Chapter II
Intellectual Property Rights: From Theory to Practical Implementation

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ABSTRACT

*This chapter presents some foundational concepts and issues in intellectual property. We begin by defining **intellectual objects**, which we contrast with physical objects or tangible goods. We then turn to some of the normative justifications that have been advanced to defend the granting of property rights in general, and we ask whether those rationales can be extended to the realm of intellectual objects. Theories of property introduced by Locke and Hegel, as well as utilitarian philosophers, are summarized and critiqued. This sets the stage for reviewing the case against intellectual property. We reject that case and claim instead that policy makers should aim for balanced property rights that avoid the extremes of overprotection and underprotection. Next we examine four different kinds of protection schemes for intellectual property that have been provided by our legal system: copyright laws, patents, trademarks, and trade secrets.This discussion is supplemented with a concise review of recent U.S. legislation involving copyright and digital media and an analysis of technological schemes of property protection known as digital rights management. Finally, we consider a number of recent controversial court cases, including the Napster case and the Microsoft antitrust suit. Many of the issues and controversies introduced in this chapter are explored and analyzed in greater detail in the subsequent chapters of this book.*

INTRODUCTION

It is now a common refrain that the ubiquity of the Internet and the digitization of information will soon mean the demise of copyright and other intellectual property laws. After all, "information wants to be free," especially in the open terrain of cyberspace. John Perry Barlow and other informa-

tion libertarians have argued this case for years, and there may be some validity to their point of view. Perhaps Negroponte (1995) is right when he describes copyright law as a vestige of another era, a mere "Gutenberg artifact" (p. 58). Even many of those who concede that this vision of cyberspace as a copyright free zone is too utopian argue for a system of intellectual property protection that is as "thin" as possible, just enough to encourage creativity (Vaidhyanathan, 2001).

The digital revolution has already thrown the music industry into chaos and the movie industry will probably be next. Both of these industries have been struggling with piracy, and peer-to-peer (P2P) networks, such as Gnutella, KaZaA, and Morpheus, are the primary obstacle in their efforts to thwart the illicit sharing of files. These P2P networks continue to proliferate, and users continue to download copyrighted music and movie files with relative impunity. Everyone knows, however, that the content industry will not sit idly by and lose its main source of revenues. It will fight back with legal weapons such as the Digital Millennium Copyright Act and technological weapons such as trusted systems.

Of course, debates about intellectual property rights are not confined to digital music and movies. There is apprehension that the Internet itself will be swallowed up by proprietary technologies. Currently, developing countries argue that they can never surmount the digital divide if intellectual property rights remain so entrenched. Governments debate the pros and cons of endorsing open source software as a means of overcoming the hegemony of Microsoft's control of certain technologies. And some claim that the impending "enclosure movement" of intellectual objects will stifle creativity and even threaten free speech rights. Hence, they argue, we must abandon our commitment to private ownership in the digital realm.

The result of these public and controversial squabbles is that the once esoteric issue of intellectual property rights has now taken center stage in courses and books on cyberlaw and cyberethics. The economic and social stakes are quite high in these disputes, so they should not be regarded in a cavalier manner or dismissed as inconsequential. The centrality of the property issue becomes especially apparent when one realizes that other social issues in cyberspace (such as speech and privacy) are often closely connected to the proper scope of intellectual property rights. For example, Diebold Election Systems, a manufacturer of voting machines, has pursued college students for posting on the Internet copies of internal communications, including 15,000 e-mail messages and other memoranda, discussing flaws in Diebold's software. The company claims that this information is proprietary and that these students are violating its intellectual property rights, while the students say that their free speech rights are being unjustly circumscribed. They contend that copyright law is being abused to stifle free speech.

This tension between intellectual property rights and the First Amendment has been addressed by many commentators on the law. As Volokh (1998) has pointed out, "Copyright law restricts speech: it restricts you from writing, painting, publicly performing, or otherwise communicating what you please."

One could easily use the intellectual property issue as a lens to examine the expanding field of cyberethics since the most salient issues seem to have a property dimension. In addition to speech, personal privacy is another issue closely connected with intellectual property. Employers, for example, often invoke property rights to justify monitoring the e-mail communications of their employees. Since the IT systems and e-mail software are the property of employers, they assume the prerogative to ensure that their property is being used in accordance with company rules and regulations.

Given the breadth of the intellectual property field, it is impossible to review all of the current topics and controversies. Our purpose in this