THE ARISTOCRATS OF INTELLECTUAL PROPERTY:
HOW MODERN ENCLOSURE HAS FUELLED THE INTERNET PIRACY REVOLUTION

ABSTRACT

Modern intellectual property laws possess an unreasonably narrow focus on economic “incentivism” and pecuniary exploitation, which is problematic because it fails to address larger social welfare issues. This paper explores the genesis of two significant and chronologically overlapping legal evolutionary processes, that occurred in England during the 16th to 18th Century, to account for the development of this overly narrow economic focus.

The first legal process would be the conception of intellectual property laws as a result of British guild influence during the industrial age. This has accounted for the asymmetrical development of intellectual property laws, which favour right-holder protectionism and seeks to combat the growing ease of copying that technology offers.

The second process is the medieval English “Enclosure Movement”, which academics use to draw similarities between the privatisation of common lands used by rural peasants and the contemporary propertisation of intellectual resource. The effect of intellectual propertisation grants right-holders exclusionary rights and contributes to the growing lack of access to intellectual goods by the masses.

Next, this essay explores the role that multinational conglomerates have played in fostering stronger global intellectual property rights and creating informational scarcity. Corporations do so through overzealous lobbying and unfortunately, the effects of which are not confined within a domestic level, and have an upward vertical transfer on an international level as well.

Lastly, the consequential effects of intellectual propertisation are explored through the use of several case studies. Firstly, in the case of the AIDS pandemic, the inflation of pharmaceutical drug prices have effectively deprived those afflicted from accessing the necessary medicines needed to alleviate pain and prolong life. Secondly, in the case of the informational commons of the Internet, continual Governmental attempts to regulate the Internet have instead conversely accounted for the proliferation of illegal file-sharing activities.
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INTRODUCTION
The Present Conundrum

In the simplest of explanations, the term “intellectual property” encapsulates a product borne of an individual’s intellectual labour; the process of thought, imagination, invention and creation. The resultant expression or product of that intellectual pursuit, is then “enclosed” or “privatised” under copyright or patent law, made subject to the right of proprietary ownership. Along with that proprietary ownership is attached a bundle of auxiliary beneficiary and exclusionary rights.¹ This grants the owner a duality of rights to not only exploit his intellectual work through its sale or rent, but at the same time it also affords him a discretionary power to control who may then have access to enjoy or use the said product.²

That definition, however, in reality is quite nebulous.³ As a result, the legal barriers set in place to safeguard a right-holder’s intellectual property have eroded to the point where an ordinary lay-person finds it hard to distinguish between lawful usage and infringement.⁴ Contributing to this erosion is the surge in the number of technologically-savvy individuals who are emancipated from the inconvenience of the physical world of print and paper, but are instead well-versed in the ease of file-sharing that is associated with the virtual-plane of the Internet.⁵ The freedom, anonymity⁶ and neutrality⁷ associated with the Internet has thus allowed for the creation of an ill-conceived expectation (amongst modern consumers) that anything and everything freely downloadable from the Internet is in fact free.⁸ At a glance, who can blame them? Where the overpricing of books, movies, music and every other

³ Biogen Inc v Medeva PLC (1997) 114 RPC 1 (UK) per Lord Mustill.
⁵ Adam D Moore, A Lockean Theory of Intellectual Property (Dissertation, Ohio State University, 1997) ii.
conceivable form of intellectual property is the norm in today’s society; it is no wonder that Internet pirates are being hailed by Internet “geeks” as cult-heroes, revolutionaries and virtual Robin Hoods fighting against greedy corporate overlords.  

Mainstream intellectual property theory however persistently insists that the overpricing of intellectual goods are justified. On the basis that pecuniary reward is a necessary mechanism embedded within intellectual property rights to provide creators and authors with an incentive to continually create or innovate and that the element of incentivism is thus directly proportional to the effect of stimulus. Which is to say, the more financial gain afforded, the larger the impetus to create. This assumption conversely condemns piracy since legislation criminalises unauthorised copying and also undermines the future creative output of the creator due to his loss of financial gain. Yet, such an assumption is argued by dissenting academics to be inherently flawed when considering this simple scenario: are markets lost or is harm wrought onto the creator when an individual downloads a song that he never subjectively intended to purchase in the first instance?

Setting aside the debate of whether online piracy is ever justified as a retaliatory response to the overpricing of digital content, consider instead whether the mainstream assumption about the current system of intellectual property is true. Especially with regard to the larger social implications that arise from the issue of global accessibility to medicine. The creation of pharmaceutical drugs is undeniably seen as the noblest of human productions and yet it is neither freely accessible nor freely disseminated. Medication is priced expensively, and is overzealously coveted and protected by large pharmaceutical corporations for the sake of economic exploitation. In that regard, should civil disobedience be favoured instead as a revolutionary response; where the illicit reproduction of generic drugs actually affords society more boon then it does bane?

The crux of this contemporary conundrum is therefore as Jeremy Waldron astutely observed; simply a matter of perspective. The line between infringement and free enterprise is a fine one. Which is to say that if people respect a creator’s right to profit from his intellectual

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endeavours, then the copier is perceived as nothing more than a thief. If, however, the perspective is inverted; where the author is seen as nothing more than a statutory monopoly, then copying is justified since the copier merely epitomises the ideals of free enterprise.12

This paper argues that the contemporary conundrum posited above is a result of the historical development of intellectual property laws, which has been moulded over time through the influence of corporate entities. This paper further explores the detrimental effect that the incremental strengthening of intellectual property laws has had on consumers. And explains how the marginalisation of consumers has attributed to the proliferation of piracy as a natural counter-intuitive response towards promoting freedom of access to informational and intellectual goods.

First, Part I of this paper explores the historical creation of intellectual property laws, which emerged as a result of the influence British guilds had over the Monarchy during the 16th Century. This proves that from the initial creation of intellectual property laws, social welfare and the ideals of free dissemination of knowledge was of little importance to medieval legislators. This is further contrasted against the modern economic justifications that proponents of intellectual property rights adopt in their bid to promote the strengthening of pre-existing intellectual property rights. Second, Part II then discusses the chronologically overlapping legal formative process of the medieval British “enclosure movement”. And further discusses how the British nobility strove to deprive peasants of common lands and defended their actions by citing the inevitable tragedy of resource overuse if the commons were allowed to persist. Third, Part III then compares the similarities and dissimilarities that modern interpretations of intellectual enclosure had to its medieval predecessor. And also raises the pertinent issue of who the aristocrats are in today’s modern context so as to adequately identify the rationale behind the need for stronger intellectual property rights. And finally, Part IV of this paper focuses specifically on the modern debate surrounding the Internet. Exploring not only the need for fairer-pricing of digital content but also the relaxation of restrictive interference from private and public bodies alike. This is because tighter regulatory control in reality propagates more instances and sophisticated methods of piracy. Lastly, this essay also considers examples of revolutionary market practices which could quell consumer dissatisfaction; by allowing increased affordability and accessibility of intellectual and informational goods for the masses.