



Software patents & IPRED2: write software, end-up in jail

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Software Patents

- not on *code* but on *inventions*: 'deeper'
- increasingly 'popular' since the 1990's
- allowed in Europe if 'technical contribution'
 - even after 2006 EU directive rejection
 - nobody knows what a 'technical contribution' is
- low threshold: 'triviality', quality problems
- “legalised extortion”

Patent Infringement

- no 'independent discovery defence'
- try to reach a settlement
 - prepare a defensive patent portfolio
- go to a *civil* court (injunction, damages)
- or be prosecuted and go to **jail**

Present Situation

- infringement a crime e.g. under Dutch law
 - 4 years / € 45000 maximum if 'business'
- provision inserted by parliament for SMEs
- *never* used in practice
 - cases too complex for criminal courts
 - parties want *compensation*, no *punishment*
 - *public* prosecution no government priority

EU policy

- enforcement a European priority
 - 'terrorists financed by piracy'
- “Intellectual Property Rights Enforcement Directive” #1: adopted 2004
 - private law only
 - extensive and inconsistent changes to procedural law (e.g. on seizures)
- IPRED #2: currently debated



– criminal law

Changes

present (WTO 'TRIPS')

- commercial scale
- trademark
counterfeiting
- copyright *piracy*
- no police priority

future (?) ('IPRED2')

- *any* 'intellectual property right'
- *any* commercial scale infringement
- joint investigation teams

Why this is ridiculous

- 'intellectual property' is an overly wide and poorly defined concept
 - age-old principle: free unless *specific* law
- 'commercial scale' much wider than 'piracy'
 - non-commercial patent or trademark infringement does not even exist
- EU can only 'harmonise' (maximum) *punishments*, not national police priorities

Threats

- 'joint investigation teams' razzia's
 - police authorities for the BSA?
- abuse of 'data retention' data
 - punishments set to meet data retention directive minimum requirements
- people will believe all imitation is a crime
 - *some* imitation is essential to competition

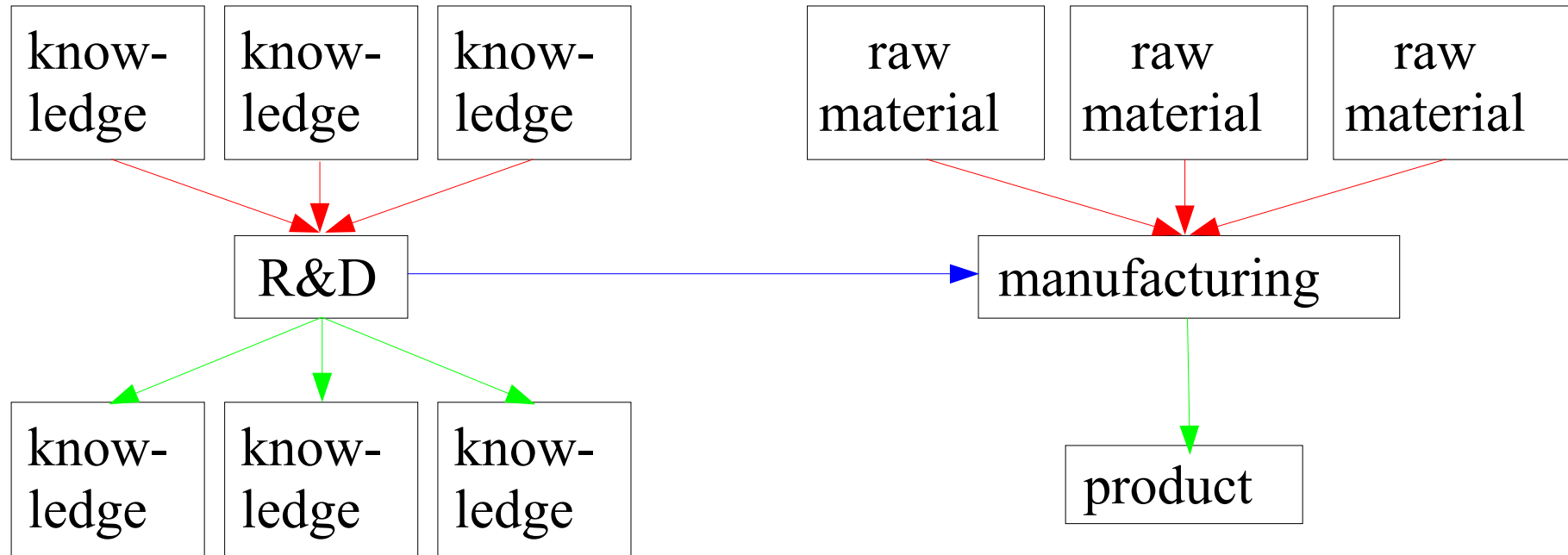
A Wider Perspective

- The economy of knowledge (information)
 - information is 'non-rivalrous'
 - information is (often) 'non-excludable'
 - *cost* and *value* can widely diverge
- Information law
 - should only remedy any 'market failure'
 - no 'reward' for effort
 - not 'natural' like real property

The Patent Law Balance

	individual	society
justice	“I created it so I own it.”	sharing knowledge does not hurt creator
efficiency	exclusivity needed for R&D cost recovery	·monopolies ·transaction cost

Transaction Costs



- trade in knowledge is expensive and frustrating - while knowledge can be shared
- that's why commercial companies like Open Source too

Patents versus “Open”

- patents are increasingly a burden
- patents are a market failure *remedy* only, not a 'natural' *reward*
- EU geared to 'rent seeking' lobbyists
- 'open' (software, science, culture) models
 - *not* something special and separate!
 - *but* a *mainline* approach to innovation without undue overhead

Messages for policy makers

- imitation is not 'theft' but key to capitalism
- innovation involves 'creative destruction' (Schumpeter)
- patent law in particular:
 - should remedy market failure *only*
 - *no* 'reward' for efforts! works two ways:
 - pure science (theories) *can not* be patented
 - zero effort 'flash of genius' inventions *can* be patented

Politics

- European Patent Office
 - run like a business, no balance
 - defeats 'separation of powers'
- Politicians
 - are told that imitation = crime
 - are told that patents = innovation
- Lisbon agenda saved by *imprisonments?!*

Political economy

- politicians lack interest and understanding in 'intellectual property'
- 'rent seeking' a highly profitable business
 - IBM in the 1990s, M\$ presently
- lobbyists set the scene
 - concentrated efforts by software giants
 - FFII counter-lobby: a major innovation
- James Buchanan 1986 Economics Nobel prize

IPRED2 - in sum

- IPRED2 criminalising all 'intellectual property' infringement
 - is not a solution
 - to a non-existing problem
 - in a very bad way ('state terror')
 - ignoring political sensitivities (front page news!)
 - based on backward innovation thinking
- **Get the message to politicians!**