

# The intellectual capitalist

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## The highest form of flattery

**The modern-day debate about IP is often described as polarised and ideological. Unfortunately, this may be too kind. Many views are best described as naïve and manipulative. The discourse on counterfeiting and piracy is a good case in point**

Intellectual property is not only an issue of competitive advantage; it is a fundamental tool for the creation of wealth and welfare for all members of society. IP is about the control of knowledge, which requires a careful, thoughtful balancing act so as not to slip from constructive to destructive. It is unproductive in this difficult task to express one's own self-interest as fact without any discussion of the broader consequences.

One opinion expressed as fact in IP circles is that all unauthorised use of others' IP is illicit behaviour by definition. But is this true? Maybe the best way to answer the question is with a thought experiment – when is the use of someone else's IP completely unproblematic or even justified (dare we say, positive for society)?

In making its "compelling case", an International Chamber of Commerce (ICC) report on the effects of counterfeiting and piracy is quick to point to loss of tax revenue, loss of jobs and loss of financial incentives to innovate. Furthermore, it adds, such IP appropriation can lead to the creation of significant health and safety risks and links to organised crime. It's strange that nowhere is the loss of profits or shareholder value listed as a significant effect. That is, until you realise that this message is directed at lobbying governments for support, which explains why taxes and jobs top the list. When industry is arguing why tax is good, it pays to be suspicious.

### Loss of money and jobs

An OECD report published in 2007 estimated that worldwide counterfeit and piracy totalled several hundred billion dollars more than their calculated number of US\$200 billion – let's say US\$400 billion, then. If loss of taxes and jobs is industry's politically correct translation for loss of profits, that begs the question of

where these US\$400 billion of products come from and who has all that money. The argument tends to stop short of this investigation as the notion of lost corporate profits and jobs seems a sufficient argument for politicians in developed economies. However, these products didn't just magically appear and the revenue generated must be in someone's pocket.

Suffice it to say that jobs were created and profits were made, albeit extra-legally, by the poor in developing countries in Asia. Isn't there an argument that selling copies of products is an essential part of the economic development process, especially given that all current developed countries have previously used the same strategy? Is it acceptable to make profits from low-cost Asian labour, but totally unacceptable to lose profits through grey-market copies? Is it reasonable to be pro-sweatshop and anti-counterfeit? How about pro-tariff and anti-counterfeit?

This incomplete argumentation is, of course, nothing new and lobbyists are great at spinning the message. In particular, the use of labels is effective. See, for example, the use of the terms stealing and piracy in digital media. To quote an ICC 2005 BASCAP report: "Media, policy makers, and the public are often more effectively influenced (and motivated to act) by accounts and stories that touch their lives and reveal the negative impacts of IP theft than they are by statistics." Yes, we don't want any objective, scientific study to bog down the debate. The OECD 2007 study further points out in its key findings and conclusions: "To date, no rigorous quantitative analysis has been carried out to measure the overall magnitude of counterfeiting and piracy." It then goes on to estimate the amount at approximately US\$400 billion using its obviously "non-rigorous" method.

It would seem, therefore, that US\$400 billion of loss per year isn't enough of a problem to initiate a major study these days. But it would be interesting, say, to investigate whether the sale of fake Rolex watches has any impact on the bottom line of Rolex – it is likely it doesn't. Certainly most consumers of fake designer products

are not buyers of the real products and have little effect on those that are. With IT-based piracy, isn't the consumer also the pirate in most cases? Prosecuting your customer is a difficult sales technique. How should this "loss" be measured?

### Disincentive to innovate

IP and the incentive to innovate is an old mantra. The more pertinent question is whether unauthorised copies cause less innovative activity in the economy. The ICC contended that the trend in 2005 of economic losses from counterfeit and piracy "reach colossal new highs each year". This is supported by the OECD US\$400 billion estimate. Has there been a slowdown in innovative or creative activity? We heard of the death of music, but all it meant was the death of profits to intermediaries with outdated business models. It is ironic that those who espouse IP as a cornerstone of innovation policy often use IP rights as a means to defend the *status quo*. There is no doubt that IP rights can affect innovation; however, whether it is positive or negative depends on the situation.

This is not a pro-counterfeit article, but it is anti-spin. Learning and in many cases imitation will always be positive. As copying is a way to learn, will we end up arguing that learning is stealing? Why don't we consider libraries, where persons are non-commercially allowed to borrow books (ie, knowledge and creative works), as stealing as well?

The role of IP in the knowledge economy will require greater balance than what was demanded in the past. It is no longer possible to face new, complex challenges with simple clichés in place of holistic, thoughtful rigour on both sides of the equation. In the 21st century our profession will undoubtedly be judged by our ability to master this balancing act.

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