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iEthics

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ABSTRACT. Nike. McDonald's Apple. These companies and many others invest millions of dollars each year protecting that one thing that distinguishes them in the marketplace – a trademark. A company's trademark is the symbol that allows consumers to know that they are dealing with a particular company. This article addresses the extent to which some companies will go to obtain and protect a trademark. Specifically, it will address the fight between Cisco and Apple over the iPhone trademark, as both companies took questionable steps in the United States and abroad to obtain rights to the iPhone mark. In addition, the basics of trademark law and ethical theories relevant to trademark law will be addressed.

KEY WORDS: ethics, justice theory, law, stakeholders, trademarks, utilitarianism

The iPhone

It was January 9, 2007, and all eyes were on the Macworld Conference & Expo. Steve Jobs, Apple's CEO, announced the company's newest product: the iPhone. Worldwide, the media anticipation for this product was unlike any other in recent memory, and much of the buzz concerned the name of Apple's newest invention. In fact, many just assumed that an Internet enabled phone made by Apple would be called the iPhone. What would transpire in the coming weeks would reveal years of wrangling over the moniker with technology giant Cisco and the questionable activities of both parties in attempting to attain exclusive rights to the trademark.

It began in 1996, when Infogear Technology Corporation (1996) registered the iPhone trademark with the United States Patent and Trademark Office. This trademark covered integrated telephone communication with computer networks. About a year later, InfoGear began selling its iPhone, which combined a telephone and dialup Internet portal (''Cisco Files Trademark Infringement Suit,'' 2007). In 2000, Cisco acquired InfoGear and the iPhone trademark along with the acquisition of the company (Martin, 2007). Cisco claimed it then began using the iPhone trademark for its voice over IP telephones (VOIP). From 2001 through 2006, Apple repeatedly approached Cisco for permission to use the iPhone mark, but Cisco never agreed to release its rights (Markoff, 2007).

What Apple proceeded to do next is ethically questionable. On September 22, 2006, a company called Ocean Telecom Services, LLC filed its Certificate of Formation in the State of Delaware. A few days later, Ocean Telecom filed an Intent-to-Use application with the U.S. Patent and Trademark Office (PTO) for the iPhone mark that requested authority to use the iPhone mark in the United States. Ocean Telecom's application claimed a prior right to the iPhone mark based on trademark filing number 37090 filed in Trinidad and Tobago dating back to March 27, 2006.

Moreover, on September 19, 2006, Apple filed an application to register the iPhone trademark in Australia. Apple's application looks very similar to Ocean Telecom's and also claims a prior right to the iPhone mark based on the same trademark filing in Trinidad and Tobago in March, 2006. This compelled the inference that Apple had formed Ocean Telecom for the purpose of circumventing Cisco's hold on the iPhone mark.

The type of priority filing in Ocean Telecom's application is allowed under the provisions of the Madrid Protocol. The Madrid Protocol Implementation Act (''Madrid Protocol'') allows for a trademark holder in another country to file an international registration with the World Intellectual Property Organization (WIPO). The trademark owner can then file for an Extension of Protection of the trademark with the U.S. Patent and Trademark

Office (PTO), which has the same effect and validity as filing an initial registration with the PTO (Madrid Protocol Implementation Act § 1141(i), 15 U.S.C. § 1141(i), 2002). One provision of the Act provides that an international registrant "shall be entitled to claim a date of priority…if…(2) the date of international registration…is not later than 6 months after the date of the first regular national filing." (Madrid Protocol Implementation Act § 1141(g), 15 U.S.C. § 1141(g), 2002). This provision allowed Apple and Ocean Telecom to register the iPhone mark in Australia and Trinidad and Tobago, respectively, and then file for Extension of Protection in the U.S. The effective date of trademark protection in the U.S., however, would be the date to the original applications were filed in Trinidad and Tobago, not when the application for registration was filed in the U.S. These provisions basically allowed Apple and Ocean Telecom to "bootstrap" the iPhone mark to a filing date, as early as March, 2006, and place which may have been unknown to Cisco.

Cisco had no public response to Apple and Ocean Telecom's effort to obtain rights to the iPhone mark, but on December 18, 2006, Cisco launched its new iPhone product (Martin, 2007). Less than a month later, on January 9, 2007, Steve Jobs announced the production of the Apple iPhone at the MacWorld Conference Expo. The very next day, on January 10, 2007, Cisco filed a lawsuit against Apple for trademark infringement (Markoff, 2007).

Beneath this simple summary of facts lies a complex web of legal and ethical issues that merits further examination. The basics of trademark law will provide a framework within which to analyze the actions of Cisco and Apple in this matter.

Trademark law basics

> If it is true that we live by symbols, it is no less true that we purchase goods by them. A trademark is a merchandising short-cut which induces a purchaser to select what he wants, *or what he has been led to believe he wants*. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol…. (Mishawaka Rubber & Woolen Manuf. Co., 1942)

Trademark law protects a word, name, symbol, or device used to identify the source of a good and distinguish it from the products of another (Federal Trademark Act of 1946 §1127, 15 U.S.C. § 1127). In order to serve as a trademark, a mark must be distinctive, meaning it must be capable of identifying the source of a particular good. Additionally, a mark may be protectable if it has acquired a secondary meaning. The courts divide marks into five categories based upon the relationship between the mark and the underlying product: (1) arbitrary (2) fanciful, (3) suggestive, (4) descriptive, or (5) generic. An arbitrary or fanciful mark bears no logical relationship to the underlying product and is considered inherently distinctive (Two Pesos, Inc. v. Taco Cabana, Inc., 1992). The court in the Two Pesos (1992) case found that a suggestive mark suggests a characteristic of the underlying good and it is also inherently distinctive. A descriptive mark is one that directly describes a characteristic of the underlying product. It is not protectable unless it has acquired "secondary meaning," meaning the consuming public primarily associates the mark with a particular producer as opposed to the underlying product (Federal Trademark Act of 1946 §1052(f), 15 U.S.C. § 1052(f)). A generic mark is one used by the public to describe the general category to which the underlying product belongs, and it may never be claimed as a trademark (Bayer Co., 1921). In order to prove a trademark violation, the plaintiff must show that there was a protectable mark and that a likelihood of confusion of the protected product with another product exists (Federal Trademark Act of 1946 §1114, 15 U.S.C. § 1114).

The creation of a proper trademark allows a company to develop and maintain an identity distinct from that of its competitors. This is precisely the issue at stake in the iPhone trademark dispute between Cisco and Apple.

The ethical issues

As the aforementioned facts demonstrate, Apple and Cisco the iPhone trademark for a number of years. The MacWorld Expo was the event at which Steve Jobs intended to announce the new phone product from Apple, and it had been anticipated for some

time. According to Jones (2007), Cisco and Apple were on the verge of an agreement on the issue of using the iPhone name before Steve Jobs announced the product's existence. However, Krazit (2007) reported that the final agreement never transpired, and Cisco decided to go ahead with a lawsuit. The lawsuit led to Apple share prices dropping 1.3% in after hours trading only to regain about 1% of the loss the next day (''Cisco Sues Apple,'' 2007).

The remainder of the article will focus on three categories of ethical issues: ethical analysis of trademark law, Apple and Cisco's best moral arguments for their actions in protecting the iPhone mark, and an ethical analysis of the actions of Apple and Cisco. The ethical analysis of trademark law examines the justification for intellectual property law in general and trademarks in particular. The moral superiority arguments posited by both sides are essentially: (1) goodwill for Apple and (2) interoperability for Cisco. The final section of this article involves ethical analyses from the following schools: (1) utilitarianism, (2) justice theory, and (3) stakeholder analysis.

Ethical analysis of trademark laws

Law and Ethics are inextricably intertwined, but there are differences. Salbu (1992) reported that law in nature is uniform and consistent, while ethics, in pure form, is free from the coercive forces of the law. Therefore, one must ask whether it is ethical to protect the exclusive rights of one company to use a mark on a product or service – are trademark laws ethical?

Intellectual property (including trademarks, copyrights, and patents) has been recognized by the law as property rights. Resnick (2003) has noted that they generally protect the private interests of the individual or business owning the intellectual property, while allowing some public access after a period of time. The bases for justifying intellectual property law are discussed in detail below. However, according to Hettinger (1989), the lack of a physical presence of intellectual property makes it nonexclusive because it is easier for people to use, for example, the trademark of another company to sell counterfeit goods. An appropriate analogy would be a person reluctant to steal a car belonging to another might not hesitate to download, or steal, a copyrighted song or movie. Thus, Hettinger (1989) and Lea (2006) argue that even traditional notions of property protection would not favor the protection of intellectual property when it does not have physical presence and is nonexclusive.

Despite these inherent difficulties in protecting intellectual property, Steidlmeier (1993) argues that intellectual property rights may be justified based on notions of a person's rights to the fruit of his labors or the incentive to innovate. Without protections for the trademarks developed by companies to brand a product or service as their own, companies would be less likely to develop trademarked goods. It follows that without some protection from competitors who would use the trademark of another to market counterfeit goods, there is little incentive to develop a brand and goodwill with consumers. Trademark laws are, therefore, ethical because they spur innovation and the development of products by companies, increasing overall efficiency and welfare in the market (Steidlmeier, 1993).

Trademarks also provide value to consumers because they allow consumers to identify the quality, performance, characteristics, and service of a product with a particular company. However, Lewin (2006) argues that removing exclusive titles from intellectual property and placing those products in the public domain might allow for the creation of some complementary items which were not available to consumers. This argument makes sense when considering examples like Microsoft and Windows or Apple and the iPod. However, looking to the market share of each company in its respective product area, one wonders if consumers desire the quality or services associated with the trademark (brand name) of some products or are simply constrained to do so. We should then consider the ethical arguments advanced by Cisco and Apple.

The moral high ground

The moral high ground for Cisco: interoperability

After the announcement of the lawsuit by Cisco, Apple chose the tact most often advised in litigation strategies – it remained silent. Cisco, on the other hand, communicated its side of the story with the public via its general counsel's blog (Schwimmer, 2007). In pertinent part, that blog states:

> Fundamentally we wanted an open approach. We hoped our products could interoperate in the future. In our view, the network provides the basis to make this happen – it provides the foundation of innovation that allows converged devices to deliver the services that consumers want. Our goal was to take that to the next level by facilitating collaboration with Apple. And we wanted to make sure to differentiate the brands in a way that could work for both companies and not confuse people, since our products combine both web access and voice telephony. That's it. Openness and clarity. (Chandler, 2007)

Mingin (2007) reported that Cisco was attempting to position itself as looking to the future of telecommunications; the protection of the brand was about the possibility of all phones (home, work, or cell) being able to work as one some day. Talks on interoperability apparently began in April of 2007, when Apple and Cisco began researching possibilities of their products working together (Bloomberg News, 2007). According to Shannon (2007), Cisco tried to argue that it did not want money for the license to use the name; rather, it simply wanted the Apple phone to work with Cisco products.

From Apple's perspective, the idea of interoperability and open source runs counter to its entire business model. Apple is known throughout the industry for not sharing technologies with other entities (i.e., iTunes songs only working on iPods) (Chapman, 2007). Chapman (2007) also reported that prior to the lawsuit, Cisco was negotiating terms with Apple to allow the use of the iPhone trademark, and those terms would have required Apple to be more open in sharing its technology. Cisco claims that Apple did not want to make its device compatible with other products and "talks over the use of the iPhone brand failed because Cisco asked that the new handset work with its networking" (Chapman, 2007). Apple does well marketing its proprietary inventions and requiring consumers to conform to its proprietary standards. To change its business strategy for the iPhone seems a bit far-fetched.

Of great interest on this interoperability point is Gohring's (2007) report that Cisco had allegedly not published the source code for all components of its iPhone, in accordance with the open source licensing agreement into which it had entered. Thus, Cisco was allegedly failing to comply with the same principle on the product at the heart of this issue, while arguing Apple was being obstructionist in its failure to agree to interoperability.

The gist of this issue is the fact that Cisco attempted to link a business issue, interoperability, with a trademark issue, the use of the iPhone mark. Few battle cries can be as attractive to consumers as interoperability and open standards, as opposed to the proprietary standards users have come to expect from the majority of companies (like Microsoft). The allure of this concept is strong, especially given the open nature of the Internet and the numerous open source projects in existence. Hence, it is likely no accident that Cisco chose this idea around which to bind its legal dispute with Apple.

The moral high ground for Apple: goodwill

One way to analyze which party had superior rights to the iPhone trademark is to look at the strength each party has in its respective mark. Clearly, Cisco already owned the legal right via U.S. Trademark law to the mark, but Krazit (2007) believed that Apple had an interesting argument to put forth – namely that it owned rights in a family of marks. According to Schwimmer (2007), Apple would posit that it owns a "family of trademarks beginning with the "i" prefix for electronic, computer and communication products…for example, iPod, iTunes, iMac, iBook, iPhoto and several others" (p. 44). The key to this line of attack by Apple would be consumer perception. And it should be noted that prior to the official announcement, members of the media and analysts were already calling Apple's iPod phone the iPhone (Apple Insider, 2006). Additionally, Apple already owned the domain name iPhone.org at that time and was filing for trademarks around the world (Apple Insider, 2006).

Apple, Inc. has invested a great deal of time and money in securing goodwill and a hold in the marketplace for its "family" of "i" products. As products like the iPod, iMac, iWork, and iLife are all associated with Apple, it seems only logical that a phone developed by Apple would be called the iPhone. In fact, Apple has been somewhat aggressive in protecting its rights to its "i"-marks.[1] A similar strategy has also been used by McDonald's to protect

the ''Mc''-family of trademarks. In discussing this concept, the Federal Circuit Court in J&J Snack Foods (1991) found that a family of marks generally has recognizable common characteristics, such that consumers associate the marks, as well as the common characteristics, with the trademark owner. ''Recognition of the family is achieved when the pattern of usage of the common element is sufficient to be indicative of the origin of the family'' (J&J Snack Foods Corporation, 1991, p. 1463). Courts will consider the use, advertisement, and distinctiveness of the family marks, as well as how the marks are identified with the common origin (J&J Snack Foods Corporation, p. 1463).[2] Apple would likely be successful from the standpoint of consumer identification of the iPhone mark with its company; as stated earlier, many assumed that the product would be called the iPhone even before Jobs announced it.

According to Schwimmer (2007), there are two legal arguments against Apple's ''family of marks'' position: (1) the non-exclusivity of the ''i'' family of marks and (2) the date Apple obtained such rights. Regarding the first point, Schwimmer (2007) notes that Sony used a technology it terms iLink to describe its version of the FireWire system. Additionally, numerous companies use the ''i'' mark for accessories created for Apple's iPod (Schwimmer, 2007). Second, when considering the date Apple might have obtained ownership of the ''i'' family of marks, any arguable date appears to post-date the 1996 iPhone trademark registration date. For example, Schwimmer (2007) reports that Apple began selling the iMac in 1998, the iBook in 1999, and iTunes and iPod in 2001. Each of these dates clearly postdates Cisco's 1996 priority date based on the trademark filing.

Cisco claimed in the lawsuit that both companies using the name iPhone would create confusion among consumers; however, LeClaire (2007) reported that Apple disagreed in hopes of further benefiting from the ''i'' brand. Cisco's claim was one of ''reverse confusion'' and actionable under the Federal Trademark Act of 1946, 15 U.S.C. §1125. As the court wrote in Ameritech, Inc. (1987), reverse confusion occurs when a junior user saturates the market with a trademark similar to a senior user's and, in doing so, overwhelms pre-existing commercial associations made by consumers with the senior user. Reverse confusion cases provide some of the highest damage awards at trial level. However, in this instance, Schwimmer (2007) believes there were a couple of factors that worked against Cisco: (1) Cisco was not the typical small plaintiff and (2) Cisco re-launched a product 6 years after becoming aware of Apple's interest in the name.

In addition to examining the legal implications, the ethical implications must be addressed as well. If the marketplace presumes that the newest product developed by Apple would bear the ''i'' prefix to its mark, does Apple have some moral ''high ground'' for the mark? Steidlmeier (1993) has pointed out that according to John Locke's writings, labor creates assets and the value of those assets accrues to the laborer. Therefore, should not Apple, and not Cisco, reap the benefits of creating goodwill and consumer recognition in the iPhone, part of the ''i''-family of marks? In fact, one wonders if Cisco anticipated this very thing when it purchased Infogear and the iPhone mark in 2000. Certainly, this article does not argue that Cisco had an obligation to abandon the mark or offer it for assignment to Apple. From an ethical standpoint, the issue may be whether Cisco had some ethical obligation to tender the mark to Apple when Cisco approached it beginning in 2001.

Cisco and Apple possess both valid and tenuous arguments in support of their morally superior positions. In order to shed further light on the issues, the actions of Apple and Cisco could be further examined using a number of different ethical theories, but this article will focus on three: utilitarianism, justice theory, and stakeholder theory.

Ethical analysis of Apple and Cisco's actions

Utilitarianism

Resnick (2003) asserted that judges and legislators often take a utilitarian approach to Intellectual Property (IP) laws, so utilitarianism has become a major theory influencing questions of ethics in trademarks. Utilitarianism, according to the English philosopher John Stuart Mill (2001), argues that actions are moral in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness. The concept is often proposed as advocating a position which promotes the

greatest amount of good for the greatest number of people.

Hettinger (1989) contended that perhaps the strongest justification for intellectual property is a utilitarian argument based on incentives. As mentioned earlier, without the legal protections of an IP owner's rights, there would be no incentive to produce the intellectual property.[3] However, while intellectual property law is based on providing protection to investors, writers, etc. for exclusive use of the owner's patented invention or copyrighted work, the intent of trademark laws is slightly different. Trademark laws protect the owner of the trademark with an eye toward allowing the use of the protected mark to commercially market a product, service, etc. This involves questions of use of the trademark and to what extent those marks are used in commerce, so trademark issues are particularly suited for utilitarian analysis.

Trademark rights can be morally defended under a utilitarian theory of ethics, according to Resnik (2003), because the protection of commercial trademarks promotes the greatest amount of good consequences for society as opposed to bad consequences. The protection of trademarks allows companies to market goods and to compete in an open marketplace, developing brand (trademark) recognition without fear of a rival competing under the same mark. On this basis, one might believe that Mill would dispute the rights of a property owner to withhold intellectual property (including trademark rights) from others who would benefit from the intellectual property based on utilitarian principles. In fact, Mill (2001) believed that an injustice occurred in "taking or withholding from any person that to which he has a moral right" (p. 45).

With regard to Apple's actions then, one must ask what use of the iPhone mark would provide the greatest amount of good for the greatest number of people. As stated above, a utilitarian argument would likely find that Cisco, as owner of the iPhone mark per the U.S. Patent and Trademark Office, had a moral right to use the iPhone mark without interference. It is clear that Cisco technically owned the mark, although this article raises questions about Cisco's right to defend the trademark based on its lack of continued use of the mark. However, Apple's behavior indicates that it paid no regard to the fact that Cisco already owned the iPhone mark. Apple knew of Cisco's ownership of the iPhone mark and even attempted to acquire the mark from Cisco prior to 2007. Certainly, Apple's actions in attempting to gain some ownership of the iPhone mark by using the provisions of the Madrid Protocol rules for international registration appear to constitute an injustice according to Mill's theory of utilitarianism.

However, while Mill might well defend the right of Cisco to exclusively use the iPhone mark based on its prior registration, Cisco had neglected to use the mark in the years since it acquired Infogear. A utilitarian argument for the protection of trademarks would focus on the users of the trademarked property, rather than on the producers (Hettinger, 1989). Based on Hettinger's (1989) article, the protection of trademarked goods is necessary to ensure that enough products are available to users (consumers) from producers who feel confident that their goods will be protected from infringers. Thus, in the spirit of utilitarianism, Hettinger (1989) would argue that the grant of trademark rights is a mere means to this end. Utilitarian principles, then, might argue that the maximum utility for the iPhone mark would be achieved by allowing Apple to obtain legal rights to the iPhone mark by filing under the Madrid Protocol.

After years of owning the iPhone mark and not using it, Cisco ultimately relinquished its exclusive right to the iPhone mark in its purported settlement with Apple. Apple has now used the iPhone mark and produced one of the most recognizable products in years. Thus, a utilitarian would argue that the best utility for the iPhone mark would be achieved in allowing Apple to use the iPhone mark, in spite of Cisco's prior registration.

Justice theory

Resnik (2003) posits that a common objection to utilitarianism is that it does not address issues of individual rights or distributive justice. In the Justice theory, Rawls (1999) wrote that the structure of society, in choosing the way in which the social institutions assign fundamental rights and duties and determine the division of advantages, will determine justice (p. 10). Rawls proposed a theory of justice and morality based on the use of the "veil of ignorance" (Fritzche, 2005, p. 53). When we step behind

the veil of ignorance, we are no longer influenced by biases and pressures imposed by society and would assume what Rawls (1999) called the original position (O.P.). While in the O.P., Rawls (1999) believes that we would choose to follow two different principles: (1) that there be an equality of basic rights and duties for each person and (2) social and economic inequalities are allowed only if they benefit everyone (p. 13).

This distribution of benefits and burdens in society can be applied to intellectual property. According to Resnik (2003), Rawls warned that even though property rights can give a person a sense of independence and self-respect, they may no longer be justified when those rights are not necessary to perform this function (p. 330). Thus, based on the extent to which an IP law limits the rights of some members of society to use the protected property that limited right would be just as long as it does not undermine the independence and self-respect of others. A justice theory might also argue that trademark protection laws are justified in their application because they benefit the least advantaged members of society in the long run – the consumers acquiring the trademarked goods (Resnik, 2003).[4]

A justice theory would examine the actions of Apple and Cisco in terms of which company's claim of right to the iPhone mark comports with self-respect and independence behind the Veil of Ignorance. On one hand, Cisco has a right to protection of the iPhone mark; it legally acquired the mark from the original mark owner and took steps necessary to maintain its continued protection of the iPhone mark. However, Cisco was slow to develop a product which would bear the iPhone mark. Thus, Rawls might also argue that Cisco was no longer entitled to protection of the iPhone mark when it became clear that it was not using the mark in commerce. Apple approached Cisco a number of times expressing an interest in acquiring the iPhone mark, but Cisco refused, arguably because of its intent to use the iPhone mark for its future product. Then, in late 2006, years after acquiring the iPhone mark, Cisco discovered that Apple would be unveiling a new product – an Internet capable phone. Cisco then watched as Apple announced its iPhone at a public meeting.

Apple's use of the "bootstrap" provisions of the Madrid Protocol Rules would be unjust under Rawls's theory. Cisco obtained trademark protection under the provisions of the U.S. trademark laws. Apple was able to legally form Ocean Telecom and file for protection of the same mark in Trinidad/Tobago and Australia. Ocean Telecom and Apple then filed for protection of the iPhone mark under the Madrid Protocol as described earlier. One could argue that the actions of Apple undermined the rights of Cisco – rights of independence and self-respect – that Rawls discussed in his writings.

On the other hand, Apple spent years developing the goodwill for its family of marks. The i-family of marks has become readily identifiable in the marketplace; other companies want and mimic Apple's products and marks. Thus, when Apple began to develop its web-enabled phone, with all indications showing great market potential, it began its efforts to acquire the most logical trademark for its new product – iPhone. However, the mark was owned by Cisco, and Apple's efforts to acquire the mark from Cisco were repeatedly refused over the course of several years. Finally, perhaps, Apple decided to go ahead with a strategy designed to force Cisco's hand with the iPhone mark and create an entity, Ocean Telecom, for the apparent purpose of filing for foreign trademark protection under the Madrid Protocol Act.

Which company's position, when viewed behind the Veil of Ignorance, would comport with principles of fairness, independence, and self-respect? While Apple may seem more culpable here, the actions of both Apple and Cisco are likely unethical under the Justice approach.

Stakeholder analysis

The stakeholder theory has arguably received more attention in recent years than most other theories of ethics. Steidlmeier and Falbe (1994) assert that the stakeholder theory, which developed from the agency theory in economics, goes beyond a narrow stockholder rights model to one involving multiple constituency groups. A stakeholder theory asserts that a business must consider the interests of all of its stakeholders when making a decision. Gibson (2000) defines stakeholders as groups or individuals who can affect or are affected by the decisions and actions of an organization. There are generally two distinct

groups of stakeholders. According to Gibson (2000), primary stakeholders include shareholders, employees, consumers, suppliers and are those who have formal relationships with the business. Secondary stakeholders have less immediate power over an organization and usually include the media and special interest groups. Since any stakeholder group has the power to be a threat or a benefit to an organization, a company must take a strategic approach to decision-making to satisfy the needs of stakeholders (Gibson, 2000). We will consider the interests of three primary stakeholder groups: shareholders, consumers, and employees.

Apple's stakeholders

The stakeholder theory is particularly interesting in Apple's case. According to Cisco's complaint, Apple had been negotiating with Cisco for several years in an attempt to obtain the iPhone mark. It should not be surprising that Apple would not disclose this information to its shareholders or consumers. It is surprising that once the news broke of Cisco's suit against Apple, Apple did not make or post any public statements responding to the lawsuit and its allegations. Such silence could leave shareholders and consumers with a sense of uncertainty.

Despite being kept in the dark for a time, Apple's shareholders are most likely pleased with the company's latest financials. Apple reported $9.6 billion in total revenue and $1.58 billion in profit in the first quarter of 2008; the numbers were based on sales of 2.3 million iPhones (Patel, 2008). With a $1.76 profit per share, it might be difficult to find shareholders who are unhappy with the way that Apple handled the Cisco suit over the iPhone mark.

A second major stakeholder group to consider is consumers. As stated above, consumers were enticed by Steve Jobs's announcement of the iPhone and then kept in the dark after Cisco filed suit against Apple. However, it is unlikely that the dispute with Cisco prevented any consumers from buying the iPhone, since the lawsuit with Cisco was settled in February, 2007, months before the iPhone was offered for sale in June. Apple has encountered consumer issues with its iPhone, including price and battery life (McIntyre, 2007), but those issues have nothing to do with the way that Apple handled the trademark dispute with Cisco. It appears from looking at the iPhone sales numbers that consumers are not concerned with Apple's handling of the suit by Cisco or its trademark rights. In fact, Fortune Magazine rated Apple number 1 of America's Most Admired Companies for 2008 (Fisher, 2008).

Finally, we consider the interests of employees. Employees invest years of their labor in a corporation – human capital – giving them a similar stake in the corporation to shareholders (Etzioni, 1998). For Apple employees, their interests were certainly served by Apple's tactics to secure the iPhone trademark. Apple's foothold in the cell phone market is secure, thus increasing job security for all Apple employees affected by iPhone sales.

Earlier in this article, the authors discussed the actions of Apple in using the Madrid Protocol Rules to internationally register the iPhone as its trademark and the ethical questions which follow from those actions. In examining Apple's actions from a stakeholder theory, however, it is arguably clear that Apple's shareholders, consumers, and employees were all served by Apple's aggressive move to secure some foothold in the iPhone mark.

Cisco's stakeholders

In contrast to Apple, Cisco's General Counsel made several postings asserting its position in the lawsuit on Cisco's website. This information was given for the benefit of Cisco's stakeholders, and gave its stakeholders an understanding of Cisco's rationale in the iPhone trademark dispute. In fact, for the initial period of the lawsuit, Cisco was the only voice being heard in the iPhone dispute.

While Cisco appears to have considered the interests of its stakeholders in its communications, its actions may well have fallen short. First, Cisco took action to protect the interests of its shareholders in filing the lawsuit against Apple. However, one must consider that Cisco may have been lax in protecting the iPhone mark over 10 years it held exclusive rights to the mark. Cisco should have never let another iPhone product exist in the market. Why would not Cisco think that Apple was looking for an opportunity to wrest the iPhone mark from it? Apple had expressed interest in obtaining the iPhone mark since 2001. Cisco certainly did not act to

defend the use of the mark by other companies, nor did it use the mark in commerce to obtain maximum protection for the iPhone mark from the U.S. Patent and Trademark Office, a misstep that may have ultimately hindered the interests of its shareholders. Although the terms of the settlement are confidential, one wonders if Cisco lost its opportunity to leverage a major settlement with Apple for the benefit of its shareholders.

Next, we look at consumers. Although Cisco was number 18 on Fortune Magazine's list of America's Most Admired Companies in 2008 (Fisher, 2008), many consumers do not readily identify with Cisco and certainly do not realize that Cisco ever owned an iPhone trademark. Arguably, once Apple announced its iPhone, Cisco positioned itself to benefit its consumers by negotiating with Apple for interoperability with Apple's iPhone. Indeed, Cisco's website now states that its WebEx PcNow provides support for PC/Mac and iPhone (WebEx PCNow Launches New iPhone Compatible Version, 2007). Even though Cisco did not act to protect the iPhone in every way that it could, its push for interoperability may ultimately be a great benefit to both Cisco consumers and shareholders.

Finally, one could assume that Cisco employees were disappointed with Cisco's apparent loss of the iPhone battle. Over time, employees develop an interest in their employer and become vested in the decisions employers make. According to Etzioni (1998), the employees' investment in the company may seem jeopardized when the company acts recklessly or carelessly. Perhaps long-time Cisco employees felt that their investment of human capital in the company was endangered by the carelessness of Cisco in its protection of the iPhone mark. Although Cisco has not announced any major layoffs of employees due to the iPhone trademark suit, the loss of investment is certainly felt by Cisco employees.

Examination of the actions of both companies from a stakeholder theory shows that Apple appears to have gained the approval of its major primary stakeholders from its aggressive moves in obtaining rights to the iPhone trademark. It would be difficult to argue that Apple has created an ethics risk of any kind with its shareholders, consumers, or employees with its actions pertaining to the iPhone trademark. Cisco, on the other hand, may have disappointed consumers, employees, and shareholders in not being more proactive in protecting the iPhone trademark over its years of exclusive ownership of the mark, as well as its dealings with Apple prior to the lawsuit. Since the terms of the settlement with Apple are confidential, it remains to be seen whether the interests of these primary stakeholder groups will be met in the long term.

Resolution: the settlement

As one might expect from such a tangled web of potentially winning legal theories and ethical arguments, Cisco and Apple settled their dispute. Cisco ultimately extended negotiations with Apple twice so that the two companies could reach a settlement (Associated Press, 2007). Cisco and Apple finally settled the lawsuit and obviated the need for trial on February 21, 2007 (Donohue, 2007). According to an Associated Press (2007) article, Cisco is apparently willing to allow Apple to use the iPhone mark if Apple is willing to allow both companies' phones to ''communicate'' with each other. The areas of interoperability that are to be explored are thought to include security, consumer, and business communications (''Cisco and Apple Settle,'' 2007). Analysts do not expect anything major from the settlement; while Apple may consider interoperability on some of its lower profile products, Apple is not expected to ''open up'' any of its proprietary technology to outside devices any time soon (''Cisco and Apple Settle,'' 2007). Many believe that money had more role in the settlement than either company is saying (''Cisco and Apple Settle,'' 2007).

Conclusion

The legal, ethical, and business issues swirling on both sides of this dispute make it an appealing case to study. Cisco appeared to have the law on its side, and Apple arguably had the moral right to use the iPhone mark. As Schwimmer (2007) put it ''Cisco has a valid and subsisting federal trademark registration, with some chinks, for a highly descriptive to mildly suggestive trademark, with little to no reputation (and ironically, most of its reputation as of January 2007 may be attributable to Apple's

reputation in the iPhone mark…)''(p. 44). Also of interest is the fact that in most trademark litigation, the trademark holder is forced into litigation by the actions of others. However, the facts appear to show here that Cisco did not have this legal dispute thrust upon it, rather it moved into the dispute (Schwimmer, 2007). Thus, Cisco's arguably legally superior position is diminished by the moral issues presented in this case. Companies spend a large amount of money securing and protecting trademarks in this global market. The ability to develop a trademark which identifies a product in the market on a global scale has immense value to a company. Competitors recognize the value of a trademark, and many will attempt to infringe, dilute, or ''ride the coattails'' of another's mark. The Apple–Cisco dispute over the iPhone mark illustrates the lengths to which companies will go to acquire and protect a trademark. This can result in expensive, protracted battles with millions of dollars and years of consumer identity at stake. With the stakes so high, many companies are willing to go to great lengths – sometimes unethical lengths – to gain the ultimate prize.

As this case demonstrates, however, the good guy or bad guy in a trademark dispute is not always easily identified. Here, both parties engaged in questionable tactics in either obtaining or protecting the iPhone mark. Yet, in examining the actions of both companies from the ethical theories – utilitarianism, justice, and stakeholder theory – it seems that Apple was morally justified in its aggressive actions to gain access to the iPhone trademark, even though it had no legal right to the mark under U.S. Trademark law. Although it had a legally protectable right in the iPhone mark per U.S. Trademark law, Cisco's moral claim to the mark was weakened by its lack of enforcement and limited use of the mark in the product market.

Perhaps most troubling are the future ramifications for U.S. companies seeking to obtain trademarks. This dispute over the iPhone trademark involved two ''Goliaths.'' Apple and Cisco are large international technology companies with huge resources and a stable of lawyers available to monitor and prosecute the protection of trademarks. What does this say, then, for smaller start-up trademark owners who are in the process of developing a product for the international market? If the lesson here is that you can be a bully in the market and come out smelling like a rose, then the outlook for smaller companies is dim. Smaller companies can no longer afford to simply file for protection of a trademark with the U.S. Patent and Trademark Office. They must also quickly obtain protection internationally through the World Intellectual Property Organization (WIPO) and avail themselves of protections of international treaties like the Madrid Protocol. Anything less may leave a company wide open for trademark disputes with larger international trademark holders with greater resources and at least some moral justification for taking the trademarks to which they believe they are entitled.

Notes

[1] See, e.g., Apple Computer v. TVNET.net, Inc., 2007 TTAB LEXIS 80 (2007) (denying application of TVNET.net to register the mark VTUNES.NET for digital music video Internet downloads because of likelihood of confusion or dilution of ITUNES and ITUNES MUSIC STORE).

[2] Relying on consumer survey evidence where 30% of respondents thought a product marked McPretzel originated with McDonald's.

[3] Although Hettinger discusses patents, copyrights, and trade secrets in his article, the same argument can be made for trademarks under a utilitarian theory.

[4] Although Resnik states that justice could be less important in trademark disputes since the purpose of trademarks is to promote commerce for the owner.

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