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The ethics of intellectual asset management

The shift from the familiar corporate asset bases – centred upon traditional physical and financial assets – to one increasingly based upon intangible intellectual capital assets brings with it changing laws and subtle new ethical problems

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Since the early 1990s, the overall importance and value of intellectual property have risen exponentially, so that today intellectual capital assets account for over two-thirds of the value of publicly held companies in the US. Concurrently, business has been subjected to a broad and unrelenting ethical examination that has left few companies, their leaders or their professional advisers untouched. While many of these individuals have been found to be guilty of both legal and moral violations, many have also been found to have been unable to tell ethical right from wrong.

Almost daily, businesses and intellectual property owners are involved in debates over the morality of their actions. Think, for example, of the ethical controversy brewing over the large sums being awarded in patent infringement suits to patent licensing and enforcement companies or patent trolls, while the patents of pharmaceutical companies are being compulsorily licensed in some developing countries. Or consider the concerns about the exploitation of children, the poor, and the elderly by powerful marketing campaigns designed to deliver shareholder value by driving wanton consumerism. Or contrast the efforts of the music industry to enforce copyright laws against unauthorised file sharing, with Google's assertion of its right digitally to scan copyrighted books without permission.

What is it about patent trolls and recouping the massive investment in valuable patented drugs that puts these relatively traditional intellectual asset

management strategies at the centre of moral controversy? Why do some brands, like Microsoft or Wal-Mart, have dramatically polarised fans and detractors? What is so dramatic about the music industry suing teenagers and Google scanning whole libraries?

This article seeks to introduce countervailing public policy analysis as an ethical analytic for intellectual asset strategies. While certainly not definitive, it sets out to enumerate some of the basic competing public policies that frame intellectual asset ethical issues, to provide some explanation for the polarising positions in these ethical arguments and to offer a framework for ethical analysis.

Intellectual asset strategies

Intellectual assets are ethically characterised by the cross-currents created by the ruling social philosophies of the day and the public policy debates that influence the creation and interpretation of law and the actions of business and enterprise in the marketplace and the society (see figure 1). What is at issue when we consider the ethics of intellectual assets is a particular strategy or action and where it falls in the public policy debate, and within the surrounding social philosophy.

Intellectual asset strategists employ a variety of means to deliver their goals of monetary success or competitive advantage in a marketplace. The majority of these are focused on the legitimate pursuit of business; activities such as excluding others from using a patent, defending the rights of a trademark against infringers, keeping a trade secret or protecting a work from unauthorised copying. These, and many

others like them, present no ethical problem in their normal deployment because they fall within the general guidance of public policy and social philosophy.

Instead, it is the new strategies that push the limits of what is considered to be ethical in using intellectual assets, such as the recent activity of patent licensing and enforcements companies, the attempts to patent aspects of human DNA, brand marketing undertaken to drive consumption beyond need or extending the limits of fair use. These make us rethink what is right or wrong. Should patents have to be in use for their owners to enjoy the right to police infringement and receive damages, or are patents simply property, like real estate, where the owners hold title whether they build upon the property or not? Should anybody have an exclusive right to commercialise a human DNA sequence, or is mapping the human genome a part of the advancement of science and knowledge that should benefit the whole of human society?

We can frame answers to these and similar questions by recalling how social philosophies eventuate public policies and how countervailing public policies work to create laws. For example: "Why does intellectual property exist?" Is there an overall public good that is served by its existence? In the United States, the framers of the US Constitution, borrowing from English law, created a system for patent and copyright grants designed "to promote the useful arts and sciences". English social thought had long since recognised that it was in the public's best interest to reward industry and innovation by securing to the

inventor a limited monopoly to exclude others from the practice of his invention in exchange for a full disclosure which would increase the world's knowledge and allow other to learn and innovate. The same was considered to be true for artists and authors who could secure the right to prevent copying and derivation of their creative works, while still allowing their work to inspire future creativity.

Granting exceptions

At the same time that public policy is served by granting these exceptions to the preferred anti-monopoly free market system, there is an equal countervailing public policy not to overextend any of the granted monopolies. Thus, while there is a right to exploit private property, there is also a right to copy or to reverse engineer. The efforts to find balance between these opposite public goods has resulted in a body of case law defining what is and is not the proper subject matter for patents and copyrights, and numerous rules for determining the exact limits to be set on any single protected work or invention.

Another public policy encourages fair dealings in business. The concept that individual industry should be rewarded and protected, and that others should not be able to reap where they have not sown, has resulted in the body of unfair competition law. These laws prohibit consumer deception and trademark infringement (preventing the use of a mark that another has first used in commerce), as well as deceptive trade practices, interference with contracts, trade disparagement, theft of trade secrets and the like. But because this concept of

Figure 1. The dynamics of ethical thought

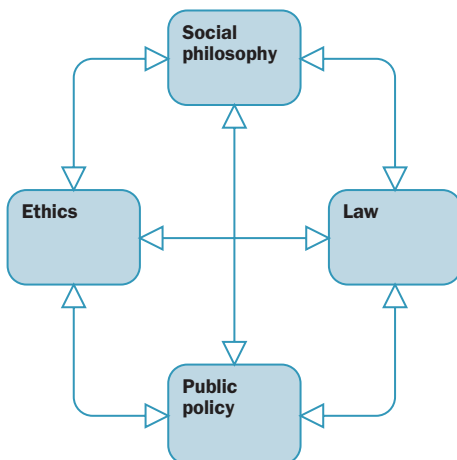


Figure 2. Intellectual assets

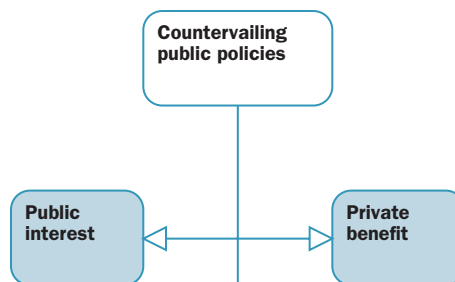
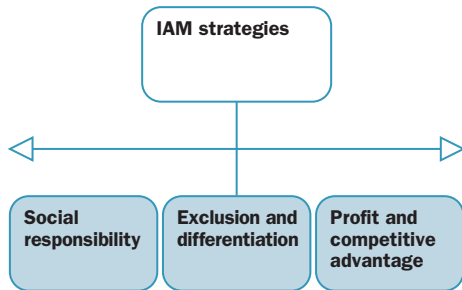


Figure 3. Intellectual assets



protection from unfair trade practices in its extreme could infringe upon another set of public goods – there is a countervailing public policy that ensures our society's belief in free speech, in the free dissemination of ideas and in the individual's right to earn a living, change employment and use his knowledge and skills in furtherance of his new job. Balancing of these public goods has created a body of law setting limits to the protection and creating certain defences to infringement, such as fair use. Thus, in each of these policy examples, a balance is found between public interest and private benefit (see figure 2).

For purposes of analysing intellectual asset management practices in business, we may agree that academic research that furthers science and technology is in the public interest and that it is good for society as it can benefit great numbers of individuals. But when pharmaceutical companies are the primary supporters of research into the cures of diseases from which many suffer, and their discoveries are available only to those who can afford their drugs, many feel that the poor and disadvantaged in the world are being exploited and that the public interest is not being served. At the same time, many applaud the burgeoning levels of research and innovation undertaken by modern corporations and the fact that the limited monopolies provided by their intellectual property substantially drive the economy, and argue that the right to exploit these

inventions should not be curtailed and that their shareholders will not stand for it. After all, we don't give away computers and cell phones to those who cannot afford them or to those who have a lower standard of living without them!

The broad spectrum

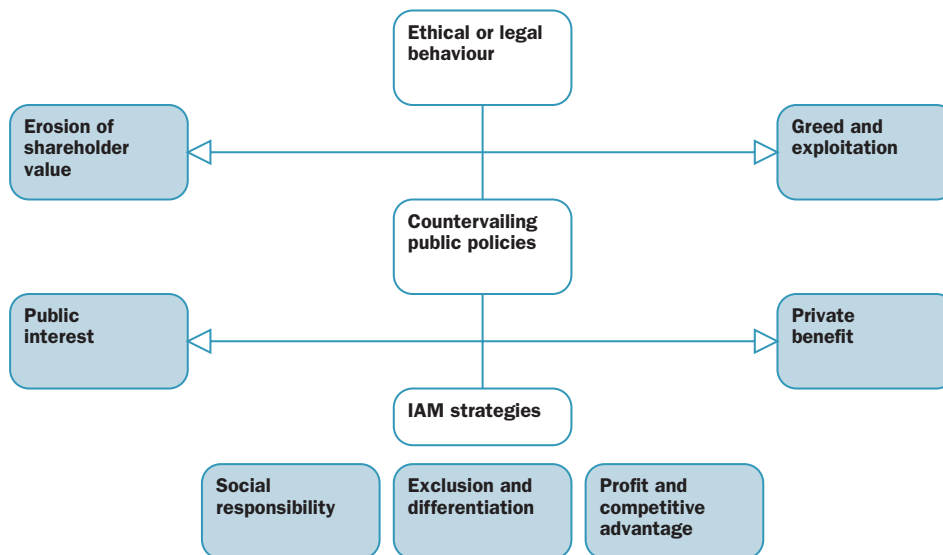
The insight is that actions within the normative range of the spectrum may be ethical and those outside of it may be unethical. Assuming the chart in figure 3 lists the broadest and most general intellectual asset strategies in use in the world today, few would disagree that actions undertaken for the traditional reasons that laws support intellectual property are ethical actions. Excluding others from using your intellectual property is the essence of intellectual property law – unless it goes too far and becomes greedy, exploitative and/or anti-competitive activity. Similarly, using your intellectual property to improve profitability or enhance competitive advantage is equally incontestable – barring the exception of monopoly behaviour or failure in the duty of care to operate a business that optimises shareholder value (see chart in Figure 4).

Today, many would argue whether corporate social responsibility can ever be ethical if it minimises the maximisation of gains, while others would claim the middleground on this issue involves endorsing only those forms of corporate social responsibility that increase competitive advantage or market dominance. In this respect, pharmaceutical companies may have found a way to resolve their ethical conundrum of losing money and shareholder value on free or under-priced life-saving drugs, by instead building possibly more valuable brand equity by giving the drugs away as an expression of corporate social responsibility. Their efforts simultaneously speak to the belief that large multinational corporations should soft-pedal the focus on creating shareholder value to find ways to “give back” to those less wonderfully endowed. Thus, counterintuitive as it sounds, fighting ravaging disease without economic gain just may provide the right social capital.

Overall, intellectual asset ethics can be mapped against a respective strategy along a spectrum of socio-economic philosophy that runs from respect for shareholder value at one extreme to the avoidance of greed and exploitation at the other extreme.

This approach allows due regard for the private benefit of not giving away the store and regard for the public interest through

Figure 4. Intellectual assets



corporate social responsibility that serves the public interest while building brand equity. In any case, ethical deployment can be defined as having a sense of balance between the unethical extremes of either social philosophy or public policy, while allowing the pursuit of the reasonable concerns of business solvency and success.

Intellectual property ethical concerns

Each kind of intellectual property enjoys a special right in return for delivering a different benefit to society. Each, therefore, gives rise to a specific set of ethical issues and public policy considerations.

The primary right with patents is the right of exclusion. Thus many of the ethical issues associated with patents have to do with fairness and over-reaching the limited monopoly or engaging in anti-competitive behaviour.

With trademarks, the primary right is the right to the exclusive use of a mark and so the ethical issues revolve around violating society's trust, as well as confusion and infringement, dilution, tarnishment and unfair competition in the marketplace.

Copyrights grant the right to publish or make public an original work in all of its forms; therefore the ethical issues address unauthorised copying and fair use.

Each type of intellectual property creates a different context for ethical issues and invokes its specific set of countervailing public policies.

Patent ethics

With the deployment of patents, the ethical range runs along a spectrum of fair market practices that exclude anti-competitive activities at the one extreme and monopolistic practices at the other extreme (see Figure 5).

Exclusion, or preventing others from practising an invention or business process, is the basic intellectual property right; it expresses the very intent of the law and is considered to be ethical. Creating patent thickets and cross-licensing are broadly recognised as acceptable and ethical, although either can be extended into an anti-competitive extreme.

Patent thickets are allowable under the public policies that advocate the promotion of the useful and the right to exploit and benefit from private property. But a patent thicket might contain so many junk patents that it could rise to the level of anti-competitive activity, could block legitimate innovation, stifle competition and become

Figure 5. Patents

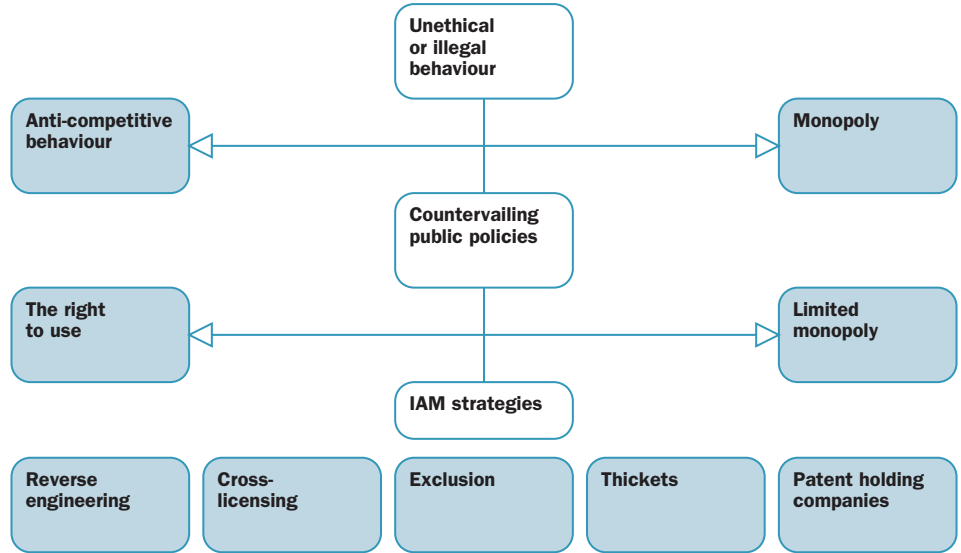
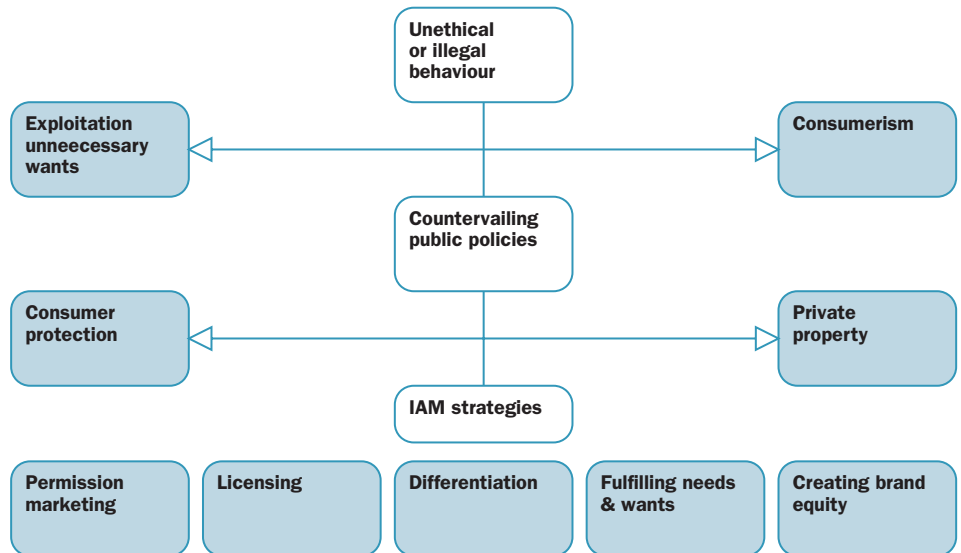


Figure 6. Trademarks



unethical. The intent of the law and public policy is to foster competition and inventiveness, and also to provide society with the tools necessary for further inventions. Junk patents, *per se*, do neither.

The concern to reward invention is balanced by the countervailing public policy of the right to use and to allow reverse-engineering. Licensing and cross-licensing are unproblematic when they encourage innovation and the advancement of knowledge. However, stick licensing, especially in the hands of a patent troll, can become anti-competitive when it erodes market profitability or acts as a hurdle or a tax on inventiveness.

Trademark ethics

The ethical range for trademarks runs along a spectrum of fair market practices that exclude exploitation at the one extreme and consumerism at the other extreme (see Figure 6).

The ethical management of trademarks requires that marks be used to identify the source of goods or services, and to differentiate products. Branding and marketing activities are intended to fulfil the legitimate needs of identifying and selling the objects of commerce. Increasingly, brand equity is recognised as the litmus test of rightful activity, under the assumption that whatever truly builds the monetary value of the brand and drives market capitalisation in a public company must be the good of the brand. In the same way, that which destroys

brand equity is generally considered to the detriment of the brand. Discounting and price competition are examples of such practices and while we may not wish to characterise such activities as unethical, they do commonly wear away the monetary value of a brand and consequently erode shareholder value.

The unethical extremes for trademarks lie with the use of the trademark to violate or mislead consumers, on the one hand, and the need for consumer protection on the other. Consumerism is increasingly viewed as egregious in the fostering of unnecessary wants, the duping of unwitting consumers or the stuffing of markets. In this respect, business ethics calls for the maximising of returns, while public policy calls for the protection of consumers.

Permission marketing has emerged as an antidote to rapacious forms of marketing and to limit marketing to those consumers who want to hear from a brand. To that end, the legitimate building of brands that consumers want to hear from, coupled with the intent of trademark law to allow unequivocal identification of the source of goods or services, has become the gold standard for brand marketing business ethics.

Licensing is a central trademark strategy that is highly respected when used to commercialise products that would not otherwise be available. However, with respect to brand marketing, merchandise licensing has acquired a bad name beyond a certain point because it trivialises a brand, dilutes its value and can thus erode shareholder value and weaken the vitality of the economy.

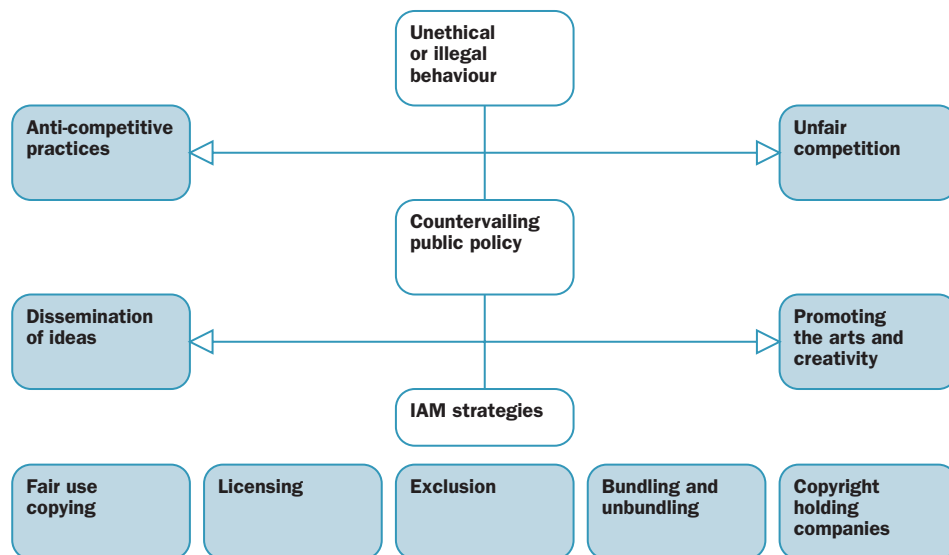
Copyright ethics

The ethical spectrum with copyrights runs from fair competition to fair use in its proximal extremes, as shown in Figure 7.

The ethical management of copyrights requires that they be used to protect and commercialise original works, and to prevent unauthorised copying or exploitation. The technological ability to copy music easily has thrust our society into a debate over the limits of fair use. While many teenagers may have had the right to copy music files off CDs they had presumably purchased, the right of musicians and the music industry to protect their copyrights came into focus when these same teenagers assumed licence to distribute and trade purchased, and unpurchased, files online.

More recently, Google's bid to extend the law of fair use to allow the scanning of entire books and libraries without permission from

Figure 7. Copyrights



copyright holders exemplifies a move to change the law and shift the rules of the game. The Google argument is that scanning books in their entirety is fair use because in each commercial use of the material they will only show a highly *de minimis* portion of the entire work (and they will offer the book for sale as the *quid pro quo* for the author and the publisher), while expanding scholarly access to an abundance of material (and creating the new Library of Alexandria) that would not otherwise easily be available.

This is an argument that is near and dear to the spirit of copyright protection (creative materials should act as an inspiration and stimulus to further creativity and invention), as it is to the policy that encourages the free dissemination and use of ideas. But, if copyright does not stop exact copying in all of its forms, what does it stop? Authors and publishers assert that their copyrights are being violated, and public policy is caught between the merits of the dissemination of ideas and protecting the rights of private property.

Rethinking good and bad

Setting strategy is difficult, not just in respect of adopting the precise means to achieve a business or legal end, but possibly even more so in respect of doing the right thing.

The first objective of a strategist is always to identify an approach that will bring about the desired result. In this article, while not providing answers to the various ethical conundrums we have identified, we have endeavoured to demonstrate a method of analysis that sets the terms for ethical debate and any possible resolution.

As the economic base of the economy shifts and intellectual assets rise in economic importance, new strategies and new deployments of old strategies force us to rethink good and bad. Today, as the rules are rapidly changing, what was once considered to be acceptable in managing business affairs is now often seen as improper, while in other cases the ethics of new deployments have yet to be determined.

Locating intellectual asset strategies between the current ethical and public policy extremes allows us to unpick the ethical issues surrounding strategic deployments. Disagreements about the morality of markets, business activities and strategies will likely continue, but countervailing public policy analysis of intellectual asset management strategies provides a reasoned technique for framing and arriving at moral judgements. ■

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