search engine, which is protected, e.g., under the ‘safe harbour’ provisions of the DMCA and the CDA of 1996
- As mentioned, Napster did not store any of the files on their servers.
- Also, their P2P technology, they argued, had substantial legitimate, non-infringing uses (cf. *Sony*)…

Further RIAA arguments in *Napster*:

- Companies are required to make an effort to prevent copyright violations and Napster did not take sufficient steps
- Napster was not a device or new technology and the RIAA was not seeking to ban the technology

The court ruled Napster liable for **contributory infringement** and **vicarious infringement** of the plaintiffs' copyrights since they had the right and ability to supervise the system, for copyright infringing activities, but did not adequately do so…

- …U.S. courts have generally upheld the *Napster* decision in subsequent cases involving P2P file sharing (Grokster, Gnutella, Morpheus, Kazaa, etc.):

  In short, under U.S. law, IPR holders can sue companies for *encouraging* or *knowingly permitting* copyright infringement.