

United States Department of Justice

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Number of pages (including this page):

Message: Here is the DOJ memo for the May 25 Intellectual Property Working Group Meeting. We understand that Commerce will be circulating something separately.

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INTELLECTUAL PROPERTY ISSUES
WORKING GROUP

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482-0432

Memorandum

To: NEC Working Group on Intellectual Property
From: Department of Justice, Antitrust Division
Date: May 23, 1994

How Does the Changing Way that the Economy Creates Value Pose New Questions for Intellectual Property Regimes?

Particularly since the Industrial Revolution, technological change has been a principal driving force behind economic growth and development throughout the world. In the United States, the patent system has played a critical role in the process from the outset. Today, technological change is a more important force behind economic growth than ever before, and other intellectual property rights regimes also play critical roles. While developments in economic infrastructure, such as education and transportation, may once have rivaled or even overshadowed the importance of technological change, that certainly is no longer the case. Worker productivity in virtually all industries is highly dependent on the use of computers, software, and information. Moreover, intellectual property in all its forms accounts for a substantial and growing proportion of Gross Domestic Product, and is even more important to the Nation's export trade and international competitiveness.

Increased dependence on computers, software, and information presents new challenges for the intellectual property regimes of patents, copyrights, and trade secrets. It makes intellectual property protection more important than ever, but also creates serious dangers from overly broad protection. In addition, it presents a variety of difficult issues about the application of intellectual property laws.

Strong intellectual property protection is difficult but essential

The incentive for investment in intellectual property derives primarily from the potential to charge others for its use. That potential, in turn, depends on the ability to prevent unauthorized copying. Intellectual property has an ironic potential to destroy itself by greatly reducing the cost of copying. Printed materials can now be duplicated rapidly and at low cost, and digitally represented works, such as computer programs, data bases, and electronic books, can be copied and distributed virtually instantaneously and at virtually no cost. Moreover, with digitally represented works, there is little possibility of identifying infringers and no real possibility of undoing any damage. Thus, piracy on an unprecedented scale threatens to destroy

the engine of economic progress. Furthermore, it is unclear whether and to what extent copyright protection is even available to data bases, although they are costly to compile and of great value to users.

Overly broad intellectual property protection is counterproductive

If intellectual property protection, particularly copyright protection for software, is overly broad, the result will be to retard technological change. For example, if copyright protection is extended to the command language of computer programs, then early market success for a program is likely to endow it with substantial advantages over even superior competing products developed later, which cannot lawfully use its command language. This results from investments users make in training and in computer programs written in the command language, and from "network externalities" relating to the development of complementary products and to benefits of using widely used programs. The consequence may be that new and better programs are not developed or not adopted.

New technologies present significant challenges to intellectual property law

Computer software does not fit neatly into one traditional intellectual property category. As an original work of authorship, it is subject to copyright. In at least in some cases, it may also be patented, and since the programming itself is not made public by the publication of software, trade secret protection may apply as well. In principle, patent protection is limited to the ideas in software that are useful, nonobvious, and novel; copyright protection is limited to the expression in software. Separating idea and expression has been a complex problem in the context of books and movies, and the tools developed in those contexts may not be adequate for the task in the software context. There is great latitude for conceiving of the ideas in software either broadly (e.g., an electronic spreadsheet) or narrowly (e.g., an electronic spreadsheet with a specific command language). As a general matter, the broader the conception of idea, the narrower will be the protection available for software. Copyright applies only to expression, and many ideas will not be deemed useful, nonobvious, and novel, and so not patentable. Whether and to what extent aspects of the user interface of one program may be used in others without infringement depends on the resolution of this issue. The interaction of copyright, patent, and trade secret protection for the same piece of property may result in overly broad protection.

The application of copyright law to computer programs also raises new questions on what it means to make a copy and when that is fair use. For example, merely turning on a computer could constitute copyright infringement in some instances because that causes the operating system to be copied from the hard disc into memory.

Digitally represented multimedia works present several challenges for copyright law. New forms of rights may need to be created to license multimedia producers and users. The nature of the copyright protection for multimedia works is also somewhat unclear, both as to the selection and organization of elements, and the individual elements, which may be subject to differing treatments under the copyright laws.

The rapid pace of technological development and reliance on digitally represented works also call into question the statutory life spans for intellectual property rights protection. If a new technology becomes obsolete in just a few years, it may be excessive to protect it for seventeen years or more, as in the case of software. After a few years, the value of the intellectual property right will be in its ability to block newer and better technologies, and that blocking ability may thwart technological development. The trade offs affecting the socially optimal life of patents are well known, and similar analysis applies to copyright and trade secrets. Trade secret protection can be especially problematic because the rights can be perpetual.

Conclusions

No particular policy conclusions follow from the foregoing. Developers of intellectual property and the courts are now groping for sensible ways of interpreting and applying existing law. It is too soon to know the extent to which they will succeed and in what ways new legislation may be needed. At this time, the best course probably to wait and see, perhaps occasionally helping to shape the development of the law in particular cases through amicus briefs.