Who Owns Intellectual Capital?

BY MARJORIE KELLY

Stockholders claim to own employee minds, or at least the right to sell them.

Can a company own ideas in employees' heads? Could you have a thought that—before you've written it down—is already the legal property of someone else? If the notion sounds Orwellian, pause a second and let this sink in: As your eyes are skimming these words, a state district court in Collin County, Texas is hearing arguments in the eery case of DSC Communications Corp. v. Brown. At issue: DSC's claim that it owns Evan Brown's thoughts.

Brown doesn't even work at DSC anymore. He was fired because of this dispute, then slapped with a lawsuit. The company—a manufacturer of telecommunications equipment in Plano, Texas—is trying to force the computer programmer to disclose an idea he developed that would solve an industrywide problem of outdated computer codes. Brown says his method would update old codes and make them usable on current—and future—computer systems. If it works, it's worth millions. But Brown's never divulged details. He's never even made notes on the concept, which remains entirely in his head. Who owns it?

Brown quite sensibly believes the idea is his: If your own interior thought doesn't belong to you, what does? He's seeking to develop the concept on his own. But DSC says it's company property, because of an employment agreement Brown signed—granting DSC rights to any inventions related to company business or "suggested by his work."

Beyond the legal question (explored in *National Law Journal*, Oct. 20, 1997), there's a broader issue here. To state it bluntly: Do companies own employees' minds? To phrase it the other way around: Do employees have a property right in their professional intelligence? Clearly they do. That's the essence of a new property right taking shape: the right of employees to own intellectual capital, *even if it is developed while working at a company.*

This is a democratic sense of property rights—as opposed to the aristocratic sense we unconsciously embrace, which could be articulated this way: Stockholders own the capital base of the corporation, so they own everything created on top of it. To see the error in this, we might look at a different form of ownership: land.

Let's say you're a farmer on land owned by someone else, and you build a house there. Who owns the house? In England, feudal custom said the house belonged to the landlord. He owned the land, so he owned everything created on top of it. But American courts rejected this. In the 1829 case, *Van Ness v. Pacard,* Justice Story wrote: "what tenant could afford to erect fixtures of much expence or value, if he was to lose his whole interest therein by the very act of erection?" It became the custom in America that "the value of improvements should be left with the developer." That's democratic property law.

But when it comes to corporate property, our assumptions remain feudal. Employees routinely "improve" corporate assets—developing new product lines and new businesses of far more value than any house. Yet those improvements belong to stockholders. Which is pre-democratic—or aristocratic.

And it makes no sense, in economic terms. It was Adam Smith who wrote, "the property which every man has in his own labour...is the original foundation of all other property." In short, you own the fruits of your labor. That's what capitalism is about. But the structure of the corporation distorts this free-market justice, capturing for stockholders the gains that belong to employees.

The most unlawful taking by stockholders is this: They claim to own employees' minds—or at the least, they claim the right to sell them (which amounts to the same thing). Take the case of a Maryland company in Chapter 11 bankruptcy, which sold itself to Space Applications Corp. (SAC) in Vienna, Virg. The company's real assets were its 100 scientists. So it sold them. As Edward Swallow of SAC told the *Wall Street Journal* (Oct. 6, 1997), "The company wasn't worth anything to us without the people."

Human capital acquisitions happen all the time. Cisco Systems Inc. in San Jose, Calif. has made 19 of them—mostly acquisitions of small software companies with 50 to 100 employees, with no products on the market and not a dime of revenue. Yet for these batches of employees, Cisco has paid premium prices: up to $2 million per employee.

Why does this money go to company owners, instead of employees? Because employees don't realize they can demand it. But they can.

Consider, for example, the birth of St. Luke's ad agency in 1995. It started when Omnicon announced it was buying Chiat/Day ad agency, and Andy Law in Chiat's London office decided he wasn't coming along. One by one, the entire London staff joined him. They phoned clients and found they too were happy to defect. And so, at one blow, employees and clients were leaving. Which left the "owners" to ponder: *What did they own?* A bunch of intellectual capital that had just decided it owned itself. In a gracious denouement, Law's rebels "bought" the London branch. For one U.S. dollar. Plus a percentage of profits for seven years.

It's a radical act, when people like Andy Law and Evan Brown stand up to stockholders and say, "You don't own us." It's as radical as our forefathers standing up to Great Britain and saying, "You don't own America." They're the kind of revolutionary acts that tend to catch fire in the world, and spread.