Securing Intellectual Property In IS Layoffs

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INTRODUCTION

The most important asset of many companies is their intellectual property (IP). Customer lists, computer code, and information about new products are all IP. According to Nichols et al. (2000) preventing the disclosure to competitors of IP is a major IS security problem. They assert that the major source of such disclosures is insiders such as disgruntled employees or former employees. Poorly handled layoffs may provide the incentive and the opportunity for employees to disclose IP to competitors at great cost to the firm.

Until recently the major HR problem facing IS managers was the shortage of qualified workers (Murray 2000). Recent events have changed this. According to Rosencrance (2001) during the first 9 months of 2001 over 130,000 jobs were cut at computer based companies. Layoffs have received considerable attention in the trade press (Duffy 2001, Georgia 2001). Despite this little has been written to guide managers faced with IS layoffs. For example, Brown (2000) devotes a chapter to hiring and retaining IS workers but does not mention layoffs.

This paper suggests legal and managerial practices which a company may use to protect its IP. The first section deals with legal strategies for protecting IP. The second addresses IS management strategies. The third considers the management of the layoff per se. The final section presents the first installment of a field study based on a large layoff of IS workers.

LEGAL PROTECTION OF INTELLECTUAL PROPERTY

There are several legal protections for IP. Copyright is perhaps the most important legal protection for computer software. The Federal Copyright Act as amended offers copyright protection to software. Copyright grants the owner exclusive use of the material. Certain types of information, such as customer lists, do not qualify for copyright protection, but may be protected as trade secrets. The classic example of a trade secret is the formula for Coca Cola. The Uniform Trade Secrets Act (UTSA) states that in order to qualify as a trade secret there must be economic value in maintaining secrecy, and reasonable efforts must be made to maintain its secrecy.

Congress recently enacted two criminal statutes that punish IP theft. The Economic Espionage Act of 1996 makes not only the theft criminally liable, but also one who knowingly obtains from the thief. Section 1030 of the Federal Criminal Code makes computer fraud a federal felony.

What should a firm do to legally protect its IP from disclosure? This is not intended as a legal treatise, and as with any legal matter, each firm needs to consult legal counsel to address its specific needs. But, there are general recommendations which should be considered. First, the firm should require an employment contract containing non-compete, non-disclosure and IP security provisions.

The non-compete agreement limits the employee’s right to seek reemployment by a competitor. Courts will enforce such agreements if they are ‘reasonable’, although enforcement varies among the states. The test of reasonableness considers how long a period of time the employee is being restrained, how extensive is the geographic area in which the employee is being restrained; and what kinds of work are being restrained. Non-disclosure agreements constrain the employee from disclosing or using IP learned while employed. It should also establish that any IP created by the employee will be the firm’s property.

IS LAYOFF MANAGEMENT

While detailed discussion of layoff management per se is beyond the scope of this paper, there are several matters relating to IP protec-
tion which warrant discussion. There are more complete discussions in many Human Resources texts (for example, Gomez-Mejia 1995).

An employer implementing a layoff must balance the twin objectives of considerate treatment of former employees with the need to protect itself. The exit interview is an essential part of the process. Exit interviews should not be harsh or threatening; indeed that would be counter-productive. Departing employees must be reminded of their legal obligations contained in non-compete and non-disclosure agreements. In a considerate manner the employee should be made aware of the importance the company places on its IP and its willingness to defend that IP by means of civil lawsuits if necessary. The matter of criminal prosecution is more delicate. The firm does not want to make the employee feel accused or threatened. On the other hand, making it clear that theft of IP is a criminal offence, as described above, may well have a deterrent effect.

The manner in which employees are notified of their layoff is important. Some of the respondents urged that the layoff be kept secret until affected employees were notified and that security guards be used to remove equipment from affected employees’ offices. Certainly, those laid off should be asked to surrender keys and identification which give them access to IS areas. Respondents also urged that support be provided after the layoffs in terms of placement assistance and email. Sensitivity in such matters may be important in influencing affected workers attitudes toward the company.

When the worker finds new employment, the new employer should be notified as to the worker’s prior exposure to copyrighted or trade secret protected works and warned that any infringement will be vigorously prosecuted.

Two final ideas: Jossy (2001) suggests looking for alternatives to layoffs such as job sharing or reductions in hours. Among the advantages are maintaining the knowledge pool so important in running IS operations and positioning the firm for later expansion. Further, there is a large body of labor law dealing with terminations. While not directly related to the problem of protecting IP, following this law is important to protect the company from liability for wrongful discharge.

FIELD STUDY OF AN IS LAYOFF

We conclude the paper with the first phase of a field study of a major corporation which recently laid off a significant number of IS employees. We interviewed an employee who was not laid off as well as a manager in another department. Because the conversations were confidential, we are, at present, unable to reveal the identity of the employees or the company.

According to the employee the company announced a reorganization well in advance of the layoffs. The announcement led to rumors of layoffs and a decline in moral. When it announced that layoffs would take place during the next two weeks and the protocol used to identify those affected, many employees overtly estimated their chances of being laid off. He reported that employees were offered a generous separation package or the option of keeping their jobs for six months. In a department of about 30 employees, 6-8 were laid off and two of these accepted the offer of temporary continued employment. The company provided placement support and continued email access. Subsequently we interviewed one of the involved managers, and he had a very different perception of the events.

The handling of this layoff seems mixed. It seems to have been reasonably sensitive, but allowing laid off IS employees to continue in place seems risky. It provided an opportunity to alienated employees to perform acts of revenge against the firm. The prior announcement of criteria and scheduling of layoffs may have had a negative impact on productivity and morale. Most disconcerting was the very different perceptions of the events. This suggests a communications breakdown.

CONCLUSION

Layoffs now constitute a new concern for IS managers. Many of the recommended practices need to be implemented well in advance of layoffs if they are to be useful. Fortunately, most of these are part of good IS management practice and therefore should cause little dislocation or additional cost.

REFERENCES

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