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FIT 1049: Week 8
Legal frameworks surrounding IT professionals

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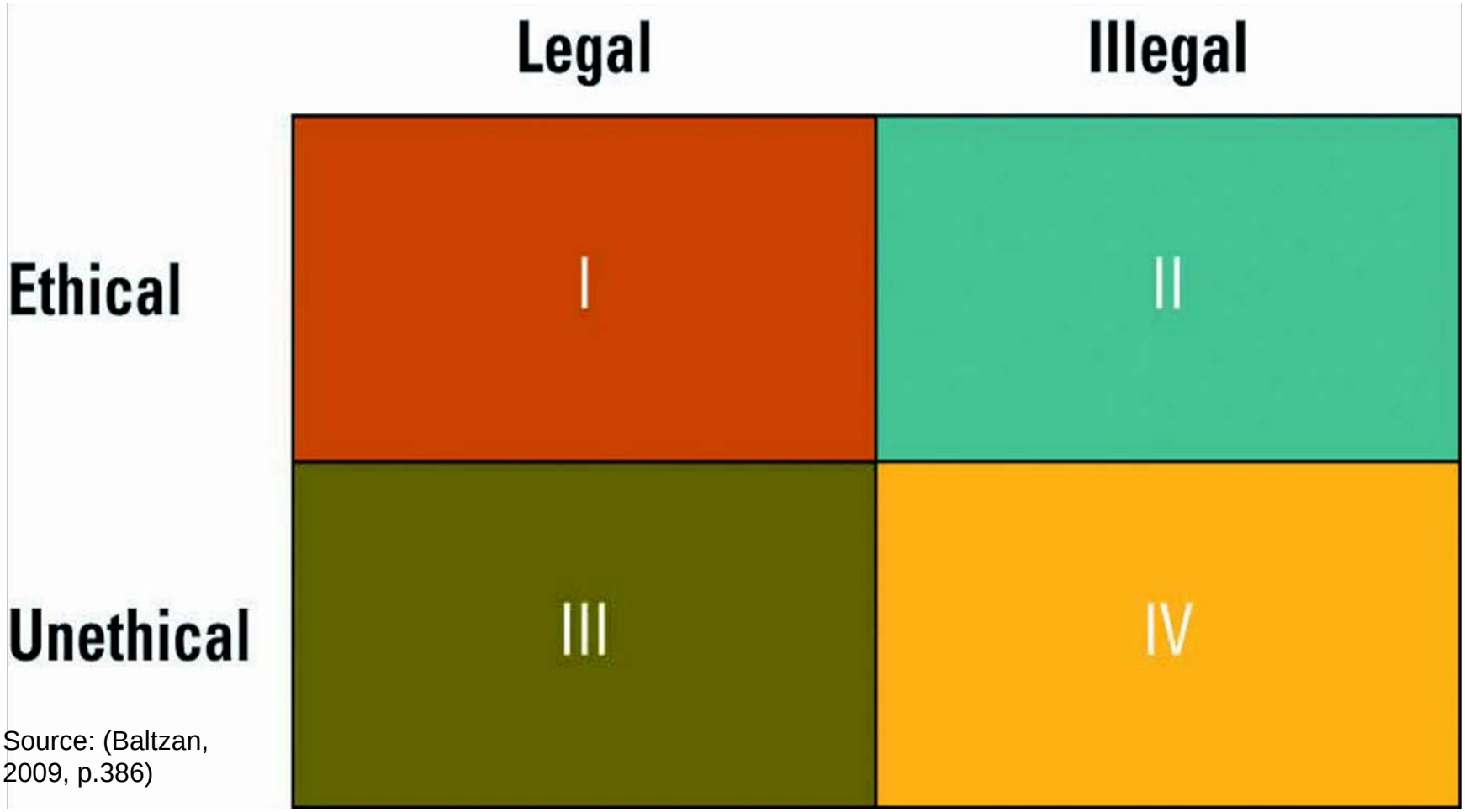
GROUP OF EIGHT AUSTRALIA

Last Week: Ethics

- Introduction to ethics - what is ethical for a current IT professional?
- ACS Code of ethics



Source: (Baltzan, 2009, p.386)

Copyright warning notice

What is intellectual property or IP?

- Intellectual property refers to **creations of the mind** for which owners are granted various **exclusive legal rights**

Source: Intellectual Property Licensing: Forms and Analysis, by Richard Raysman, Edward A. Pisacreta and Kenneth A. Adler. Law Journal Press, 1998–2008

E.g.: Not the physical book but the words and ideas in the book

IP Case study: What would you do?

You are in your first real job as a programmer.

A client comes to you very excited about their new game idea that they want you to develop.

It is based on the Star Wars game *Sabacc.* In Star Wars lore, *Sabaac* is the game Han Solo plays to win his ship, the Millennium Falcon.

But there is no record of any rules for this game.

The client has come up with their own rules and gameplay.

They want you to turn this into a mobile game and sell it on the Apple App store.

Is there any IP problem in developing a *Sabacc* game based on your client's rules and gameplay?

IP Case study: Problems in the game?

Answers:

Yes. The idea of a game might be protected by a patent from Lucasfilm

No. Copyright doesn’t protect ideas, only expression, so the idea of a game from the Star Wars universe isn’t protected

Yes. Copyright will protect anything to do with Star Wars and you should stay away from this IP minefield

IP Case study: What would you do?

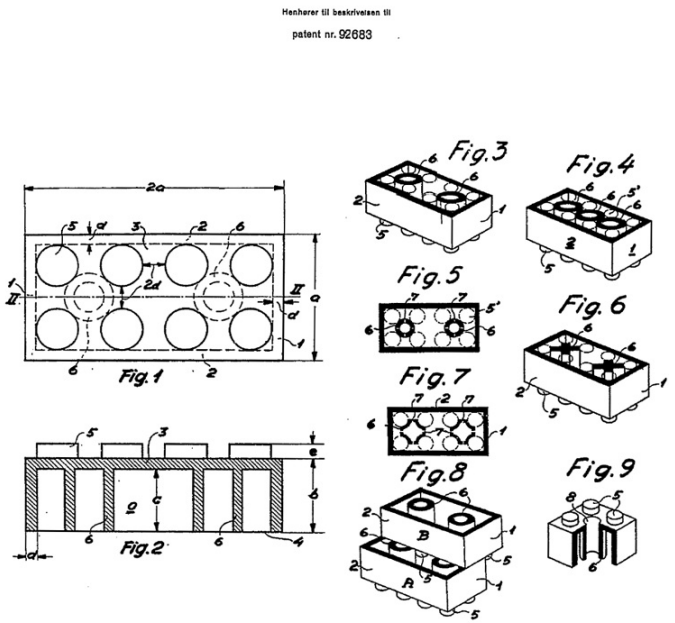
Correct answer is No.

Patents – why doesn't this apply here?

Patents do protect ideas, but this must be in relation to an invention or process, not a discovery. A concept or name of a game, alone, can't be protected by a patent.

Patents must also be novel. Rules of the game may not be sufficiently new or unique to attract patent protection.

Also patents must be registered. There is no indication that Lucasfilm have registered a patent for any rules or gameplay here.



Lego brick patent. Source: http://block62.com/wp-content/uploads/2012/01/patent1.jpg

Copyright – why doesn’t this apply here?

Copyright doesn’t protect ideas or concepts alone, only the expression of the ideas

The expression must be in material form – that is recorded in some way e.g. written, filmed, coded etc.

So unless Lucasfilm had documented some rules or gameplay for their version of Sabacc and this was copied by your client, there shouldn’t be any infringement in just coming up with some rules for a game.

Next step – more trouble ahead?

The client is excited about they way the game is looking, but thinks it needs more links to the Star Wars universe to tap into that market of fans.

The client tells you about the great new marketing they are doing for the app. This includes making GIFs with images from Empire Strikes Back and Return of the Jedi. They are promoting it with tweets saying “From a Cantina, far far away to your mobile device” and “Go bust? Don’t worry, we won’t take your ship!”

Can you see any IP problems with this marketing approach?

Answers

No. GIFs will use such a small amount of the images from the film and those tweets use such a limited amount of words from the film it is bound to be ‘fair use’

No. As long as you don’t include those images and dialogue in the game itself, things will be ok

Yes. Even using a small amount of images or dialogue from the film could be infringement and Australia doesn’t have fair use anyway

Answers

Correct answer is yes.

Why would copyright be a problem here?

Copyright protects text, images, film, music, code, photos, performances etc. automatically on creation, so images and dialogue from the films would be protected

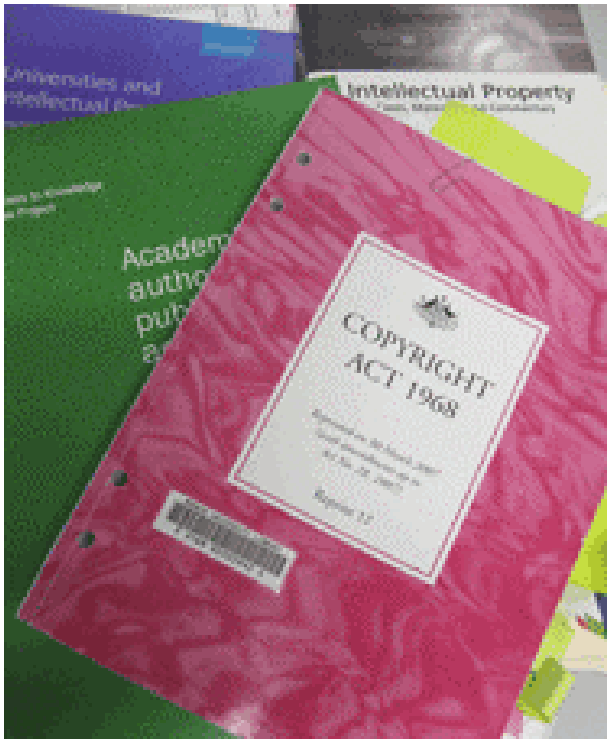
Even taking a small amount of copyright material can be an infringement because it is the quality of what is taken rather than the quantity that is important

Although those images aren't in the game itself, progress will be affected by any legal trouble based around the advertising

No fair use in Australia!

Australia only has fair dealing which only allows use of copyright material for particular purposes:

- Research and study
- Criticism and review
- Parody and satire
- Reporting News
- Giving professional advice



If the use doesn’t fall within one of these purposes, it can’t be fair dealing, no matter how ‘fair’ the use might be

Why would copyright be a problem here?

Even in the US, it would not be easy to prove fair use in this example because

- The use is commercial – it is for promoting sale of the game
- It is arguably not transformative – the images and dialogue have not been sufficiently transformed or used for a completely different purpose

IP case study – protecting the client's IP

The client says they are not worried about the advertising as a court case will only make the game sell better.

But they are concerned that someone else will try and make another Sabaac game, since there are numerous rip-offs and clones online.

They have decided to name their company Sabacc Industries to make it clear they own the game. They already searched the US trademarks register and can't find anything there, so they think this will be the best way to protect the game

Are there any problems with registering the trademark Sabacc and naming their company after the game?

Answers

No. Lucasfilm have not registered the trademark so it is fair game

Yes. Lucasfilm could still have trademark protection in Sabaac

Answers

Correct answer is yes

Why might there be an issue with trademark?

If Lucasfilm can show that the term has been continually used in commerce and is identified in the mind of the public with the Star Wars franchise, rather than with this company, Lucasfilm could have an unregistered trademark in the film.

Although you can register trademarks, there can also be protection for famous brands and symbols without specific registration, if they have that recognition in the public mind.

Apple App store

You bring up all these possible issues with the client, but they are not concerned. The app is developed and released.

They tell you the app is available on the Apple app store and if there was any problem with it Apple would have rejected it as they are very careful about what they allow there. The app went through so there are no problems.

Now that the Sabacc game is on the Apple app store does this mean everything is legally okay?

Answer

Yes. Apple have very careful processes, much more so than Google or Android

No. It is not Apple’s responsibility to check all games for IP or other legal issues

Correct Answer

No

It is the developer’s responsibility

It is true that it is much harder to get something on the Apple app store than other retailers.

But you cannot rely on Apple App store moderators to be experts on IP law.

It will be the legal responsibility of the owner or person who uploads to the app store when there are any legal issues.

What happened in the real case?

The company using the name Sabaac lost the copyright case over using images and dialogue from the films. In a summary judgement, the court found that this was not a fair use as it was not transformative and was for a commercial purpose.

They also lost their attempt to dismiss the trademark case that Lucasfilm had brought against them. Lucasfilm argued that the game was cashing in on the goodwill of the Sabacc trademark and the Star wars franchise. Lucasfilm were able to show that the Sabacc trademark, although not registered, was used in commerce prior to the date of the companies first use and that this use was continuous. The court found that there was trademark protection in Sabaac as a mark for Lucasfilm overall and the Star Wars products.

See Lucasfilm Ltd. LLC et al v. Ren Ventures Ltd. et al

IP Case study 2 : What would you do?

You are working for a large company and had to sign an agreement when you were employed. There was something in there about copyright and patents belonging to the employer and some mention of confidential information. But you need a job and are in no position to negotiate. It is ‘take it or leave it’.

You get on great with your boss. After a year, they leave to start a new business. They bring you over to work on the same sort of software package you were working on for the first company and give you a copy of the code from the original company to ‘inspire’ you on the sort of thing they want.

You develop new code, but there are a few parts where the code from the first company would be good to use, because it is really the best way to write it.

It is only 800-1000 lines out of approximately 250 000. Should you use them?

IP Case study 2 : What would you do?

Yes: Such a small amount is not going to be a copyright issue and it will save time and money

No: Even a small amount could be infringement

IP Case study 2 : What would you do?

Correct Answer: No

How much can you copy?

Even 800 lines out of 250 000 can be considered substantial in copyright law, because it is the quality not quantity that counts.

Software also protected by patents

There may also be a possibility that you could have breached a patent in the software if it is a process that has been registered by the company for patent protection.

What about confidential information?

You rewrite the code to be on the safe side, but you can write it more efficiently because you have access to the original.

Then you get a letter from the previous company's lawyers talking about breach of a non-disclosure agreement and confidential information. But you must be able to use your expertise in your new job. Can software be confidential and the subject of a non-disclosure agreement?

What about confidential information?

Yes.

No

Correct answer yes

What about confidential information?

Any information you access as part of your employment could be classified as confidential information. To ensure that the information remains secret, your employer may also ask you to sign a non-disclosure agreement.

Or your employment contract may have a non-compete clause. These clauses may be seen as anti-competitive, but they have been enforced by the courts.

Even if your employment contract doesn't mention confidential information, employees have duties to the employer not to misuse information the obtained when they were employees.

Consequences

You go to court and the company you used to work for is demanding:

- a block on your new company selling the software,
- for all copies to be destroyed,
- for damages or for profits for any copies already sold.

What do you think the court will grant?

Consequences

- a block on your new company selling the software or
- for all copies to be destroyed or
- for damages or for profits for any copies already sold or
- All of the above

All of the above

This is based on the real case of *IPC Global Pty Ltd v Pavetest Pty Ltd* [2017]. The 2nd company were prevented from selling software and copies were destroyed. The 2nd company had to pay damages or give back profits made from sale of software.

Be aware of any agreement you sign. Even if you think you have no room to negotiate, try and get a copy of the employment contract in writing so you can refer to it in future if any issues come up.

Case study 3: Data and information

You join a social media company that is popular with teenagers and people in their 20s. The advertising manager asks you to datamine the responses of clients from 15-18 and 18-24 and work out when they feel insecure. They suggest you use keywords “defeated”, “overwhelmed”, “stressed”, “anxious”, “nervous”, “stupid”, “silly”, “useless”, and a “failure”.

You feel a bit unsure about this, but they are the manager, so you don’t want to argue about this.

What are the potential legal or ethical issues here?

Case study 3: Data and information

Discussion – word cloud

Case study 3: Data and information

The advertising manager explains that they want to show their clients that the company can track young users when they are feeling vulnerable and this means they are more prone to be a good target for advertising.

They explain to you “It is clearly allowed in our terms and conditions where the user grants us permission to use all their data to provide services to them and to 3rd party companies that we have agreements with.”

Are you convinced by this argument? Why? Why not?

Case study 3: Data and information

Discussion – what do you think? Short answers…

Case study 3: Data and information

You express some concern about privacy to your line manager. Your manager says not to worry because the data will be de-identified. The advertiser will not get the information about who is being targeted. They will only know that advertising is being targeted to a certain number of people overall.

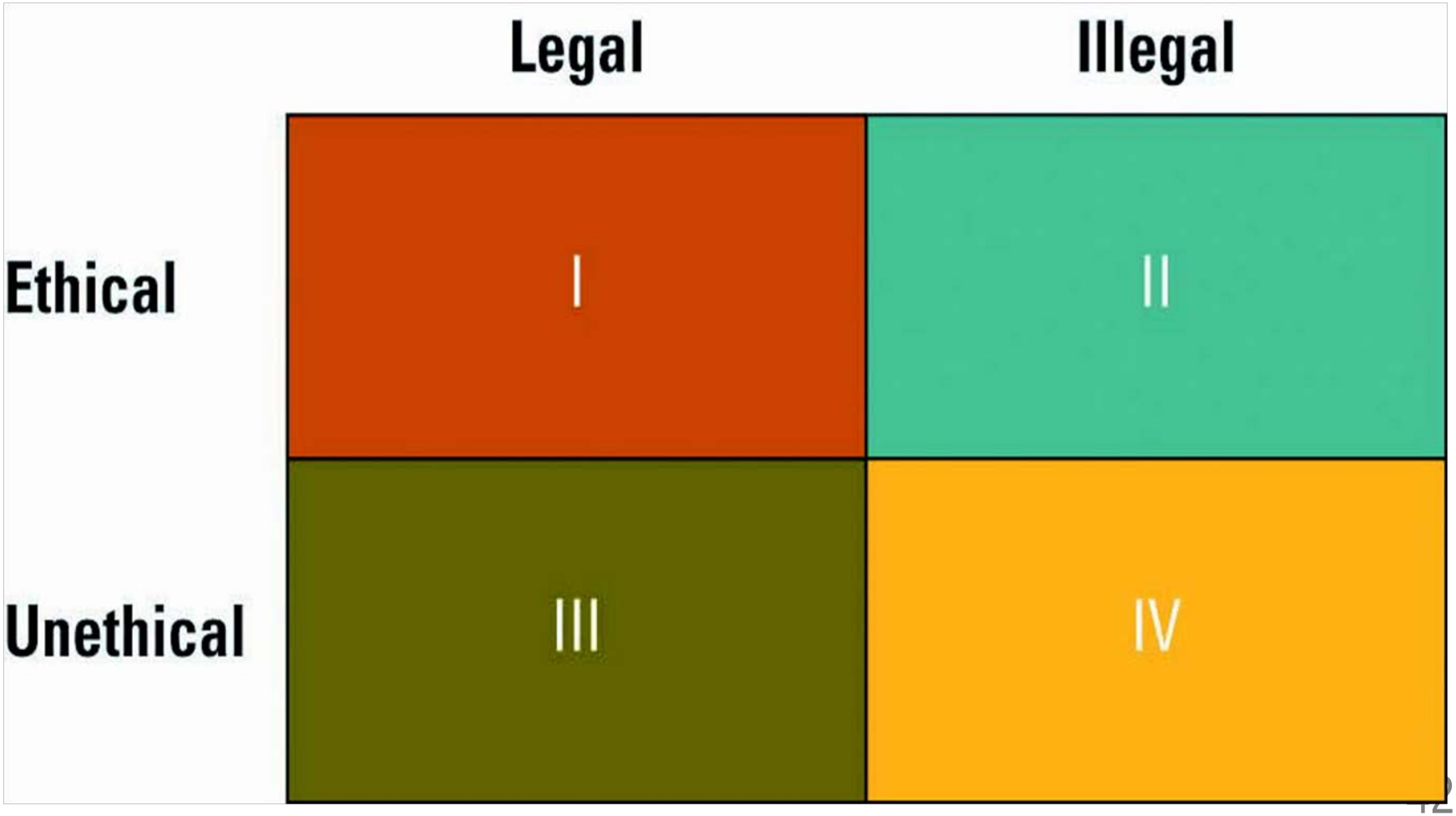
Even you won't know who is being targeted as you will only be dealing with the outputs. Other people will work out when to best place the ads.

So is there a breach of ethics or law here?

Case study 3: Data and information

Has there been actual breach of legal and ethical framework?

Or is it just potential?



Real case of Facebook Australia

- In 2017 Facebook Australia were revealed through leaked documents to be targeting users as young as 14 for advertising when they were depressed. This data was not available to the public, but the leaked documents showed that Facebook could predict moods and behaviour based on posted content.
- Although Facebook initially apologized, they later said the data was ““intended to help marketers understand how people express themselves” and did not rule out using the research or commissioning research of the same type
- This is consistent with Facebook’s apparent lack of concern over manipulating users emotional states. Facebook allowed researchers in 2012 to alter the newsfeed of 70 000 randomly selected users to more negative stories to see if it made them depressed. (Unsurprisingly it did!)

Any questions?

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