

The challenges of enforcing Intellectual Property rights

Deborah Amos talks to Professors John Whealan and Chris Sprigman about the problem of counterfeit goods. John Whealan is Associate Dean of Intellectual Property Studies at the George Washington University of Law School; and Chris Sprigman teaches Intellectual Property Law at the University of Virginia School of Law.

DEBORAH AMOS (DA): Why do counterfeit goods matter?

CHRIS SPRIGMAN (CS): I don't think they matter as much as people say they do. It depends on what you're talking about. I think things like counterfeit pharmaceuticals or counterfeit airplane parts matter; we don't want people getting sick or airplanes falling out of the sky. But if you're talking about counterfeit handbags, no one ever died from one. I think one message that I would try to bring is that the government shouldn't spend a ton of public resources on law enforcement in that area.

DA: The explanation that's often given in the U.S. is that because our economy is increasingly knowledge-based, we need to aggressively protect American ideas. Do you agree with that?

JOHN WHEALAN (JW): Yes, I agree whole-heartedly. If you just look at the technology that's running this car we are on, or the iPad you have, or the BlackBerry you have, the advance there is not the manufacturing of those products. It's all the innovation and technology that goes into them. If competitors were allowed to just take those inventions for free and knock them off – we call them infringers or overseas as counterfeiters – it would disincentivize the companies from inventing in those areas. It would be totally unfair for all the people that have invented a new drug or new computer technology.

DA: Let me ask about developing countries. Do you think that they have a different set of values than the United States when we are talking about intellectual properties?

JW: I don't know if it's a different set of values but they are in a different situation. Imagine a country that's poor – that can't afford good drugs or good technology like we can in the United States. Their choices are: do we get access to them at all; or do we have to pay for them; or we can't pay for them. I think they are faced with a difficult choice. I think it is wise for U.S. companies or multinational companies to try to work with those countries to try to help them understand intellectual property. Maybe on a different pricing scale? Maybe on a different entry level scale? Encourage them to invest in their own intellectual property. If you're from the United States and you go to a foreign country and you say 'don't use our goods,' it doesn't work. You encourage countries to invest in their own technology – get their own intellectual property. Once they start protecting their own intellectual property they will start protecting and understanding the importance of it for multinational companies. Examples like this might include India and Korea.

DA: Do ideas need to be protected to foster innovation or does less protection mean ideas transfer more easily across borders?

CS: It depends. Intellectual property has become a bit of a religion. Every idea needs to have protection in order to thrive. The religion is false. In the area of open source software, you have tremendous amounts of innovation with not only no intellectual property but a culture with an open source that rejects intellectual property – that wants the open source software to be spread freely. Lots of innovation there. We have lots of innovation in the area of fashion in the United States. No copyright protection for virtually any fashion goods. There are some creative areas that intellectual property is important to. There are some in which it doesn't really do any work and there are some areas in which too much intellectual property retards progress.

JW: I think it's funny we talk about intellectual property as an area of law, but most people don't practice in every single area. It's like calling somebody a doctor. People specialize in different areas. We have different statutes for the patent, copyright and trademark. We have different sets of rules, different lengths of time, and different types of exceptions like fair use and copyright. To lump them all together really doesn't help as much as discussing the drug technology and patents or the music industry and copyrights. I think that's a very fair approach.

DA: Can we talk about also reasonable expectations? You can't stop this completely. There are some things you can do to minimize harm. Certainly in the case of drugs. But what is a reasonable balance for other goods? Our reporter, Sean Carberry, went to Ghana and he saw that they were making strides at their ports but the land borders are a big problem. You really cannot close those borders. Smuggling will continue. So, what is a level of investment in enforcement to make a reasonable enforcement regime?

CS: To know what to say to that, you need to need to know a lot more about the facts to quantify the size of the counterfeiting and piracy problem. I'm not sure that industries are really interested in gathering those facts because if the facts come out, there is a risk that the amount of public enforcement dedicated to interdicting fake handbags at the port is going to be reduced. I don't think it's the kind of problem that the international anti-counterfeiting coalition says it is up to \$250 billion a year. That's a \$800 in counterfeit goods for every man, woman and child in the United States. That number is absurd and I think the number is much lower. What we would expect to see is a lower level of public investment in anti-counterfeiting enforcement. I don't think the industry really wants that.

JW: Let's assume that number was lower by 10%, or lets say 50%, you would still have a huge number. I don't think the answer is just in the enforcement. If you compare it – I don't want to compare to somewhat different things – but you can compare it to drugs in the United States. If you just keep criminalizing it, it doesn't necessarily enforce it. You have to educate. You have to get people to realize this is not a good thing. There has to be other sorts of penalties in the system. If you look at copyright file sharing, you know kids don't have to steal music if they can buy it for \$1 a song. When you create other options – when you create different choices that are more reasonable for consumers , you start to see people don't take it freely. They are willing to pay for it as long as it's within reason. I think there are different ways to gradually move people to believe in the system and to understand its importance.

DA: Is intellectual property enforcement going to be more or less important in the future?

JW: I think more. The economies are moving from manufacturing economies to intellectual property economies, to inventions and things like that. I think if people want to take these and a free license or without paying for them, I think that the companies are going to be concerned. I think that the countries are going to be concerned if their economies are moving in that direction – with other people having easy access to their intellectual property. I mean, what's the difference between somebody taking your product or taking your idea and then making the product? The second is even a bigger concern because then they can just manufacture the product as much as they want wherever they want. So yes, I think you already see more concerns from companies and from the United States that this is an issue and that they want to try to get ahead of it.

DA: Chris Sprigman?

CS: I think the trend is going to be that we are going to see more and more of the limits of what the law can do. I agree that ideas and creativity are very important, but I think the ability of IP law to effectively motivate and protect these things is declining. What I expect to see is the exploration of a lot of other ways that we can incentivize creativity and we can encourage its spread. Ways that don't have so much to do with the law but have to do with the norms of consumers or the norms of producers or the way to construct business models that are more resistant to piracy.