Proceedings Symposium "A New Feudalism of Ideas?"
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Note: These proceedings are edited transcriptions of contributions drawing on notes taken by Julia Fallon and Gurminder Panesar (MA/LLM Intellectual Property Management). A special issue on the topic of the symposium is in preperation (eds. Martin Kretschmer & Peter Drahos).

PAPER 1:

Feudalism, Retreat or Revolution?

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1. Feudalism revisited

About two years ago, a thought occurred to me, some might call it a nightmare. We might not be far off a time when each and every human activity triggers a licence fee:

- A mental performance right secures royalties each time I read a book.
- A shoe design communication to the public right charges my credit card each time I leave home in that pair of designer shoes.
- Goods (such as music or games) will expire after use.
- The world will be divided into property zones in which each citizen holds a royalty account with a comprehensive provider of services. (Negotiations to integrate AOL into the next generation of Windows operating system, Widows XP, failed only recently over Microsoft's demand that AOL agree not to challenge Microsoft in court over antitrust matters.)
- And of course, such transactions would require a business method patent licence.
- The law would endorse a technology, called digital rights management, prohibiting circumvention of protection measures.

Some of these examples already have had a brush with reality. Corporate activity by multinational firms such as AOL TimeWarner, Bertelsmann, Disney, Coca Cola, McDonald, Monsanto, Pfizer, Microsoft, IBM, Vivendi Universal, Sony appears to

anticipate a world based on licensing agreements. As Monsanto's CEO Robert Shapiro suggested in an admirably frank interview in the Harvard Business Review in 1997 (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:

> "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?"

Monsanto's "teminator gen" that renders seeds infertile after cropping is in line with such thinking.

Now, I deliberately overplayed this vision. I am no conspiracy theorist. The vision may be labelled "A New Feudalism" because property relations are no longer based on transfer of title. Feudalism, economic history tells us, was based on the notions of conditional tenure, and grants in fee with ownership residing - perpetually and non-transferable - in the Crown.

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2. The Licence Economy - some indicators

I claim that the licensing deal is one of the defining features of the post-industrial economy. At this moment, empirical evidence is limited but here are some indicators pointing to a dramic shift in property relations.

- Catalogue of Beatles publishing rights bought by Michael Jackson in 1985 for $ 50 million from a bankrupt Apple Records is today valued at $ 700 million (PATNEWS Newsletter, 14 May 2001). 14 times increase in as many years - while McCartney is alive, at least the term is not getting shorter.[1]

[1] The music industry has operated something similar to a pay-per-use scheme since 1851, the formation of French copyright collecting society SACEM. It is a valuable research site for anybody wishing to study the licence economy. (cf. M. Kretschmer, C. Baden-Fuller, G.M. Klimis, R.Wallis), "Enforcement and Appropriation of Music Intellectual Property Rights in Global Markets", in *Globalization of Services* (eds. Y. Aharoni, L. Nachum), London: Routledge (2000): pp. 163-196.

- In 1990, IBM earned $30 million from patent licensing royalties; in 2000 royalties reached nearly $1 billion. With annual grants of 2000 patents, they are top of the patenting league. (Kevin G. Rivette and David Kline, "Discovering New Value in Intellectual Property," *Harvard Business Review*, January-February 2000, p. 56)

- Licensing his brand name and image has turned Michael Jordan into a business with a $10 billion impact on the global economy, half of which benefited Nike. (Walter LaFeber, 1999, *Michael Jordan and the New Global Capitalism*, Norton).

- NewYork based investment bank Pullman has pioneered the securitization of intellectual property assets, successfully placing a $55 million bond issue in 1998 secured against future royalties from David Bowie's backcatalogue.[2]

Licensing contracts are deemed good business practice in "extracting value from intellectual property". Rivette and Kline suggest (HBR, p. 56) 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." Overall, patent licensing revenues increased between 1998 and 1999 from $15 billion to $110 billion (Kevin G. Rivette and David Kline, *Rembrandts in the Attic: Unlocking the hidden value of patents*, Harvard Business School Press, 2000, p. 6).

However, the offensive use of patent strategies has lead to what has been termed "intellectual property congestion", restricting the room for innovative activity for example in the computing and electronics industries. In 2001, Hewlett-Packard settled a dispute with Pitney Bowes (a Stamford-based $4 billion provider of mail, messaging and document management solutions) over print technology patents for $400 million. The dispute involved technology that created a smoother edge on the characters of laser jet printers, making letters and numbers more readable. As a result of the

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[2] David Pullman commented: '*Historically, entertainment and intellectual property owners could only get substantial cash from their asset's value by selling* [my emphasis], while only minimal opportunities to borrow against future cash flow existed before. Typically intellectual property owners find their most valued assets are illiquid and undervalued. Due to the limited options of short term, low leverage bank loans and the onerous terms of venture capital, major corporations have traditionally acted as the bankers to their respective intellectual property industries. However, an advance from a record company, for example, is a fully taxable event offered with high rates of return and significant loss of control or even ownership. The size of the market cap of intellectual property and entertainment assets is probably a trillion dollars.' (interview data: M. Kretschmer, G.M. Klimis, R. Wallis, "Music in Electronic Markets", *New Media & Society* Vol 3(4): 417-441; 2001). Other music securitizations since have involved Rod Steward, Iron Maiden, Rolling Stones and Elton John. Issueing banks included Nomura, Merrill Lynch, Citibank and Morgan Stanley.

settlement, the companies said they entered into a technology licensing agreement and expect to pursue business and commercial relationships (SiliconValley.com Newsletter, 4 June 2001).

Will this become the natural way of achieving technology transfer between feudal war lords? It certainly suggests that the costs of conducting business in a litigious, patent congested environment need to be subtracted from the licensing royalties which many consultants promote as free cash flow.[3]

Having established a current trend towards licencing arrangements, I shall briefly consider the legal concepts that make such property relations possible.

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3. The Propertization of Ideas, historically speaking

Paradoxically, the regulation of ideas first had to adopt the full paraphernalia of exclusive, transferable property right, before threatening to revert to feudal arrangements.

In economic history, the standard explanation for the evolution of well-defined, secure, individualised property rights is that they are an efficient response to scarce resources (North, Douglass C. & Thomas, Robert (1973), *The Rise of the Western World: A New Economic History*. Cambridge: CUP; North, Douglass C. (1981), *Structure and Change in Economic History*. New York: Norton). Private property rights prevent the overexploitation of a resource by those with no incentive to conserve it (the so-called 'Tragedy of the Commons').[4] Private property rights allow the formation of prices, and make resources travel to their most valuable use.

Intellectual property does not fit easily into this picture. As our economically trained colleagues, Bill Maughan, Peter Drahos and Nickolaus Thumm will soon tell us, knowledge and information is a public good, and non-rivalreous in consumption. The economist's standard argument that "[f]ree usage of knowledge ends up with societies that create too little new knowledge" (MIT economist Lester Thurow, "Needed: A

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[3] At the symposium, Jeremy Phillips offered an alternative interpretation of the settlement between HP and Pitney Bowes: If a company of the stature of HP does not challenge the validity of a patent, no one will. The law suit might be just a cover for anti-competitive behaviour.

[4] The phrase 'Tragedy of the Commons' was coined by biologist Garrett Hardie in an article in *Science* (1968).

New System of Intellectual Property Rights," *Harvard Business Review* (September-October 1997), pp. 95-103, at p. 101) is harder to make (and empirically support) than it seems.

I also share doubts whether one should treat the intellectual estates as one unified property domain. Historically, the godfathers of intellectual property, patents, copyright and trade marks are not property at all, if we rely on the economic definition.

- **Trade marks** began as indicators of origin, today they are expressed as exclusive brands that can be sold, franchised or merchandised. Trafficking in TM was banned under the UK 1938 Act. Even under the 1994 Act, licensing can mean that a mark has become liable to deceive and thus revocable (Cornish, W. R. (1999), *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* (4th ed.), London: Sweet & Maxwell: 17-16 and 17-79).

- **Copyright** began as a regulation of reprinting for 14 years, today industrial products derive their protection from the life span of an author (plus 50-70 years) during which all conceivable forms of communication, including adaptation, remain the prerogative of the owner (who typically is not the author).

In the pre-royalty era, a new piece of music was typically sold in its physical instantiation, i.e. the manuscript. With the sale of the manuscript, all title claims passed to the publisher. It appeared to be a straightforward transfer of property.[5] Similarly, if a musician acquired a printed score, she appeared to suffer no further restrictions of usage (apart from re-printing). The music could be performed in public without further payment; it could be transcribed, arranged or simply copied. (Friedemann Kawohl will have more to say on the paradigm shift in music copyright around 1800)

- Patents began as a form of local protectionism (first English patents from 1565, for example for attracting Huguenots glass makers whose knowledge already existed), grew into an incentive to disclose, before turning into a strategic tool for manipulating competition (discovering the bargaining and retaliatory power of patent portfolios).

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[5] Martin Kretschmer, "Intellectual Property in Music: A historical analysis of rhetoric and institutional practices," *Studies in Cultures, Organizations and Societies* Vol. 6 (2000), p. 205. Some composers manipulated this convention to their own advantage by selling the same manuscript to different publishers (e.g. Mozart, Beethoven).

The process of propertization culminating in the TRIPs agreement of 1994 took place largely without public debate. IP law mostly evolved as an incremental response to technological change.

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4. Retreat?

Attempts to re-structure areas central to a society's economic, social and cultural well-being around licensing arrangements based on exclusive property rights will become politically sensitive. We already may have reached a crossroads which we hope to explore further today.

In April, a case brought by 39 pharmaceutical companies against the South African government over the parallel importing of generic AIDS drugs - allegedly in violation of TRIPs obligations - collapsed. (Indian generic manufacturer Cipla offers copies of patented three-drug combinations for £250, which cost around £10000/year if supplied by licensed suppliers).

I just read the submission of the EU to the special meeting of the TRIPs Council last Wednesday (convened in response to issues raised by the South African case) in which it is argued that Articles 7 ('Objectives': 'social and economic welfare') and 8 ('Principles': allowing members to take measures necessary to protect public health, provided such measures are consistent with TRIPs) "were not drafted as general exception clauses". Contrast WTO Director-General Mike Moore's statement on the day that "countries must feel secure that they can use this flexibility." This is a sign of retreat from propertization.

Other examples of corporate retreat include Monsanto's forced withdrawal of the terminator gene. Revolution has been threatened in the music industry where a heavy-handed response to the digital distribution of music has spurred a host of underground sites subverting corporate control. Competition/anti-trust law intervention investigating dominant market positions arising from the control of intellectual property are increasing (e.g. EC investigation of BMG-Warner-EMI venture MusicNet, and Sony and Vivendi's Pressplay).

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5. The Future

Where do we go from here?

In 2000, the IP Task Force (part of the Creative Industries Programme at the UK Dept. of Culture, Media & Sport) commissioned MORI to investigate public attitudes to intellectual property. On 21 October 200, MORI conducted a focus group with participants from a nationally representative Panel of 5000 people. Under the Heading "The value that people attach to IP", MORI offers recurring attitudes such as:

- IP is too often used by large corporations to protect their profits at the public's expense
- IP is too seldom used to protect the interests of lone individuals
- IP used to create a monopoly over production of a product or service is anti-competitive
- IP used to protect ideas that have not yet become tangible prototypes/products hinders creativity
- People who contravene IP law as a 'one-off' should not be punished

"Where [IP] is seen as most important is through enforcing standards and protecting consumer rights."

MORI concludes that this attitude (that IP law should benefit the consumer) must be the result of a confusion. "There are clear problems with the public understanding and attitudes towards IP."

I would suggest that legal regulation will need to respond to these public attitudes, not vice versa. Copying without commercial gain, for example, is expressly condoned by the MORI respondents and appears to carry significant public benefits. Over the last 150 years, right holders, right distributors and their lawyers have been the dominant players of the so-called Patent, Copyright and Trade Mark Communities. This is about to change. The public will engage in fundamental normative discourse – a discourse that does not accept the premise of lawyers trained in defending existing rights on their clients behalf. Today, we have economists, political scientists, sociologists, philosophers, historians and legal scholars providing a wide range of material on the normative premises underlying intellectual property and likely developments. I look forward to a lively afternoon.

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