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Commentary

Land, knowledge and the space in between - is there a distinction between property rights and intellectual property rights? – Meir Pugatch and Helen Disney¹

On Property Rights

Just what is the difference between property rights and intellectual property rights (IPRs)? From an economic perspective, the difference lies in the nature of the resources that we are using and more specifically, about the *scarcity* of these resources.

Economists explore ways of efficiently allocating scarce resources to unlimited wants. Let us take land as an example. Land is a scarce resource, the more people we have on this planet, the scarcer it becomes. So how do we make the most efficient use of land? We do so by establishing property rights. Putting aside all the philosophical and theological explanations (important as they are), the most famous formal economic justification for the use of property rights with respect to scarce resources was given by Garrett Hardin in 1964, in an article entitled *The Tragedy of the Commons*. Building on a scenario that was first developed in 1833 by the political economist William Forster Lloyd, Hardin explained the nature of the tragedy:

Picture a pasture open to all. It is to be expected that each herdsman will try to graze as many cattle as possible on the commons. Such an arrangement may work reasonably satisfactorily for centuries because tribal wars, poaching, and disease keep the numbers of both man and beast well below the carrying capacity of the land. Finally, however, comes the day of reckoning, that is, the day when the long-desired goal of social stability becomes a reality. At this point, the inherent logic of the commons remorselessly generates tragedy – the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd... and another. But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit, in a

world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.

Thus, as Hardin explained to us, if we were to establish property rights in that pasture, each individual would become responsible for the consequences of his own behaviour. Consequently, each property owner would have the incentive to take care of his land, both during the short term and for years to come. Indeed, this theory applies to many situations in which we have to allocate scarce resources. By establishing property rights we help to prevent the tragedy of the commons as well as to increase our social productivity as a whole.²

On IPRs

But what about *knowledge* and *creativity*? What kind of resource are they? They are certainly not scarce (in fact, they are 'public goods'). Theoretically-speaking, the potential use of existing knowledge is unlimited and may be diminished only when such knowledge becomes obsolete. In other words, the use of any invention or creation by one individual does not reduce its accessibility to others but is more likely to increase it. If, just now, we thought of a brilliant poem or an invention, after we let you listen to this poem or to learn about the brilliant invention you are all free to use it, so that this creativity and knowledge would now be freed to the world for anyone to use and enjoy.

So why should we establish property rights and restrict the use of such a wonderful resource? The reason lies in the essence of human nature, and in particular a phenomenon called 'free-riding' (as articulated by the famous Nobel Prize winner, Kenneth Arrow in the 1950s).³ In the absence of property rights for these types of knowledge and creativity resources, as well as in other forms of collective goods, free-riding occurs when the innovator/creator cannot prevent others from exploiting his/her creation/invention free-of-charge. Consider a case in which an innovator was able to develop a revolutionary product, such as a pharmaceutical compound to treat some form of cancer, or a

new Internet based software. If the innovator decides to sell his invention in the market, he cannot expect potential buyers to pay for the invention without first assessing its potential uses, effectiveness and value. Yet, doing so will effectively allow potential buyers to obtain crucial information from the inventor free-of-charge. Moreover, once a potential purchaser has gained sufficient information and, provided he has the capabilities, he is now in a position to copy the innovation without paying for it at all.

Consequently, the problem of free-riding creates a disincentive for private entrepreneurs to engage in innovative and creative activities, as they will not be able to receive commercial returns for their work.

This problem was already been recognised and noted as far back as 1793 by the father of utilitarianism, Jeremy Bentham, who argued that “without the assistance of the law, the inventor would almost always be driven out the market by his rival, who finding himself without any expense, in possession of a discovery which has cost the inventor much time and expense.” Bentham concluded that “he who has no hope that he shall reap will not take the trouble to sow”.⁴

Therefore, we grant property rights to products that are based on knowledge and creativity because we know that, without these rights, we would have fewer of these products. To this extent, IPRs provide the security and the incentive that innovators and creators need in order to invest the time and money, as well as to bear the risk of trying to bring a new product to the market.

In the knowledge economy, IPRs have become more important than ever, as the national aspiration of each nation, as well as the EU as a whole, is to climb up the innovation value chain.

The Present and the Future

The IP system has its problems, and it can be improved and adjusted in order to meet the challenges of time. But its rationale and underlying principles are as powerful today as they were when the system was founded, back in Renaissance Venice.

It is therefore disappointing to see that in some fora (including the EU) IPRs are still being treated as a barrier to commerce rather than as a platform for innovation and creativity. Attacks on the IP system are usually portrayed as an attempt to increase access, to boost competition and to fight monopolies. But these attacks are based on the notion that society would be better off by free-riding the innovation and creativity of other people, and at times even by the appropriation of these products (via compulsory licensing).

This is a serious mistake – not only in economic terms, but also in philosophical and historical ones. IPRs are the hub through which society gains more and more innovative products. In exchange, society is required to wait for the duration of the temporary period of exclusivity granted by IPRs. Yes, there are short-term costs but the long-term gains are far more substantial. As Adam Smith argued in *The Wealth of Nations*: [it] is the easiest and most natural way in which the state can recompense them [the innovator and the risk takers] for hazarding a dangerous and expensive experiment, of which the public is afterwards to reap the benefit. A temporary monopoly of this kind may be vindicated upon the same principles upon which a like monopoly of a new machine is granted to its inventor, and that of a new book to its author..⁵

Europe experienced a fierce debate about the nature of the IP system during the 19th century, and eventually the advocates of intellectual property prevailed.

We are told that the future lies in our ability to know our history and learn from it. Europe only needs to understand and appreciate the magnitude of its contribution to the creativity and innovation of our society. It did so once by inventing the system of intellectual property rights. It must rediscover that appreciation, if it is not to stifle and snuff out its creative sparks.

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². Hardin, G. "The Tragedy of the Commons," *Science*, vol. 162(1968), pp. 1243-1248

³. Arrow, K. 'Economic Welfare and the Allocation of Resources for Invention', in: *The Rate and Direction of Inventive Activity: Economic and Social Factors*, ed. National Bureau of Economic Research (Princeton, New Jersey: Princeton University Press, 1962). pp. 609-626

⁴. Bentham, J. 'A Manual of Political Economy', in: *The Collected Works of Jeremy Bentham*, ed. J. Bowring, vol.III (Edinburgh: 1842)

⁵. Smith, A. *An Inquiry into the Nature And Causes of the Wealth of Nations, (1776), Book Five Of the Revenue of the Sovereign or Commonwealth*

Topic of the Month

More Italian than the Italians? Geographical indications and Parmesan – Savvas Parselias ¹

What is in a name? Well, if your name is Parmigiano Reggiano then rather a lot. Indeed, when the name of your product identifies not only the product itself but also the region from which it has originated than this combination has a special meaning for the product's quality, reputation and cultural significance. This at least is the logic being used by those in favour of the system of geographical indications - especially the EU, which has embraced the system of Protected Designation of Origin (PDO) aimed at protecting the names of local produce originating from a specific country or region in Europe. However, as discussed below not everybody agrees with this approach, both within the EU and outside it.

In the case C-132/05, initiated in 2003, the European Commission accused the Federal Government of Germany of failing to fulfil obligations stipulated under Regulation No 2081/92 on the protection of Geographical Indications and designations of origin regarding Italian 'Parmigiano Reggiano' cheese. According to the German defence counsel, as the European Court of Justice (ECJ) had yet to make a decision on whether German producers had the right to use the term 'Parmesan', there was no need to protect it.

The ECJ disagreed, ruling that the term 'Parmesan' does enjoy the same rights and protection as the term 'Parmigiano Reggiano'. A victory for makers of the real Parmigiano Reggiano. Yet the ECJ also ruled that the Regulation does not require the German

government to take active measures for the protection of 'Parmesan'. It ruled that the responsibility of the German state was confined to providing an appropriate legal system which all interested actors could access and where they could defend their interests.² Those actors, including competitors, consumers, and most importantly, the owners of the IPRs – in this case the Consorzio Parmigiano Reggiano – share the responsibility to monitor the market and bring cases to the Court.

The case forms part of an ongoing debate at the European and international level on the criteria for the protection of Geographical Indications and the consequences for the economies that produce and consume the products they protect.

The term 'Geographical Indication' (GI) is commonly used for names or signs that identify a good, whose peculiar characteristics, quality and reputation are attributable to its unique geographical origin. The EU created a framework for the 'advanced protection' of GIs, to use its own terminology. In this framework, the term 'Protected Designation of Origin' (PDO) is the strictest standard and describes a GI whose production, processing and preparation take place in a defined geographic area. The term 'Protected Geographical Indication' (PGI) is less strict and only requires that some of the production and/or processing and/or preparation take place in the defined geographic area.

What does 'Parmesan' really mean?

The key issue in this case is whether the law considers the term 'Parmesan' to be a "generic name". Under Article 3(1) of EU Regulation No 2081/92, a name that has become generic means "the name of an agricultural product or a foodstuff which, although it relates to the place

or the region where this product or foodstuff was originally produced or marketed, has become the common name of an agricultural product or a foodstuff".³

Since there is no objective threshold to distinguish generic from non-generic terms, a legal definition is necessary. However, no clear definition has yet been agreed. Arbiters must consider a number of factors: the existing situation in the Member State in which the name originates and in areas of consumption, the existing situation in other Member States, and the relevant national or Community laws. The Commission, along with a technology committee, then determine whether an application for a GI meets its criteria, and reject or approve it accordingly. Any stakeholder who has an objection regarding whether a name is given GI status or not, can bring the case to ECJ, which then has the final say.

The Parmesan case is not the first of its kind. In a similar case, Denmark attempted to block the Protected Designation of Origin (PDO) status of feta cheese. In this case, the name was declared not to be generic. PDO status was given to feta and Danish producers had to stop marketing their cheese as feta.

In the Parmesan case, the German representation claimed that the term 'Parmesan' is used in Germany as a generic term for 'grated cheese or cheese that is meant to be grated' and hence, is not connected in any way with the protected 'Parmigiano Reggiano'. According to the ECJ, however, the German representatives failed to prove that the term 'Parmesan' is generic. Hence, given the phonetic and visual similarity between the names in question, and the similar appearance of the products, the use of the name 'Parmesan' must be regarded as an evocation of the protected designation of origin 'Parmigiano Reggiano,' which is protected by Community law.⁴

The economic incentive for the protection of GIs

The eagerness of the EU to protect GIs in a strict framework stems from the fact that EU member states hold disproportionately more GIs than

other economies, coupled with the fact that the EU has been trying to shift the focus of its agricultural policy from quantity to quality.⁵ According to this approach GI products enjoy superior quality due to their special human and natural resources, factors that are exclusive to specific geographic areas. Legally-protected GIs help consumers make better-informed decisions and allow them the option of paying a premium for the quality and origin that GI products guarantee. The premium in turn incentivises producers to continue making foods of superior quality.

Strong PDO production offers the EU a way to counterbalance demands for the liberalisation of the agricultural sector with maintaining its economic sustainability. State subsidies and tariffs on imports are inefficient, distort the market and harm consumers and producers. The aim is to move away from subsidised mass production of standard products towards the production of more diversified, high-quality specialised products. However, this move requires securing IPRs if it is to be successful. According to the EU's perception, its agricultural goods will be more appealing to customers who are more concerned with quality than price, enabling them to survive in markets full of cheaper agricultural products from developing countries. However, these efforts are hindered by the inadequate international framework for the protection of GIs.

The international protection of GIs

GIs are protected within the WTO framework by Articles 22, 23 and 24 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Although there is a provision for the protection of GIs against misleading use, similar to the EU framework, generic names are excluded. As such, there is plenty of room to manoeuvre and define a name as generic in politically-advantageous terms. 'Generics' are not the only exclusion though. If a name had been registered in a country as a trademark before TRIPS, or before it was protected in the country of origin, it loses the right to protection. For this reason TRIPS is inadequate for the protection of GIs. For instance, Parmesan is protected in Europe, but not in the USA where it is

considered to be a generic term. In Canada, Parma ham (i.e. ham from Parma made in the traditional manner) is sold as 'Original Prosciutto' as the phrase 'Parma Ham' is a registered trademark.

In an effort to achieve stricter protection than TRIPS, the EU has reached a number of bilateral agreements with other countries, and, at the same time, has led the call for the creation of a WTO register of GIs.⁶ Most of the countries which oppose the initiative share European culinary traditions and hence, have substantial domestic industries that produce substitutes for the original European products. The group, led by the US, includes Argentina, Australia and New Zealand, among others, and continues to oppose stricter multilateral agreements to protect domestic food industries.

US: Policeman or Pirate?

An interesting element to this debate is the seeming conflict of interests between the EU and the US over PDO products. While exporting a great deal of branded products that use trademarks to protect their brands the US does not currently protect GIs. There are many products that are widely used in the US market which are major European PDOs and their protection is therefore deemed a priority for the EU. The US produces and consumes vast quantities of Parmesan, feta and Roquefort. A stricter protection of the EU standards for those products would force US producers to rebrand their products, with significant advertisement and marketing costs, as well as a probable loss of customers. Kraft, which produces a wide variety of would-be protected products including feta, Bologna ham and mozzarella, sold 60 million pounds of 'parmesan' in 2003.⁷ Once protected, only original products can enjoy exclusively the reputation of their name and charge a premium for this. French PDO cheeses are 30% more expensive than non-PDO cheeses, while they represent 30% of overall cheese exports.⁸ As negotiations are progressing, the EU appears to be relaxing its demands in response to opposition. The 2006 EU-US agreement showed that the USA is unlikely to accept EU demands on GIs without any reciprocal concessions. Certain PDO names, such as champagne, are widely used

on US products. The EU wanted to secure the protection of champagne and other products in the American market and closed a package deal on wine trade. The compromise that the EU had to make was the recognition of certain American wine-making practices and the facilitation of wine imports from the USA. In response, the US promised to pass legislation in order to stop the abuse of specific name brands by American producers.

Conclusion

The issue of GIs is an interesting one. On the one hand it is argued that local producers should be able to protect their traditional products to the benefit of consumers who can be assured a high quality product and, as the EU argues, to the economic and social benefit of many of these regions. But PDO is not good for everyone, and those outside of the region may struggle to compete with brands when they cannot convey to consumers what their product is meant to represent. Some may even argue that the system of GIs amounts to a crude form of protectionism, hindering real competition in the marketplace and keeping prices artificially high.

Whatever the real cost or benefit GIs bring to the economy the debate looks as if it is here to stay, with a number of controversial rulings over the past years including Asda's six year legal wrangle over their right to pack and slice Parma ham in the UK and the significant ruling that feta could only be applied to cheese produced in Greece, despite Denmark being a significant feta producer.

So, what is in a name? A complicated debate over the rights of local manufacturers that touches on issues of trademarks, competition, protectionism and what is best for the consumer.

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² Article 65 of the C-132/05 ECJ Judgement

³ Council Regulation (EEC) No 2081/92 of 14 July 1992 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs

⁴ Article 46 of the C-132/05 ECJ Judgement

⁵ Fischler, F. "Quality Food, CAP Reform and PDO/PGI" Speech in the *First European Forum on Food Quality*, Siena (17 April 2004). <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/04/183&format=PDF&aged=1&language=EN&guiLanguage=en>

⁶ New, W. "WTO Members Continue Debate On Geographical Indications Register", *IP Watch*, (17 December 2007)

<http://www.ip-watch.org/weblog/index.php?p=874>

⁷ Cox, J, "What's in a name", *USA Today* (9 Sept 2003).

⁸ World Bank Presentation on GI, <http://info.worldbank.org/etools/docs/library/55547/geoindications/geoindications/pdf/GIeconomics.pdf>

Experts' Corner

Sittin' in the Dock with eBay – Benjamin May¹

On June 30th 2008, the Paris commercial court rendered three judgments holding eBay liable for the online auction sale of counterfeit goods and the breach of exclusive channels of distribution. The total indemnity amounts to €40m, payable immediately to Parfums Dior, Kenzo Parfums, Parfums Givenchy, Guerlain SA, Christian Dior Couture and Louis Vuitton Malletier.

eBay claimed the benefit of the protective status of hosting (as provided for in Directive 2000-31/EC on e-commerce), under which it could have avoided direct liability, subject to the withdrawal of listings on counterfeit goods after the receipt of a formal notification.

This position did not convince the French judges. They considered that eBay qualified as a provider of intermediation services between sellers and buyers in consideration of a commission. The judges expressly denied the protection of the status of hosting, since eBay takes an active role in the information published on its website. As a result, eBay was submitted to civil law (non-contractual) liability.

The judges blamed eBay for not having secured that its activity was not generating illegal acts, such as the sale of counterfeit goods or the violation of exclusive channels of distribution. They also considered that eBay breached its duty to check that sellers making a large number of transactions were duly registered with the Trade Register. This latter ground may cause eBay

additional trouble in the future, as buyers might claim the benefit of consumer laws for sales by professionals – and blame eBay for not providing this information.

In the Christian Dior Couture and Louis Vuitton Malletier cases, the judges observed that eBay should have set up effective measures against the infringement, such as (i) the duty for the sellers to provide on demand a receipt or a certificate of authenticity of the goods in sale, (ii) the immediate and definitive closing of the account of sellers in fault, or (iii) the immediate withdrawal of the listings reported as illegal by the claimants. They also underlined that the listings related to sales of counterfeiting goods could be easily identified, either by the 'fake' or 'imitation' quotes which often appear, or by the low price of the goods.

The judges concluded that eBay was liable for both the wrongful use of the claimants' rights and the damage caused on their image. Interestingly, the indemnity awarded is an indemnifying royalty based on a percentage of eBay's commissions. This type of indemnity is unusual, for under French civil law the amount of the indemnity may not exceed the prejudice actually suffered – which is, in most cases, limited to lost profits and the compensation of lost investments. The concept of indemnifying royalty was introduced in France by law n°2007-1544 of 29 October 2007 implementing the 2004-48/EC Directive on intellectual property rights enforcement. Lastly, the judges released an injunction for eBay to stop auctions on the perfumes, under a restriction of €50,000 per day of delay.

Although eBay immediately filed an appeal, these judgments may be perceived as an incentive to

sue eBay to seek indemnification. The short-term future of eBay is gloomy: in November 2007, the French regulator of public auctions took action against eBay for failure to comply with French rules applicable to public auctions. Another important judgment is expected this year.

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Views

The IP Challenges of Web 2.0 – Gulya Isyanova¹

What is Web 2.0?

Web 2.0 is a notoriously difficult concept to define. Arguably, the first notable use of the term took place in 2004 at the O'Reilly Media Web 2.0 conference.² Although it suggests a technical Internet revolution, Web 2.0 is in fact jargon which alludes to a change in the way the Internet is used. In other words, it is innovation of practices and principles, not logistics.

During the early years of mainstream Internet use – what may be deemed Web 1.0 – the web was used in a uni-directional manner, mainly for information retrieval. These days, however, we are seeing something different taking place – multi-directional interactivity (both downloading and uploading) and very high levels of collaboration and information-sharing between users. With Web 2.0, consumers have become 'prosumers', to coin a phrase. In other words, the Internet is no longer just a source for users – it is an interactive depository. Sites like Facebook, eBay, Craigslist and Wikipedia allow the user to add and alter content, which is therefore in constant flux. This is not to say, however, that information retrieval no longer takes place, rather that Web 1.0 and Web 2.0 co-exist – after all, checking the BBC News website and changing your status on Facebook are not mutually exclusive.

What is really novel about Web 2.0 is its entirely decentralised character – its key protagonists are individual Internet users. As such, Web 2.0 has been associated with enhanced online freedom

and creativity, and there has been a mushrooming in the popularity of this type of Internet use.

However, while this is undoubtedly of merit in many respects, Web 2.0 also presents the world with several challenges, of which I will examine only the logistical and the legal.

The Logistical Challenge

Over the last few years, the Internet has become the primary form of human communication, with 2 million e-mails being sent every second.³ This has effectively bred such a sense of familiarity among users that the Internet has almost come to be taken for granted. Part of the problem lies in the fact that most users do not fathom what the Internet actually is – for most it is somewhat ethereal and is somewhere 'out there', rather than being seen as the physical 'network of networks' that it actually is. In other words, the global connections between our PCs are the Internet. Moreover, because most people do not realise the physical but decentralised nature of the Internet, they are unaware of the fact that this network of networks has to be constantly maintained, expanded and upgraded via private investment – for example, Internet Service Providers (ISPs) in North America are currently investing around \$72 billion per annum into their own facilities.

However, although investment is taking place, there is a dark cloud looming on the horizon – demand for the Internet is starting to outstrip physical capacity.⁴ Some telecommunication companies believe that we are in the early stages of handling what has been termed the 'Exaflood'⁵ – an unprecedented new wave of broadband Internet traffic. In other words, bandwidth-hungry applications (the kind characteristic of Web 2.0) are eating up all the available

bandwidth. According to a report by the Discovery Institute, by 2015 Internet traffic will be 50 times greater than it was in 2006.⁶ As such, by 2011 twenty typical households will be generating more traffic than the entire Internet did in 1995. However, it is not merely a question of volume. It is also a question of bandwidth requirements (video already makes up a third of all Internet traffic, which is expected to grow to 80% by 2010) and of changing user expectations.⁷ What this means is that we will be “butting up against the physical capacity of the Internet by 2010”.⁸ In order to avoid an ‘Exaflood’ or tsunami and instead to create a rising tide effect, investment into the physical infrastructure of the Internet needs to approximate an additional \$137 billion worldwide over the next three years.

The Legal Challenge

The legal challenges of Web 2.0 come from two parties, which we may provisionally term Web 2.0 ‘natives’ and ‘settlers’.

Let us start with the settlers first, who, in this sense, are the ‘traditional’ content creators, such as the film and the music industries. In other words, for these content creators the Internet is an additional format and a platform for the distribution of their product. However, while the Internet has indeed proved to be a successful platform for these content creators in terms of sales and distribution, it has also increased their vulnerability and susceptibility to online piracy and the widespread violation of their copyright. So, according to the International Federation of the Phonographic Industry (IFPI), while the Internet has enabled a huge growth in the sales of digital music (with for example 30% of US music revenues in 2007 coming from digital sales), in its *Digital Music Report for 2008*, the IFPI also claims that for every legally downloaded song, 20 are downloaded illegally.⁹ It estimates that in the US alone, the music industry lost \$3.7 billion in potential revenue in 2007. The film industry has also suffered, with the Motion Picture Association of America (MPAA) estimating that in 2005, worldwide losses to the industry from online piracy amounted to \$18.2 billion.¹⁰

So-called *prosumers* use elements of copyrighted material indiscriminately.¹¹ Although online piracy

became an ‘issue’ a number of years ago, courtesy of a number of high-profile cases fought between the creative industries and media pirates, Web 2.0 differs slightly from straightforward online piracy.¹² YouTube is a perfect example of this - it borrows elements, e.g. clips from films, rather than distributing whole copies. Nonetheless, it involves the unlicensed use of others’ material and protected performance rights and is therefore highly problematic from the point of view of the creative industries.

Can copyright cope with this evolution in use? Can it evolve? Some settlers believe there is no need for drastic solutions and that the copyright system is robust enough to face these challenges.¹³ In other words, we have the legal tools we need at our disposal, we just need to use them better. IFPI’s recent Pirate Bay victory in Denmark seems to support this.¹⁴

This may not just be a question of better IPR enforcement or even education, however, but of also thinking about new business models and strategies. In October 2007, for example, five major commercial copyright owners (CBS Corp., Disney, Fox Entertainment Group, NBC Universal, and Viacom Inc.) collaborated with four leading UGC sites (Dailymotion, Soapbox on MSN Video, MySpace, and Veoh.com) to establish a new set of UGC principles.¹⁵ The goal is to strike a balance between copyright protection and the benefits of UGC services – surely a constructive step in the right direction.

In the meantime, the ‘natives’ – those who are creating content expressly and solely for the Internet and are mainly people under the age of 25 – are also facing some copyright issues. In the last few years these types of users have uploaded an unprecedented amount of UGC, mostly via blogs, wikis and social networking sites (such as Facebook, MySpace and Bebo). A large part of this UGC is content created by the natives *for* the natives, i.e. personal details, photos, and videos. It may be a recent phenomenon but it is only expected to grow – a recent study done by Nokia, for example, suggests that by 2012, 25% of entertainment content will come from online communities.¹⁶ How is *this* content being protected?

Many users are unaware of the terms and conditions of the networking sites they join, for example, or if they do, they appear not to fully understand them or their implications. Facebook is a company which has prominently featured in the UK media over the last year with respect to this issue, when it was exposed that hardly any users were aware that the content they uploaded on their profiles became Facebook property for the duration of their membership. The terms and conditions state the following:

By posting User Content to any part of the Site, you automatically grant, and you represent and warrant that you have the right to grant, to the Company an irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide license (with the right to sublicense) to use, copy, publicly perform, publicly display, reformat, translate, excerpt (in whole or in part) and distribute such User Content for any purpose, commercial, advertising, or otherwise, on or in connection with the Site or the promotion thereof, to prepare derivative works of, or incorporate into other works, such User Content, and to grant and authorize sublicenses of the foregoing. You may remove your User Content from the Site at any time. If you choose to remove your User Content, the license granted above will automatically expire, however you acknowledge that the Company may retain archived copies of your User Content.¹⁷

This is concerning, as unaware users (the majority of which are young people) effectively temporarily relinquish control over their digital identity and footsteps. It is hard to establish to what extent this is a matter of carelessness or a matter of the impenetrability of legal language for most people. For example, in a storyline about the increase in binge drinking amongst young women, Facebook photos were used to illustrate the point.¹⁸ It is doubtful that this was the initial intention behind the women's postings. Moreover, once something is online, it effectively becomes permanent, even bearing in mind Facebook's terms and conditions. As with a database of any kind, there is no guarantee as to the future use of Facebook archives. The majority of users seem to have not fully thought this through.

Here the answer perhaps lies in education about the intellectual property dimension that most of us operate in. This is not only so that members of the public are aware when they are breaking the law online, but also so they are aware of their own legal standing and rights and do not relinquish them unexpectedly.

Web 2.0 is an exciting opportunity, both from a personal and a business perspective. However, like any paradigm-shifting novelty, it entails some pitfalls. Policymakers and the public need to stop conceptualising the Internet as 'out there' and deal with it in 'real life' terms.

¹ Gulya Isyanova is a Researcher at the Stockholm Network.

² <http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html> (Accessed 23 June 2008).

³ This section is based on comments made at the Westminster eForum Keynote Seminar on Web 2.0 on 15th April 2008.

⁴ Ibid.

⁵ <http://www.Internetinnovation.org/tabid/56/articleType/ArticleView/articleId/35/Default.aspx> (Accessed 23 June 2008).

⁶ <http://www.discovery.org/a/4444> (Accessed 23 June 2008).

⁷ http://www.peerapp.com/Data/Files/Accelerating_the_Video_Internet_PeerApp_Ltd_January_2008.pdf (Accessed 23 June 2008).

⁸ Ciccone (2008)

⁹ http://www.ifpi.org/content/section_resources/digital-music-report.html (Accessed 23 June 2008).

¹⁰ http://www.mpa.org/piracy_Economies.asp (Accessed 23 June 2008).

¹¹ During the Westminster eForum Keynote Seminar on Web 2.0 on 15th April 2008, one of the speakers called called the User-Generated Content (UGC) a "misnomer",

¹² <http://news.bbc.co.uk/2/hi/entertainment/3082119.stm> (Accessed 23 June 2008).

¹³ Comments made at the at the Westminster eForum Keynote Seminar on Web 2.0 on 15th April 2008.

¹⁴ http://www.theregister.co.uk/2008/02/05/ifpi_pirate_bay_denmark (Accessed 23 June 2008).

¹⁵ <http://www.ugcprinciples.com> (Accessed 23rd June 2008).

¹⁶ http://findarticles.com/p/articles/mi_m0EIN/is_2008_March_17/ai_n24925209 (Accessed 23 June 2008).

¹⁷ <http://www.facebook.com/terms.php> (Accessed 23 June 2008).

¹⁸ <http://www.dailymail.co.uk/news/article-491668/The-ladettes-glorify-shameful-drunken-antics-Facebook.html> (Accessed 23 June 2008).

News Flashes

Top Stories in the World of IP and Competition

China's new national IPR strategy

China has vowed to place intellectual property in the centre of its political agenda. The outline of the national IP strategy was enacted on 5 June by the State Council, China's cabinet. It will be followed by more than 20 strategic tasks to be implemented by different government ministries, ranging from amending existing laws to enhancing the juridical powers of the government departments related to IP enforcement. The long-term goal, the document states, is to develop China into "a nation with an internationally top level of creating, using, protecting and managing IPRs by 2020."

<http://tinyurl.com/5f2wm6>

Broadcasting copyrights spreading their wings

Broadcasters could find it easier to get the rights to use a piece of music across Europe following a highly-charged antitrust decision on Wednesday by the European Commission. In a move that will reshape the treatment of copyright, the Commission declared that some of the ways in which so-called collecting societies – whose job is to gather up and distribute music royalties – currently do business are anti-competitive and illegal.

<http://tinyurl.com/64sar7>

G8 ACTA-ing on IP

G8 governments have not lost sight of earlier plans to promote and more strictly protect intellectual property rights. In their document on

the *World Economy* the G8 leaders called for the finalisation of negotiations of the much-debated Anti-Counterfeiting Trade Agreement (ACTA) by the end of 2008 and also declared patent harmonisation a topic of high importance, asking for "accelerated discussions of the Substantive Patent Law Treaty (SPLT)".

<http://tinyurl.com/5kkbm4>

GIs extended to developing countries

An association of producers of geographical indications *OriGIn* - product names associated with a particular place and characteristics - is promoting the idea that extending the high-level protection of geographic indications currently enjoyed by wines and spirits to other goods (called GI extension) is in the interest of developing countries.

<http://tinyurl.com/5qw2c5>

UK court ruling to boost innovation

Innovators ranging from multinational drug companies to technology start-ups should find it easier to secure patent protection in the UK following a landmark ruling on one of the most important medical products of the past 20 years. In July, the law Lords upheld the British patent on the Taxus stent device after a 3½-year legal battle, sweeping away claims that the invention was too obvious to merit protection from copycats. The decision is a significant boost to holders of valuable intellectual property, who have long viewed the UK as one of the most "patent unfriendly" countries in Europe.

<http://tinyurl.com/5d8qo6>