

## Will the information highway make IP obsolete?

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Since I write a column on intellectual property, my attention was naturally caught by the words "everything you know about intellectual property is wrong" on the cover of the March issue of *Wired* magazine.

*Wired*, for readers who may not be up-to-the-minute with the latest techno-cosmic fashions, is a well-known new monthly magazine about computers, virtual reality, the information superhighway and other hi-tech stuff.

The full title of the article is "The Economy of Ideas; a framework for rethinking patents and copyrights (everything you know about intellectual property is wrong)" by John Perry Barlow, who is, according to a short blurb accompanying the article, "a lyricist for the Grateful Dead". The thesis of the article, so far as I can make out, is that copyright and patent laws are outmoded because they are based on physical embodiments of ideas, and are meaningless in the age of hi-tech when everyone sends digitized information back and forth over the Internet (or information superhighway or whatever you call it).

"If our property can be infinitely reproduced and instantaneously distributed all over the planet without costs, without our knowledge, without its even leaving our possession, how can we protect it? How are we going to get paid for the work we do with our minds?" asks Barlow, who calls the world's intellectual property system "moribund" and "a sinking ship". He talks of the dawning of the Virtual Age, when new forms of intellectual property will emerge. "Notions of property, value, ownership, and the nature of wealth itself are changing more fundamentally than at any time since the Sumerians first poked cuneiform into wet clay... Only a very few people are aware of the enormity of this shift, and fewer of them are lawyers or public officials."

As a lawyer, I hate to be unaware of shifts, especially enormous ones, so I earnestly read the article several times.

In the end I concluded only that Mr. Barlow must have consumed more than his share of prohibited substances while writing all those Grateful Dead lyrics. His complaints about the world's IP laws are muddled and contradictory. IP laws are no good, he says, because

the new technology makes them impractical and unenforceable. On the other hand, "broader and vigorous enforcement" of IP laws " will inevitably threaten freedom of speech".

Now, I'm something of a computer nerd myself. I love magazines like "PC Computing" and "Windows Sources", and sprinkle my conversation with terms like Internet, DOS, hard-drive and megabytes. Nevertheless, I'm not so sure that the world's intellectual property laws will be thrown in the dumpster any time soon, just because of computers. For one thing, years of effort have recently resulted in an international harmonization of the world's intellectual property laws as part of the Uruguay Round of trade negotiations. No one that I know of (other than Mr. Barlow) is proposing to rip up these laws and start again.

It is of course true that technology poses copyright problems, but no dramatic overhaul of the law of copyright is likely to improve this situation. Some estimates say that half of all the software running on the world's computers is pirated. But widespread piracy is nothing new. Unauthorized copies of novels were common in the nineteenth century. Everyone has been copying tape cassettes for years. The reality is and always has been that copyright-owners have to make their product more easily available and more convenient than bootleg products in order to survive, and that copyright laws are of only limited use in preventing piracy. Despite all this, Bill Gates seems to manage to make money somehow.

One of Mr. Barlow's objections to copyright law is that information zips around the world on the Internet without being effectively protected by copyright. But copyright has always protected only the fixed expression of ideas, not the ideas themselves. I for one see nothing wrong with this. There has never been copyright protection of the spoken word, nor of what you say on the telephone, nor should there be of what you put on the Internet, if you do not first record it in some fixed form. If you have a database that you don't want people snooping in, you should set up appropriate security, just as you would lock your house.

Mr. Barlow's objections to the patent system are equally hard to follow. Patents are outmoded in the age of the Internet, he says, because "mental to physical conversion" is central to the idea of patents. "If no purposeful object could be rendered because of some material limitation, the patent was rejected...It had to be a thing and the thing had to work".

First of all, this is not quite right, and second of all, so what?

A patented invention does not need to "be a thing". It can be a new or useful "art", meaning a method of doing something, such as, for example, a new way of refining oil. Granted, there has to be some practical physical result. But, Internet or no Internet, what is wrong with that? It has never been the purpose of the patent system to protect abstract theories or new discoveries. It is difficult to see why this should change just because

people now communicate frequently by computer. Theories and discoveries have always been, and will I hope continue to be, available for everyone to discuss and use freely, either on Internet or in any other way.

It is true that an invention, to be patentable, has to work, in other words, it has to have what patent lawyers call "utility". Again, it is difficult to see what is wrong with this. The whole point of the system is that the inventor discloses something new and useful to the world in return for a twenty year period of exclusivity. It would be a waste of time to confer this benefit on inventions that don't work.

It is true that the computer revolution has changed and will continue to change our intellectual property laws. For example we now have, as of a year or two ago, a new type of intellectual property in Canada and in most other western countries, namely a registration system designed to protect the topography of integrated circuits. Our copyright laws have also been expanded to protect computer programs as though they were literary works.

But the idea that our intellectual property laws are about to vanish in a kind of hi-tech apocalypse is just part of the current frenzy of hype surrounding the information superhighway.