

# Intellectual Property Consumerism

On a striking clash between consumer desire and intellectual property precedent.

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## Abstract

This paper will be an investigation into the rise of intellectual property infringements, in the form of copyright and trademark violations. I will attempt to prove a correlation between ever-growing technological means of acquiring intellectual property and a rise in these infringements by showing that consumers want what they want, when, they want it, and in the format they desire. Too often, however, businesses do not provide this to consumers, either because a fear of new technologies or because of their general unwillingness to accept change. Often times, corporate IP holders are blinded by strong IP law with the hopes that it will advance their profit, while, in fact, embracing technological change will sooner limit the number of copyright infringements and increase revenue if a twenty first business model is designed correctly. Also explored will be licensing possibilities, potential models for success, and actual case studies. Overall, it will be shown consumers want what they want, when, they want it, and in the format they desire, and 1) businesses today overall do not give this to them and 2) businesses stand to profit from this.

Keywords: intellectual property, law, policy, infringements, copyright, music, filesharing, consumer, consumerism, policy, WTO, TRIPS, economics, rights

## Introduction

Intellectual property law and scholarship is on the forefront of world jurisprudence<sup>1</sup> and the global society, in ways that are uniquely different than almost every relevant topic in either field. The notion of protecting something that cannot be transferred or secured physically poses unique challenges to conventional thinking regarding ownership and 'rights,' and requires the redefinition of many facets of legal and organizational thoughts. The relatively fast advent of information technology, coupled with globalization, has led to revolutionary advancements in the spread of this intangible, 'intellectual,' property that can be seen virtually everywhere in the common life of a twenty-first century first-world resident. In this twenty-first century arena of the fast spread of ideas and knowledge - as free enterprise and human nature would have it - intellectual property has been quickly capitalized on, as ideas and knowledge are claimed and peddled across the expanse of the globe. The notion that a person or persons would want to lay claim to an idea or an intangible facet of knowledge is not new, but rather the scale and magnitude with which such claims are entered have drastically changed. More people, of all intellectual abilities, and in forms of varying (and increasingly less) formality can claim rights to intellectual property.

With these changes that have accompanied the global society, one stands out on the forefront due to its economic and societal implications: corporate intellectual property, and, more specifically, consumer interactions with corporate intellectual property giants. Protections of intangible goods have increasingly, and now more than ever, been pushed into the corporate arena whereby whole markets have opened up for the sale and purchase of intellectual goods, whereby the pace at which these 'goods' are produced and used, and the ease with which they can be accessed are reaching never before seen highs. Movie studios and recording labels push out hundreds of thousands of movies and songs each year, software companies make, test, sell and distribute billions of lines of code to customers' computers, and the (web)design industry designs and sells countless more pieces of intellectual property for uses on the web, in advertising, labeling and virtually all tangible products on the market today. Intellectual property is ubiquitous, and western society and culture has become undoubtedly submersed in the realm of intellectual property (McLeod, 2001).

Along with these changes, however, comes an inescapable truth in the nature of commercialism and the corporate world - companies who own intellectual property and sell it at high premiums will, and have great interest in,

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<sup>1</sup>It is important to note here that, although this paper has a relevant international context and an international scope, it is written with the perspective of American consumerism. General legal references should be presumed to be of the United States unless specifically noted otherwise.

protecting their profits at any cost. Corporations in the multi-billion dollar intellectual property industry need to actively combat threats to their exclusivity of such intellectual property, and, whereas a tangible goods corporation can protect its interests through effective physical protection, an IP peddling corporation must rely on its legal intellectual property protection (with limited physical or effective software means of protection) to ensure that its intellectual goods remain solely its own to sell (and thus prevent unauthorized use by non-paying parties). Generally, corporations strictly interpret Intellectual Property and related law to ensure that they can tightly grasp all of their intangible goods on the market with the help of profit-minded executive boards and like-minded high-priced legal teams. In theory, corporations whose main businesses interests are in their prized intellectual property have a sustained business need to fiercely and effectively protect legally (the main source of protection) their intellectual goods. And they do. But, in practice, strict interpretations of intellectual property law and precedent do mostly just the opposite in the corporate arena of IP commercialism, inciting more of a battle between corporate intellectual property holders and consumers due to inherent problems of information control. On certain bases such as information format and timed delivery of content, consumer desire very often clashes with the intellectual property law that corporations use to defend their intellectual property rights. This paper serves to highlight the disconnect between what consumers want and what businesses provide to them, in light of intellectual property issues. Very often, innovation in the realm of intellectual property (and its subsequent delivery) is hindered due to a fear that innovation will increase the propensity of intellectual property violations (and thus, loss of profits), when, in fact the very innovation that is being hindered may hold the key to higher profits and gains for both the consumer and the business.

## Trends and Traditions in Intellectual Property

Intellectual Property (IP) law has deep roots in progressive civilizations – both modern and ancient – and IP law is uniquely ubiquitous through its economic scope and cultural implications that are often overlooked. Recent developments in American and international legal statutes have contributed to a growing trend that has pushed legal artistic protections and inventors’ rights towards the commercial arena; copyrights and patents are increasingly becoming de facto standards of monetary gain through legal intimidation. But are such common uses of intellectual property clauses correct interpretations of jurisprudence? In an early form, intellectual property protection can be found in the United States constitution, which gives the US Congress the power

“to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,”

the essence of which suggests IP law serves to further the artistic field. Conventional wisdom dictates that future interpretations would have this original intent in mind, but, nevertheless, IP law is a staple of commercial claims and stakes to business. The role of business pertaining to this concept can be simplified into two ideas: primarily, to make a profit, and secondarily to serve the needs of the consumer in order to turn that profit. Consumer desire and consumer intent are important – though minimally explored – topics in intellectual property law with relationship to this model. Business may evolve through changes in technology and policy, but the basic concepts of the business model and legal artistic protections remain relatively constant. US legal code defines multiple “exclusive rights” that a copyright holder may lay claim to, including “to reproduce,” “to prepare derivative works,” and “to distribute copies or phonorecords of the copyrighted work.” This legal statute may be universally known, however even the most scholarly consumers fail to separate what they desire with what the law actually says (and thus pointing out a clear disconnect).

Consumer desire is undoubtedly a facet of Intellectual Property and IP commercialism, and at this point we must answer the question: What is it that consumers actually desire? The aforementioned assumptions of consumer behavior do nothing in this realm other than to poorly explicate consumer desire. Mikhail Bakhtin, a language scholar, writes in an essay titled *Discourse in the Novel*: “Social stratification is also and primarily determined by differences between the forms used to convey meaning and between the expressive planes of various belief systems – that is, stratification expresses itself in typical differences in [different] ways.” This theory on ‘true meaning’ is very useful, in that it exemplifies the fact that to dissect a problem through intellectual inquiry can complicate the inquiry more than help it. And, if we take the Bakhtinian principle of behavior as a form of language into account, consumer actions will tell us all we need to know about how they truly feel. An analysis of this behavior can provide further insight into intellectual property issues at large and such analysis is the sine qua non of a successful inquiry into IP commercialism. The best practical way to understand – to the highest extent possible – what consumers want, is to look at when consumer behavior clashes with intellectual property laws in real-life examples:

Examples of copyright infringement <sup>†</sup>	Insight into consumer desire	Insight into business behavior
“LAST YEAR Disney and other media companies sued two small L.A. shops for selling \$15 piatas of Winnie the Pooh, The Incredibles, and Nemo.”	Consumers want to reference pop culture on the small scale without fear of retribution. Consumers, in this case can be thought of as small retailers (whereas the producers are the corporate intellectual property rights holders, not even the artists themselves).	Business here believes all IP sins are created equal. There is no scale to such infringements, even when they may serve as blatant advertisements and cultural icons. Consumers desire such themed products, but businesses turn a blind eye.
“THE ROCK AND ROLL Hall of Fame sued several journalists for naming their website ‘The Jewish Rock and Roll Hall of Fame.’ They renamed it Jew-rock.org.”	Consumers expect that certain colloquial phrases can be fairly used. Especially when used to make harmless references to popular culture.	Business refuses, again, to gauge the impact of infringements; blind trademark litigation prevents the possibly beneficial use of a name.
“A DAY AFTER Senator Orrin Hatch said ‘destroying their machines’ might be the only way to stop illegal downloaders, unlicensed software was discovered on his website.”	The origin of such a statement indicates that when it comes to intellectual property, consumers want what they want, when they want it and in the format they want it.	Business views all ‘piracy’ as the conscious act of stealing intellectual property, while, in reality, as shown here, strict licensing laws target many as “thiefs” while they have done nothing commercially detrimental.

<sup>†</sup>from Mother Jones, “The Comedy of IP Overkill,” March/April 2006, Clara Jeffery

These are just a few investigations, among many possible, into actually getting working ideas of what consumers think. As writing instructors Gerald Graff and Cathy Birkenstein (2006) put it: “basic moves are so common that they can be represented in templates that you can use right away.” This supports the conclusion that, although it may not ever be possible to truly quantify consumer desire (and in fact, the customer may not even be able to articulate this desire for his or her self), consumer behavior can be template and studied as general trends. The increase in ridiculous copyright infringements is clear, and the list of frivolous anti-consumer lawsuits is never-ending. “U.S. intellectual property is valued at \$5.5 trillion, equal to 47% of our GDP and greater than the GDP of any other nation but China,” and there is certainly a problem in handling it. As we have seen, IP law is inextricably linked with consumerism and what the consumer desires. Siva Vaidhyanathan, a media culture historian and scholar, explains: “Lately, as a result of schools of legal thought that aim to protect ‘property’ at all costs and see nothing good about ‘public goods,’ copyright has developed as a way to reward the haves: the successful composer, the widely read author, the multinational film company.” Taken further – keeping in mind, as Vaidhyanathan continues, that “the goal of the entire copyright system should be to recognize the pernicious repercussions of restricting information, yet to reward stylistic innovation,” – IP law is certainly clashing with what people actually want.

A possible reason for such a disconnect is, most obviously, that there are better alternatives to legally acquiring intellectual property (more compatible formats more attractive, on demand capability, no DRM, etc.). Consumers very clearly know what they want: they want the content they wish, when they want it, and in the format they desire. The motion picture industry knows this: for example (Yar, 2005), “the movie industry has been publicizing its own bte noire, in the form of digital media that enable large amounts of high-definition audio-visual content to be quickly and cheaply copied onto optical disks.” In the end, reconciliation is a necessary step that is next logical progression in intellectual property commercialism. Vaidhyanathan maintains that “copyright should be about policy, not property. Many recent trends and changes in copyright laws are bad policy. These changes threaten democratic discourse, scholarly research, and free flow of information.” And, on the issue of compromise, he asserts: “American culture and politics would function better under a system that guarantees ‘thin’ copyright protection – just enough protection to encourage creativity, yet limited so that emerging artists, scholars, writers and students can enjoy a rich public domain and broad ‘fair use’ of copyrighted material. While ‘thick’ copyright has had a chilling effect on creativity, thin copyright would enrich American [culture].”

Furthermore, ignoring consumer desires while hiding behind tough intellectual property laws is not efficient. But, can you blame recording companies and movie studios for their isolationist actions? Thomas G. Field, Jr. a lawyer and scholar, writing United States government web-literature states (2006): “Intellectually or artistically gifted people have the right to prevent the unauthorized use or sale of their creations, just the same as owners of

physical property, such as cars, buildings, and stores.” But, by assuming intangible goods have the same societal merit as tangible ones, he ignores the desires of intellectual property acquirers entirely. Using consumer copyright infringement as a gauge for consumer dissatisfaction as aforementioned, a business model could be shaped around a single principle: give consumers what they want, when they want it, and an equilibrium is certain to be established between the revenue that the company wants to make and the amount people purchase at new unit prices.

## Lessons in Cooperation and Disconnect

George Washington University professor Ryan Jerving (2007) begs the question, in an online wiki collaboration on Intellectual Property and derivative works: “where are we willing to draw the line – ethically or artistically, if not legally – for what counts as an original contribution worth encouraging?” There is always room for more analysis on the consumer side of business, an area that has been minimally explored. For example, US Supreme Court ruled in the landmark trade dress case *Two Pesos, Inc. v. Taco Cabana, Inc.* that: “trade dress which is inherently distinctive is protectable under 43(a) without a showing that it has acquired secondary meaning, since such trade dress itself is capable of identifying products or services as coming from a specific source.” This is a valid point of IP, though more emphasis needs to be placed on consumer perceptions, because, after all, consumers of intellectual property are the ones feeling the brunt of its litigation. A simple analysis of a restaurant scene, for example, does reveal many expressions of intellectual property, but, more importantly, the people in the scene ground intellectual property law to the human element. This element is too often ignored. In the words of legal scholar Andrew Corydon Finch, copyright infringement “should reinforce the strength of the brand name [the intellectual property] as an indicator of source and quality because, in effect, the private label product [consumer] is indicating that the brand name product is ‘the one to copy’.”

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), an international commerce agreement brokered by the World Trade Organization, is a prime place to start in discussions of cooperation between consumers and businesses. A small clause within its text, that represents a viable future for intellectual property claims, outlines a staple in the balance between corporate intellectual property and the consumer’s right to information:

### “Article 17

#### Exceptions:

Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.”

*World Trade Organization, TRIPS, Uruguay: 1994*

United States legislation has been shaped to include the following, in accordance with this international agreement:

“The fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include

1. the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work”

*§107, US Copyright Act*

The fair use model is upheld to provide non-commercial legitimate uses of intellectual property to scholars, educators and researchers who would otherwise be breaking intellectual property laws through the use of this intellectual property. And, while the fair use model does little for IP consumerism as a whole, its inception represents a revolutionary leap forward in loosening harsh commercial IP laws. The case against intellectual property laws is strong, and laws that aim to protect intellectual property cross the boundary of protection and move into the realm of regulation, in which businesses try to control how the IP is used and “consumed” (Boldrin and Levine, 1994). Michele Boldrin and David K. Levine, of UMN and UCLA, give the following example:

“...what is commonly called intellectual property might be better called ”intellectual monopoly.” When you buy a potato you can eat it, throw it away, plant it or make it into a sculpture. Current law allows producers of a CDs and books to take this freedom away from you. When you buy a potato you can use the ”idea” of a potato embodied in it to make better potatoes or to invent french fries. Current law allows producers of computer software or medical drugs to take this freedom away from you.”

*Boldrin and Levine, The Case Against Intellectual Property, 1994*

Boldrin and Levine insist that controlling ‘downstream’ intellectual property (i.e. controlling intangibles post-distribution) is not only the source of immense consumer dissatisfaction, but also poses a risk to the stability of intellectual property giants (McLeod, 2001). If Levine and Boldrin are right, and their research asserts that they are, then a new model for intellectual property protection is not only appropriate, but necessary. The popular assumption that consumers are a negative force with regards to intangible holdings is not a functional one, and businesses should reanalyze their intellectual property offerings as opposed to blindly litigating.

The following case studies serve to emphasize the conclusion that people are forced to ‘steal’ intellectual property because they are adverse to what they are being given ‘legally’ and how it is being given to them.

### ***allofmp3.com***

Allofmp3.com was an online music store founded in 2000 by MediaServices, a Moscow based internet communications company. While the internet had a plethora of music stores, allofmp3.com entered the market with a uniquely competitive edge that had never been seen before with services of its type. Allofmp3.com offered individual songs for \$0.09 - \$0.30 per song with each song clearly indexed and searchable. Songs were provided from 128 kbit/sec (FM/low quality) all the way up to 320 kbit/sec (lossless, studio quality), and pricing (varying by kbit/sec rate) was standardized and clear. Most notably, songs were provided to consumers as industry-standard files with no form of Digital Rights Management attached to them. Consumers had full freedom to use these songs the way they wished.

Notwithstanding questions of allofmp3.com’s legality, when compared to other legal online music alternatives – which were laden with DRM, confusing software and portable player restrictions – allofmp3.com was undoubtedly the most attractive way to buy music. And, more importantly, when compared to ‘conventional’ illegal means of acquiring music which require software clients, trackers, and P2P programs, allofmp3.com was a clear alternative to many people, made more intriguing by the fact that allofmp3.com charged fees whereas other illegal alternatives were free. The allofmp3.com model shows that customers will pay for what they truly desire, which, in allofmp3.com’s case, was the music they wanted, when they wanted it, and in the format they desired. Allofmp3.com profited an estimated \$30 million USD a year from 2000 - 2007 until it was shut down, and, while \$30 million is a low figure when compared to annual revenue of intellectual property giants (such as those protected by the RIAA), it is shocking considering the low publicity of the site, and it’s relatively quiet inception. In general, the allofmp3.com case proves that customers will pay for what they want. And, while allofmp3.com was shutdown due to pressure from the Russian Government and the WTO, a fully legal service of similar type could be a business model for the recording industry mediating the desires of shareholders and consumers in a way that will still turn a profit.

### ***Valve***

Any investigation into the cooperation between intellectual property holders and the customers they serve would not be complete without the discussion of the Valve corporation, an American Video Game developer that has produced such titles as Half-Life, Counterstrike and Day of Defeat. When Valve released it’s new-generation Half-Life game in 2000, it opened the game’s engine and internal workings up to customization by users and gaming communities, a move that made the game sharply rise in popularity. All Valve games now have this unique feature, in that they are customizable; the loyal fanbases for these games are very strong, as is the profit that Valve makes every year from the increasing popularity of its games. And so, when the next release in the developer’s ‘Half-life’ series was stolen and posted freely on the internet – a potential profit disaster for Valve – the community faced free copies of the next version of the game that they were loyal to. The loyal fanbase, however, as opposed to continuing with the stolen copies of the game, actually actively pursued in a collaborative effort, the perpetrators who hacked the Valve system, and led authorities to his imprisonment. David H. Freedman, of Inc Magazine, begs the following question:

“Why would a posse of online gamers – a group not known for respecting niceties like copyrights – set out after the liberators of the program they had so eagerly awaited? The answer can be found in the open-source movement, in which software – the Linux operating system is the best-known example – is developed by a community of mostly volunteer programmers, and anyone is free to use or modify it.

Open-source ideas are fast moving beyond the high-tech world that spawned them. And while few firms are ready to give their products away, a growing number of entrepreneurs are embracing the idea of handing over their intellectual property to a community of volunteer enthusiasts to perform tasks that have long been the province of salaried employees. Call it a ‘hybrid open-source’ model: The company owns the product, but the customers help customize and improve it.”

*David H. Freedman, The Secrets of Open-Source Managing, Inc.com, 2004*

The Valve example shows simply that customers, when treated correctly, are loyal to the businesses that listen to what they want. It is not the case, as this shows, that consumers will always resort to the cheapest option; informed consumers are undoubtedly benevolent when it comes to compensating businesses that give them what they want. This article proposes the following standard: “if you sell it correctly, they will come.”

## The Significance of IP Delivery: Recommendations

In light of these studies, a business model that effectively strikes a balance between the strict application of intellectual property laws and customer desire has the potential to be highly profitable. An effective business model for a company selling intellectual property can be simplified into four main facets that should lead the framework and thought process of corporate IP/IP law positioning:

1. *Recognize that delivery is as important as content.* Questions of ‘piracy’ are usually less related to the desire of a consumer to ‘steal’ but rather are more pointed to a more desirable mode of delivery. Time and attention needs to be put to delivery, as opposed to content alone. In the world of twenty-first century intellectual property, delivery is everything.
2. *Study the delivery that consumers are overwhelmingly partial to.* Intellectual property holders have it in their best interest to invest research and development dollars into what their customers want content-wise, but why must the delivery of these goods be overlooked? ‘Piracy’ is an issue of delivery methodology, and therefore time and attention needs to be directed to this often ignored part of intellectual property. Digital rights management, confusing software clients, exclusive mobile player rights, confusing subscription models, low quality transfers, all lead to customer dissatisfaction. Overall, customers will pay for what they want if it is made more attractive than the illegal alternatives (which, as in the alfofmp3.com example, is not hard to do).
3. *Employ a pricing model that is reasonable to the average consumer.* \$0.09 - \$0.30 per song as opposed to \$0.99 per song is an example of a pricing model that is attractive to consumers. ‘Reasonable’ should not be arbitrarily derived, but rather gauged through tests of the market (the alfofmp3.com model is an example of a successful one).
4. *Embrace innovation.* Innovation provides people with what they most truly desire, and therefore embracing innovation of delivery and content ensures that customers will turn to the alternatives most profitable for intellectual property consumers.

## Discussion

Such recommendations need to be implemented, not only for the sake of the customers who simply desire certain goods, but to ensure the longevity of intellectual property holders into the future. A model for the future of intellectual property management (necessary seeing as some applications of intellectual property law grossly run past their original intent) would be the basis for a competitive edge in an industry with little future innovation planned. Proponents of fierce copyright litigation are right to argue that their profits needs to be protected. But they exaggerate to claim that customers can only be trusted with small set of legal IP acquisition methods. The community of active software programmers and distribution networks that is in place to circulate copyrighted material is strong and adaptive, but consumers desire nothing more than to end the continuing headlock between corporate intellectual property holders and themselves. A change to current intellectual property law should also be explored in tandem to changes in the IP business model, though this paper does not touch on that possibility. In either case, however, death-plus-70 years has the ability to sound less like a criminal sentence and more like a profit model for the creators of music, software and countless other intangible goods. The potential is there, and the research is clear; the opportunity, needs to be harnessed.

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