‘Software Piracy’ Is Not Theft

Charcoal Design has an article arguing that the metaphor of ‘theft’ or ‘piracy’ for unauthorised use of information (such as software) can be highly inappropriate, immoral and damaging.

Yes, software creators need to have an incentive to produce their products, and they also have a moral right to receive the fruits of their labour. But they have no moral right to harm someone who has done them no harm. And it will be disastrous if a law based on a silly metaphor continues to shield this vital industry from the need to create innovative ways of marketing, and new types of relationships with their customers, appropriate for the still more knowledge-dominated economy of the future.

This, too, is a problem that has to be solved if we are to set the world to rights.

Update: See also their **article** on the future of Apple Computer.

Tue, 10/24/2006 - 22:42 | **digg** | **del.icio.us** | **permalink**

So what about other forms of

So what about other forms of "intellectual property"? Is **The World** for or against those?

by a reader on Wed, 10/25/2006 - 08:42 | **reply**

I agree so called software pi

I agree so called software piracy is not harming the producers. Have you seen Weird Al's "Don't download this song"? Very funny take on music piracy. :)

What about art theft, though? When someone steals someone's art, and poses as its own art, unfairly profiting from it? Or a company with better marketing skills as the artist, sells it as "royalty free stock". What do you think about that?

by a reader on Wed, 10/25/2006 - 22:10 | **reply**

Piracy is not copyright violation

Piracy and copyright violation are not the same thing (though they

may overlap).

Claiming somebody else's work as your own is depriving them of their rightful reputation for creating the work, and any profit you make from hijacking their creativity is fraud - you are conning the person who pays you for the work, and may or may not be depriving the artist of the money from the sale as well, since it seems likely that if someone was willing to pay you for the art, they would have been willing to pay the *actual artist* as well, assuming he or she would have been willing to agree to the same terms.

Generally speaking, software pirates do not claim to have created the works they are distributing. And as long as they aren't charging for it then they are not *demonstrably* depriving the creator of any revenue, since those that download it may well have been unwilling to pay (if they would have been willing to pay had a pirate copy been unavailable, then the decision to pirate instead rests on *their* conscience, not the distributor's).

Claiming work as your own, and charging for it without making it clear that you are not ethically entitled to profit from it are both fraudulent and immoral activities (As well as being illegal). Distributing a work that is hard to obtain otherwise (for reasons of scarcity or cost) is not fraudulent as long as you make it clear that's what you are doing (it is of course still illegal, unfortunately).

What you are distributing doesn't matter. The same would be true with any medium for creativity, whether it is spoken, written, recorded, painted or programmed.

by Nick on Thu, 10/26/2006 - 12:57 | **reply**

Copyright as contract

I'm not sure I understand the **article** referenced. On one hand Deutsch appears to think protection against copying is not necessary for innovation. On the other had he does appear to do so when he writes:

I am not suggesting that software companies shouldn't fight piracy - it is this very fight that spurs much of the innovation I've been advocating - I only ask that they fight fair.

And here Deutsch misses the point completely:

Similarly, affluent 'adults' will not pirate because they have neither the time nor the inclination to trawl the dark recesses of the Internet looking for seedy pirate web sites when they can more easily walk into a shop.

This is an attempt to have your cake and eat it too. The reason affluent adults will not pirate is because there is copyright law. Now does Deutsch advocate making copying legal or not? If yes, then software makers will no longer be able to sell their software at a premium. Because legal copies will be sold by others with the same quality and they will no longer be sold at seedy pirate web sites. If no, then Deutsch must accept that action is taken against copyright

infringers, whether they be young girls or grown men. Whether this is a function of the state or private initiative is a different debate.

I believe copyright arrises via freedom of contract. Just as when you order dinner at a restaurant, you implicitly agree to pay for it afterwards, so too when you buy anything with the label "copyright" you implicitly agree not to copy it or let someone else copy it (except for backup purposes). If everybody abides by their contract, we have de facto copyright.

The problem is some people will not abide by their contract. Or someone who has not been bound by the contract may find or steel or borrow software and make a copy. But a copyright contract means that the buyer gains only certain limited rights with regard to a property. A copyrighted book remains in one sense physical property of the seller. The buyer buys only the right to read the book and do some other things with it (similar for software). All other rights with regard to the physical property, including the right to copy, remain with the seller. And therefore the finder of say a software DVD on the street does not have the right to read that DVD on his computer and make a copy. Even though he does not have a contract with the original owner, he is not the rightful owner of the DVD. Nor can he be given full ownership rights by the previous owner, because that owner cannot give away rights he does not have, and the right to copy remains with the original seller. And so via purely physical property rights, an immaterial copyright can be derived.

Compare this to renting a house. If I rent a house a condition may be that I am not allowed to allow anybody to smoke in the house. If I sublet the house to someone else, that third person can never gain the right to smoke in the house, even though he signed no contract to that effect himself. I can never give or sell a right with regard to a property which I do not have. Therefore I cannot give or sell the right for someone to smoke in the house. And similarly, I can never give or sell someone the right to copy a DVD which I "bought" ("rented" would be more accurate) if I do not have full property rights to that DVD myself (and in particular do not own the right to copy it).

One might argue that if I pay for downloaded software, I download that software to my own physical harddisk. In that case I can no longer argue, it appears, that part of my harddisk remains physical property of the seller and that he keeps the right to use it to make copies. Well, one *could* in fact argue exactly that. Part of the contract could be that the seller gains some physical ownership over the part of my harddisk where I store the copy. Now my point is not that such a contract should really be made. My point is that we can always find some way for a copyright contract to be phrased so that copyright arrises out of purely physical property rights. And the very fact that that is possible makes copyrights reasonable, whether or not people actually take the trouble to phrase it in such ways.

Henry Sturman

Legality and Morality...

It seems to me that the solution of this problem rests on the distinction between legal and moral rights. I think software piracy is theft and that's all there is to it in legal terms. Whenever somebody pirates a piece of software the software maker has a legal right to prosecute the pirate and as I will explain that is how it should be. However, there is a distinction between when it is legally feasible to prosecute somebody for theft and when it is right to do so.

Consider a person who sees a bunch of grapes in a supermarket and wants one of them. Now, she doesn't want to buy a whole bunch because she knows she won't eat most of them, so instead she takes a single grape without paying for it. Perhaps she does this once or twice a year. Now the supermarket manager might catch the whole thing on CCTV and decide not to prosecute. Why? Well, it would be a bit silly wouldn't it? And it would drive away customers. And it would be wrong to throw a person in jail for taking a single grape.

Nevertheless, I think that grape theft should be a prosecutable offence. Why? Well, imagine that somebody comes in every day for a year and steals two grapes. That starts to add up to the supermarket losing a significant amount of money. Likewise setting up a massive file sharing network with the sole purpose of systematically undermining a company's private property rights seems quite wrong to me.

I think there is a combination of factors at work which make software piracy a problem - some of this may be the fault of software companies, some of it is the fault of other people. Let's take the little girl alluded to in the article who downloads a copy of Brittany's Dance Studio. Well, the girl's parents have a computer, so the software can't really be out of their price range IMO. So if the little girl really wants it and the parents haven't bought it then it is very likely that the parents are dicks, which is very common. Even if it puts a bit of a strain on the budget they might say something like: "If you really want this we'll get it, but we won't be able to get that pink pair of jeans you want until next month." or whatever. The point is parent and child can come to a **common preference**. So a prosecution seems reasonable to me.

What about the students who can't afford the thousand dollar software package? Well, the software company could choose not to prosecute or to offer students a concession offer or the right to put their software on some number of computers specified in advance, with copies above that number being prosecutable. So for six students the number would be six computers or whatever. And if a student copies software from Uni perhaps the software company ought not to prosecute if he can't afford it.

Of course, all of the cases I've given above are a bit vague and could have holes poked in them but my point here was not to give a comprehensive list of when prosecutions should and should not be made. I just wanted to highlight the distinction. I think we should

move past discussing the legality of this issue, on which the software companies are right. Rather we should start suggesting in which sorts of cases software companies should prosecute and discuss solutions to the problems raised by cases in which prosecution seems unjust.

by **Alan Forrester** on Thu, 10/26/2006 - 17:17 | **reply**

Hypothetical parents unfairly slandered

Alan wrote

"Let's take the little girl alluded to in the article who downloads a copy of Brittany's Dance Studio. Well, the girl's parents have a computer, so the software can't really be out of their price range IMO. So if the little girl really wants it and the parents haven't bought it then it is very likely that the parents are dicks, which is very common. "

Not necessarily. It may be that the parents are decent people and so is the little girl, and she wants to play *Britney's Dance Studio*, but doesn't think it is worth $60 of her parent's money. Rather than lie to them by telling them that she thinks it's worth more than it is, or ask them to knowingly spend more money on something than it is worth, she instead downloads a copy for free (whilst retaining the option of asking them to purchase it should it unexpectedly turn out to have hidden depths).

If this reasoning were applied to shoplifting then it would obviously be wrong to steal something because you don't think it's worth the price tag, but since nobody loses out either way when she downloads it (versus not playing it), I fail to see any moral dilemma.

by Nick on Thu, 10/26/2006 - 18:55 | **reply**

... hard to obtain otherwise

> Distributing a work that is hard to obtain otherwise (for reasons of scarcity or cost) is not fraudulent as long as you make it clear that's what you are doing (it is of course still illegal, unfortunately).

As one interested in the history of computing, this is of some interest to me. In order to use and maintain most obsolete machines, violating copyrights is almost essential, since manuals and software are no longer available by 'legitimate' means (although a few manufacturers have graciously granted free non-commercial license to obsolete material). In this respect, trademark law, with its "use it or lose it" rule, could be a reasonable model; it would protect Disney's continuing interest in Mickey Mouse without forever criminalizing the use of material of no commercial value.

by **Kevin** on Fri, 10/27/2006 - 00:24 | **reply**

Software trespassing as breach of contract

Henry and Alan both make interesting points which I think somewhat cancel each other out. Yes, we do have to distinguish moral from legal issues, but in contract law they overlap in a unique way that has no close analogue in other branches of the law. Contract law is unique in that the parties themselves decide the conditions that they must obey, and society at large enforces this.

Consequently society - other people - may choose not to enforce certain types of contract. Morally, why should they?

Thus, for instance, contracts 'in restraint of trade' are invalid under existing law. So are contracts intended to fulfil an illegal *or an immoral* purpose. In the past, the latter have included contracts for the purpose of prostitution, an exception which would obviously be illiberal. But, for instance, what about contract terms which benefit no one but do harm people who themselves have done no harm? Surely those terms are nothing but harmful. Why should society jump up and intervene by force?

A related issue is this: if no harm has been done, surely the plaintiff should not be allowed to sue for damages: there were none.

by **David Deutsch** on Fri, 10/27/2006 - 00:26 | **reply**

Contracts not applicable here

In response to Henry:

Attempting to apply contract law to pre-existing intellectual property has the same problems as trying to apply normal property law - it is an analogy that doesn't fit.

A contract is supposed to be agreed before either party makes a contribution to ensure that once the contribution is made the other party doesn't renege on their part of the bargain.

If party A signed a contract agreeing that they would pay party B to create a piece of software, then, once the work had been done refused to pay, certainly that would be a breach of contract. In the case of commercial software however party C creates a piece of software first and then goes out looking for people who will retrospectively pay for it *to have been created*. There is no contractual obligation for anyone to do this since it was not agreed in advance.

And of course if any given person doesn't pay then C is no worse off than they were before and still has every opportunity to find someone else who will, unlike person B, who may be forced to renege on other contractual agreements (such as paying back a bank loan) because person A didn't pay.

In the first case, party A would need to pay even if they decided they no longer wanted the software, yet clearly in the second case it would be ludicrous to suggest that people must pay for software created by C, even if they don't want to use it. The two cases are therefore not analogous. (BTW, C may go bankrupt because they

wrongly assumed more people would buy the software than do, but that could happen just as easily if nobody used the software illegally).

When installing a piece of software, a user *may* read the contract and agree with it. Alternatively they may read the contract and say "I don't agree with that, I think I should be allowed to use the software without paying instead". They don't expect the author to do anything for them in the latter case, so they don't need to sign a contract to proceed (they may need to click a check-box marked "I agree", but it is debatable that that constitutes contractual agreement - I don't believe its ever been tested in court).

The software author is not providing a service to the user in return for the demands they make - the user is expected to hand over money, and/or inconvenience themselves (by not installing multiple copies of the program for example), but the software author offers nothing in return for this. They aren't offering the physical media since the user has either provided that themselves or someone has paid for it already (if they stole it then that is theft according to the standard definition and not relevant here), and they aren't providing any creativity or intellectual effort, since this effort was already expended prior to the user's involvement.

The only thing that the author provides to the end user in return for their money is access to a service. When the user decides to pay for that service, they are aware that the price includes both the cost of distribution *and* a markup to cover the original development. The user never agreed contractually that that they thought that the product was worth the price quoted, and if they don't feel that it is then they have the (currently illegal) option of getting the product via a different distribution channel that doesn't cost as much. By doing this they are not violating a contractual obligation, at least not a legitimate one.

If on the other hand they *do* think the product is worth the price, and can afford it, but still don't pay it, then they are acting in a way that they themselves probably recognise as being unethical, and will have to deal with that. Even then I don't consider that it should be *illegal* since it is really no worse than listening to a busker in the street for half an hour and then *not* dropping any coins in his hat.

by Nick on Fri, 10/27/2006 - 00:57 | **reply**

Private Property and Software

I think I might need to address the issue of why we have private property at all. In order to produce any commodity a person must consume resources. Even those little Buddhist monk fellows who produce feelings of serenity or religious piety in hippies and buddhists need to eat, assertions by the monks to the contrary notwithstanding. We need to be able to criticise the distribution of property between different ends and that's why we have the institution of private property. If a person can't persuade other people to give him enough resources to make a particular product by argument that constitutes a criticism of that product or of his

salesmanship, i.e. - his ability to distribute knowledge of the product. (The product is useless if people don't buy it because of crappy salesmanship.) This applies just as much to computer games and programmes as it does to apples or books or whatever. It is perfectly possible to distribute a book against copyright law by photocopying it and putting the photocopies on the Internet for people to download illegally. However, when people do this they deprive the author of money that he might have used to make more books either directly or simply by paying for food or whatever. So contractual exchange of property is one of the essential institutions of criticism of any free society.

Nick objects to prosecuting illegal downloads on the spurious grounds that ticking a box saying "I agree not to filch this software by giving it to other people," is not a contract. The person signing it might not read it or might agree to forfeit the software company's support if the product goes a bit wrong or whatever or might sign it wihtout any intention of sticking to it. People can and do sign loan agreements and other kinds of contract without reading them, should all such contracts be void? If people are too stupid to read contracts or if they just can't be bothered to pay for something does that get them an out of jail free card? I should also note that traditionally when a person signs a contract that he does not intend to fulfil people look on such behaviour as a bad act on the part of the person signing the contract, not on the part of the person who drew it up. Furthermore, I don't recall signing any contract saying that I wouldn't beat the shit out of the next person I see on the street, or that I wouldn't go the nearest shop, put a brick through the window and start stealing stuff. I respect these rules despite not having signed a contract to do so because these rules are objectively right and no free society could exist in which people systematically refused to respect them. I think that intellectual property in software tends to fall in that category. It costs money to develop software. If that software is distributed for free in violation of a contract saying that the buyer would not distribute it the software company often loses money that it might otherwise have received. This does harm the company.

Now let's go back to the case of the little girl:

> It may be that the parents are decent people and so is the little girl, and she wants to play Britney's Dance Studio, but doesn't think it is worth $60 of her parent's money. Rather than lie to them by telling them that she thinks it's worth more than it is, or ask them to knowingly spend more money on something than it is worth, she instead downloads a copy for free (whilst retaining the option of asking them to purchase it should it unexpectedly turn out to have hidden depths).
>
> If this reasoning were applied to shoplifting then it would obviously be wrong to steal something because you don't think it's worth the price tag, but since nobody loses out either way when she downloads it (versus not playing it), I fail to see any moral dilemma.

Let's suppose that this is true. She doesn't think the game is worth

nothing or she wouldn't want it at all. There are lots of ways she can enjoy the computer game without paying sixty dollars. She can rent it from Blockbuster. She can buy it in a year or so as a budget release for a much lower price. She can try to find second hand copies and so on. In all of these cases, her buying or renting the computer game at the very least does not make it more probable that people will buy games of the same sort in the future because they will be able to sell the game when they're bored with it or rent the game to other people. She ought to want to find a legal solution and she ought to be able to get help from her parents to do so. I do see a moral dilemma.

David points out that some contracts are wrong and ought not to be enforced:

> Thus, for instance, contracts 'in restraint of trade' are invalid under existing law. So are contracts intended to fulfil an illegal or an immoral purpose. In the past, the latter have included contracts for the purpose of prostitution, an exception which would obviously be illiberal.

Some contracts are invalid under existing law and it is rightly a matter for debate what sort of contracts ought to be enforced when somebody chooses to try to get the authorities to enforce them.

> But, for instance, what about contract terms which benefit no one but do harm people who themselves have done no harm? Surely those terms are nothing but harmful. Why should society jump up and intervene by force?

Well, if none of the parties to a contract want it enforced then I don't see that there is much of a problem. If one of the parties does want the contract enforced then there is a disagreement about the harm done or benefit gained by enforcing or not enforcing the contract. The person who wants it enforced thinks that it would be harmful for the contract not to be enforced, other people might disagree. It might be the case that some cases of illegal downloading are like this as I implied in my original post. I might be prepared to concede in some such cases that the downloader ought not to be prosecuted. But that's a long way from saying that such acts are not theft. If a starving orphan child steals a loaf of bread that is theft, but the government ought not to prosecute the orphan. Perhaps software companies ought to make provisions for some people to buy their software under different terms, e.g. - poor students, I see no need to scrap intellectual property in software.

> A related issue is this: if no harm has been done, surely the plaintiff should not be allowed to sue for damages: there were none.

An "if" that is not indiscriminately applicable to illegal downloading even if it might be applicable in some individual cases.

It seems to me that there is more than a touch of utopianism about

this post. **The World** didn't take the time to weigh up the actual damage done by illegal dowloading and whether people have other alternatives. Nor did it take the time to look at whether there might be solutions that would involve making suggestions for better software selling policies. No, instead it just threw the whole edifice of intellectual property in software out the window.

by **Alan Forrester** on Sun, 10/29/2006 - 17:36 | **reply**

Alan writes: "In order to

Alan writes:

> "In order to produce any commodity a person must consume resources... So contractual exchange of property is one of the essential institutions of criticism of any free society."

I'm going to assume that "institutions of criticism" is worldspeak for "mechanisms to promote creativity", so forgive me if I misinterpret what you mean, but I assume that you are saying people should be allows to sign binding contracts when exchanging property and expect them to be respected even if the burden they place on the other party could be considered totally unreasonable (e.g. not allowing them to make backups in case of damage). This is true, with the proviso that the contract must not require either party to behave in a way which is immoral, or impose ludicrous penalties for violation (such as death). This would seem to imply that someone who buys the software legitimately and then violates the terms of the contract by copying and distributing the software should be subject to penalties, but it does not imply that the author should be permitted to extrapolate huge imaginary "lost earnings" and charge them to the violator, nor does it imply that the violator should suffer prison. I would guess that the worst legitimate penalty you could justify placing on the violator would be confiscation of the software and any ill gotten gains from its resale, minus the price he originally paid for it.

Anyone receiving the software from this person would not have been party to the contract, so they would not be subject to any penalty. In fact, if they paid the contract violator for the software they should be probably offered a refund if they return all copies - though this should not be compulsory.

Alan continues:

> "I don't recall signing any contract saying that I wouldn't beat the shit out of the next person I see on the street, or that I wouldn't go the nearest shop, put a brick through the window and start stealing stuff. I respect these rules despite not having signed a contract to do so because these rules are objectively right and no free society could exist in which people systematically refused to respect them."

As he himself points out this is a case where contract law doesn't

apply. Some things we don't do because a contract says we shouldn't, some we don't do because they are *objectively wrong*, some things we don't do because they are wrong *even if we have signed a contract saying we should*. Morality exists independently of contracts - contracts do not define right and wrong, and there are some things to which they do not apply. Since the whole thrust of my previous point was that contracts arent't applicable in this case, I'm not sure what point he is trying to make by pointing this out.

> "I think that intellectual property in software tends to fall in that category. It costs money to develop software. If that software is distributed for free in violation of a contract saying that the buyer would not distribute it the software company often loses money that it might otherwise have received. This does harm the company."

If the company were to release the software and someone wrote a bad review and then people didn't buy it, that would harm the company. Does that mean writing bad reviews is immoral? If someone can, through a non-immoral act cause another person harm, that doesn't suddenly render that act immoral after all. The morality of software piracy needs to be defined independently of its consequences.

In reference to the little girl:

> "There are lots of ways she can enjoy the computer game without paying sixty dollars. She can rent it from Blockbuster. She can buy it in a year or so as a budget release for a much lower price. She can try to find second hand copies and so on. In all of these cases, her buying or renting the computer game at the very least does not make it more probable that people will buy games of the same sort in the future because they will be able to sell the game when they're bored with it or rent the game to other people. She ought to want to find a legal solution and she ought to be able to get help from her parents to do so. I do see a moral dilemma."

In the hypothetical situation I was describing it was assumed that there was no alternative channel by which to get the game. This counter-argument is very much tied to the relat-life happenstance of the situation, in which the software developers, in conjunction with a third party have arrived at a clever a viable way allow people to try the game without paying and yet still make revenue for the developer. On the one hand Alan has avoided the issue of whether the girl would have been right to pirate had such an option not been available (as it often isn't), but on the other hand he has illustrated a very good example of how the developer can apply creativity to solve the problem (crap software being expensive) in a way that makes everyone happy (videogame rentals). If they had instead been allowed to exact a profit by getting the police to round up all 13yo girls who pirate, and then sued their parents for $50,000 each, it seems unlikely that there would have been much incentive for them to devise this (much better) solution.

Incidentally, it's worth noting that Sony recently launched an

attack against the second-hand gaming market. Although most people criticised them for this money-grubbing attitude, since developers make no direct profit from the second-hand games market, it does raise the question of why we should consider second-hand intellectual property to be morally distinct from piracy anyway? Just because *someone* is making a profit, it doesn't mean the developer benefits. In fact how is selling a used game any different than selling an unused pirate game? In both case you profit from the publishers work without them getting a penny, and in both cases you deprive them of a sale since that customer won't be buying a legitimate new copy instead. And yet since there is obviously nothing morally reprehensible about second hand games (at least to any sane person) it would seem to cast further doubt about the validity of the "lost revenue = stealing" argument commonly used against pirates.

> "It seems to me that there is more than a touch of utopianism about this post. **The World** didn't take the time to weigh up the actual damage done by illegal downloading and whether people have other alternatives. Nor did it take the time to look at whether there might be solutions that would involve making suggestions for better software selling policies. No, instead it just threw the whole edifice of intellectual property in software out the window."

I believe that the path to a utopian society is to first work out what the ideal situation would be and then compromise if necessary when pragmatism requres it - not to shoot for an unsatisfactory solution in the first place. This is sometimes called "not going in with your highest offer first".

The closing argument of the original article was that software developers *should* be seeking innovative solutions for better software selling policies rather than concentrating its efforts on demonising and prosecuting pirates. So what makes you think that **The World** isn't interested in doing that?

The purpose of intellectual property rights is to promote innovation, but it has become patently obvious (no pun intended) that they can easily be abused to stifle creativity and competition, (or just to make a fast buck at the expense of some poor sap), and that violating them can benefit humanity in many cases. So *why not* 'throw the whole edifice out' and see if we're better off without it? After all, we're just talking...

by Nick on Mon, 10/30/2006 - 10:51 | **reply**

Piracy

"If the company were to release the software and someone wrote a bad review and then people didn't buy it, that would harm the company. Does that mean writing bad reviews is immoral? If someone can, through a non-immoral act cause another person harm, that doesn't suddenly render that act immoral after all. The morality of software piracy needs to be defined independently of its

consequences."

Nick,
Keeping a promise (for example, honoring a contract) is usually considered ethical behavior! So Alan is not defining moral behavior just by its consequences. There is a principle involved.

An honest review that is critical of a product and thus causes its sales to fall, is not the same as stealing the product! Owners of a product do not own the right to column space in newspapers or on blogs. Therefore they cannot restrict an individual's right to express an opinion in such a column. Such a restriction would be illegal and immoral.

If you own a television, I cannot say you have economically damaged me because you have not given it to me. In almost all circumstances, it would be illegal and immoral to take your television from you. Similarly, software developers and distributers do not own the right to other people's money. So others can rightfully (morally and legally) try to convince potential customers not to spend money on a software product.

On the other hand, software developers do own their own product, the fruits of their labors. Owning something means restricting other people's rights to use it in a particular way and allowing other people to use it in a particular way, for the most part at the discretion of the owner. If you instead "pirate" those rights, by downloading software without paying for it, that is properly considered illegal and immoral because it is taking the product of the developer's labor without compensating him.

The developer would not have put in the hours to develop the product if others could simply use his product without paying for it. Stealing software is immoral for the same reason that stealing labor (slavery) is immoral. People properly own the fruits of their own labor, unless someone compensates them for their time.

By respecting intellectual property rights, Alan is defending the moral principle that coercing people into giving up the products of their labor is wrong.

by a reader on Mon, 10/30/2006 - 22:39 | **reply**

"...software developers do ow

> "...software developers do own their own product, the fruits of their labors. Owning something means restricting other people's rights to use it in a particular way and allowing other people to use it in a particular way, for the most part at the discretion of the owner."

The problem with this statement is that software developers do not own the product once they have sold it. If they burn it onto a CD and you pay money for that CD then *you* own it. What they own is the copyright, which to me means that they own the right to claim

credit for the work, and to charge for reproductions of it. You have

paid for one such copy however, and that copy is yours to do with as you please within the confines of moral behaviour.

> "The developer would not have put in the hours to develop the product if others could simply use his product without paying for it. Stealing software is immoral for the same reason that stealing labor (slavery) is immoral. People properly own the fruits of their own labor, unless someone compensates them for their time."

You are simply repeating the flawed analogy of "copyright violation is theft" without justifying it. In fact you attempt to reinforce it with the even more inaccurate assertion that "copyright violation is slavery". Forcing someone to work is slavery (whether you pay them or not). However not paying someone for work they do voluntarily is not slavery, and is only immoral if you agreed beforehand that you would pay them for it.

You are not stealing their labour because with intellectual property, the fruits of that labour can be recycled infinitely. Steal as many copies as you want, and they still have an infinite supply. Forget for a minute whether copyright violation is right or wrong, the point here is that it is *not* anything like slavery, and it is *not* anything like theft.

> "By respecting intellectual property rights, Alan is defending the moral principle that coercing people into giving up the products of their labor is wrong."

Where is the coercion? This is yet another metaphor in lieu of an argument. Nobody is trying to make software developers give their software away for free, on the contrary it is they who are trying to make others *not* give it away.

Software developers are perfectly entitled to use any morally legitimate means to control the distribution of their software, whether it be through copy protection schemes, competitive pricing and distribution, or legal action against those who cause them actual (provable, calculable) harm.

The point of the article was that the harm caused by philanthropic (free) redistribution has been massively overestimated, and the legal penalties for such actions are wildly disproportionate, and must be heavily clamped down to prevent publishers abusing the legal system to recoup outrageous fines from the few pirates they manage to catch and make examples of. They cannot be allowed to blame poor sales on pirates and then expect the pirates to pay the difference - pirates for the most part just supply software to those areas of the market unwilling to pay for it, and they do no calculable harm by doing this because most users of pirate software would not have paid for it anyway.

The way they get away with fining pirates for more than they've taken is by using the "theft" metaphor to imply that pirates selling copies is like them stealing them off the shelf. But that's not true -

the pirates aren't manufacturing wealth from nothing - software is

not a money tree. If you copy a CD full of valuable data then together those two identical CDs have exactly the same value as the first one (plus the miniscule cost of the media). The same is true of 10, or 100, or a 1000 copies. You cannot steal or devalue intellectual property in that way - you cannot increase or reduce its worth by duplication.

The true value of intellectual property is the number of people willing to pay for it, multiplied by the amount they are willing to pay. A pirate is no more likely to influence those numbers than a magazine reviewer is.

by Nick on Tue, 10/31/2006 - 00:51 | **reply**

Re: Legality and Morality...

I argued that copyright should be viewed as a contract. David replied:

Consequently society - other people - may choose not to enforce certain types of contract. Morally, why should they?

Indeed. Nobody is forced to enforce any contract. But in a free society one will always be able to find someone willing to enforce a certain contract. So even if only 1% of arbitration agencies enforce copyright contracts, one can still hire one of those 1% to enforce the contract. If the other 99% do not agree with the legality they might use force to prevent the 1% from enforcing copyright contracts. Whether that would be right depends on the question of whether copyright contracts are legal. So my point is that David's distinction between legality and morality does not solve the problem. In a society where copyrights are considered illegal and immoral, copyrights can not be enforced. In a society where copyrights are considered legal but immoral, copyrights will be enforced.

David also writes:

A related issue is this: if no harm has been done, surely the plaintiff should not be allowed to sue for damages: there were none.

Perhaps. But this can be solved by specifying payments in the contract. If I download software costing 10 euros I might be asked to agree that if I allow someone to copy it, then I will pay a charge of 1000 euros. If society believes in freedom of contract that contract can be enforced, not because of the principle of damages but because of the principle of property exchange.

Henry Sturman

by **Henry Sturman** on Tue, 10/31/2006 - 20:36 | **reply**

Re: Legality and Morality...

Henry writes:

If society believes in freedom of contract that contract can be

enforced

So if someone enters into a contract to love, honour and obey another person for the rest of her life, and later decides that she doesn't want to obey any more, a society that believes in freedom of contract will force her to obey nevertheless?

And 'freedom of contract' also implies that third parties who believe that entering into such a contract is immoral, are nevertheless obliged to enforce it? (Or to stand by while the 'aggrieved' party uses force.)

by **David Deutsch** on Tue, 10/31/2006 - 23:13 | **reply**

Legal vs Moral

I think Henry's position is something like:

- legal things are ones you have a right to do without anyone using force against you

- all contracts are legal, including their enforcement

with those premises, then a third party who thinks something is a bad way to live, but legal, must not intervene.

but I disagree that all contracts ought to be legal. that allows for slavery contracts. i think it needs to be legal to quit a contract and only owe damages.

-- Elliot Temple
curi@curi.us
Dialogs

by **Elliot Temple** on Wed, 11/01/2006 - 00:29 | **reply**

Re: Legality and Morality...

David replied:

So if someone enters into a contract to love, honour and obey another person for the rest of her life, and later decides that she doesn't want to obey any more, a society that believes in freedom of contract will force her to obey nevertheless?

Perhaps we should distinguish between a contract and a promise, as Rothbard suggests. And certainly a marriage promise (or contract) should not be enforcible for the simple reason that it is understood that it will not be enforced. In our culture we all know that marriages are not to be taken as literal enforcible contracts. One of the reasons for this is that we understand love can not be forced. But one might specify in a marriage contract things such as that if one party leaves the other, he agrees to pay a charge. In fact such contracts do exist, and such a charge is called alimony.

Elliot writes:

but I disagree that all contracts ought to be legal. that allows for

slavery contracts. i think it needs to be legal to quit a contract and only owe damages.

I agree not all contracts should be legal. So in that sense I agree freedom of contract is not 100%. For example, the contract to commit a crime (e.g. a hit contract) should not be enforcible. Whether slavery contracts should be enforcible, I'm not sure. A point can be made that certain rights are inalienable, so that you can't sell yourself into slavery. But again, people can agree to charges if they, say, quit their job without giving 6 months notice. But there would be exceptions. For example, a doctor should not be permitted to quit an operation in the middle of it so that the patient dies. And a pilot agreeing to fly someone to the North Pole and back should not be able to refuse the return journey.

Also, it seems right that soldiers in a voluntary army are punished for desertion. If soldiers are paid for their services and trained, then we should be able to rely on them. Also, suppose an astronaut's training costs a million euros. Then again it seems unfair that he should be able to quit the moment his trainig is done. Unless perhaps he pays back the million euros, but if he is not rich he won't be able to pay, and so this does imply in such a case a slavery contract of sorts should be enforcible.

Henry Sturman

by **Henry Sturman** on Wed, 11/01/2006 - 01:25 | **reply**

damages

Also, suppose an astronaut's training costs a million euros. Then again it seems unfair that he should be able to quit the moment his trainig is done. Unless perhaps he pays back the million euros, but if he is not rich he won't be able to pay, and so this does imply in such a case a slavery contract of sorts should be enforcible.

---

yes, slavery "of some sort". but what sort? exactly the conditions that will cause him to pay back the debt. and nothing else, no matter how small

note that in the case of a music CD, the damages are not so large, so paying them back is a lot easier. the damages, for many types of piracy, are zero.

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promises, as Godwin taught us, are not rational. if something is right to do, I will do it whether I promised or not. If I promise to do something, and in the event it is wrong to do, then I have promised to do wrong. so promises vary between useless and wicked.

-- Elliot Temple
curi@curi.us
Dialogs

by **Elliot Temple** on Wed, 11/01/2006 - 02:04 | **reply**

contracts

contracts are supposed to help people. they should not be a mechanism to create Rules and Authority over people. as long as everyone consents to a contract, and finds it useful, then great. but if they don't consent, they should stop. this is just basic human decency. don't do stuff that hurts people.

stopping, of course, can be problematic. but how could it possibly be reasonable to demand anything from someone who quits a contract but the damages to you? if he pays those, you have lost nothing (except a nice opportunity. but he did not and does not owe you that.)

-- Elliot Temple
curi@curi.us
Dialogs

by **Elliot Temple** on Wed, 11/01/2006 - 02:09 | **reply**

I think the key point about c

I think the key point about contracts, which has been lost in a sea of extreme examples, is that a contract cannot be used to enforce lifelong involuntary servitude, or anything else that violates the rights of a participant. If you sign a contract agreeing to do something but then later change your mind, then the contract is intended to ensure that the other party does not suffer unduly as a result of that decision - not to ensure that you suffer to make them feel better. This means that you are contractually obliged to *make it up to them* as best you can, but that's all.

In the case of a doctor who wants to quit surgery, there is no way he can make it up to the patient if he lets them die, hence he is duty bound to ensure that they don't. That may mean having to finish the surgery, but he can probably get away with calling in a colleague in most cases.

In the case of a soldier who wishes to desert, he can do so but he must ensure that he does not endanger his fellow soldiers or the war effort in doing so. This is liberally and unfairly interpreted by the army to mean he cannot do so during wartime *at all*, but in this day and age the penalty for deserting in a way that does not endanger lives is likely to be minor.

A wife or husband who decides to leave a marriage cannot be forced by contract to stay, but they may be expected to pay money to compensate their partner for irreversible life choices they have made on the understanding that the marriage would last longer.

A person who agrees to work indefinitely as a slave, but later changes their mind can leave without owing anything since the other party has only gained by their generosity, and was never legally entitled to it. They may however be expected to help make arrangements for their replacement and give an adequate notice

period, to avoid causing harm by their sudden departure. The exact same thing is true of paid employment, incidentally.

In the case of a software pirate, the contract can oblige them not to give away or sell copies of the software, and if they violate it they can have the software itself, and any ill-gotten gains confiscated. The contract cannot however impose an arbitrary fine of $500,000, or any other unreasonable penalty, any more than a prenup could dictate that a bride must submit herself to the electric chair if she ever decides to leave her husband. The penalty terms in a contract must be *reasonable* in order to be legally binding.

by Nick on Fri, 11/03/2006 - 09:43 | **reply**

Software is not property, sof

Software is not property, software is a form of **knowledge**.

Is it moral to prevent the spread and growth of knowledge?

by a reader on Mon, 12/04/2006 - 02:21 | **reply**

Maybe a better question would be...

Is it moral to own knowledge?

by the same reader on Mon, 12/04/2006 - 02:23 | **reply**

Nothing Can be Owned Except Knowledge

by another reader on Thu, 12/07/2006 - 00:54 | **reply**

Is it moral to restrict knowledge?

I suppose it is for what is clearly harmful knowledge, like how to build a nuclear bomb. But what about useful knowledge? How about an AIDS cure? Or the GENOME sequence? Or software? In these cases, it could be argued that people are being harmed by restricting who can use these forms of knowledge. Is the coercion of those that would like to replicate this knowledge justifiable?

by a reader on Thu, 12/07/2006 - 06:12 | **reply**

Software and Community in the

Software and Community in the Early 21st Century

Keynote address given at Plone Conference 2006 by Eben Moglen of the Software Freedom Law Center. The moral implications of owning knowledge are discussed.

by a reader on Sun, 12/10/2006 - 18:16 | **reply**