

The internet's undoing: Commercial control and tighter protection of intellectual property will end up stifling innovation, warns Lawrence Lessig

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ABSTRACT (ABSTRACT)

Yet neither the rise nor the fall of the net is hard to understand if you know where to look. Its source is in the ecology produced by the network's basic design. The innovation of the internet flowed from the network's architecture - and the demise of that innovation flows from the corruption of the environment created by that architecture.

Governments sometimes get this point, though never consistently and never in time. This was the core of the case against Microsoft. Microsoft defended its "unrestrained right to innovate" in the name of its property copyright; the court of appeals for the DC circuit unanimously held that upholding this property right was secondary to preserving a competitive and neutral platform for innovation. A similar insight has led Michael Powell, chairman of the US Federal Communications Commission, to hint that overly protective intellectual property laws may be stifling broadband deployment. And recently, the Federal Trade Commission announced it would investigate the effect of software and business-method patents on internet innovation.

These are hopeful signs but they are incomplete. Governments that want to see more innovation should be careful to ensure that the architecture of the new network preserves the values of the past. Enclosure of the innovation commons is the first step to the undoing of the internet revolution. There is little evidence that regulators understand these changes or will stop them in time.

FULL TEXT

The internet revolution has fizzled out just as surprisingly as it began. No one foresaw the explosion of innovation that it produced; no one guessed it would end as precipitously as it did.

Yet neither the rise nor the fall of the net is hard to understand if you know where to look. Its source is in the ecology produced by the network's basic design. The innovation of the internet flowed from the network's architecture - and the demise of that innovation flows from the corruption of the environment created by that architecture.

Network "architecture" is not the usual place where policy is found, so policymakers can be excused if they have failed to notice its role so far. But we shall lose a great opportunity for growth and creativity if we do not come to understand the ecology of this network and how changes to this ecology lessen its potential.

Though it was built on computers and wires that were owned, the internet belongs to no one. Its design left a core resource - the right to innovate - essentially free. The network's communication protocol, for example, did not

enable network owners to discriminate about the flow of information through their wires. It offered equal access to all who could develop content or applications - and broadcast them - without seeking the permission of a network owner or administrator. The internet's original architecture thus created a sort of "innovation commons".

That commons is now under attack. Those who were threatened by its potential have sought to contain it. Changes in the network's physical infrastructure and in the legal environment within which the network exists threaten to destroy it.

The physical infrastructure is transforming as cable companies, and soon telecommunications companies, persuade governments to free them of traditional common-carrier responsibilities. As a result, companies can exercise more control over what runs along their wires and even decide which content flows at what speed - something called "policy-based routing".

This change alters a crucial premise of the original internet: that no one should exercise control over the platform to set "policy" about how the network would develop. By permitting such a fundamental shift, governments are allowing the enclosure of the innovation commons. That will destroy innovation.

A similar change is happening in the content layer of the net. As intellectual property laws have been expanded and strengthened, stakeholders of pre-internet industries have used them to veto threatening innovations. Online music is the best example: a concerted campaign by traditional record labels has stopped every independent form of online music distribution and production. The big labels call these new competitors "thieves" and defend their legal action in the name of their "property".

But these innovators are no more - and no less - thieves than cable television companies were thieves when they "stole" broadcasting content and resold it to their customers. In that case, however, courts were slow to stop the "theft" because they were slow to extend old laws to cover new technologies. And when the US Congress eventually tackled the matter, it ensured that the old (broadcasters) could not veto the new (cable) by exercising control over property to stifle innovation. The same can, and should, happen with online music but this time the courts have been quick and Congress slow.

In both architecture and content, changes to the network's original environment are being justified in the name of protecting "property". But this property-focused debate misses the equally important need to protect the innovation commons. Over-zealous protection of property rights can allow yesterday's property owners to stifle tomorrow's innovations.

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These are hopeful signs but they are incomplete. Governments that want to see more innovation should be careful to ensure that the architecture of the new network preserves the values of the past. Enclosure of the innovation commons is the first step to the undoing of the internet revolution. There is little evidence that regulators understand these changes or will stop them in time.

The writer is professor of law at Stanford Law School and author of The Future of Ideas Copyright Financial Times Limited 2001. All Rights Reserved.

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