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the extremists in power

I don't even know how to begin this story, so stupid and extreme it is.

The World Intellectual Property Organization (WIPO) was convinced by Jamie Love and others to hold a meeting about "open collaborative models to develop public goods." One of those models is, of course, open source and free software. Lobbyists for Microsoft and others apparently (according to **this** extraordinary story by Jonathan Krim) started lobbying the US government to get the meeting cancelled. No surprise there. Open source and free software is a competitor to MSFT's products. Lobbying is increasingly the way competition is waged in America.

But the astonishing part is the justification for the US opposing the meeting. According to the Post, Lois Boland, director of international relations for the U.S. Patent and Trademark Office, said "that open-source software runs counter to the mission of WIPO, which is to promote intellectual-property rights." As she is quoted as saying, "To hold a meeting which has as its purpose to disclaim or waive such rights seems to us to be contrary to the goals of WIPO."

If Lois Boland said this, then she should be asked to resign. The level of ignorance built into that statement is astonishing, and the idea that a government official of her level would be so ignorant is an embarrassment. First, and most obviously, open-source software is based in intellectual-property rights. It can't exist (and free software can't have its effect) without it. Second, the goal of WIPO, and the goal of any government, should be to promote the *right balance* of intellectual-property rights, not simply to

promote intellectual property rights. And finally, if an intellectual property right holder wants to “disclaim” or “waive” her rights, what business is it of WIPOs? Why should WIPO oppose a copyright or patent rights holder’s choice to do with his or her rights what he or she wants?

These points are basic. They should be fundamental. That someone who doesn’t understand them is at a high level of this government just shows how extreme IP policy in America has become.

posted by [[Lessig](#)] on [**Aug 22 03 at 5:58 AM**] to [**bad law**]

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Comments on “the extremists in power”

I think this shows the true state of insanity in this country. The level of greed/resistance to change is just amazing.

» posted by Brian on Aug 22 03 at **7:31 AM**

Boland was right. Let’s get real. This conference idea was not a nobly dispassionate proposal to examine the ontological status of open source software. This was in fact an an openly politicized attempt to get an international, government-sanctioned intellectual property organization to provide a forum so that the usual suspects can vent about the evils of capitalism in general and Microsoft et al. in particular. Why should the USPTO send somebody to listen to that that crap or give credence to it merely by being there?

If someone has a specific, serious proposal to change the legal status of open-source software then let the WIPO examine that concept when and if it is ripe for such examination.

I think it is flatly disingenuous to presume that this proposal was anything other than a highly politicized stunt with no basis in any specific concepts or proposals ripe for WIPO-level discussion. Boland was right. Lessig was way over the top calling for resignation.

» posted by **George Tobin** on Aug 22 03 at **7:50 AM**

Some historical context is probably helpful in not getting too frustrated here.

Looking over a longer term, the US does have a history of being too stingy with intellectual property rights. In the patent context there have been arguably arbitrary and arguably capricious obviousness standards (see *AG Pro v. Sakraida*). Also, in the patent context there was the longstanding blanket denial of software patents.

In the copyright context there has been denial of copyright based on failure to follow hypertechnical procedures (*Gold Rush* movie, that *Capra* movie).

Against this temporally dilated background, it is easier to understand the simple minded more-ip-better attitudes that we commonly observe. Not everyone has an easy time walking away from their Reagan era political stances.

The real challenge on a going forward basis is how can we strategically dole out intellectual property rights so that you only get rights economically commensurate with the economic benefit you give.

In *SCO v. IBM*, this will probably be a relatively straightforward process when the copyright infringement evidence (and counter-evidence) emerges.

Crafting better standards for who really deserves a given software patent monopoly seems like a funner issue. The WIPO will get there in time. Not all big players are wedded to expansive patent rights these days (eg, some of the amici briefs in the Warner-Jenkinson case).

Hopefully, when the debate happens, the big players won't think of some way to game the obviousness law in their collective favor — I mean, that would take some real creativity ;)

» posted by **David Wojcechowsky** on Aug 22 03 at **8:01 AM**

George Tobin ought to apply for a job with Lois Boland. He is equally adept at missing the point. Open Source is a real, expanding phenomenon. Even if the WIPO has to listen to the occasional political rant, it should be there. But even more importantly, Boland didn't refuse because she was concerned about the politicisation of the meeting; she refused because she sees open source as *opposed* to intellectual property laws, and this statement is, as our esteemed host says, ignorant and an embarrassment, and ought to get her sacked.

» posted by **Chris Lawson** on Aug 22 03 at **8:05 AM**

I believe that George Tobin may be missing the point here. Open Source Anything is based on international intellectual rights. George makes a common mistake of confusing Open Source _fill in the blank_ with the public domain. If you look closely, you will see that the end products of open source projects tend to come with license agreements. In my work I have seen source code licenses for many proprietary products. The structure of agreements covering the usage of open source products is similar (if not identical) to agreements covering the use of proprietary "closed source" products. They tend to describe who owns the intellectual property, who is being granted a license, what the licensee is allowed to do with the licensed product, who owns derivative works, and who gets to collect fees for derivative works.

To say that open source is at odds with intellectual property and IP law is to completely miss the point. Intellectual Property law creates the legal environment that supports both proprietary and open source projects. WIPO is the international structure for establishing international agreements WRT IP. Lessig is not wrong in asking for Boland's resignation. Boland should know better.

Tobin is wrong to state that only proprietary interests should be represented in an international IP forum. The reason that there is international interest in open source is because a great number of people, including people from the commercial sector (like myself) recognize a tremendous benefit to "the commons." It is irresponsible of Boland to not represent US commercial interests with a stake in open source software and projects.

» posted by **Matthew S. Hamrick** on Aug 22 03 at **8:34 AM**

This is so awful I don't know where to start. I don't have time to deal with this kind of thing, but I have a little bit of money. Who should I send it to do the most good. I already donated \$50 to the FSF to help defray the SCO extortion case.

» posted by **Henry Minsky** on Aug 22 03 at **8:41 AM**

oh come on George, "the usual suspects can vent about the evils of capitalism"? You mean like IBM? It is first grade in this field to understand that open source and free software is not anti-commerce, or anti-IP. It might be anti-proprietary software, but it takes a particularly careless mind to miss the distinction. Such minds do not deserve high office (all evidence to the contrary).

And Henry: **EFF**, and Jamie Love's organization is **CPTech**.

» posted by lessig on Aug 22 03 at **8:56 AM**

With all due respect to Mr. Lessig, and with the caveat that I too think defenestration is appropriate with regard to this statement... if in fact it was made ... I think perhaps Mr. Tobin's point is the one being missed.

I think his argument was that the function of having this get-together re: open-source was not to discuss directions for or desirable changes in law relating to open-source development, but simply an opportunity for a bunch of pinko commie bedwetters to bitch about our fine upstanding IP right holders' activities.

I suspect he is probably quite aware of the legal basis for open-source development. I believe he just thinks the purpose of the session was to promote open source, not to engage in a meaningful dialectic process or otherwise share information. Is this a valid and reasonable complaint? I'm too intellectually lazy to inquire further, but I suspect it's at least based on the questionable premise that rich capitalists carving up the world is OK, but (metaphorically) penguin-suited computer geeks having a go is wrong.

» posted by **Ian Lindley** on Aug 22 03 at **9:25 AM**

If that is what Mr. Tobin thinks the meeting would be about, he is not informed. But that's quite besides the point of my post. Whether you support there being a meeting or not, my criticism was of the **reasons** given for opposing the meeting. They betray ignorance.

» posted by lessig on Aug 22 03 at **9:31 AM**

The Open Letter to the WIPO addresses following 7 topics

1. The IETF and Open Network Protocols.
2. Development of Free and Open Software
3. The World Wide Web.
4. The Human Genome Project (HGP).
5. The SNP Consortium
6. Open Academic and Scientific Journals
7. The Global Positioning System.

Note that Free software / Open Source is just one of them.

Full text can be found here:

<http://www.cptech.org/ip/wipo/kamil-idris-7july2003.pdf>

A few days later an article about it appeared in Nature.

[118 Nature, vol 424 | 10 July 2003]

Full-text see: <http://mail.fsfeurope.org/pipermail/discussion/2003-July/004003.html>

The initial answer from WIPO:

"Francis Gurry, an assistant director-general at the WIPO, said that the organization welcomed the idea. "The use of open and collaborative development models for research and innovation is a very important and interesting development," he said in a statement. "The director-general looks forward with enthusiasm to taking up the invitation to organize a conference to explore the scope and application of these models."

Someone wrote on this blog:

"I think it is flatly disingenuous to presume that this proposal was anything other than a highly politicized stunt..."

Like a typical Slashdotter... I propose that you first READ the Open Letter before making lousy comments like that.

Someone else:

"...a bunch of pinko commie bedwetters to bitch about our fine upstanding IP right holders' activities."

And how many Nobel prizes have you got?

One vote more for Boland's resignation.

» posted by **Wouter Vanden Hove** on Aug 22 03 at **9:46 AM**

For anyone who thinks the WIPO meeting was supposed to be a stunt, please have a look at the original July 7 letter to WIPO, available online at www.cptech.org/ip/wipo/kamil-idris-7july2003.pdf .

The letter calls for a meeting to examine the IPR implications not only of free software, but of a wide range of emerging economic models based on open collaboration. The signatories include economists like Joseph Stiglitz and Hal Varian, not generally known for their anti-capitalist views.

» posted by **Darius Cuplinskas** on Aug 22 03 at **9:59 AM**

Consider this excerpt from [this page](#) on the WIPO's site:

*"7. Given its increasing global relevance, the intellectual property system cannot continue to evolve as an issue limited in scope and focused mainly on maintaining and developing intellectual property rights protection. The more intellectual property becomes central to economic growth and wealth creation, the greater will be the challenge of developing the international intellectual property system in a way that it be instrumental to social and economic development. In addition, while stressing the economic benefits of intellectual property creations, **it becomes most necessary to also attribute a rightful place to the less economically tangible but equally important cultural aspects**, namely the artistic and intellectual pleasure that such creations bring, enriching our daily life and lasting cultures."*

» posted by **Drew Vogel** on Aug 22 03 at **11:03 AM**

This is fun. Let me reply:

1) The proposed conference was specifically intended to be about promoting 'open' models of innovation that don't rely on patents.' The Nature article specifically states the signers' goal of promoting alternatives to current protections with respect to software and pharmaceuticals. Whether one endorses this agenda or not does not change the fact that the conference was expressly intended to advocate /endorse /promote models closer to a "patent-free" paradigm. The express intent was to act to reduce the scope of current intellectual property rights for both pharmaceuticals and software.

2) The express goal of WIPO is, in the words of the current director general, the "maintenance and further development of the respect of intellectual property throughout the world. It means that any erosion of the existing protection should be prevented..."

3) Ms. Boland said that the US (as a member of WIPO) should not be in the business of acting to reduce the scope of intellectual property rights, a statement completely consistent with the express goals of WIPO and accurately responding to the true intention of the conference promoters.

4) So how the hell is that wrong and worthy of a demand for resignation? She appears to have a better grasp of her role and that of WIPO than does Prof. Lessig.

That is my point.

No matter how warm and fuzzy James Love and the Naderite agenda may make you feel, Ms. Boland was correct to keep away from it. If "patent-free" government funded-innovation is your dream, then by all means strap on those Birkenstocks and march the issue through any and every appropriate forum.

PS: Mr. Hamrick & Mr. Lessig: I do know the distinction between open source and public domain. I did pass the bar and people have actually paid me to draft license agreements. However, I think many people treat "open source" as if it were a political buzzword meaning death-to-Microsoft-free-software-for-the-people. I also think that some people who know better but with a broad political agenda intentionally attach meanings to "open source" that should not apply. When I wrote "change the legal status of open source software" I did not mistate nor did I imply that it was identical to public domain. I get agitated precisely because I believe that Mr. Love et al. often imply political connotations to the term "open source" as if it were synonymous with an anti-capitalist agenda rather than a reference to copyrightable code subject to legal protection.

Dumping on Lois Boland for being too politically incorrect to welcome an anti-WIPO agenda to the WIPO was a cheap shot. And ad hominem about "careless minds" when you clearly blew off a few distinctions yourself is unfair, Mr. Lessig.

Nevertheless, thanks for a providing thought-provoking and enlightening exchange. Great blog!

» posted by **George Tobin** on Aug 22 03 at **11:39 AM**

Hi, you might also be interested in my stories on the WIPO flap, which we published in Technology Daily two days before Krim followed up. One story interviews WIPO official Francis Gurry on the subject and the second story is an interview with Lois Boland on the WIPO meeting.

As we are subscription-based, I have included them below, with apologies for space consumption:

National Journal's Technology Daily

Intellectual Property

Global Group's Shift On 'Open Source' Meeting Spurs Stir

by William New

A request for a meeting on open development issues has plunged the Geneva-based World Intellectual Property Organization (WIPO) into a Washington political battle, causing it to shift its position on the issue.

At issue is whether WIPO should hold a meeting next year on "open and collaborative projects" such as "open source" software, which allows users to view and modify underlying code. The meeting was proposed in a July 7 letter sent to WIPO Director General Kamil Idris by 68 distinguished scientists, academics, technologists, open-source advocates, consumer advocates, librarians, industry representatives and economists worldwide.

Although the letter cited a broad range of open collaborative projects such as the World Wide Web and the Human Genome Project, the fight has focused on open-source software and on one signer of the letter — James Love, director of the Consumer Project on Technology, who has actively pushed for the meeting.

WIPO's initial response to the idea was so favorable that proponents began planning for a meeting. After receiving the letter, Francis Gurry, WIPO's assistant director and legal counsel, e-mailed a statement to a Nature magazine reporter calling such open development models "a very important and interesting development."

"The director general of WIPO looks forward with enthusiasm to taking up the invitation to organize a conference to explore the scope and application of these models as vehicles for encouraging innovation," he wrote.

But a few weeks later, WIPO backed off the idea. Gurry said he and other WIPO officials received "many calls" from consumer groups, trade associations, professional associations and representatives from governments.

"What happened in the intervening weeks is that a request for an open discussion on a range of 'projects' became transformed into an increasingly domestically, as opposed to internationally, oriented, polarized political and trade debate about one only of those 'projects', namely open-source software," Gurry told National Journal's Technology Daily on Tuesday. "In those circumstances, the possibility of conducting a policy discussion on intellectual property of the sort that might be appropriate for an international organization devoted to intellectual property became increasingly remote."

U.S. government officials have argued that WIPO is an inappropriate place for such a meeting. One developing country representative to WIPO on Monday expressed disappointment at hearing that the meeting is in doubt, and Love and representatives from the Computer and Communications Industry Association (CCIA) were furious to learn of the shift. Love last week called the decision a "temporary setback," and vowed, "We're going to make this happen." But for meeting opponents, he said, it would be "as if you made an atheist pope for the day." CCIA President Ed Black said on Tuesday: "Does this indicate that WIPO is abdicating authority and responsibility for these issues, including open source for the future? If so, we will all live by that, but then so must they. They should step up the plate or step aside. ... It is inexplicable that they would shut the door on what are clearly important issues."

Intellectual Property

U.S. Official Opposes 'Open Source' Talks At WIPO

by William New

An international intellectual property body is not the place for discussions about "open source" software, which allows users to view and modify the underlying code, because it falls outside of the organization's mission, a senior U.S. official argued on Monday.

Reviewing the original mission of the World Intellectual Property Organization (WIPO), said Lois Boland, the U.S. Patent and Trademark Office (PTO) acting director of international relations, it is "clearly limited to the protection of intellectual property. To have a meeting whose primary objective is to waive or remove those protections seems to go against the mission."

Boland was referring to a July request by a group of scientists, academics, open-source advocates and others for a meeting at WIPO on "open and collaborative projects," including open-source software. The WIPO secretariat initially replied favorably to the idea.

In a telephone interview, Boland gave several reasons why the Geneva-based WIPO should not hold the meeting, including a tight budget and late scheduling. She also said WIPO's agenda should be driven by member nations, and the idea came from outside the organization.

Officials from the 179 WIPO nations will convene in late September to decide their agenda for the next two years; the agenda has been in the works for months and does not include open-development issues. "It would have been somewhat unusual for such a meeting to materialize out of nothing," Boland said.

In the past six months, WIPO has had to cancel several meetings on topics directly relevant to the organization due to budgetary issues, she said, adding that with those problems, the organization should not "go out on a limb and express receptivity" to an open-development meeting.

U.S. government officials have had "informal" communications with WIPO, Boland said. A WIPO official said that since receiving a wide range of communications, WIPO has stepped back from the idea of a meeting but has not fully rejected the possibility of addressing the topic.

The U.S. government has an interagency process for developing formal positions at WIPO. A meeting that included officials from PTO and the Copyright Office was held last Thursday at the State Department. The Commerce Department and Office of the U.S. Trade Representative are part of the interagency process, too.

Boland said the United States "would certainly have some rather bureaucratic objections" to WIPO considering a policy on open-source software. "There are technical and legalistic

arguments to that." Open-source software is not protected under copyright law but only contract law, which is not the domain of WIPO, she said. That point has been heavily disputed by copyright experts.

Boland suggested that the U.S. government supports open-source growth as a development tool and she proposed it for consideration by a U.N. body focused on development.

She also reprimanded WIPO officials for publicly giving the impression that the body might consider open-source issues. "We think people working within the organization need to be better stewards of interactions" with nonprofit groups and other non-member organizations, she said.

» posted by **William New** on Aug 22 03 at **12:00 PM**

George, you misunderstand Lessig: he's only talking about the world as it should be ("the goal of WIPO, and the goal of any government, should be to promote the right balance of intellectual-property rights, not simply to promote intellectual property rights"), not as it is. If we were talking about the world as it is, then of course Boland didn't say anything wrong. But in the world as Lessig would have it, then of course she did. Always pay attention to the distinction between Lessig's world and ours.

Lessig goes wrong, of course, when he suggests that opposition to his agenda (to his view of how the world should be) is somehow ignorant. There's nothing ignorant about Boland's view, unless Lessig thinks (and perhaps he does!) that everyone who disagrees with him is ignorant.

» posted by on Aug 22 03 at **12:05 PM**

In my opinion, "promoting 'open' models of innovation that don't rely on patents" does nothing to "erode... existing protection" or to "reduce the scope of intellectual property rights". If one were graphing the two, they would be on separate perpendicular axes. If you think that the owners of free and open source "intellectual property" do not take it seriously or want the protection of their rights to be eroded, you seem to have missed the many times that the FSF or other "property right owners" have taken steps to enforce their licenses. Fortunately, most commercial entities have not needed to be taken into court to bring about compliance with the licenses. Confusing the political goals of some of the advocates of 'software libre' (free software), like Richard Stallman, with the commercial goals of advocates of open software, like IBM and HP, also gives the appearance of ignorance.

» posted by Fuzzy on Aug 22 03 at **12:10 PM**

"Open-source software is not protected under copyright law but only contract law, which is not the domain of WIPO".

what a week! First SCO-lawyers saying the "GPL is pre-empted by US Copyright law", and now this. Is there some hidden contest being held here?

And the winner "Stupidest IP-statement of the year 2003" is ...

» posted by **Wouter Vanden Hove** on Aug 22 03 at **12:19 PM**

"And how many Nobel prizes have you got?" -

» posted by Wouter Vanden Hove on Aug 22 03 at 9:46 AM

Although off topic, I can't resist the observation that ever since Arafat was given the Nobel Peace Prize (even as he was signing checks for the families of homicide bombers), I have lost total respect for the Nobel.

» posted by Bill Zimmerly on Aug 22 03 at **12:34 PM**

Mr. Tobin, please site your source for this quote:

"maintenance and further development of the respect of intellectual property throughout the world. It means that any erosion of the existing protection should be prevented..."

I am very interested what is hiding behind the "..."

» posted by **Drew Vogel** on Aug 22 03 at **12:40 PM**

Mr. Tobin,

What distinctions did I fail to make — in the argument I actually make as opposed to the one you paint above. Again, my criticism is of Ms. Boland's statement. According to Jonathan Krim's story, here is what she said: "that open-source software runs counter to the mission of WIPO, which is to promote intellectual-property rights."

Is that statement true?

It would be true if "open source software" somehow opposed intellectual property rights. I take it you concede that is wrong.

It would be true if WIPO's mission was to maximize intellectual property, as opposed to striking the right balance of intellectual property. No serious economist believes IP should be maximized; no serious attention to our own history would suggest we have believed in maximizing IP. The aim of WIPO and the US government should be to promote progress, which has always meant a balance of IP.

And it would be true if WIPO's aim was to force holders of IP rights not to "waive" or "disclaim" their rights. But again, why possible interest would WIPO have in interfering with the choice of authors and inventors?

So again, exactly how is the statement attributed to Ms. Boland true? Forget political-correctness, and all the stuff about "my world" versus the real world: Is it true or not true?

» posted by lessig on Aug 22 03 at **1:11 PM**

George,

I don't understand your point. I think it is fairly obvious that she was misinformed about the legal status of open source work and the motivations for using it. (i.e. commercial click-to-accept software relies on contracts — she stated they did not; Open Source software relies on copyrights — she stated they did not; Open Source software and collaborative research and development models are not about stippling legal protection from copyrighted works, patented technologies, or trademarks.)

Basically, she is not qualified for the position she holds.

Therefore some people want to ask her to step down.

Pretty simple, isn't it?

» posted by Robert on Aug 22 03 at **1:20 PM**

I believe it is important to recognize our own language problems in these conversations. Those opposing **Free/Libre and Open Source Software** are not "proprietary" as in the context of copyright law FLOSS is just as proprietary as the closed-source alternatives.

I have found that the best distinction to use is “software manufacturing”. We are really talking about folks who for historical reasons dating back to when software was always bundled with hardware treat software as if it were hardware. Hardware is manufactured, distributed, and sold on a per-unit basis, and these folks mistakenly believe this is the only and most logical way to think of software.

In this context it is clear that the opponents to FLOSS are simply yet another case of candle makers lobbying against the introduction of the electric light bulb.

The candle maker analogy is a useful one. The light bulb did not eradicate the candle making business that still exists today, it just removed their monopoly. Having free markets, which FLOSS promotes, is far more supportive of free market capitalism than the alternative forms of capitalism that are barely deserving of the name.

BTW: Canadians interested in this topic may want to visit the [digital-copyright.ca forum](#).

» posted by **Russell McOrmond** on Aug 22 03 at **1:35 PM**

Claiming “open-source software runs counter to the mission of WIPO, which is to promote intellectual-property rights” is actually a very good thing. It makes it very clear that WIPO proposals are partisan and not an appropriate basis for law.

» posted by **James Day** on Aug 22 03 at **4:31 PM**

Once upon a time, at lunch, my father-in-law and I got into a discussion about politics. It remained a discussion, rather than escalating into an argument, because I refused to take his bait: each time he resorted to name-calling in order to provoke me emotionally, I simply continued to point out the inherent weakness of whatever argument he had just presented.

After about a half hour of this, one of his sons (who is, by the way, eleven years old, and had been listening intently the entire time) spoke up. He said, “This is the first time anyone has ever been able to have a conversation about politics with my dad without yelling.” He then pointed out a flaw in one of his father’s arguments, which impressed the heck out of both of us.

So to those who pepper their otherwise apparently rational statements with petty little barbs like “pinko commie bedwetters” and “strap on those birkenstocks”, you should know that it is obvious even to eleven-year-olds that those who resort to name-calling probably aren’t winning the argument. ;))

» posted by **Dave Owen** on Aug 22 03 at **4:47 PM**

Even if Open Source were opposed to intellectual property — one may fairly argue that Richard Stallman is obviously opposed to the very idea, while Eric Raymond is equally obviously in favor — how is this a disqualifier for consideration by WIPO? It’s not necessarily a bad idea for an organization to consider its own cause for existence, nor is it a bad idea to listen to the opposition. In fact, both practices are essential not only to avoiding extreme positions but also to developing a deeper understanding of one’s own views.

It is safe to say that Microsoft and other industry groups lobbying the State Department are not *for* intellectual property in any sort of broad, unqualified way. As has been noted by others here, Open Source — even Stallman’s GPL’ed version of it — is positively *dependent* on intellectual property rights. Microsoft and its fellow travelers are only in favor of intellectual property when it suits their purposes. If SCO v. IBM is, as it seems likely, the tip of the iceberg, strong IP proponents may increasingly have reason to wonder if they are actually undermining their own interests by creating a legal minefield that serves only to benefit the minelayers, i.e. intellectual