Intellectual Property

[Image of a world map]

[Image of a handwritten note saying "cease and desist!"]
More and More Important: The value of many companies based on IP

Intellectual property rights (IP rights) are not inherently valuable. Their value is the strategic advantage gained by excluding others from using your intellectual property.

Your exclusionary rights should be strategically aligned with your business objectives.

Nearly 30 percent of all U.S. jobs are directly or indirectly attributable to the IP-intensive industries.

Most rapidly growing method of doing business abroad is by transferring intellectual property.

Intellectual property: The result of mental creativity.

Trade Secrets

- Copyright
- Patent
- Trademark
Property

- A Bundle of rights
- Concept of property: state provides mechanism to allow owner to exclude others
- Article I § 8 authorizes Congress to “secur[e] for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

Trade Secrets

- Business process or information that cannot or should not be patented, copyrighted or trademarked.
  - Includes: customer lists, plans, research, formulae, pricing info, marketing techniques, manufacturing techniques, processes.
  - Estimated that US companies trade secrets valued at U.S. $5 trillion.
  - FBI estimates $13 billion in trade secrets lost.
Trade Secrets

- Provides independent economic value from not being generally known.
- Company spent time and/or resources developing or discovering it.
- Reasonable, under the circumstances, efforts used to maintain the secrecy.

Trade Secrets

- Uniform Trade Secrets Act
  - Damages, Injunction, restraining orders; transfer of property.
- Economic Espionage Act of 1996
  - Criminalize theft of trade secrets; penalties up to $10 million & 15 years imprisonment.
  - Business partners falling out or employees leaving or being careless.
  - NDA, Non competes, Non Solicitation Agreements.

Copyrights

- Intangible property right granted by federal statute to creator of a literary or artistic production of a specified type.
- Automatic Protection for life of Author plus 70 years.
- Must be fixed in a tangible, durable medium; No requirement for registration.
Copyrights

- Must fall into one of the following categories:
  - Literary Works, Musical Works, Dramatic Works and Accompanying Music, Pantomimes and Choreographic Works, Pictorial, Graphic and Sculptural Works, Motion Pictures and other Audiovisual Works (including multimedia), Sound Recordings, Architectural Works

- Only the expression of an idea can be copyrighted -- not the idea itself (Section 102).
- Thus, anyone can use the underlying ideas in a copyrighted work
- Compilations of Facts are copyrightable, but the compilation must be "original."
- Exceptions: Fair Use; First Sale (software)

Trademarks

- Distinctive mark, motto or device or emblem that a manufacturer stamps, prints or otherwise affixes to the goods it produces
- Distinguish product/service from goods of other manufacturers and merchants
- Trademarks helps avoid consumer confusion
  - *The Coca Cola Co. v. The Koke Co. of America* (1920).
Trademarks

- USA Protection: Lanham Act (1946)—likelihood of confusion
- Trademark Dilution Statute—protects famous marks even if no likelihood of confusion
- If mark is copied either intentionally or unintentionally—infringement

Distinctiveness of the Mark.
- Trademark must be sufficiently distinct.
  - ‘Strong’ Marks: Fanciful and Arbitrary Marks: fanciful (Xerox and Kodak) and arbitrary (DutchBoy paint).
  - Secondary Meaning.
    - Descriptive, geographical terms are usually not protected, unless there is a secondary meaning, e.g., “London Fog” coats

Patents

- USPTO granted 167,349 in 2009
- Over 1.8 million in force in USA
- Only 4% of defendants in patent suits are found guilty of copying or infringing, even less in software suits
Patents

- Exclusive federal right from U.S. Patent and Trademark Office to make, use and sell an invention for 14 years (20 years for design).
- Must be “novel, useful, and not obvious” in light of current technology.
- First person to invent, not file, gets protection.
- What is patentable? Almost anything except:
  - (1) laws of nature, (2) natural phenomenon, (3) abstract ideas.

Patents

- Patents for Software.
- Patents for Business Processes.
- Patent Infringement.
  - May occur even though product is not identical.
  - Under U.S. law, no patent infringement occurs when a patented product is made or sold in another country.

Patents v. Copyrights

- Similarities
- Differences
- Why one or the other?
- Patent trolls and cyber squatting
Hardly any Chinese inventors seek to patent their ideas abroad. Between 2005 and 2009 fewer than 5% did (see chart 2). In America, the figure was 27%; in Europe, more than 40%.

- Government subsidies for filers
- Government orders/plans to increase Chinese patents
Patent Trolls (or Non-Practicing Entity, NPE)

Patent Troll or NPE

- **patent troll** is a person or company that attempts to enforce patent rights against accused infringers far beyond the patent’s actual value or contribution to the prior art. Patent trolls generally do not manufacture products or supply services based upon the patents in question.

Defenses against NPE’s

- Small companies most vulnerable
- Google launches Patent Starter Program
- Attempts in US congress: House Judiciary Committee approves patent reform bill
- Supreme Court has made it more difficult to get injunctions
International Protection

- Rights granted under US laws enforced only in USA
- Protection outside USA only through treaties or under domestic laws of country
- For real protection must file in each country
- Paris Convention for Protection of Industrial Property allows country to grant compulsory licenses if owner doesn’t use the patent or trademark

International Protection

- Patent Cooperation Treaty (123 countries) allows filing a single application in a member state, but must be followed up by country registration within 30 months
- Berne Convention—a signatory country must recognize copyright of owner/author in a signatory country in same way it recognizes rights of authors in its own country—enforcement and differences

International Protection

- Berne Convention establishes copyright protection a matter of International Law, but leaves up to individual states the scope of protection
- US has a number of Bi–Lateral Treaties for Copyright Protection
- Makes sure you check
Some Differences

- Copyright v. Derecho de Autor (Urheberrecht, droit de auteur): Economic v. moral rights
  - Right to claim authorship; right to prevent distortion, mutilation or other modification; right of disclosure; right of withdrawal
- Works made for hire
- Check the local rules and litigation perspective
- Compulsory licenses Art 31 of TRIPPS