



Lawrence Lessig - The BBC's lessons for America.

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Greg Dyke, director general of the BBC, announced last month that the broadcaster would make the contents of its vast archive available to the public so long as any re-use of that content was for non-commercial purposes. (Commercial re-users will have to strike their own deal.) The BBC Creative Archive would enable the British to cultivate this national resource - for which they have already paid - for educational, critical or comedic purposes. The very structure will also make it much more likely that commercial creators will be able to identify content valuable to them, and then license that content from the BBC. The idea is a brilliant response to the extraordinary explosion of creative capacity enabled by digital technologies, in light of the BBC's founding mission - as Lord Reith put it - to "inform, educate and entertain".

It also required a bit of creative thinking. For the natural intuition of content owners is control. The very idea of giving up perfect control over how and whether content is re-used is treason among insiders. But as the BBC understands, it does not live in Disney World. And in the course of its internal review an obvious question has become increasingly pressing: if the BBC could make its archive available cheaply, what reason is there for keeping it from the people who have already paid for it? Moreover, such access would increase the BBC's chances of selling content commercially and make it more likely that the technology to cultivate this content (computers) will be more eagerly bought.

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On the other side of the Atlantic there is little evidence of similarly creative thought. Instead, the US government remains captured by the extremists. The very same week that the Creative Archive was born in Britain, it was exercising its power to kill a planned meeting of the World Intellectual Property Organisation (WIPO), the United Nations' intellectual property agency, to consider "open and collaborative projects to create public goods". The examples that had led WIPO to call for that meeting included the internet and World Wide Web (whose protocols are in the public domain); a consortium of biomedical researchers and companies exploring single nucleotide polymorphisms (SNPs); and the Global Positioning System, which Ronald Reagan had set free for any use, commercial or non-commercial, in the United States in the early 1980s. It also included the phenomenon of free and open source software (F/OSS). It was this last category that excited the opposition of Microsoft.

While there are many commercial developers who build and rely upon F/OSS (IBM and Apple to name two), Microsoft is not one of them. For it, F/OSS is instead a competitor. And it therefore launched a lobbying campaign to get the US to have the meeting cancelled.

There is no surprise in Microsoft's behaviour. Nor is there anything wrong with a business lobbying the government to behave in a way that benefits it, even if it harms everyone else.

But what was surprising was the US government's reasoning for the meeting's withdrawal. Lois Boland, director of international relations for the US Patent and Trademark Office, explained "that open-source software runs counter to the mission of WIPO, which is to promote intellectual-property rights". As she further explained: "To hold a meeting which has as its purpose to disclaim or waive such rights seems to us to be contrary to the goals of WIPO."

These statements are astonishing for a number of reasons. First, they are just flat wrong. Neither "free" nor "open source" software is in the public domain. Both depend fundamentally upon strong intellectual property rights, and supporters of both are eager that WIPO facilitate easy enforcement of their rights in any jurisdiction.

Second, who said WIPO's sole purpose was to maximise intellectual property rights? Is WIPO against generic drugs? Is it a failure of WIPO's objectives that patents do not run for 100 years? As every serious economist since Adam Smith has taught, good intellectual property policy is not the same as maximal intellectual property rights. And as every serious policymaker should therefore understand, WIPO's objective should be good policy, not maximal rights.

But third, and most troubling, why would it be "contrary to the goals of WIPO" for intellectual property rights holders to "disclaim or waive" their rights? Property is all about individuals having the right to choose what they do with their property rights. Does Bill Gates undermine private property generally when he gives \$20 billion to do good in the world? The last time I wrote about the United States Patent and Trademark Office on these pages, it was to praise the apparent scepticism of the Office's new boss. I was quickly scolded by the USPTO press office. The only problem with the patent system in the US, I was told, was that patents were not issued fast enough.

Ms Boland's comments confirm that the US administration remains captured by a simplistic and fundamentally misguided idea: that if some control is good, then more control must be better. That idea is simply wrong. And if the BBC survives the pressures now bearing upon it from the intellectual property extremists, perhaps its Creative Archive will help the US think more creatively as well.

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