



Online Writing and the Global Distribution of Intellectual Property

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In this paper I look at the sometimes very extensive claims by companies that disseminate online writing of rights to the commercial use of this writing. I describe the current global distribution of intellectual property. I argue that these claims might further skew the distribution of rights of commercial use of ideas, and give suggestions for limiting these claims.

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Abstract

In this paper I look at the sometimes very extensive claims by companies that disseminate online writing of rights to the commercial use of this writing. I describe the current global distribution of intellectual property. I argue that these claims might further skew the distribution of rights of commercial use of ideas, and give suggestions for limiting these claims.

Introduction

This paper looks at claims made by companies that disseminate online writing on their rights to use the writing that passes through their systems. In many cases the claims made include extensive rights to commercial exploitation of this online writing. The companies I am concerned with in this paper run commercial online communities, that is, they provide online services which disseminate messages and material posted by cybergizens – member web pages, bulletin boards, online chat services, and so on. The central section of this paper describes the current global distribution of intellectual property in the form of patents. I argue that the claims made by these companies might further skew the current distribution of rights to the commercial use of ideas, to the detriment of developing countries. I end by suggesting ways of limiting exaggerated claims to rights of use, through good practice, consumer power, and publicity.

Examples of Terms of Service

Here are some examples of the claims made by companies running online communities to the rights of commercial exploitation of the information they disseminate.

AOL Time Warner Internet sites accounted for nearly one-third of all time spent online in January 2001 in the United States (Reuters, 2001). Here is an extract from AOL.com's terms of service (America Online, 2002).

all content and materials available on this site are protected by .. proprietary rights and laws. Except as expressly authorized by America Online, you agree not to sell, license, rent, modify, distribute, copy, reproduce, transmit, publicly display, publicly perform, publish, adapt, edit, or create derivative works from such materials or content.

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By posting or submitting content to this site, you:

1. grant America Online and its affiliates and licensees the right to use, reproduce, display, perform, adapt, modify, distribute, have distributed, and promote the content in any form, anywhere and for any purpose

This is from Sony Online's terms of service (Sony, 2001):

If you send any communications or materials to the Site ... you give up any claim that any use of such material violates any of your rights including moral rights, privacy rights, proprietary or other property rights, publicity rights, rights to credit for material or ideas, or any other right

And this is from the terms of service for the McDonald's site (McDonald's, 2001):

All remarks, suggestions, ideas, graphics or other information communicated to McDonald's through this Site (together, the "Submission") will forever be the property of McDonald's... McDonald's will have exclusive ownership of all present and future existing rights to the Submission of every kind and nature everywhere.

In fact, this last claim has no legal basis. If you send a remark in your own words to the McDonald's site, then according to international copyright law (Berne Convention, 1886) Ronald McDonald cannot automatically have "exclusive ownership" of this remark. Although you can grant McDonald's a licence to use your remark just by sending it to them, you cannot transfer copyright without saying so in writing. However I suspect that not many users of the McDonald's site are copyright experts.

Not all companies that run online communities make such wide claims as in these examples, although many do. By being specific about the uses that will be made of user-submitted material, it is possible to design terms of service that allow a distributor of online information all the rights they need for their business, but not all rights of every kind.

The Okinawa Charter

The eight leading industrial democracies declared in the Okinawa Charter (G8, 2000) that:

Everyone, everywhere should be enabled to participate in and no one should be excluded from the benefits of the global information society.

The same Charter goes on to say:

Protection of intellectual property rights for IT-related technology is vital to promoting IT-related innovations, competition and diffusion of new technology.

This may be intended as a willingness to protect the IT knowledge produced in poorer countries, and assist nascent IT industries in these countries. However, if instead this strengthens the rights of technology companies to use the knowledge disseminated through their IT systems, then it is not so clear to me that this will promote a global information society in which everyone everywhere can participate.

Geographical Distribution of Patent Ownership

Legally-protected intellectual property is at present disproportionately owned in richer countries. For example, consider who owns the patents granted for the world's largest market, the US. There were 157,497 new US patents for inventions granted in 2000. (Data for 2001 is not yet available). Residents of G7 countries own 88% of the US patents granted in 2000. Residents of Taiwan, South Korea, Sweden, Switzerland and the Netherlands own a further 8%, and other countries in the list of the top 25 most developed countries in 2000 (United Nations, 2000) own 3%, leaving 1% for the rest of the world. (US Patent Office, 2001a).

Over half of the US patents for inventions granted in 2000 were granted to US residents. One might assume that in most countries a majority of patents valid in that country would be granted to residents of that country. In fact data from the WIPO (World Intellectual Property Organization, 2001) show that this is not the case. In 1999, the most recent year for which WIPO data is available, the patent-granting countries in which a majority of patents were granted to residents were the US with a total of 153,487 patents granted to residents and non-residents in 1999; Japan with 150,059; the Russian Federation with 19,508; and twelve other mostly East European countries (Armenia, Byelorussia, Cuba, Georgia, Kazakhstan, Kyrgyzstan, Macedonia, Moldova, Mongolia, Romania, Uzbekistan, and Yugoslavia) with 3,671 between them. Every other patent-granting country in the world granted more patents in 1999 to non-residents than to residents.

In fact, about half of the 120 or so countries that granted any patents at all in 1999 granted more than 90% of their patents to non-residents. The list of the countries granting more than 90% to non-residents in 1999 is varied – it includes some very rich countries (such as Luxembourg and Monaco) as well as some very poor ones - however there is a geographical pattern: with the exception of Brazil and Argentina, the list includes every patent-granting country in South America and continental Africa. If 1999 was a representative year, then in about half the patent-granting countries of the world, nine-tenths or more of the patent-based monopolies in the country are owned abroad.

All of the patents granted in 1999 in the countries Albania, Barbados, Bosnia, Botswana, Cyprus, Ethiopia, Gambia, Ghana, Haiti, Kiribati, Lesotho, Macao, Malawi, Nicaragua, Rwanda, Sierra Leone, Sudan, Swaziland, Uganda and Zimbabwe were granted to non-residents.

Patent Ownership by Technology Companies

Although there are a few prolific individual inventors, the entities owning the greatest number of patents are, as might be expected, not individuals but large companies. Companies own 85% of the US patents for invention granted in 2000.

These are the companies that were granted over 1000 US patents for inventions in the year 2000 (US Patent Office, 2001b).

IBM 2886, NEC 2021, Canon 1890, Samsung 1441, Lucent 1411, Sony 1385, Micron Technology 1304, Toshiba 1232, Motorola 1196, Fujitsu 1147, Matsushita 1137, AMD 1053, Hitachi 1036, Mitsubishi 1010.

These companies own 13% of all the US patents for invention granted that year. Hewlett Packard was granted 901 US patents for inventions in 2000.

It is not surprising that these are very large corporations, most with headquarters in the US or Japan. These corporations have a large number of employees to come up with ideas, and can afford to retain their own patent lawyers. It is interesting, however, that the number of patents is so large - NEC was granted on average over 5 US patents a day in 2000, including weekends, and IBM was granted over 7 a day. Also, you might not have guessed that *all* these companies would be in the computing, electronics and telecommunications industries, rather than for example the pharmaceutical or automobile industries.

These numbers are likely to increase further, because there has been an acceleration of patent applications by some large computer companies in the last few years. (Not all applications are granted, and the process from patent application to granted patent takes two to three years.) The number of patent applications by HP worldwide increased by 30% between fiscal years 1999 and 2000, and 67% between 2000 and 2001 (Hewlett Packard, 2002).

Obtaining a US patent costs \$20,000. Challenging a US patent belonging to someone else that should not have been granted in the first place can cost about \$1.5 million (*Economist*, 2001).

Under TRIPS, the World Trade Organization's international agreement on trade-related aspects of Intellectual Property rights, the patenter of an invention has a monopoly on its use for twenty years (World Trade Organization, 1994:II, 33).

Terms of service claims and rights to commercial use of online writing

IT companies in poorer countries will have to wait many years before the lapse of the intellectual property protection on IT products and methods currently belonging to companies based in richer countries. Since innovation in the IT industry tends to be sequential (Bessen and Maskin, 1999), there is a danger that such companies may find it difficult to innovate and compete with established companies, and the geographical distribution of IT-related intellectual property may be self-perpetuating. Whether or not this happens, in the short term at least the online dissemination of information is almost certain to be dominated by large IT companies based in rich countries.

The terms of service with which I began this paper raise the spectre that this dominance might skew the distribution of rights to the commercial use of ideas in general, not just

IT-related inventions. Suppose that we succeed in wiring the world and giving a very large number of people in poorer countries the ability to disseminate their ideas through online writing. Is this going to mean that the companies doing the online dissemination will automatically be granted unlimited commercial use, without payment to the inventors, of all this online writing?

Suggestions

Here are some suggestions of ways of limiting exaggerated claims to rights of use in terms of service documents.

First, good practice by web site owners. If you run a web site yourself, do not claim more rights to the commercial exploitation of users' content than you need. (And do not claim rights that you are not legally entitled to.) Be careful when choosing the terms of service for your web site, and explain to the lawyer who drafts them that you do not want to claim all rights of every kind and nature everywhere.

Second, publicity. Terms of service with very extensive claims are being accepted because cybercitizens do not realize that this is happening, or do not realize that there is any alternative.

Finally, consumer power. In 1999 Geocities changed their terms of service as a result of a boycott of their services by consumers protesting at their intellectual property claims. Another virtual community made the same change within 24 hours of Geocities, because they could see that the same thing could happen to them. The Internet industry is particularly sensitive to consumer opinion, and the Internet can be a useful tool for consumer protest groups.

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