

Rewiring your ethics

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Quiz. Which of the following actions are legal and paperwork-free? Which one is a felony?

- 1) Whistling a song while waiting for the bus.
- 2) Writing software to make copies of an entire DVD.
- 3) Writing software which allows making copies only of a few seconds of a DVD.
- 4) Writing software to hack into your neighbor's wireless Internet connection.
- 5) Jaywalking.
- 6) Making a mix tape/mix CD for a friend.
- 7) Loaning an entire CD to aforementioned friend.
- 8) Closing out your band's set with a kitschy cover of a song by your band's favorite band.
- 9) Building a patented device from the blueprint on the patent, but only for a university experiment.

It's a breeze, because the law is molded to your intuition, no?

How to enforce a law

Businesses have to comply with a whole lot more laws than people. Laws are easier to enforce with a company, because most of them can't get on a bus and disappear. If a law seems onerous, it's still not a violation of human liberty— if ya don't like the industry's laws, then do something else. There are fewer businesses than people, so the problem of communicating meticulous nonsense is that much simpler, and ignorance is that much less of an excuse.

When you start your business, you walk in knowing that your gut instincts and the letter of the law won't match, so you consult loads of people to make sure you conform. Intuition is irrelevant in a business because you know that you have to find out the legal details.

Individual laws are different, because you're not expected to call your lawyer before rolling out of bed. As a very general rule, those laws which are imposed upon individuals are of the 'don't hurt nobody' variety, because it doesn't take a legal theorist to explain why the restricted action is bad. Taxes are a good example: although most would concede that they're important, we don't *really* ask individuals to comply, because it's too abstract and so too many people feel no ethical qualm about not doing so; instead we dump reams of withholding rules on businesses and individuals voluntarily ask the government that it return

the excess withheld. Meanwhile, littering, murder, and terrorism are readily enforced upon the individual, because these laws are clear without philosophical treatises on the leviathan and overcoming collective action problems: you feel it in your gut.

To summarize the section: laws on businesses are often supremely detailed and arcane; an eight-year-old can understand most laws on individuals.

Ethics vs law

Meanwhile, here is a survey which found that people just don't internalize intellectual property laws. They don't feel in their gut that it's wrong to pull down a song from the Net, or for their band to do the kitschy covers. So, what do we do about it?

The article reports that Michael Rawlinson, deputy head of Elspa [Entertainment and Leisure Software Publishers Association] suggests: "The government has spent millions of pounds to change public awareness of drink-driving and smoking. As a society, we need to go through a similar process for creativity and intellectual property."

I think most sane people would distinguish between drunk driving and, um, creativity. Both alcohol and tobacco have a direct effect on the brain and impair one's ability to make rational decisions. You pull the drunk driver out of the wreckage and they say 'I totally thought I was in control.' Millions of quid in advertising makes sense to combat a drug-induced irrational state. But, when you download a song, are you less capacitated than when reading a magazine? You've thought about the ethical consequences, probably *ad nauseum*. The message is out there, rational people have thought about it, and they just didn't feel bad about it. The Elspa therefore recommends more advertising and more messages until the public does feel bad about these things.

Intellectual property is often compared to physical property. This is only a metaphor, and we all know it, but the laws for physical property are much more stringent, both in our gut and in the law. There are exceptions all over the place in intellectual property, and many things, like the pure idea underlying an invention or composition, will never be covered by an honest IP law. Therefore, lawyers of major IP holders are constantly pushing for judges to accept the physical property metaphor, thus handing more control to the IP holder.

But that's not enough, since intellectual property laws are now being enforced on individuals. As our Elspa representative is explaining, it's not enough that intellectual and physical property become identical under the law; we need individuals to accept this metaphor as fact in their gut. Until they do, they just won't feel the same revulsion to downloading that they do to shoplifting.

I posit that such public reprogramming will fail.

How'd you do on the quiz? Here are the answers: 2, 4, and 7 are legal; the others aren't. Number three is the felony. [Full solutions are below.] Does the law follow your intuition?

If we don't want a consult-your-lawyer regime for every instance where someone opens their mouth or laptop, the illegality of the majority of the items on

the list needs to be internalized as ethical beliefs. Except, as the survey and our intuition shows, they aren't. Few people (if anybody) feels bad whistling a song in public or making mix tapes for people they have crushes on.

Intuition especially falls apart in situations where the work is disaggregated, dissected, and componentized. OK, so the author of a song owns the rights to the song, but do they own the rights to three seconds of the song? Different people have different intuitive beliefs about where lines are drawn. The physical property metaphor makes it easy for those who believe in it: just as ownership of a car means ownership of the paint chips, ownership of a song means ownership of every microsecond. As Ms MKW of Washington, Columbia, pointed out in the comments section last time, all of academia is a constant process of remixing, and so has developed its own code of ethics—and it ain't based on the physical property principle. Academia would crumble if it had to follow the physical property metaphor, music would crumble if Metallica gets to own the F-chord, however uniquely strummed, and literature would fall to pieces if Henry Miller's estate owned the F-word. The physical property metaphor doesn't work for disaggregation, and that leaves us with no intuitive principles on which to rely. But the law, as interpreted by the courts and people with J.D.s in IP, continues to be enforced on individuals cutting and pasting at their laptops.

So, my recommendation to the industry associations of the world: stop going after individuals, both legally and ethically. Intellectual property law will never pass the eight-year-old kid test—especially not IP law based on the physical property metaphor, which even the most pro-IP courts don't entirely favor. So stick with enforcing IP law upon the for-profit enterprises who aren't expected to have any intuition. Go after the people who work full time in making thousands of copies of DVDs and CDs, like y'all did a decade ago, before you collectively embarked on a campaign to reprogram individual ethics.

Quiz notes:

Here are my solutions for the quiz. I am certain that at least some number of my readers will point out details, caveats, and corrections; please, bring it on. You will only work into my overall point that there is no easy intuition to IP law, while making the overall work more accurate.

1) *Whistling a song while waiting for the bus: illegal.* Public performance of a copyrighted work is a violation of copyright law regardless of whether the performance is for-profit [17 U.S.C. 106(4)]. For example, authors of fan fiction are often made fun of by the public and harassed by the people who own the copyright to the characters. Last night I dreamt about some of the characters from Lord of the Rings (they were debating how to make Mordor into a more accessible tourist destination), but for me to tell you the details of my dream would be to dilute the market value of those characters. Similarly, random background music in this documentary counted as dilution.

2) *Writing software to make copies of an entire DVD: legal.* Making backup copies is fair use, and a bit-for-bit copy of a DVD doesn't require decrypting the contents of the disk. As of a few weeks ago, legality depends on the wording

of the software's documentation.

3) *Writing software which allows making copies only of a few seconds of a DVD: illegal.* Pulling scenes from a disk *does* require understanding (=decrypting) its contents. The algorithm is commonly available, but writing software around it is still a felony. One company was run out of business over this one, and one individual prosecuted.

4) *Writing software to hack into your neighbor's wireless Internet connection: legal.* The DMCA, which makes (3) a felony, is currently interpreted by the courts to only outlaw decrypting copyrighted works like music and movies, and not things like garage door openers. So decrypting your neighbor's wireless signal doesn't count. Frankly, I've been working on the software IP book for a year and I'm still not certain of the status of this one.

5) *Jaywalking: illegal.* Once you leave IP, it's easy. They draw lines on the pavement.

6) *Making a mix tape/mix CD for a friend: illegal.* Unauthorized copying to a different medium; not fair use.

7) *Loaning an entire CD to aforementioned friend: legal.* Fair use. Do what you want with the physical media, regardless of what Garth may tell you.

8) *Closing out your band's set with a kitschy cover of a song by your band's favorite band: illegal.* Once again, public performance (and a typically for-profit one, at that). This used to be a fun live show tradition. It was dessert, and if it was a crappy band, you at least got one good song in your head. Fewer bands do it now, and I suspect it's because of IP concerns.

9) *Building a patented device from the blueprint on the patent, but only for a university experiment: illegal.* *Madey v Duke University* shut down the concept of experimental use exceptions to a patent.