

The Business Ethics Center of Jerusalem

ONLINE HI-TECH MAGAZINE: Ethics & Intellectual Property Rights

Introduction

In today's Hi-Tech world, information and knowledge are a company's most important assets. These can be used or abused...

Intellectual Property Rights (IPR), a prerequisite for modern commerce, are the mechanisms used by companies to exploit and protect their innovations. Man has seen the necessity of IPR since ancient times, when early pottery makers stamped their goods to differentiate them from those of their competitors. In the last twenty years, new technology has tested the limits of IPR laws like never before.

At a recent seminar at the Business Ethics Center entitled "Ethics & Intellectual Property Rights," internationally-recognized expert Professor Jay Erstling, Chair of the Department of Legal Studies in Business, University of St. Thomas, Minnesota, discussed some of the serious issues that face IPR today. Following Professor Erstling's lecture, there was a roundtable discussion focusing on the challenges that new technology raises for IPR laws. This edition of Values for Management focuses on some of the conclusions from these discussions.

Are Intellectual Property Laws Necessary?

Intellectual Property Rights are basically monopoly rights, given to allow a person to commercially exploit his ideas (commonly enforced through a copyright, patent or trademark) for a set amount of time. This monopoly gives the owner of the patent the right to exclude others from infringing on his rights. Most societies view monopolies as problematic because they stifle competition, and in doing so, they discourage creativity and innovation. At the same time however, IPR is encouraged. Why is this?

Rather than discouraging creativity and innovation, IPR is intended to encourage it. This occurs in three ways:

1. Recouping Costs: Having the exclusive rights to sell a product enables an inventor to recoup the high costs of development, and make a profit.
2. Imitation: If one person is successful at inventing a product and making a profit from it, others may follow suit, to the benefit of society.
3. Disclosure of Knowledge: When a patent is filed, it must include full technical details, which puts the invention and its knowledge into the public sphere. Patents are a good research tool because they are a measure of new technology, and they allow others to build on it. An ethical abuse of the IPR system could be filing a patent and not using it, just to prevent others from manufacturing the product and profiting from it.

The intent of IPR is exactly opposite that of a monopoly. Whereas a monopoly is intended to stifle competition and innovation, IPR brings more people into the

marketplace, and spreads knowledge instead of restricting it.

IPR & the Internet

One of the defining features of the Internet is how easy it is to transfer information across it. This simple transfer of information makes IPR laws very problematic online. Theft or unethical actions do not require breaking into someone's house; they can occur simply through the push of a button. In addition, IPR laws are harder to enforce online because a piece of music, article or computer code can be easily transmitted and changed without the author's knowledge.

Napster

The most well publicized IPR issue on the Internet involves the digital exchange of music. The very existence of Napster (and related software such as Gnutella) raises pressing ethical questions. The Napster software program was originally created to allow Internet users to quickly and easily exchange files for free over the Internet. However, Napster is primarily used for the exchange of copyrighted songs. A product whose only use is for illegal activities is clearly unethical, but a product which has both legal and illegal uses is more problematic. If a product is created for legal purposes but is then used almost exclusively for illegal acts, is the creator responsible?

Napster has been involved in an ongoing legal battle with major music companies who are trying to prevent their songs from being downloaded with the software. This issue is such a complex one that it has even caused rifts within the community of musicians:

- Music companies claim that they are losing tremendous amounts of profits because potential customers are stealing music online instead of purchasing it directly from the companies. The companies are supported in their claims by several top musicians, notably the hard rock band Metallica who brought on the original lawsuit.
- On the other side of the argument are unknown musicians who see Napster as an opportunity to spread their music. The purpose of IPR laws is to expand knowledge and intellectual property. Unknown musicians say that this can happen just as well through Napster. Many musicians also see Napster as a way to free themselves from the high fees of music companies, allowing them to directly reach their fans.

Current Case Before the U.S. Supreme Court

The Internet is a vastly different form of media than anything seen before, which raises an important question: Are current concepts of copyrights inadequate for the Internet? The concept of originality still exists online, but the concept of reproducing and copying has completely changed. The U.S. Supreme Court is currently deciding a case with far-reaching consequences. The case revolves around whether companies need to pay royalties to freelance writers if they republish magazine and newspaper articles on the Internet that had been previously published in print. The authors argue that they should be paid, because their work is being reprinted in another form. The publishers (The New York Times and others) say that they have already paid for the rights to the material. They consider the articles in an online database to be revisions of the originals, and because copyright law considers revised work to not be a new product, the companies

say that they should not have to pay royalties.

The Supreme Court decision will have a large impact on IPR on the Internet. How far do an author's rights go online? If a person writes an article, creates a song or writes a piece of computer code, and this is distributed online, does it still belong to the creator, or does it become a new product every time it is distributed?

IPR & Pharmaceutical Companies

A question commonly used by psychologists to measure moral development in children is: "Is it morally correct to steal an expensive medication in order to save a life, if no other alternative is possible?" This real question plagues pharmaceutical companies and third world countries. Pharmaceutical companies have come under fire for selling critical medicines at prices that third world countries cannot afford. Some third world countries have responded by permitting their own companies to manufacture the drug cheaply according to published patents. While this solution solves one problem, it raises other serious questions.

Pharmaceutical companies argue that they need to charge high prices for their medication because of the high costs of developing the drugs. It takes a lot of time to develop a new drug (15-20 years in some cases), and up to half a billion dollars in costs. Companies claim that given the high costs, it is very hard to make money from a new drug before a patent expires and the market is flooded with cheap generic drugs. Also during the life of the patent, there is always the risk that a competitor will develop a cheaper alternative.

The ethical issues are clearly complex and emotive. We believe that a major social responsibility issue to be addressed is that of the proper allocation of resources. All too often the reason for a country's inability to pay is not the cost of the drug, but rather the country's inefficiency, corruption and overspending on the military.

Case Study

Merck, a major international pharmaceutical company, several years ago serendipitously discovered a cure for African River Blindness while developing a medicine for horses. However the manufacture and distribution costs were very high, and neither the U.S. government nor the World Health Organization wanted to subsidize the costs. Merck decided to develop and distribute the drug by itself. Merck, like other pharmaceutical companies, is a strong supporter of IPR laws and will defend itself when its products are threatened, but it still tries to ensure that drugs are available to all who need them.

IPR & Biotechnology

The rapid pace of technological innovation in the biotechnology field has raised numerous IPR questions. The recent completion of the Human Genome Project brought these issues to the forefront. According to U.S. law, if a company maps a certain genetic sequence, they can receive a patent for it, even if this gene belongs to everyone. This raises ethical and moral issues, because a company could conceivably map a person's genetic sequence and patent it. What then becomes of that person's identity if someone else owns the rights to who he is? What if a company maps a person's genetic code, and then wants to clone that person? Can he stop them? Do companies have obligations to

the humans whose genes they have mapped?

Our genes affect not only who we are, but also what diseases we get, and even how we respond to medication. Therefore the ethical issues of IPR in biotechnology are tremendously far-reaching and challenging.

Perspective from Jewish Sources

Introduction - The Different Types of Intellectual Property

The term "intellectual property rights" (IPR) comprises a number of distinct rights which enable their owners to prevent other people from using their ideas. It is customary to divide IPR into four categories:

1. Copyright: This enables authors and artists to prevent others from copying their artistic creations and using them, selling them, or claiming them as their own. The prohibition on copying is prolonged, extending fifty years after the death of the creator.
2. Patents: If an inventor of something truly novel and useful registers his invention as a patent, then he is granted the ability to prevent anyone else from using his idea for a limited period of time, usually eighteen or twenty years.
3. Trademark: When some mark or designation is clearly identified with one place of business, trademark law prevents any other business from using this mark.
4. Trade secret: The law recognizes the interest a business has in keeping secret methods of production or of doing business which give it a competitive advantage over other firms.

These properties have in common that they are examples of what economists call "public goods" - goods which can be used by one person without significantly reducing the ability of others to use them. A sandwich is a private good and if one person eats it then it is gone, but a road or public park can be used by many people at once. Likewise, many people at once can read a book, make a device, call themselves a certain name, or use a certain industrial process.

This suggests that we may liken a copyright or patent to the requirement to pay a toll on a public road. Just as the government encourages building bridges by giving builders a concession to collect large tolls, even though each trip costs them a minimal amount, so it supports artistic creation by granting a copyright which enables the artist to collect a fee for each copy made, even though the copying itself may cost almost nothing.

Laws and Ethics of Intellectual Property Protection in Jewish Law

Just as each of these form of IPR have their own legal framework in secular law, so in Jewish law we need to appeal to varying legal models in order to examine how Jewish law can protect these rights.

The latter two examples are the simplest. Using someone else's trademark is clearly forbidden in Jewish law not because it wrongs the trademark's owner, but rather because it actively misleads the customer into thinking that the product is made by the competing firm. And Jewish law, growing out of the Jewish tradition's profound insistence on modesty and privacy, naturally gives extensive protection to secrets,

including business secrets.

In the case of copyright and patent, which in secular law are statutory rights and not inherent ones, the main role of Jewish law also is to legitimize the right of the Jewish community or the secular government to grant property rights.

The legal tools for such legitimization are clearly present. Traditional Jewish law recognizes the right of the government to grant monopolies. Moral as well as legal authority can be inferred from the likeness to tolls. Our Sages saw paying tolls as an archetypical example of the citizen's duty to obey the law, and emphasized the importance of avoiding even the appearance of evading this duty. From an ethical point of view, the same approach should apply as well to the citizen's duty to recompense the owner of a copyright.

This legal authority to enforce copyright was often invoked by the Jewish communities themselves. Following the invention of printing, bans were widely promulgated to give authors and printers varying periods of monopoly to sell their works.

Unjust Enrichment

One legal category which is applicable to all of these areas of intellectual property is unjust enrichment, in Hebrew *ze neheneh veze chaser*. Jewish law, like common law, prevents "free riding" by compelling someone to pay for a benefit he receives which cost money to the provider, even if the benefit is not sought. A person who makes commercial use of a creative work, an invention, a trade mark or a trade secret is benefiting from the expense and effort of the artist, inventor, or trademark owner. This category complements the others by adding a way for the injured intellectual property owner to seek redress.

The Ethics of "Storming the Barricades"

One interesting phenomenon with important ethical consequences is when intellectual property returns to the public domain because the owner was insufficiently vigilant in protecting it. For example, "zipper" was once a registered trademark, but the name was so successful that it came to refer to any slide fastener.

Sometimes this recession into the public domain can occur spontaneously, but sometimes there can be a conscious effort to exploit someone's intellectual property with impunity knowing that the owner can not enforce his rights against a large number of infringers who are "storming the barricade". This is one aspect of the complicated legal situation created by peer-to-peer networks enabling virtually unimpeded copying of copyrighted material, especially songs in MP3 format.

Returning to our analogy with a toll road, we find an analogous situation when so many people cut through a private way that a de facto public thoroughfare is created. Our Sages condemned the cynical use of this erosion of rights in the story of a man who was rebuked by a child for cutting through a field. When the man replied that he was only walking on the path, the youngster replied, "That path was cut by crooks like you."

SOURCES: MISLEADING THE CUSTOMER: Shulchan Arukh Choshen Mishpat 228.

PROTECTING SECRETS: Chafetz Chaim I 9:6, II 8:5. ENFORCING MONOPOLY: Choshen

Mishpat 156:5 in Rema. TOLLS: Bava Kamma 113a; Sukkah 30a. UNJUST ENRICHMENT: Pitchei Choshen Geneiva 8:5. PUBLIC RIGHT OF WAY: Eirubin 53b.

Conclusion

Today's electronic age raises many ethical challenges to current IPR laws. However, the basic ethical issues still seem to come down to stealing, copying and cheating. In this context, we have yet to discover an alternative to the teaching of moral conduct and values.