

# Intellectual Property Rights (IPR) and communication: A glossary of terms

Appropriation is a term used to describe the public use of copyrighted and non-copyrighted ideas, images and meanings. Since all new ideas and expressions are based on prior ideas and expressions, copyright helps cultural industries extend their control over symbols and meanings that originated in the public domain. A current US Supreme Court case filed by Eric Eldred and represented by Lawrence Lessig has challenged the unconstitutionality of perpetual copyright. If, as has been argued, Walt Disney made a multi-billion dollar industry by freely plundering the works of Hans Christian Andersen, then, Mickey Mouse and Donald Duck ought to become public property.

Authorship, meaning reward for creative labour, is a concept that is central to classical definitions of copyright. While authors do need to be 'rewarded', they are no longer the sole beneficiaries of copyright. Today corporate firms who own both authors and their texts are the key beneficiaries of copyright. Authorship has also been complicated by the advent of digital technologies that have unfixed the materiality and objectivity of stand alone, non-digital formats. For instance, 'Sampling', the compilation of music tracks based on borrowings, has made traditional notions of authorship problematic.

Berne Convention for the Protection of Literary and Artistic Works (1886) is the major multilateral copyright treaty adhered to by more than 159 member states that form the Berne Union. It is administered by the Geneva-based World Intellectual Property Organisation (WIPO).

Code refers to the instructions that operate software or hardware. Programmers write a 'source code', instructions that are, in turn, translated by the computer into machine-readable 'object code'. Code is encrypted. Contestations over the free availability or otherwise of source code are a defining feature of the contemporary cultural politics of IPR.

Copyright protects the concrete expression of an idea and not the idea itself. It protects musical, literary, scientific works, computer software, plays, lectures, etc. that are fixed in tangible or material form. It also gives protection to dance moves, riffs, html coding recorded in any given medium. Copyright is given for a fixed duration. It has its origins in the late 16th century in the Statute of Anne (1710). This statute gave authors rights over their creation for a limited period of time after which the work became part of the public domain. Today, copyright functions mainly as a tool for securing the property interests of corporations. It has become a key means for the expansion of the neo-liberal economy. In the USA the term for copyright has been extended on eleven occasions since 1960. Today the basic copyright term in the European Union and the USA is the life of the author plus 70 years. Following the enactment of the Sonny Bono Term Extension Act in the USA in 1998, works belonging to corporations are now protected for 95 years.

Copyleft describes the deliberate attempt to create the space for and the use of non-proprietary software through the sharing of software programmes and its codes, and the collaborative development of software. It recognises the centrality of prior ideas as the basis for all creativity. Copyleft gives users the freedom to redistribute software and alter/improve its codes as long as the freedom to copy and change is passed on it every user. The GNU Project is one of the better examples of the copyleft movement.

Cultural Exception Clause refers to an effort by the French government, supported by the Canadians to make a cultural exception for trade in audio-visual goods. During an earlier round of trade negotiations in the early 1990s, the EU in its 'Television Without Frontiers' policy had supported the idea of quotas for Hollywood imports to the EU. This clause privileges national jurisdiction for trade in culture and makes a case for trade in culture to be treated differently from trade in other goods and services.

Digital Millennium Copyright Act (1998) updates copyright protection in the US for a digital era. It aims to protect electronic commerce and digital content providers. Its anti-circumvention provision - that makes it a crime to break encrypted codes, and its anti fair use provisions - continue to be contested.

Fair Use is the right to use a copyrighted work for educational, academic, research purposes. The Fair Use doctrine has come under serious threat in the USA as a result of the Digital Millennium Copyright Act (2000). This Act includes a swathe of restrictive clauses related to the use of copyrighted material with major consequences for knowledge extension via public libraries, educational institutions and home use.

First Sale is the principle that allows the buyer of a copyrighted item to use it for any purpose except the public performance of that work or its copying and redistribution for the individual's profit.

Hacker is described in one definition as 'A person who delights in having an intimate understanding of the internal workings of a system, computers and computer networks in particular.' Crackers are the ones who attempt to access computer systems without permission!<sup>1</sup>

Indigenous Cultural and Intellectual Property refers to rights heritage, to the objects, sites, knowledge, the methods of transmission by communities that have traditionally been defined by the social ownership of knowledge. This right privileges customary law over modern law. Heritage includes all aspects of culture (art, music, dance, etc), indigenous knowledge (medicinal, nutritional), land management practices. There have been many documented instances of cultural and bio-piracy around the world. These modern day pillagers take refuge in the claim that oral knowledge that is not fixed or recorded in a material medium is public property. There are numerous attempts today to give legal substance and scientific validity to indigenous knowledge. Article 29 of the Draft Declaration of the Rights of World Indigenous People states that 'Indigenous people are entitled to the recognition of full ownership, control and protection of their cultural and intellectual property.'<sup>2</sup>

Intellectual Property Rights is the generic name given to the means of protecting and extending proprietary rights over all commercial inventions, innovations, and expressions of ideas contained in digital and non-digitised formats. It is the primary means by which power over knowledge is maintained today. It is an essential part of the armoury of the neo-liberal trade paradigm. Technological convergences have reinforced IP as one of the foremost means of maintaining economic dominance. The intellectual grab of the 21st century has been compared with the colonial land grabs of the 17th, 18th and 19th centuries. IP is governed by a range of distinct legal platforms that offers degrees of protection, rights, obligations, enforcement procedures and reliefs to all commercial products and processes that are a result of human creativity including products arising from the genetic manipulation of Nature.<sup>3</sup>

The IPR tool kit consists of patent, trademark & service mark, design registration, copyright, layout design for integrated circuits, trade secrets and undisclosed information, geographical indications, protection of new plant varieties and anti competitive practices in contractual licenses. From the perspective of communication, copyright and to a lesser extent patents are the key instruments for enquiry.

Linux is an operating system based on open code. Open code allows for the modification of the source code by the user. Users can also adapt parts of the code for use in other software.

Created by a Finn, Linus Torvalds, the Linux OS has become an established alternative to proprietary systems such as Microsoft's Windows platform and is the fastest growing operating system in the world. The advantage of this open code system is that it enhances sharing, creativity and innovation resulting in a commons of code and to cumulative knowledge.

Moral Rights expressed in the Paris and Berne Conventions are rights given to authors beyond those recognised in copyright law, rights that accrue to authors in spite of the ownership of their work/s by a corporation or commercial entity. Article 6bis of the Berne Convention states that 'Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification... which would be prejudicial to his honour or reputation.' The Trade Related Intellectual Property Rights Agreement (TRIPS) and subsequent copyright legislations do not recognise this right. This right, under legislations originating in Europe, has been omitted in US-inspired copyright legislations around the world.

Napster was a US start up service that offered free, peer-to-peer, online, file swapping service that allowed users to download music from computers belonging to any other Napster user. The files are CD-based but compressed into a digital MP3 format stored on the user's hard disk. At its peak, this service had 80 million users who swapped as many as 15 billion music files. Napster was forced to close its operations after being taken to court by the pop/rock bands/acts Metallica, Dr Dre, Alanis Morissette, along with most of the major players in the music industry under the auspices of the RIAA in the USA. However, other copycat sites have taken its place. Unlike Napster, Gnutella, for instance, does not operate from an identifiable server. Neither does it function as a mediator between file swappers. Files are swapped directly which makes it all that more difficult to police. The music industry has learned valuable lessons from this case, not least exploring music on-line as a business proposition.

Open Source is a means of ensuring the development of collaborative, non-proprietary software. It is based on the non-exclusive appropriation of source code. It facilitates innovation and creativity and is often contrasted with the staid nature of invention in proprietary systems such as Microsoft.

Patents are given by a state to protect inventions that are novel and useful. The first patent was granted to the Florentine architect Filippo Brunelleschi in 1421 for his invention of a barge and hoist. The barge 'The Badalone' sank on Lake Arno on its maiden voyage resulting in a temporary halt to the granting of any more patents by authorities in Florence!

A patent is granted for a specific term during which the owner has exclusive rights to its use. The ownership of patents and its licensing is a major source of income for US, Japanese and European companies. In 1997, 1,113,342 patents were in force in the USA alone, 28% of the world's patents. IBM with 2,766 patents topped the list in 1999. There were 7.1 million patent applications in 1999 against 1.8 million in 1990. With the patenting of genetic resources, patents have become the life-blood of the IT and Life Science Industries and are worth billions of dollars of real and projected revenues. 30,000 patents have been issued for software alone in Europe. In the UK, 15% of patents granted are for computer software.

Many believe that patents stifle invention. They have pointed out that the PC, the Internet, email and the World Wide Web are what they are today precisely because their development was not stifled by patent claims. A patent gives monopoly over an idea. Software products however, are the result of many ideas – old and new. Many of these ideas have been patented – and this presents an unnecessary hurdle to creativity/innovation.

Piracy of Hollywood films, software, CDs is a reality. Cultural industry spokespersons estimate losses to piracy in billions of dollars of lost revenue. The US-based Business Software Alliance (BFA) estimates piracy losses of US\$11.4 billion in 1997 up from 11.2 billion in 1996. It is estimated that in Japan, the second largest market for software, 67% of software used is 'illegal'. Piracy has become a pretext for global, multimillion dollar anti-piracy efforts supported by the Motion Picture Association of America (MPAA), the Business Software Alliance, the Recording Industry Association of America (RIAA) and other trade-related organisations in the

West.

But the odds are stacked against established industries. The advent of MP3 technology, personal computers and the internet, mass digital reproduction technologies and astute pirate production/distribution strategies have ensured that enforcers are in for a long and costly battle. Hollywood is advocating a digital rights management technology (DRM) and is lobbying for a Security Systems Standards and Certification Act (SSSCA) which would make it mandatory for all manufacturers of computers and electronic entertainment devices to include government approved anti-copying technology. It would be illegal to decrypt its code or remove it. A recent digital piracy spat pitted Sony Music and the British Phonographic Industry against the owners of the Easy Internet Café chain, EasyGroup. The music industry claimed that Easy Internet customers were downloading music illegally and accused EasyGroup of aiding piracy.<sup>4</sup>

There are those who advocate the use of neutral terms such as 'prohibited copying' as an alternative to 'piracy' with its connotations of drama and murder on the high seas. Critics maintain that the issue of piracy is used by cultural industries to deflect attention away from predatory business practices – such as the over-pricing of cultural products. In fact, on 1 October 2002, leading record companies in the USA including Universal, BMG, EMI, Warner Music and Sony agreed to pay \$US 143 million to settle charges of price fixing filed by 43 US states.<sup>5</sup>

Public Domain refers to the social and culture space that is commonly shared by communities throughout the world, and the ideas, principles, artefacts and applications that belong to this space. Today, it also refers to virtual spaces and digital media environments where 'progressive' sectors freely create, appropriate, interact. The public domain used to be the space for non-copyrighted works like Shakespeare and the Koran, for those works that were no longer copyright and for traditional knowledge that was orally transmitted and not fixed in a tangible form. This space is rapidly shrinking today. The public domain is increasingly under threat from proprietorial understandings of IP. The numerous restrictions on the 'appropriation' of knowledge have resulted in the global stifling of creativity.

Trade Related Intellectual Property Rights (TRIPS) Agreement was initiated under the forerunner of the WTO, the General Agreement on Tariffs and Trade (GATT) under the Uruguay round of trade negotiations. It was created by a government/industry combine, namely the US, EU, Japan and 13 major US corporations including Monsanto. It is the most comprehensive multilateral agreement on IP covering all IP instruments. It was the first IPR accord to legitimise the patenting of life forms. TRIPS provide the guidelines for the harmonisation of IPR laws under the WTO. All WTO member countries have substantive TRIPS obligations. While audio-visual trade (with the exception of Hollywood quotas) has not figured high in the TRIPS agenda as yet, TRIPS has nevertheless functioned as an umbrella for bi-lateral agreements on audio-visual trade.

World Intellectual Property Organisation (WIPO) is a UN agency that was created in 1967 and is responsible for creating IP standards and protecting IPR throughout the world. It relates to 21 treaties, 11 of which relate to IPR. Among these are the WIPO Copyright Treaty (1996) and the WIPO Performance and Phonograms Treaty (1996). The Copyright Treaty negotiated in 1996 by WIPO and a sister treaty related to protecting sound recordings came into effect in May 2002. The Copyright Treaty protects copyright in cyberspace. It outlaws attempts to circumvent anti-copying encryption. 38.5% of the 104,000 patent applications received by WIPO in 2001 were filed from the USA. Developing countries accounted for just 5% of applications. In recent years, its function has been closely tied to enabling the WTO's global IPR interests.

World Trade Organisation, the major multilateral body overseeing world trade and investment, also facilitates the implementation of the TRIPS Agreement. The WTO started functioning on 1 January 1995. It has progressively taken on responsibilities related to the harmonising of international IP laws and its enforcement. It has also systematically brought every trade related area under the jurisdiction of IP. One of the sectoral councils of the WTO, the Intellectual Property Council has been set up to deal with matters related to the TRIPS Agreement. A key liberalisation/trade-related WTO agreement that affects communication is the Agreement on Basic Telecommunication that came into force in February 1998.

Compiled by Pradip Thomas.

Notes

1. Sarai Reader 2 (2001): 'The Hacker Anti-Defamation League' (p.191), [www.sarai.net](http://www.sarai.net)
2. Janke, Terri (1999), 'Biodiversity, Patents and Indigenous Peoples' (pp.28-34), Media Development, 2.
3. Ganguli, P. (2001), Intellectual Property Rights: Unleashing the Knowledge Economy, Tata McGraw-Hill Publishing Co. Ltd., New Delhi
4. Williams, F. (2002), 'Copyright protection enforced' (p12), Financial Times, March 6
5. Grimes, C. (2002), Music groups pay \$143m to settle suit', Financial Times, October 1.