



## *Policy: Copyright and Patents*

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### **Policy**

The Liberal Democrats support intellectual rights in return for private creative endeavours, but opposes increased restrictions, such as is happening with copyright. The Liberal Democrats also believe that intellectual rights laws need to take into account the changing nature of society and technology.

#### **The Liberal Democrats would:**

1. Abolish copyright on material produced by the Australian Government (subject to privacy concerns).
2. Put into the public domain or auction off patents owned by the Australian government.
3. Reduce copyright duration to 15 years from publication or broadcast, or the life of the author (whichever is greater).
4. Reduce patent duration to 15 years.
5. Establish an orphan works defence for copyright infringement.
6. Repeal the technological protection measures and electronic rights management sections of the Copyright Act.
7. Support legal protection for trivial, non-commercial copying, such as sharing between friends.
8. Clarify patent law to explicitly exclude things that are not inventions such as discoveries of nature (including human genes) and abstract concepts (such as business methods).
9. Establish an independent invention defence for patent infringement.

## Discussion

Thomas Jefferson wrote:

"If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me."

Copyright and patent law are often described as "intellectual property", and while it is important to remember that these legal regimes are not property and in fact very different from traditional property rights, the analogy provides a useful guide regarding the important characteristics that policy in these areas should have, such as clear rules of ownership and a stable set of laws that allow precedents to arise.

Copyright, patent and similar laws have been created with the intention that, by allowing a period of controlled monopoly over the use of ideas, they will encourage the creation of such ideas.

The argument is that without enforcing restricted control over intellectual material, then there would be no incentive for inventors, artists, and the like. Historically, however, systems such as copyright are relatively recent and many of the great inventions and artworks of history were created without such protection. Even today many street artists busk instead of charging a fixed fee and we are already seeing alternative modern funding models arise such as crowd funding.

Copyright terms have increased from the original 28 years, to now the life of the creator plus 70 years, with proposals to increase this to life plus 120 years. These changes have

been made retroactive and therefore benefit existing copyright holders rather than encourage new ideas.

This cost of restricting access to ideas for so long has been calculated as far outweighing the benefit in stimulating creation. The optimal term for copyright duration has been estimated at around 15 years[1]. Patent duration is likewise now longer than optimal[2], and given the rate of technological progress and improvements available in distribution and production should be also reduced.

The Liberal Democrats would return copyright and patent to the original purpose, the encouragement of new ideas, and shorten terms to those calculated as providing the optimal benefit.

These changes would have impacts on several international treaties.

Copyright no longer requires registration or even a declaration notice, and is automatic even where the material has no commercial value. This means ownership is often unclear (unlike real property). There is a growing body of orphan works that cannot be used because their copyright owners cannot be determined, leaving any who use such works open to enormous liability.

The Liberal Democrats propose an orphan works defence for copyright infringement. This would permit use of a work where, after a reasonable effort at searching had been made, the owner cannot be found. If the owner subsequently turns up the infringer would not be liable for damages, if they can prove in court that the reasonable search was undertaken, although royalties on any remaining undistributed or unsold copies of the work would be owed.

The technological protection measures and electronic rights management sections of the Copyright Act impose penalties and damages, even where no copyright infringement has

occurred. For example, copying from a VHS video for purposes of fair dealing is allowed, but copying the same material from a DVD would be breaching the technological protection measures provisions, even though there is no breach of copyright.

These provisions are unnecessary, as any breaches they would involve are already covered by existing laws. They hamper technological development and impede property owners from using their property (such as DVDs) as they see fit (such as format shifting).

Intellectual property laws have also failed to keep up with advances in technology. For example, research has estimated digital file sharing - the modern equivalent of lending someone a book or cassette tape - is practiced by 2.8 million Australians[3], out of around 8 million households. People simply no longer own physical books or recordings that they can lend to friends. Protections need to be introduced to ensure that individuals are not persecuted for trivial behaviour as has been seen in other jurisdictions[4].

The definition of what can be patented has expanded to cover abstract concepts like business methods and products of nature . In particular the patenting of existing human genes, where a company claims ownership of part of an existing person is absurd.

The Liberal Democrats would introduce provisions similar to Europe with a (non-exhaustive) list to clarify these items are not to be regarded as inventions. This would explicitly exclude from patents discoveries and scientific theories.

The LDP would also introduce a defence of independent invention where defendants who can prove they have developed their invention independently, without the knowledge from an existing patent, would not be liable for infringement. This would reduce the proliferation of vague patents that are used solely for litigation across such a broad area that they actually stifle invention (for fear that it might be infringing upon some patent) rather than promote it.

## References

Note: Sections of this policy are based on the Cato Handbook for Policymakers, <http://www.cato.org/cato-handbook-policymakers/cato-handbook-policymakers-7th-edition-2009>

[1] "Forever Minus a Day? Calculating Optimal Copyright Term", Rufus Pollock, July 2009, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1436186](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1436186).

[2] "Market Size and Intellectual Property Protection", Boldrin and Levine, August 2009, <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2354.2009.00551.x/full>.

[3] "Unauthorised file sharing has a significant impact", <http://artfacts.australiacouncil.gov.au/music/industry-8/unauthorised-file-sharing-has-a-significant-impact-on-the-music-industry/>.

[4] "Copyright madness: \$1 million for 7 songs", <http://rt.com/usa/copyright-madness-1-million-for-7-songs/>.