

Michael Pritchard's Commentary on "From Fundamental Physics to the Private Sector"

Commentary On
From Fundamental Physics to the Private Sector

This is a case in which universities who traditionally have collaborated in research find themselves unable, or unwilling, to collaborate as they move into the commercial market. This failure in collaboration comes at the expense of providing a more cost effective (and probably more environmentally friendly) service to the medical world and, ultimately, the public. These universities were able to move into this position because of NIH support in the initial phases of their research. That is, public monies have been used to create a stalemate between competing institutions. As described here, the universities were motivated to seek NIH support by the promise of lucrative returns.

Presumably, NIH support was intended to facilitate developing a new MRI technique that would enhance the ability of doctors to observe patients' brain function. Perhaps NIH saw the promise of financial gain as a necessary means to encourage further MRI research. But for NIH, the promise of financial gain for the universities was simply a carrot to encourage needed research, not a final end. In a capitalist venture for individual institutions, the universities had much to gain. However, by failing to insist that this research is not simply a capitalist venture for individual institutions, NIH apparently failed to take advantage of the opportunity to further the collaborative efforts of institutions that already had a good track record of collaborative work. This goal might have been accomplished by restricting the proprietary claims of NIH-supported institutions to the results of their research.

In the absence of NIH restrictions Hugel and Ivy have emerged as intense, uncooperative giants, apparently with large appetites for financial gain and considerably smaller appetites for sharing their research gains in ways that enhance their commercial ventures.

Bearing this background in mind, I now turn to the specific questions raised by the case.

1. Huge should not directly violate Ivy's patent rights. The fact that universities have been reluctant to sue to protect patents does not mean that they always will be, or that they will be in this case. Quite apart from the respective merits of the ethical arguments either side might produce, blatant disregard of patent rights is an open invitation for expensive litigation, and that is a battle that Huge will not win. Litigation costs, fines and the like are themselves ethically relevant considerations for Huge. The costs it would have bear in this case would be at the expense of other commitments the university has (to its faculty, students and the public).
2. I should think that both Huge and Ivy have moral reasons for working very hard to try to reach working agreements to make the most cost-effective MRI process available for medical practice. These reasons derive both from their support from NIH and their public missions as universities. I would say that the universities' obligations are to both NIH and the public.
3. I don't think that this case really raises the question of which is more important, human lives or intellectual property, at least not in the abstract. Instead, the case raises questions of responsibility. The seriousness of the responsibilities here pivots around the great value we attach to human life. However, there are limits to what sorts of demands we make on people (and institutions) to develop and market products designed to support human life. For example, we know that improvements in automobile safety can save human lives. However, that does not mean that automotive companies have an obligation to make cars as safe as is technically possible. Cars must be both affordable to the public and at least somewhat profitable to the companies. Minimum legal standards of safety may not always suffice, but there are also acceptable limits of safety that fall far short of saving as many lives as is technically possible. Although I believe that both Huge and Ivy have obligations to try to work out an agreement for public benefit, that does not mean that each has an unconstrained obligation to do so at any cost. That is not to argue that human life has less value; it simply means that there are limits to what can reasonably be expected. (I should add, however, that it appears that neither Huge nor Ivy has reached that limit.)
4. This question is related to Question 1, but it is somewhat more complicated. As long as there is a reasonable chance that Ivy will eventually work out an agreement with Huge, Huge should not knowingly sabotage the deal by selling

its systems to those it is known will violate Ivy's patent rights. That would kill any deal with Ivy, and it would invite the same sorts of litigation discussed in 1, only this time between Ivy and all of its other competitors. Short-term gains will probably give way to long-term losses. Huge needs to keep its eyes steadily on the morally desired end -- a cost-effective MRI process that will benefit doctors and their patients. Complicity (however legally acceptable) with others who are prepared to violate another's patent rights is not the moral high road; in fact, it's unlikely to be a successful road at all.

5. If Ivy makes a serious effort to reach a reasonable agreement with Huge, but Huge remains uncooperative, it seems ethically acceptable for Ivy to provide the machine itself, provided that it will perform reasonably well despite its higher cost. If by "sub-par" means "unacceptably poor," then everyone should wait until a better quality MRI process is available.
6. This question asks whether a company has the moral right to patent an idea for a specific process well after it has become public knowledge "among physicists and chemists who are not experts in this particular" field. If it is legally permissible, it is difficult to argue that it is not morally permissible in a case like this one. I don't know if it would be legally permissible. However, even if it is, not everything one has a moral right to do is morally right to do. Depending on the impact of asserting such a moral right on the availability and affordability of the MRI process, this distinction could be an important one to bear in mind.