ITO 5

Social Aspects of the Digital Age

ESSAY

"Intellectual property rights can not be defended!".

Discuss this statement by considering the Napster case or (and) the Borland vs. Lotus case

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Abstract

This essay discusses intellectual property rights (IPRs) from sociological perspective by referring Napster as the main case study. It examines IPRs by examining its history, theoretical foundations, and current practices. Labor theory and personality theory of intellectual property are not sufficient to justify the importance and existence of IPRs since they pose some problems in the real practices. Such problems especially are concerned with the difficulty to control and measure IPRs. Besides, IPRs is also impossible to be implemented due to the role of technology, which often developed to liberate people to get, use, and disseminate information and knowledge easily and with lower costs. At this point IPRs is against the basic rights of people, because it privatizes and commodifies information which should be available as a public good. This essay argues that IPRs is an ill concept and, thus, can not be defended. It results in negative impacts on our society. The rhetoric often used the proponents of IPRs, such as creativity and competition, is falsified by showing some evidence that IPRs is not fostering creativity and, in the long-term, really harmful to business competition. To a great extent IPRs also make the society suffer because companies holding rights or monopolize their intellectual work usually set prices for their products high, and can only be afforded by the well-offs. This essay also elaborates real political economy setting at which IPRs forced, largely by the U.S., as a single economic agenda in this information age. This reflects that IPRs is a regime of truth because it is based on a particular discourse set by the U.S.

Knowledge is not only power. It is also the source of profits in modern global markets.

(Drahos and Braithwaite, 2002, p. 39)

Napster lawsuit might be one of the most popular cases concerning intellectual property rights in the last century. It became another land mark case between copyrights holders and a particular industry because it represented another battle between law and technology after the other suit involved Sony Betamax in 1970s (Zoellick, 2001). Napster case began in December 1999 when the Recording Industry Association of America (RIAA) filed a federal in the Northern District of California. RIAA claimed that American recording companies had been lost at least $100,000 with respect to copyrighted work infringed through the software written by Shawn Fanning, a freshman of Northern University. The Court finally found that Napster was guilty for its contributory and vicarious infringement. In September 2002, Napster made a painful decision since it laid off nearly its entire 42-person staff and proceeded company's liquidation[1].

To begin with, it is interesting to note that Napster case can be viewed from many different perspectives. Above description is merely to summarize the case from legal perspective, which seems to become one the most dominant view on that case. Many law experts and industries especially that concern with copyrighted work believe that the main problem of intellectual property rights (IPRs), particularly with respect to Napster case, is the failure of the law to keep pace with technological change (Anestopoulou, 2001; Kretschmer, 2000; Langenderfer and Cook, 2001).

This essay, however, believes that a discussion which puts IPRs mainly in a legal context would somewhat make it more complicated and not helpful to explain the essence of IPRs. For that reason, it will discuss IPRs ontologically in order to understand its very basic nature, how it is developed and adopted as a concept in our society. It will examine the existence of IPRs and the interrelationship of some elements surrounding such a concept. In particular, it will also elaborate the discourse in which IPRs justified as a practice in our modern society.

The central argument of this essay is that IPRs, due to some reasons, is not defendable. Firstly, IPRs is a false concept and practically impossible to be

[1] http://www.e-businessethics.com/napster.htm (5 January 2003)

implemented. Secondly, it also undermines science and technology because it aims to monopolize certain information and set limitation for people to access that information (Perelman, 2003). Finally, it results in negative impacts on society because it favors to certain group of people especially those from developing country. IPRs is a regime of truth of the U.S. because it is forced for the sake of their benefits.

The discussion will be divided into four sections. Following this section, the brief history of IPRs will be discussed to give a context of which it emerges as an influential concept in this information age. Then, the notion of 'ownership', on which the concept of IPRs is based, will be elaborated. The examination of two theories used to justify the importance of IPRs will also be presented in this section. Next, this essay will discuss the impacts of IPRs on our society. This section, in particular, would falsify the current believe that IPRs will encourage creativity and develop the society, by examining the discourse set by the U.S, a country that has the biggest interest in IPRs. Finally, this essay will draw some important points concerning the future of IPRs in the conclusion.

The brief history of IPRs

The history of intellectual property can be traced back to the invention of printing press by Johannes Gutenberg in 1450 (Drahos and Braithwaite, 2002). This invention played crucial role in shaping copyrights, the earliest version of IPRs. In England[2], copyrights took place for the first time in 1557 when Queen Mary established a charter giving a printing privilege to Stationers, a London-based craft guild that had a serious interest in profits monopoly. The charter had a significant impact on the printing business because anyone who wished to enter such an activity must be a member of Stationers' Company.

In 1709, Parliament passed a new legislation, The Act of Anne, which protected "books or other writings" for 14 years after publication. The Act of Anne became the first modern copyright legislation in England (Kretschmer, 2001). During eighteenth century, national copyright systems gradually spread out across Europe. Some

[2] Other European countries, such as Germany and France had its own legislation for copyright protection.

European countries began to make bilateral and multilateral agreement to protect copyright for the works of their nationals.

In 1886, a multilateral agreement, the Berne Convention for the Protection of Literally and Artistic Work (Berne Convention), was born in Europe. However, this agreement was mainly supported by European countries because the U.S. was absent. It was obviously disappointing delegations from such countries as England, Germany, and France, especially when they knew that the U.S. absent was because most of foreign books were pirated in this country. Some actions for retaliation were taken by not assigning copyrights for US author's books published in European countries. However, this attempt was not effective since books market for US authors was not great and able to jeopardize the US publishers. At the same time, there was practically no response to such retaliation taken by US. The only effort made was the 1891 Act, under which foreign works could gain protection in the US if they were published simultaneously in the US. As a matter of fact the U.S. joined Berne Convention in 1 July 1989 (Drahos and Braithwaite, 2002).

Today, the scenario for imposing copyrights internationally was reversed. The US is the biggest copyright exporter in the world. This country is becoming the main player in the 'knowledge game' because it is there most of modern inventions have been taking place[3]. This country is now the main actors behind current international IPRs scheme, the Trade Related Intellectual Property Rights (TRIPs) agreement. Although established in the framework of the World Trade Organization (WTO), in essence, the agreement was sponsored by three organizations –Intellectual Property Committee (IPC), Keidanren, and the Union of Industrial and Employees Confederation (UNICE). IPC is a coalition of twelve major US corporations such as Hewlett Packard, Monsanto, IBM, and Pfizer. Keidanren is a federation of economic organization in Japan, and UNICE is recognized as the spokesperson for European business and Industry. The coalition was formed because most of transnational companies have vested interest on the TRIPs agreement (Shiva, 2000). Currently, TRIPs is forced to other countries, especially those do not have legal framework for IPRs. In this case, the US is the strongest advisor for countries all over the world to ratify such an agreement.

[3] Ibid.

IPRs: An Ill Concept

Given the context in which IPRs has been evolved and introduced as an influential concept in our society, this essay believes that IPRs is an odd notion. It is somewhat confusing because, first of all, the term of 'property' was originally used to describe an ownership of tangible assets over which the owner has full control. Historically, property meant land (McFarland, 1999). However, the term of 'property' has evolved and now it can be used to label almost everything, including the so-called 'intellectual work'. IPRs were born to protect people or companies who claim to have produced such a work. Napster became a case because it was seen to override some recording companies' 'rights'. Napster, these companies claimed, had facilitated internet users to have access and use to their 'property' for free and, as a result, these companies have lost millions of dollars.

The underlying cause of Napster case's complexities was really not because of that law could not adapted to technological change, but because of the impossibility of assigning 'property' in such intellectual work as songs. In essence, it is illogical to treat intellectual work, which is intangible, the same as tangible goods. A song is different from land in many respects. People can have full control over their lands, houses, or cars because the physical presence of the assets. They can easily set fences for their lands or lock the doors in order to prevent others to use their properties. However, how can people prevent other singing their songs or creating other songs that have similar rhythm with theirs or copying their songs by using recording devices? Can they have full control over their creative works? Can they claim themselves as the sole creator of those songs?

People who believe in IPRs might use some philosophical or moral justification. There are theories can be used to justify IPRs, for instance labor theory and personality theory of intellectual property (Hughes, 1988, cited in McFarland, 1999). By using labor theory, known as Lockean justification, a person can acquire property rights to something if he or she has invested labor on it. The author gives an example of a person who goes into the forest, cuts down a tree, and converts it into firewood. Because he has invested his effort in that process, he can claim the wood as his property. He can use it as he wants and, importantly, prevents others from its use. In practice, this theory is also used, implicitly, to justify intellectual property rights, especially by those who develop software or write a song. Songwriters, or recording companies, usually claim that

'pirates' inflict their financial loss because their enormous time and efforts are being used without any compensation.

In another way, by using personality theory of intellectual property, or Hegelian justification, they could also claim that a song, or other creative work, is a form of self-expression or self-realization, and, therefore, it is belongs to the creator, as a part of the self. If another person is using or reproducing it without permission from the creator, this person would be seen as violating the author's rights and doing unethical business.

The arguments from these theories, however, are somewhat problematic. Again, both can not solve the real problems posed in some questions mentioned above. In that case, the main problems are closely related to how to control and measure it. Such moral arguments as Lockean and Hegelian are only useful to answer 'why' intellectual property rights are important. Nevertheless, when these theories are applied, they start posing such problems. In fact, songs writers or recording companies can not control others to sing their songs. In addition, when the claim to have investment in those songs, how it can be calculated? It is impossible to say that these songs are solely their creative work and they have absolute rights over it.

Virtually, nothing is created without using other sources. To some extent, Hughes' examples are not appropriate in a sense that a tree can grow without any intervention from that person and, thus, it is impossible for that person to claim to the wood belongs to him. Similarly, a person can not creatively write songs without having idea or inspiration from other songs which created by other song writers. In an extreme way, the absolute rights for the songs does not exist because previously he or she also has gained knowledge, formally or informally, from others or schools and this knowledge is an accumulation of many people' inventions or discoveries before his or her. This accumulation is what Marx called 'universal labor'. Ideas are draw upon a multitude of sources (Perelman, 2003) and 'intellectual work never spring pure and original from a single human mind' (McFarland, 1999).

In addition, the impossibility of IPRs is accentuated when it involves technology. In fact, from the beginning, the notion of ownership often contradicts the basic nature of technology. Gutenberg' printing machine was the first obstacle for imposing copyright in the fifteenth century and Napster technology arose to challenge the existence of intellectual property in the last century.

In particular, the technology that had give rise to Napster is Internet. Unlike Gutenberg' printing, Internet facilitates information distribution in a tremendous way. It connects computers all over the world and enables distribution in an unimaginable speed. By using the power of computer and latest Internet technology ones can not only communicate to each other but they also disseminate information in a way that does not exist before. Using the Internet, people can deliver content over the network quickly and at, practically, zero cost. It is because of these particular capabilities people are very interested in the Internet (Healy, 2002). Current computer technology and Internet enables users to get information easily or make perfect copy of files (Zoellick, 2001). For this reason, it is not a peculiar thing that people access the Internet to download songs, especially using Napster which enables users for doing such an activity.

With regard to Napster case, it seems that IPRs law, such as Digital Millennium Copyrights Act (DMCA) by which Napster was caught, is set to control all internet users' activities especially those related to distributing intellectual work, such as songs. With millions of computers connected, which means millions of people who have different interests are online, it is practically impossible to do such a control. New technologies might be invented to prevent piracy. However, these technologies would become obsolete soon since the other inventions intended to against them would be introduced by the other groups of people who against those protection. For example, companies that were using "Content Scrambling System" (CSS), a piece of code used to prevent people to copy movies from DVD disks, no longer had privilege to protect their products, movies, because another technology was invented to decrypt the code, called DeCSS. This decryption code was developed by three European programmers to enables people playing DVD disks on Linux machine (Dugan, 2000; Langenderfer and Cook, 2001; Zoellick, 2001).

Social Impacts

It seems that all of cases cited on many literatures have common patterns of why those cases occurred. One of these patterns is that IPRs is established to serve certain interests, companies or individuals that want to monopolize the benefits of their intellectual works. IPRs emerge to control the so-called 'properties' and prevent the other groups for using these properties for free. It is also common that products that are

intellectually protected are expensive or not accessible. Copyrights violation in the Medieval Ages, Napster case, and, even a case previously cited, DeCSS, at least, reflect these circumstances.

Another pattern in these cases is people resistance. Violation, piracy, plagiarism, or other terms that often used by copyrights holders, occurred because people can not afford the products or can not access and use the products easily. As a result, they try to 'break the rule' by downloading songs for free as they find the website address and have a particular technology, open the code for locking software, distributing information freely on the Net, and so on. This essay believes that these are logical response because freedom and accessibility seem to be important to people. It seems that these two notions to a greater extent are people's basic rights. In fact, any attempts to put limitation to a certain product or information would be seen as violation to these rights and people will response to against these attempts.

In addition, there seems a contradiction concerning the objectives of IPRs. Such contradiction stems from the fact the proponents of IPRs usually use such rhetoric as creativity and competition. They might say that copyright fosters creativity and, therefore, a lack of protection would paralyze any creativity activity (European Commission, 1995, cited by Kretschmer, 2001)[4]. In other words, the creativity should be maintained by conforming IPRs law because, they argue, this will encourage people to be more creative and, as a consequence, society will get benefit from it. Also, they might argue that IPRs is important to encourage business competition that will result in higher standard of products and services, and this will be beneficial for our society.

However, although the argument above seems to be logical, but it is not necessarily true. At this point we should be suspicious to the statement since it is clear in what context IPRs emerges. Historically, it is obvious that copyrights protections, from the Medieval Ages to current 'international agreement' such as TRIPs, are established in the business context. The Queen Mary's Charter, the Act of Anne, Berne Convention, and other IPRs regulations are set to serve business entities. It is also obvious that, instead of encouraging creativity and developing society, these regulations have negative impacts on society. As a result of the protections, information becomes very expensive and scarce, because profits and capital accumulation are the only ends to

[4] European Commission (1995) *Green Paper*, Copyright and Related Rights in the Information Society, Brussels.

which creativity is put (Shiva, 2000). How can IPRs develop our society if all of information is expensive, while most people can not afford it? How will business competition be on the future, if every single idea used in business is patented? Can companies learn from others' achievement and set higher standard of products and services in such a business environment? These questions, I believe, might pose a sign that IPRs is a 'self-destruction system'. It is harmful to our society and will be stark, using Marx term, 'class differences' (Perelman, 2003).

In addition, the main fundamental objection of this essay to IPRs is actually closely related to its basic assumption. IPRs treat public goods as private ones. Information or knowledge falls into public goods category. As a public good, knowledge has two characteristic: non-rivalry and non-excludability (Drahos and Braithwaite, 2002). The former means that once knowledge is 'consumed', it is still available as it was and no part of this knowledge is reduced. While the latter means that the availability of knowledge does not exclude certain groups of people to use the knowledge. Let us back to previous example in the Napster case, songs. Once a song is written and published everyone can listen to and sing it, in this case 'consume' the song, without reducing its quality and quantity. Once a music CD is played by a person, it will not exclude other persons to listen to it, even they do not have that CD.

Given these characteristic, it is obvious that IPRs try to privatize and commodify knowledge as a public good. This will be a thread to our society in a sense that IPRs prevent people to gain and use knowledge unless by paying the prices which has been set high. Instead of encouraging creativity and developing society, it will be a disaster for certain groups of people, especially those who are poor. Chomsky (2000, cited in Sum, 2003) says:

> …[I]ntellectual property rights are just protection of monopolistic pricing and control, guaranteeing that corporations … have the right to charge monopolistic prices, guaranteeing…that pharmaceutical production drugs will be priced at a level at which most of the world can't afford[5].

[5] Chomsky (2000) 'Unsustainable Non Development' in http://www.zmag.org/Zsustainers/Zdaily/2000-05/30chomsky.htm.

Conclusion

In brief, we are entering to the so-called 'knowledge economy' where people around the world are more dependent on information and knowledge. It seems that IPRs seems to be the main obstacle for such an economy because it tries to control the supply of knowledge and encourage people all over the world to gain knowledge by paying it, because knowledge is no longer a public good. In that case, using Drahos' term, IPRs is a form of 'information feudalism'. It is a new variant of the transformation of the relation of production in our society because it treats companies as 'lords' that renting knowledge to people or consumer[6]

Moreover, on the more practical level, IPRs is now becoming a regime of truth. In reality, the U.S., as the main actor behind TRIPs, is trying to force all countries over the world to ratify such an agreement. It is because the U.S. has an agenda to export knowledge. They realized that the U.S. economy will inevitably be much dependent to knowledge since its main ability is producing knowledge. Most of computer technologies and biotechnology are invented and produced in the U.S. Exploiting its competency, U.S. start developing infrastructure and superstructures, not only nationally but also internationally, by introducing the Global Information Infrastructure (GII) and at the same time encouraging other countries to enforce IPRs[7]. The U.S. is also setting a particular discourse on which it can justify its action to push IPRs and fight piracy. The main discourse in the U.S. copyrights is that 'large companies' are 'victims', because their work have been pirated and 'pirates' are 'illegal' or 'immoral'[8].This essay, however, believes that IPRs is really representing an ambiguity, especially, of the U.S. because in the past this country was the biggest pirates.

As a matter of fact, there is another big issue which related to another form of stealing, which is called 'bio-piracy'. In this sense, the things pirated are not in the forms of songs or software, or other types of technological innovation. Also, the pirates on bio-piracy are not individuals from developing countries but some multinational companies from developed countries, such as, Pfizer, Bristol Myer and Merck. These companies had patented some bio-materials collected from developing country such as

[6] In fact, some experts suggest that, instead of selling information, licensing is a possible solution to overcome piracy. With this scenario, it becomes clear that the relationship between producer and consumer will be like lord and vassal as it happens in feudal society.
[7] This view was presented in the G-7 Ministerial Conference in Brussels, Belgium 25 February 1995.
[8] Sum, 2003, 'Global Governance of ICT and Intellectual Property Rights: GII, NII, WTO, WIPO, and ITU, Course hand out.

India without payment of royalties.[9] Finally, given such a fact, this essay raises two questions which are also important to pose to clarify or, to some extent, could falsify the existence of IPRs: Can the developing countries, such as the U.S., still justify its action to eradicate piracy in the world? How will this country treat itself in the context of bio-piracy which has been done by those companies?

[9] See Shiva, 2000; Sum, 2003.

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