

Chapter 11

Against Strong Copyright in E-Business

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ABSTRACT

As digital media give increasing power to users—power to reproduce, share, remix, and otherwise make use of content—businesses based on content provision are forced to either turn to technological and legal means of disempowering users, or to change their business models. By looking at Lockean and Kantian theories as applied to intellectual property rights, we see that business is not justified in disempowering users in this way, and that these theories obligate e-business to find new business models. Utilitarian considerations support disempowering users in this way in some circumstances and for the time being, but also show that there is a general obligation to move to new business models. On these moral bases, as well as on practical bases, e-business ought to refrain from using the legally permitted strong copyright protections, and should instead find ways of doing business which support, value, and respect the technical capabilities that users have gained.

INTRODUCTION

One of the most ethically contentious areas of e-business is the assertion and enforcement of intellectual property rights by businesses based upon content provision. Businesses engaged in content delivery tend to view themselves as sellers of goods rather than service providers, and this difference in perspective has significant social, practical and ethi-

cal implications. By debunking the idea that strong copyright over content in a digital context is morally supported on Lockean or Kantian considerations, and by shifting the burden of proof on economic and utilitarian considerations against those who employ strong forms of copyright, the chapter demonstrates that there is generally a moral obligation to refrain from use of standard (or, *maximalist*) copyright protection in e-business. Thus, businesses based upon content provision should, for both moral and

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practical reasons, change their business model from the product to the service economy.

While it is well established in U.S. law that sweat-of-the-brow does not generate goods subject to copyrighting, there is still a strong intuition that a moral, if not a legal right over expressive works is generated through labour. By an investigation of the Lockean presumption against the right of exclusion, we can see that a viewpoint true to Locke's moral emphasis on the preservation of freedoms held within the state of nature would not support such a right given the current structure of digital media. Indeed, Locke himself, even though he wrote in a far different communications context, supported only limited intellectual property rights, which he justified on a utilitarian, not a labour-desert basis.

The Kantian basis of intellectual property rights is approached next. The Kantian view centers on author's rights, and is far removed from the current legal regime in place in the U.S. and spread internationally through the World Intellectual Property Organization, but again speaks to a strong intuition that a moral, if not a legal right to exclusion is generated in expressive works. Here, by looking at Kant's *Metaphysics of Morals*, as well as his essay "On the Wrongfulness of Unauthorized Publication," we see that the moral basis of the right of exclusion is founded upon the communicative relationship between an author and her public, and offers no support to the use of strong copyright law in our current communications context. Instead, a Kantian perspective would today support open-content models utilizing public domain dedication or GPL/Creative Commons licensing.

Finally, a utilitarian perspective—the explicit basis of intellectual property rights in the Anglo-American legal tradition—is considered. The moral basis being found in consequences rather than in natural or moral rights, the great success of the open-source movement is the primary consideration. By looking at recent history, it can be seen that the practical necessity of a right of

exclusion over expressive works within our current communications context is suspect at best. The primary utilitarian considerations holding weight today have to do with the large role played by copyright-based industries in our economy, and the disutility that would be caused by undermining the basis of these industries. This consideration, while important, is counterbalanced by considerations of the loss of public rights required by the use of strong copyright.

Several examples of currently marginal but emerging business models are then presented, including shareware, subscription, patronage, and value-added delivery models. These examples illustrate how a conceptual shift in content-delivery-based e-business from a product to a service model is able to satisfy practical utilitarian and economic considerations while remaining true to Lockean and Kantian moral considerations. In conclusion, it is argued that e-business has an obligation, on the grounds previously explained, to refrain from the use of legally available strong copyright protection.

BACKGROUND

The current debate over copyright is a tangled mess. Concerns with individual and corporate rights are intertwined with concerns about economic and social effects, and within each of these kinds of concerns there are a great number of stakeholders whose interests are not readily ranked. The rights in question include those of various parties who may or may not be the same person: the author, the creator, the copyright holder, the purchaser, the consumer, the licensee, and the user. Within larger societal concerns, the field is no less crowded: we are concerned with the freedom of the market, the freedom of the culture, and the freedom of expression; and also with the benefit of the public, of the entertainment industry, of the national economy, and of the entrepreneurial impulse. We are rightly commit-

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