

ATRIP 2009—Vilnius
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Encouraging Dissemination in Intellectual Property Law

Outline

1. The misguided focus on creation and innovation
2. How the current system fosters dissemination
3. Problems with the current system

The misguided focus on originality

- Under the prevailing paradigm, IPRs are typically justified as a reward for creativity and innovation
- Creativity and innovation does afford benefits
- But a system of property rights—as opposed to a patronage model—is generally desirable only if society benefits
 - Exception: the “immature” work or invention
 - But even here society ultimately benefits

How the current system fosters dissemination

- The property model itself encourages dissemination by playing off the desire for profit
- The limited term of exclusive rights
- Patent law: written description (and in some nations, best mode)

Problems with the current system: a few examples

1. Refusal to sell or license
2. Blocking patents
3. Undisclosed content (usually software code)
4. Contractual limitations on reverse engineering

A threshold question

- Dissemination of *what*?
 - The fruits of creation and innovation
 - The knowledge resulting from creation or innovation
- In copyright, this distinction borders on the metaphysical (except for software)

Dissemination of products

- Problems stem from the nature of the “property” right involved
- Can be dealt with both from within and without the IP system
- Internal solutions
 - The term of the IPR
 - Compulsory licensing
- External solutions
 - E.g., competition law and the blocking patent

Dissemination of knowledge

- Here, patent law does a fairly decent job
 - Exception: limits on reverse engineering
 - A role for a broader doctrine of misuse?
- Primary problems are in copyright
 - Hidden code
 - Immature work (but here a reason not to force dissemination)

To recap

- The IP system *does* encourage dissemination of both products and knowledge, even if the importance of dissemination is not always recognized
- Existing problems stem from
 1. The nature of the right and the propensity to misuse it
 2. Extension of IPR protection to immature works

Thank you for your time

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