Thriving in the Global Idea Marketplace:
Protecting Intellectual Property from Escalating Threats

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Executive Summary

Creations of the mind, or intellectual property (IP), have become increasingly important sources of wealth and power in the global marketplace. Organizations, countries and individuals that possess know-how also have the keys to growth and economic development. These assets, however, are constantly being attacked on various fronts by competitors, organized crime and others. The threat spectrum has widened with the growth of global markets and the advent of the Internet. To thrive in the global marketplace, companies must ensure that effective protective measures are in place to safeguard their IP. In addition, the development of international IP rights treaties is crucial to robust intellectual property protection in the worldwide economy.

Overview of Intellectual Property

International trade used to conjure up images of massive container ships loaded with cargo ranging from coffee beans to automobiles. In today’s global marketplace, trade goes beyond grains, merchandise, and machine parts. Know-how and innovation have increasingly become crucial elements of trade among nations.

Creations of the mind, or so-called intangible assets, are increasingly recognized as sources of wealth and power, playing a greater role in trade and economic development. Intangible assets fuel economic growth and competitiveness. According to the World Intellectual Property Organization (WIPO), investment in knowledge creation has more than doubled in the past 15 years, rising to $1.1 trillion in 2009.

Intellectual property, a subset of intangible assets, refers to certain products of human creativity and ingenuity like literature, music, films, inventions and designs that are protected as property. Intellectual property rights (IPR) are in force for a period in time after the persons who created them meet certain criteria as defined by pertinent laws in their respective countries. Patents, trademarks, copyrights and industrial design rights are among the commonly used methods of protecting IP. For most types of IP, protection is effective only in the country where the IP is registered, but broad international protection can be achieved by mechanisms established under various treaties among nations.
Patents are exclusive rights to make, use and sell inventions for a specified period of time. The term for U.S. patents is 20 years from the filing date of the patent application. In the U.S. patents are issued by the U.S. Patent and Trademark Office. These patents are enforceable only within the U.S. and have no effect outside of the country. The Patent Cooperation Treaty (PCT) provides a unified procedure for filing patent applications to protect inventions in each of its contracting states around the world. As of September 28, 2009, there were 142 contracting states to the PCT.

Trademarks are signs which distinguish goods or services from those of competitors. They can be symbols, words, slogans and designs that identify a product. Trademarks are registered at a national or territory level with a designated government body. Typically, registering a trademark in one country will protect the trademark within that country only. In the European Union, however, there is a Community Trade Mark (CTM) which allows for coverage in all EU member states. The Madrid System for the International Registration of Marks is the primary international method of facilitating the registration of trademarks in multiple jurisdictions around the world. It works by creating a bundle of national rights that are administered centrally, which is more effective than seeking protection separately in each individual country or jurisdiction of interest.

Copyrights protect the expression of an idea. They are the legal protection given to creators of literary and artistic works, as well as to more practical creations such as software and corporate brochures. The period of copyright protection begins when the work is created and terminates 70 years after the author’s death. Copyright exists from the moment a work is created, but in the U.S., in order for copyrights to be enforceable in the courts, they typically must be registered with the U.S. Copyright Office. Copyrights are governed by an international agreement known as the Berne Convention for the Protection of Literary and Artistic Works. Apart from requiring its member states to provide strong minimum standards for copyright law, the Convention also requires signatories to recognize the copyright of works of authors from other signatory countries in the same way as it recognizes the copyright of its own nationals. Presently, 164 are parties to the Berne Convention.

Industrial designs refer to the aesthetic quality of products which makes them attractive and marketable. They can consist of shapes, colors, patterns or a combination of these. The Hague Agreement Concerning the International Deposit of Industrial Designs provides a system for registering industrial designs in several countries by means of a single application. This system is administered by the WIPO. The duration of an international registration is five years, extendable in further five-year periods up to the maximum duration permitted by each contracting party.

Trade secrets are also considered part of intellectual property. These include confidential information or proprietary knowledge that companies protect to give them an advantage over their competitors. Trade secrets have no standardized mechanism like a patent or copyright for protection. However, they are protected within the U.S. under various state laws, as well as by the federal Economic Espionage Act of 1996.
**Crimes Against Intellectual Property**

The rising threat of intellectual property theft is a major concern to companies across the world. The most IP-intensive industries include pharmaceuticals, entertainment, biotechnology, fashion, publishing, software, electronics and energy, but IP rights are important to companies in every industry. The International Chamber of Commerce conservatively estimates global losses from IP theft at nearly $900 billion annually.

With the emergence of global markets and the advent of the Internet, the threat spectrum for intellectual property has expanded. Today, threats come from a wide variety of sources including competitors employing shady techniques to obtain a company’s valuable information assets, disgruntled or simply dishonest employees looking to earn money from selling a client list or an R&D report to unscrupulous competitors, and professional IP pirates and counterfeiters who operate within vast criminal networks that generate billions of dollars. In some instances, countries have seized valuable IP by using their intelligence networks.

Counterfeiting is one of the most substantial threats to intellectual property. “If you can make it, we can fake it,” has become the mantra of many counterfeiters. Companies all over the world are suffering the scourge of fake products such as medicine, food, clothes, electronic equipment, mobile phones, cement and auto parts. In recent years counterfeiting has grown from a localized industry with small players to a huge global business that involves mass production of various fake products. According to the International Anti-Counterfeiting Coalition, counterfeiting is a $600-billion-a-year problem which is ballooning due in part to growing consumer demand. In addition to the economic costs, fake products can be dangerous. Substandard counterfeits pose a real risk particularly in the pharmaceutical sector. The World Health Organization emphasizes that counterfeit medicines, which may contain dangerous materials or lack active ingredients, can result in treatment failure or even death.

The “2010 Special 301 Report on Copyright Protection and Enforcement” released by the Office of the U.S. Trade Representative (USTR) found that counterfeiters are exploiting free trade zones where they can easily disguise the origin of counterfeit goods. Another trend reported is the tactic of shipping counterfeit products separately from labels and packaging to evade law enforcers. The USTR cites an example in Russia where counterfeiters reportedly import unbranded goods, package these goods with unauthorized packaging bearing the rights holders’ trademarks, and export them to various countries.

Increasing Internet piracy is another trend reported by the USTR. According to the Special 301 Report, the unauthorized retransmission of live sports telecasts over the Internet has become rampant, particularly in China. Gadgets such as mobile phones and flash drives also are being used in piracy operations. These devices are being pre-loaded with illegal content before they are sold in various markets.

The Special 301 Report also noted a growing concern in the area of trademarks and domain name disputes. According to the USTR, there is rising unauthorized usage of trademarks under country code top level domain name extensions. The danger is that U.S. rights holders risk losing valuable Internet traffic due to such unauthorized uses.

After extensive research and analysis, the USTR placed its trading partners Algeria, Argentina, Canada, Chile, China, India, Indonesia, Pakistan, Russia, Thailand and Venezuela in its Priority Watch List. Placement on the Priority Watch List indicates that particular problems exist in that
country with respect to IPR protection, enforcement, or market access for persons relying on intellectual property. In the case of China, the report stated that “China's IPR enforcement regime remains largely ineffective and non-deterrent...The share of IPR-infringing product seizures at the U.S. border that were of Chinese origin was 79 percent in 2009, a small decrease from 81 percent in 2008.” The report also cited the massive losses suffered by U.S. copyright industries due to widespread piracy in China.

The increasing global trade of intellectual goods necessitated a web of treaty relations between nations. International treaties such as the PCT, the Madrid System, the Berne Convention and the Hague Agreement have become crucial to achieving strong intellectual property protection in the international arena. These treaties also provide a way to prevent tensions in international economic relations by settling intellectual property disputes more systematically.

With the introduction of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), IP laws saw a move toward standardization. Administered by the World Trade Organization (WTO), TRIPS is an international agreement that sets down minimum standards for many forms of intellectual property regulation. It contains requirements that countries’ laws must meet for copyright rights, geographical indications, industrial designs, patents, trademarks and undisclosed or confidential information. It also mandates detailed civil, criminal and border enforcement provisions. The significance of TRIPS lies in the fact that it makes protection of intellectual property rights an integral part of the multilateral trading system as embodied in the WTO.

Major IP Cases

Stories of high-stakes patent wars, trademark disputes and copyright infringement cases make headlines all over the world. Presented here are some cases from various industries and countries that illustrate some of the key issues in global IP protection.

- **Starbucks v. Xingbake** – In 2003, U.S. coffee giant Starbucks sued Chinese coffee company Xingbake due to alleged trademark infringement. According to Starbucks, "xing" translates from Mandarin as "star" and "ba-ke" is an approximate phonetic rendition of "bucks." Starbucks’ also accused Xingbake of copying its green and white logo. The owners of Xingbake argued that the company has registered its enterprise name with the Shanghai authorities in March 2000, before Starbucks was established in the region. The Intellectual Property Research Centre did not accept this argument, pointing out that "Xingbake" has been used as the sole translation of "Starbucks" in Taiwan since 1998. Xingbake was ordered by the Court to stop using its name, issue an apology to Starbucks in a local newspaper, and pay $62,000 in compensation.

  The basis of the Court’s decision was the then newly-amended Trademark Laws of the People’s Republic of China. Under the new laws, the Court determined that the name "Starbucks," whether written in Chinese or in English, was popular enough to be considered a famous trademark. Therefore, it was entitled to protection. The Starbucks v. Xingbake case is seen as a landmark case in the protection of well-known international trademarks. It also shows China’s efforts to handle cases of intellectual property infringements by local companies against foreign businesses.

- **Novartis v. India** – In 2006, Swiss pharmaceutical company Novartis launched a court case against India, seeking to prohibit the country from developing generic medicines based on patented drugs such as Glivec, Novartis’ cancer drug. The company challenged a law allowing India to refuse to recognize a patent for an existing medicine if there is a modified
formula resulting in a re-patent of the drug. An Indian court ruled against Novartis saying that, “Novartis’ legal challenge – mounted to limit competition to its own patented medicines – was a threat to people suffering from cancer, HIV and other diseases who are too poor to pay for them.” The court also claimed to have no jurisdiction on whether Indian patent law complied with patent guidelines of the WTO. Novartis received letters from patients’ rights organizations and more than half a million people who said that a ruling in favor of Novartis would eliminate a vital global supply of affordable, generic medicines from India. Novartis decided not to appeal the ruling.

This case is significant because of the “patent rights versus patient rights” conflict it presents in the pharmaceutical sector. Patient rights organizations argue that the supply of low-cost generic versions of cancer and AIDS treatments for the developing world could be hampered if pharmaceutical giants win legal challenges such as the one for Glivec. On the other hand, drug companies underscore that ignoring patent laws would severely hamper their ability to invest in the research and development of critically needed new medicines.

- **The Pirate Bay** – The infamous Pirate Bay trial revolved around a joint criminal and civil prosecution in Sweden of four individuals charged with promoting the copyright infringement of others with The Pirate Bay site – a Swedish website that enables the exchange of BitTorrent files. Swedish prosecutors filed charges against Fredrik Neij, Gottfrid Svartholm, Peter Sunde; and Carl Lundström. Warner Bros., Fox Movies, Sony Music, and EMI were among the global entertainment giants that brought the case. The prosecutor claimed the four worked together to administer, host, and develop the site and thereby facilitated other people’s breach of copyright law. Some 34 cases of copyright infringements were originally listed, of which 21 were related to music files, nine to movies, and four to video games. On April 17, 2009, the four were found guilty and sentenced to serve one year in prison and pay a fine of 30 million Swedish krona (approximately $3.5 million). All the defendants have appealed the verdict.

In a similar high-profile infringement case known as *MGM Studios v. Grokster*, the U.S. Supreme Court held that defendant peer-to-peer (P2P) file sharing companies Grokster and Streamcast could be sued for inducing copyright infringement for acts taken in the course of marketing file sharing software. The critical part of the decision was that the file sharing software’s primary purpose was to pirate copyrighted material, and therefore violated copyright law. Entertainment giants may have rejoiced over the victories, but the convictions apparently only boosted the number of piracy sympathizers. Piracy has not been stopped, and has gone from bad to worse.

**How Companies Can Protect Their IP in the Global Marketplace**

Counterfeiting, piracy and trade secret appropriation are daunting challenges, but companies can take measures to protect IP in the global market.

- **Take full advantage of available legal IP protections.** Register copyrights and trademarks and apply for patents. This is the first step in attempting to ensure that intellectual property rights are protected. Additionally, companies should use available international mechanisms such as the *PCT*, the *Madrid System*, the *Berne Convention*, and the *Hague Agreement* to try to achieve international IP protection.

- **Record copyrights and trademarks with U.S. Customs and Border Protection.** U.S. companies should record their copyright and trademark registrations with U.S. Customs and
Border Protection (CBP). Recording copyrights and trademarks with CBP assists CBP in identifying infringing goods and allows Customs to seize and destroy the infringing materials.

- **Take measures to keep IP out of the wrong hands.** A company should restrict access to pertinent data and technology to a small circle of people. Employees and contractors who are given access to IP should be bound by strict confidentiality agreements and appropriate IP clauses in their contracts. Physical security measures must also be enforced. Among these measures are limiting the usage of movable storage devices like flash drives, encrypting all IP that is transmitted electronically and controlling access to IP storage areas. Employee training should be a regular activity in order to instill a culture of awareness that data security is critical. Investing in a security officer and a legal counsel will boost efforts to protect information assets.

- **Become familiar with foreign IP systems.** When doing business in a foreign country, conduct extensive research on that country’s IP system to avoid legal entanglements. Additionally, familiarity with IP laws in counterfeiting hotspots like China can be valuable in developing an IP risk management strategy. The U.S. Department of Commerce, in cooperation with the American Bar Association’s Section of International Law and the Coalition Against Counterfeiting and Piracy, offers American small and medium-sized enterprises free, one-hour consultations with volunteer attorneys knowledgeable in both industry IPR issues and a particular country to learn how to protect and enforce IPR in that country. The International Intellectual Property Rights (IPR) Advisory Program has experts available for Brazil, Russia, India, China, Egypt, and Thailand.

- **Conduct due diligence of potential foreign partners.** In addition to various private sources of company information, the U.S. Department of Commerce offers the International Company Profile (ICP) that includes a low-cost background report on a prospective international partner. Additionally, the U.S. Commercial Service’s International Partner Search provides U.S. exporters with a list of up to five pre-qualified partners. Potential partners should be interviewed, and preferably audited, concerning their IP protection practices. Detailed IPR language should be included in licensing and subcontracting contracts.

- **Be relentless in attacking IP piracy.** Since organized crime groups and unethical individuals are unrelenting in their attack of others’ patents, copyrights and trademarks, it is only right for IP owners to be relentless in attacking crimes against their information assets. One way of attacking piracy is exhausting all available legal options to clamp down on IP violators, including both civil and criminal actions. IP laws may not be the only avenue for reaching pirates and counterfeiters – fraud statutes and consumer protection laws also may be fruitful, especially if regulatory agencies and law enforcement officials are willing to assist. Legal battles, however, require significant money, time and energy, so choosing strategic targets is important.

**Conclusion**

Intellectual property drives today’s global economy. Patents, trademarks and copyrights have become increasingly important sources of wealth and power in the global marketplace. The extent of protection of these rights varies widely around the world. The bottom line, however, is that companies must invest in protecting their intellectual property against escalating threats in order to safeguard their information assets and economic interests. Otherwise, they run the risk of being bled dry by competitors, organized crime and unethical employees.
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