

WORLD WIDE WEB OR TELA TOTIUS TERRAE? WHAT THE ROMANS COULD DO FOR US

by

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The question of intellectual property protection is almost as old as mankind itself. Certainly since antiquity, creators of intellectual goods have voiced complaints about so-called intellectual theft and the perceived violation of their rights. These complaints have increased over time and have eventually lead to what could be labelled “total propertisation” of such goods in both the real and the virtual world. The consequences of this development have been described as disastrous not only for the sectors of research and education but also for society as such.

Concentrating on the question of intellectual property and the World Wide Web, this paper examines the question if the WWW could be considered a service as indispensable for today’s society as some services in ancient Rome and what, if anything, modern society could learn from the ancient view. It is suggested that it might not be such a bad idea to re-discover some forgotten values to the benefit of society.

Introduction [1]

In this day and age, all sectors of economic activity depend heavily on information and communication technologies. It has also been said¹ that the Internet has fundamentally changed the practical and economic realities of distributing scientific knowledge and cultural heritage and, that the Internet now offers the chance to constitute a global and interactive representation of human knowledge, including cultural heritage and the guarantee of worldwide access. Yet increasingly, this unique chance appears to be at threat: the culprit being the ongoing and persisting enclosure of cyberspace and the propertisation of online resources.

¹ Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, Preface.

The explanation for this development is neither new nor particularly unusual and has been described with “if value then right”. To put another: if a certain good is taken to be of some (monetary) value, then, surely, its owner must possess a right in it? But does this mean that everything that has some value has to be (privately) owned?

Almost inevitably, any attempt to explain this development leads back to the question of intellectual property protection, a question which is almost as old as mankind itself. Since antiquity, creators of intellectual goods have voiced complaints about so-called intellectual theft and the perceived violation of their rights. However, this is not the reason why a look at the Roman perception of intellectual property might prove beneficial. Rather, the Roman stance on intellectual property reflects values and ideas which might prove equally useful in relation to the establishment of the “Information Society”. In particular, the question is could the World Wide Web be considered a service as indispensable for today’s society as some services in ancient Rome, hence the term “tela totius terrae”? Or does information (in the broadest meaning of the word) have to be privately owned as some voices increasingly would like to make the public to believe?

Ancient Rome: Intellectual Property as a Public Good [2]

In ancient Rome, services which nowadays are only rendered in exchange for money used to be performed gratuitously; these services used to have a function of their own in society and not just in special personal relationships but in general and with no limitation.² These gratuitous services covered essential needs of society and the State; the condition of both rested for hundreds of years on the presupposition that such services could be safely depended upon at all times to the needed extent without pay; these services were indispensable, and yet at the same time free. Labour had only a limited economic importance. This also applied to intellectual labour: the main incentive for writing literature was fame. To some extent, it might even be said that a work’s content was, with publication, “legally abandoned” by its author.³ Once published, it could be reworked, altered and copied. Thus,

² Cf. von Jhering (1893: 104).

³ Peter (1911: 437).

intellectual power, talent, knowledge were goods which everyone who valued honour had to place gratuitously at the disposition of his fellow citizens and the State. The State official received no salary (only subordinate service was paid, so far as it was not provided for by public slaves); magistracies were purely posts of honour (“honores”). Neither did the calling of juriconsult (“juriconsultus”), another indispensable service to Roman life, bring any income.⁴ Therefore, it would have been paradox if something that was considered to be essential, a public good, had – all of the sudden – been declared an object of private ownership.

Yet it is not as if there was no acknowledgement of intellectual goods: Roman authors were accusing each other of “intellectual theft”, potters signed their works and inventions were associated with the name of their inventors.⁵ The poet Martial, for example, referred to a person reciting poems written by him, Martial, as his own as “plagiarus”, i.e. “kidnapper”.⁶ But there is no report about any legal proceedings having been taken for intellectual theft nor does there appear to have been legal protection available. How come?

It is too easy to explain this lack of legal protection with the limited technical possibilities of reproduction: that, as long as literary works were reproduced by manual copying, no considerable monetary exploitation of the absolute right of reproduction was possible and, thus, no economic need for the protection of intellectual property existed. Such an explanation can even be considered unsatisfactory⁷ as there were booksellers which, by means of dictating texts simultaneously to several writers (mostly specially trained slaves), were capable of producing editions of up to 1,000 copies.⁸ In fact, the quality of reproduction – as well as the quality of other means of communication – as it was organised in ancient Rome was superior to the standard of reproduction in the Middle Ages. Furthermore, Roman Law acknowledged the existence of intangible objects – the denial of the existence of such things would inevitably have made the recognition and protection of any related right impossible.

⁴ Kunkel/Schermaier (2005: 125).

⁵ Fechner (1999: 22ff.).

⁶ Martial Ep. 1, 52.

⁷ Kohler (1880: 319f.).

⁸ Fechner (1999: 23); Marquardt (1964: 830).

Today: Intellectual Property as a Private Good [3]

Given this historical account one might, therefore, question whether or not is there a need for private property in intellectual goods at all. But, as Hunter has pointed out, private ownership of resources is not problematic in itself; rather, private ownership is generally considered the most efficient form of allocating property resources, and the economic history of the last five hundred years has been characterised by the movement from the public to the private.⁹ And there is, as Hardin has demonstrated, the tragedy of the commons: public resources are overused and destroyed where there is no private property limiting their use. Thus, there is clearly a place for private property and moreover, a justification for its existence in general – at least in the real world and in relation to tangible goods. Yet, with regard to intellectual property, the picture seems to present itself quite differently: here private ownership can lead to a tragedy of the anticommons, the situation when multiple parties can prevent others from using a given resource so that no one has an effective right of use. This in effect will lead to inefficient underuse of the resource. Increasingly, this appears to be the case with the Internet as online resources are being privately enclosed. Eventually, this development will create a digital anticommons, in which no one will be allowed to access competitors' online "assets" without either licensing access or agreeing to some other transactionally expensive permission mechanism.¹⁰

Historically, this development is rather a paradox – commons property defined the early architecture of the Internet and commons property ensures its functioning today: take, for example, the protocols on which the operation of the Internet relies upon. In recent years, however, many proprietary software companies have discovered the Internet and invented new protocols without passing them through any standardisation process supervised and authorised by organisations like the Internet Engineering Task Force or the World Wide Web Consortium, resulting in incompatibility between different products like Microsoft's and Netscape's web browsers. The enclosure movement of intellectual commons does not

⁹ Hunter (2003: 502).

¹⁰ Hunter (2003: 502f.).

end here: ongoing term extensions for copyright (resulting in only few works having moved from copyright into the public domain for decades); scope extensions for patents to include business methods (affecting online transactions); new intellectual property rights for hitherto unprotected collections of facts (also relevant to the World Wide Web); the erosion of fair use in areas such as parodies and decompilation of computer programs; and the rise of digital rights management systems. All of these either already have a restrictive effect on the Internet or are bound to have such an effect on it in the not so distant future.

Yet, the economic rationale underlying the privatisation of tangible goods does not apply to a non-rivalrous good like data as one person's use of another person's data does not deplete or prevent that person's use. Also, from an economic perspective, the more people who can use information, the better. From this point of view, the cyberspace enclosure clearly contravenes the objectives and demands of a successful development of the Information Society – if one takes the concept of such a society seriously as a Knowledge(-based) Society, i.e. a society in which low-cost information and Information and Communication Technologies (ICT) are in general use and whose most valuable asset is investment in intangible, human and social capital. It should go without saying that the key factors to this concept are knowledge and creativity. But how to achieve these goals if information and knowledge is locked away instead of freely available? Surely, this cannot be in the interest of any government or official body promoting the establishment of an information society.

This effect becomes even more striking if one considers the fact that information is a public good. And, technologically, the Internet does consist only of information and anyone can transmit data onto the network. However, given the current development, the access to (at least scientific) information is becoming increasingly dependant upon the permission of a private owner. But in order to realise the vision of a global and accessible representation of knowledge, the future Web has to be sustainable, interactive, and transparent. Content and software tools must be openly accessible and compatible.¹¹ The road we appear to be on at the

¹¹ Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities.

moment does not lead to the goal of inclusion but away from it. Especially the goal of supporting innovation by stimulating the competitiveness of the ICT sector, by improving the enabling environment for ICT-based innovations and by promoting the widest and most effective take-up of ICT seems to be at risk.

Conclusion [4]

Therefore, a recourse to the Roman reading of intellectual property appears to be advisable: instead of the monetary value of intellectual goods, the focus should be on more transcendent values again. This is not to say that there should be no financial remuneration at all; indeed, such a claim would be unrealistic, given the times we are living in. However, in the interest of the desired Information Society and its sustainability, the balance between owners of perceived rights in intellectual goods and users of such goods should be reconsidered. It need not get as far as in Roman times but the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities,¹² however, might be a good starting point in order to make information and knowledge more freely accessible again. And who knows, constant dripping might wear away the stone...

¹² According to the declaration, open access contributions must satisfy two conditions:

1) The author(s) and right holder(s) of such contributions grant(s) to all users a free, irrevocable, worldwide, right of access to, and a license to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship (community standards, will continue to provide the mechanism for enforcement of proper attribution and responsible use of the published work, as they do now), as well as the right to make small numbers of printed copies for their personal use

2) A complete version of the work and all supplemental materials, including a copy of the permission as stated above, in an appropriate standard electronic format is deposited (and thus published) in at least one online repository using suitable technical standards (such as the Open Archive definitions) that is supported and maintained by an academic institution, scholarly society, government agency, or other well-established organization that seeks to enable open access, unrestricted distribution, inter operability, and long-term archiving.

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