Chapter 1

When it comes to intellectual property, people, more accurately, consumers, know much more than they think they know. They receive IP inputs and process them all day long. The number of times during a given day that a person is using IP, interacting with IP, and recognizing IP is likely to be thousands of times. Of course, there is no conscious thought given to this fact. But, the reality is mind boggling. For example, how much of a person’s day is spent using a cell phone or looking at passing automobiles or simply walking down the aisles of a store?

These activities bring individuals face to face with intellectual property. The casual walk down the street or down a store aisle is an experience in being bombarded by IP signals: names of banks, coffee shop signs, labels on soft drinks and bottled water, the packaging on chips and snacks. These “brands” and logos are everywhere and because they are everywhere, we often pay no conscious attention to them. They have become part of the background.

Consider one of today’s necessities, the cell phone. The cell phone on my desk has two logos. One logo tells me who manufactured it (LG) and the other logo (AT&T) tells me who provides the service. Both “logos” are intellectual properties, specifically trademarks, of these two respective companies and are legally protected.

Pressing a button and activating the phone for use generates a colorful screen display. The screen display is the result of a combination of things, including code. Interestingly, the many codes (source or object code) written for the many programs on the phone can be protected by copyright. As a “literary” work, the codes are protected like the text of a book and the photos that may be in it. As a consumer, consider what elements make up a television commercial: music, words that actors speak based upon a written script, and the audiovisual aspect of the commercial. These various elements are different works that can be protected by copyright (music, script, audiovisual work).

The phone’s capabilities (making a call, connecting to the internet, downloading data, receiving/sending data and many other tasks) are the result of a lot of creative thinking, engineering, testing, miniaturizing components, and refining various processes. As new phones are placed on the market and a person/company develops a new and useful improvement over what existed before, a patent could be obtained. To put cell phone technology in perspective, and to understand the competition in this field of technology, it is interesting to note that in 2013 it was estimated that smartphone technology is covered, more accurately smothered, by about 250,000 patents.

Patents are difficult to “see” because the technologies inside of a phone, a jet engine, or a household appliance make something function and, usually, are not a visual form of intellectual property. But, to provide examples of patents that are visual, here are examples of things millions of people use daily that have been protected by patents. First, a piece of plastic that has
a useful function because it can prevent a hot drink from spilling out of the cup and onto your hand or clothing.  

While most consumers wandering into a coffee shop may have used a similar plastic lid with the opening that exists as pointed to by #52 (located at the “7” position), it is the improvement on the basic lid as shown by #54 that made this a development worthy of patent protection (located at the #1 position). The raised piece at #54 swivels to allow the hole one drinks through at #52 to be opened or closed. An easier patent to see and understand is another cup related item that is often made from cardboard. Many usually refer to the item as a “sleeve” for a cup, but Patent 5,205,473 is the “Recyclable corrugated beverage container and holder” as seen here.

The plastic lid and cardboard cup holder inform us that patent protection is not limited to things like the latest and most sophisticated inventions such as a great new cancer curing drug or the most fuel efficient engines. Rather, anyone with insight into making something function better or differently may be able to take a gadget and obtain a patent for the new and different function that has been added.

Turning back to cell phones, their shape, external appearance and design may be protected. In addition to the trademarks, patents and copyrights, it is possible to legally protect cell phone designs with design patents (referred to as “industrial designs” in many other countries).
We are bombarded all day long with one or another or a combination of intellectual property rights (IPR). Consider the passive act of waiting to cross the street. If you are watching the cars go by as you wait, are either of these familiar?

![Nissan Front End](image1.png) ![BMW Front Grill](image2.png)

Can you tell that one is the front end of a Nissan and the other a BMW? Nissan has obtained a design patent on this particular front end while BMW has done the same for its front grill. Like a cell phone that packs a lot of different types of IPR into a device that fits into the palm of a hand, our automobiles are complex machines that are similar in that there are logos on the front grill telling us who the manufacturer is (trademarks), the engine that has thousands of functioning parts with an unknown number of patents as well as all the safety features that include patented technologies, and there are the displays that require code that is protected by copyright.

Whether a cell phone, automobile, foods and beverages, or basic ideas for marketing a product, there are many other things involved in improving on existing products as companies work on developing future versions or models with more capability to do more things. To the extent that a company may not want to share information or allow information to get into the hands of their competitors, a company may keep information internally secure and maintain the information as trade secrets. Perhaps one of the most broadly recognized trade secret is the exact formula for Coca-Cola.

Examples of trade secrets include new formulas for paints and coatings, software and equipment that regulate the flow of electricity to wind turbines, and seeds that have drought and pest resistant traits that can give the owners of these secrets a perceived competitive advantage over their competitors.

How often does one hear about grandma’s secret recipe for a favorite food? Interestingly, when it is in the context of cooking a favorite food for a family dinner, the special ingredients may be thought of in terms of “grandma’s special recipe”, but in a commercial context as in a restaurant business, that same special recipe can be a trade secret that the restaurant owner or chef keeps secure because of its commercial value to the business.

Champagne, just saying it or seeing a bottle of Champagne brings a smile to many. Champagne may be the most famous example of a type of intellectual property: geographical indications. Champagne is a sparkling wine that originates from a specific region of France and made using a specific method and has a reputation that is worth protecting. This is one type of IPR that is hotly argued over between the U.S. and Europe. Europe is not a fan of feta or parmesan from the U.S. as Europe views both terms as a protected geographical indications and should be used only by certain cheese makers from Greece and Italy, respectively.
Similarly, the U.S. has its protectors of U.S. geographical indications. One example is “bourbon”. Because some view bourbon as uniquely American, specifically from Kentucky, groups representing U.S. bourbon makers have taken action to protect this geographical indication, including a successful action in Europe to prevent Romanians from using “bourbon” in a proposed name.12

Consider, too, a trip through the aisles of a grocery store. Is the soap and shampoo section simply lined and stacked with a bunch of cardboard boxes with “Soap” printed in plain black lettering for a bar of soap or are all shampoos in a simple round clear plastic bottle with “Shampoo” printed in the same font for all? The reality is that soaps and shampoos are packaged with colorful wrapping, different shapes of bottles, names and logos, all trying to attract the consumers’ attention, but more importantly, attracting the consumers’ dollars. But, it is not that simple because all those different packages with color schemes, names and logos are all wrapped using trademarks and to the extent the advertising is promoting a new and different cleansing compound, there may be patented compounds in the soaps or shampoos. Products in every aisle are bombarding us with intellectual property.

As consumers, do we confuse the following pair of rings?

Most consumers know that the four interlocking rings belong to Audi13 or is associated with an automobile and the five rings are associated with the Olympics.14 The mental connection occurs instantly and no thought is given to these very identifiable marks. Similarly, a consumer is unlikely to confuse liquid soap or a bare of soap marked with the word “Dove” with chocolate beverages or other chocolates with same word, “Dove”.15

An overlooked reality is that it is, in fact, easy to start a detailed conversation or workshop or training program about intellectual property. It is easy because today’s consumers, regardless of age, are exposed to IP, but are not aware of the more technical and legal aspects of IP or the legal terminologies. The common knowledge that we possess is in relation to all the devices we use, the things we see and the things we consume. Today, IP is everywhere and if we wish to raise awareness about IP we should begin by talking about how IP is so much a part of our daily lives and start to connect our daily actions to the various things we depend upon that contain an IP component.

Globally, today’s consumers are more aware of brands (trademarks) than ever before and all the devices with various programs and apps have engaged consumers with many programs (copyrights) and patented functions. To the extent there is an awareness problem, it is a problem of failing to take advantage of what consumers know and increasing their knowledge base about what IP is and how IP can be used to leverage ideas into something useful and the value that becomes a part of the goods and services associated with them.
There is one option that is rarely discussed. Anyone who does develop a new gadget, gives it a name and markets it to the public can opt to “give it away”. While IP may be protected by various laws and regulations (laws and regulations that govern when a person obtains legal rights to a patent, trademark, copyright, design, etc.), one can choose not to seek that legal protection, allowing anyone to make a copy, use the brand name, etc. This is a choice that can be exercised.

To the extent that steps are taken to obtain legal rights to a trademark, patent, copyrighted work, design, trade secret (adopting and enforcing procedures internal to an enterprise to keep the secret), or geographical indication, IP has become a “big deal”. They can be discussed without always delving into the complexities of the laws that govern each type of IP if we can take advantage of the common knowledge the public has based upon their expertise as “consumers”.

Chapter 1

3 TRIPS, Part II, Section 1, Article 10(1). Computer Programs and Compilations of Data. Computer Programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971). http://www.wto.int/english/tratop_e/trips_e/trips_e.htm.
4 Title 35, U.S. Code § 101. Inventions Patentable. Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.
8 U.S. Patent and Trademark Office, Nokia, Design Patent Number D625,700 S.
9 U.S. Patent and Trademark Office, Samsung, Design Patent Number D626,528 S.
14 These five rings make up a significant part of the U.S. Olympic Committee’s Registration No. 4102607. http://www.uspto.gov.
15 “Dove” for liquid soap is a trademark registered and owned by Conopco, Inc. (U.S. Patent and Trademark Office Registration No. 4419926) and “Dove” for chocolate beverages is owned by Mars, Inc. (U.S. Patent and Trademark Office Registration No. 3313237). http://www.uspto.gov.
Chapter 5: Enforcement-Where are We Now?

There are some things about global counterfeiting and piracy that most can agree on at this juncture. There is little or no doubt that there are more dangers posed to public health and safety than one might have believed twenty or thirty years ago. Simply seeing the results of the limited enforcement operations targeting pharmaceutical products coordinated by INTERPOL provide evidence of the dangers arising from the production, distribution and sale of fake pharmaceutical products, but this is only one of many categories of products that now pose such risks.

In addition, the E.U., Japan and the U.S. have concrete statistics from their respective customs agencies. The limited statistics from just these three sources inform us that there have been over 625,000 customs actions to stop the import, export or transshipment of goods that infringed intellectual property rights during the 2009-2013 period. Although the number of actual items seized in each action was not available, it would not be unreasonable to conclude that these seizures stopped billions of infringing items from entering the stream of commerce.

From an international trade and customs perspective, the WCO’s Secretary General characterized the situation in 2014 as an “explosion in counterfeit and pirated products” during an interview. The Secretary General’s description of the global counterfeiting situation is likely based, in part, on the WCO’s regular participation in regional and global enforcement operations, including one in 2013 that resulted in the seizure of over a billion items.

Counterfeiting and piracy have reached levels that have been described as a scourge, an epidemic, an explosion and viewed as a threat to economic recovery. The growth in the fakes trade has occurred when, supposedly, strong enforcement measures were legislatively in place and implemented. These numbers beg the question: why is there so much illicit product made, distributed and sold? There is a long list of reasons.

The participants at the Global Congresses identified a number of reasons why the trade continues to grow. One major theme is the lack of national legislation that makes counterfeiting and piracy punishable by more severe criminal penalties. At the 4th Global Congress on Combating Counterfeiting and Piracy in 2008, the International Trademark Association’s President-Elect enumerated a number of recommendations that included freezing and confiscating monetary and other assets arising from counterfeit activity, making criminal counterfeiting an extraditable offense thereby eliminating safe havens and recognizing counterfeiting as a transnational organized criminal activity.

In 2009, the WCO’s representative to the 5th Global Congress on Combating Counterfeiting and Piracy suggested that customs agencies could contribute more toward reducing counterfeit and pirate products if governments authorized actions to stop exports, goods moving in-transit that contain infringing goods and actions to prevent infringing goods into free trade zones. The customs related authority to take action has been echoed by industry representatives. As recently as June 2014, Unilever’s chief executive officer underscored the need for enforcement of IPRs in free trade zones as well as other legislative steps to combat counterfeiting. But, from a cross border perspective, some of these recommendations are not recent. Regarding industry’s calls
for increased powers for customs to stop export shipments and in-transit shipments containing infringing goods, the U.S.-based IACC made recommendations for enforcement in these areas in its 2003 Special 301 submission.7

At least a couple of reasons for the growing fakes trade is the continuing lack of criminal sanctions and weak border enforcement. In part, these are due to weak penalties or the reluctance to impose deterrent penalties that are available or a combination of both.8 To the extent that there may not be deterrent penalties enacted or deterrent penalties are not imposed may be reflective of a government’s lack of making IPR a priority that translates into weak IPR protection and enforcement.

Another reason is price as consumers may be willing to purchase counterfeit and pirated goods at a lower price even when they are aware of what they are buying.9 Price may be a controlling factor regardless whether a consumer knows that a particular product is genuine or not.

While there are many reasons for the robust trade in counterfeit and pirated goods, the response to the trade has been for some governments to expand the universe of those reacting to the problem. As discussed earlier, the IPR enforcement effort to protect these assets has broadened the scope of the types of parties being enlisted to help. Working toward improving the enforcement environment without the need for new laws, the U.S. reported in 2013 that Center for Safe Internet Pharmacies, aimed at combating illegal online pharmacies, was formally launched, bringing together numerous payment processing companies working to stop providing services to illegal online pharmacies.10 Essentially, the initiative involves numerous credit card companies.

In July 2013, the U.S. Intellectual Property Enforcement Coordinator (“IPEC”) wrote that a number of internet service providers and the Interactive Advertising Bureau have agreed to a set of best practices aimed at denying website operators advertising revenues. The objective was to combat online infringement by eliminating the money that could be generated from the illegal activity.11 Although these voluntary and best practices efforts may be making some progress in bringing different parties together, these are recent developments still in early stages. Moreover, only time will tell if agreements between the different interests have long term and positive impacts to interrupt the illegal trade. Additionally, these types of actions are needed in many countries in order to have a significant effect on the illegal physical and online environments.

The push toward engaging payment processors is also a goal for the U.K. government as it has expressed a desire to enter into an agreement with payment service providers. The objective would be to prevent the payment providers from supporting illegal websites and to cut off the revenue stream.12 In addition to the goal of engaging payment providers, the U.K. has pressed for a voluntary copyright alert program that brings together the creative industries and internet service providers, two groups that have usually been at odds, in an effort to identify online infringers and reduce online copyright infringement.13 The voluntary copyright alert program includes an education14 component that will be financially supported by the U.K. government.

In 2014, the Office of the U.S. Trade Representative noted that it was the 25th year in issuing its Special 301 report and indicated that there have been many positive developments in a number
of countries over the past 25 years, but compared its first report listing a total of 25 trading partners to the 2014 report that listed 37 trading partners.\textsuperscript{15} USTR reported that “problems of trademark counterfeiting and copyright piracy continue on a global scale and involve mass production and sales of a vast array of fake goods . . . .”\textsuperscript{16}

The USTR Special 301 report provides an opportunity to gauge the views of the various affected industries because of the industry submissions that USTR reviews in order to issue its report. Therefore, USTR’s summary of industry’s perspective on counterfeiting and piracy provides insight into how much or how little progress is being made in the eyes of the IPR owners who are active in markets around the world. Among the list of points made by industry, they include the following:

- continuing growth in the piracy of copyrighted products in virtually all formats as well as counterfeiting of trademarked goods;
- continuing rise of the involvement of criminal enterprises;
- continuing growth in online sales of pirated and counterfeit hard goods that will soon surpass the volume of such goods sold by street vendors and in other physical markets; and
- continuing increase in the use of legitimate services to deliver infringing goods making it more difficult for enforcement officials to detect these goods.\textsuperscript{17}

The IP enforcement mindset in the U.S. Congress seems to be similar to what was being said a number of years ago. As recently as June 2014, Senator Wyden held a hearing focused on IP enforcement, noting the more complex trading environment, and the need to press ahead with vigorous enforcement to protect U.S. businesses and jobs from the threats abroad.\textsuperscript{18} In addition, in November 2014, several members of the U.S. Senate and House of Representatives joined to form a new caucus, the Congressional Trademark Caucus, stating that it was necessary to educate other members of Congress and the public about important role of trademarks and about the rising tide of counterfeit goods.\textsuperscript{19}

A 2014 IP Enforcement Summit in London provided representatives from industry and government officials with an opportunity to assess the situation, primarily as it affects European businesses, and how to move forward to combat IPR violations. Improvements that aid the digital economy, such as broadband, increased computing power and storage capacities are the tools that allow counterfeiting and piracy to grow. The internet related problem was highlighted by looking to an estimate of illegal downloading activity calculated by the UK’s Ofcom (Independent regulator and competition authority for the UK communications industries), reporting that during a three-month period five million video games were consumed without permission and seven million e-books, nine million feature films and 54 million television programs were illegally downloaded.\textsuperscript{20} In late 2014, after announcing the seizure of over 290 domain names, the director of EUROPOL commented that “infringements of intellectual property rights is a growing problem in our economies and for millions of producers and consumers.”\textsuperscript{21}

Despite years of combating IPR crimes and all of the actions that have occurred, the need for dedicated law enforcement units to combat IPR crimes exists. In the U.K., its Intellectual
Property Office is funding a new Police IP Crime Unit, focusing on “serious and organised intellectual property crime (counterfeit and piracy) affecting physical and digital goods” committed by use of an online platform. One of the many recommendations made at the International IP Enforcement Summit in London was for the creation of more specialized units, which arose during the discussion regarding customs enforcement and the proliferation of small parcels being shipped internationally.

The same trends are reflected in enforcement actions in Australia as the head of its Customs and Border Protection Service indicated that the effort to detect and stop the importation of counterfeit goods is increasingly difficult because trade volume is growing and counterfeiters have improved their skills. With plans in Australia to create a consolidated agency with expanded functions, the head of the Customs and Border Protection Service hints at the need to increase enforcement efforts to combat counterfeit and pirate products that are attempted to be imported into Australia.

As Australia’s Customs agency was experiencing a leadership change in October 2014, the deputy chief executive officer for enforcement indicated that counterfeiting was consuming more time given the threats posed by fake goods. The official reiterated what has been said often by INTERPOL’s leadership that organized criminal involvement had increased and added to the dangers posed by counterfeit goods.

These enforcement challenges are increasing and there are many reports of a still proliferating product counterfeiting and piracy problem. These reports that the problem continues to grow are from rich and poor countries alike. In 2014, the examples are plentiful. In developed countries, this trend is acknowledged in the U.S. and the U.K. In the U.S., the FBI issued a warning about the prevalence of counterfeit cosmetics and fragrances, especially at flea markets and on websites, but also noted that, in general, the availability of counterfeit goods is proliferating.

The U.K.’s national and local authorities have reported an increasing number of complaints regarding fake goods and have seized an increasing number of dangerous products seized. Whether electrical products that pose a safety risk or a broader array of goods, the trends point to a problem that continues to grow.

Additionally, organizations that represent IPR owners are critical of some of the efforts or call for more government action given the proliferation of counterfeiting and piracy. For example, in Japan, those who represent IPR owners are critical of the current efforts and some believe the government needs to do more to close legal loopholes and do more to accelerate procedures to pursue infringing goods. The National Association of Manufacturers in the U.S. called for increased enforcement efforts at the state and federal levels as it announced the results of a study reporting on the impact of software piracy on U.S. industry, claiming that U.S. industries had lost nearly $240 billion dollars over a decade due to software piracy that amounted to unfair competition that caused this financial harm.

While IPR owners in developed economies complain of the problems they may be encountering in foreign markets, governments in those foreign markets, a number of them in Africa, are finding counterfeit and pirate goods flooding their markets. Because of today’s communication
technology, consumers around the world are more aware of the major branded products made and sold by major multinationals. The goods associated with major multinational companies are sought after by consumers everywhere and counterfeitors and pirates are adept at getting their goods into countries whose enforcement agencies are not as well trained in IPR matters as those in developed countries.

African countries are vulnerable to the entry of counterfeit and pirated products due to porous borders. The notion that Africa as a whole was becoming a dumping ground for counterfeit goods was observed several years ago because of a growing number of direct trade routes with China, porous borders and weak laws and border enforcement. The Kenyan Anti-Counterfeit Agency’s Deputy Director for Enforcement indicated that he was aware of Kenya’s reputation as a counterfeit goods dumping ground in Africa and the problem is exacerbated by the fact that the Anti-Counterfeit Agency has identified alcoholic beverages, electrical products and medicines among the categories of goods most affected. At a fall 2014 conference, the Malawian Minister for Industry and Trade was reported to have called for improving cross-border cooperation against the tide of counterfeit and pirated goods that had turned Africa into a dump site for such products. The most unusual enforcement step to be announced may be in Uganda where the government plans to create a police unit within the Ministry of Agriculture to combat the increasing level of counterfeit agro-chemicals, seeds, entering the agricultural sector, which can have detrimental effects on crop yields.

Unfortunately, Africa is not the only major geographic area that has government officials concerned about the massive levels of infringing goods. The six-country Gulf Cooperation Council has decided to create a consumer protection commission that is scheduled to be launched in 2016 in order to combat the proliferation of imported fakes. The consumers of the GCC member states are said to be at risk and suffering from the increasing volume of fake goods.

Nearly twenty years after TRIPS went into effect in developed countries, the main story line appears to be that the IPR enforcement situation as reflected in global markets is, generally, worse now than ever before. As the current situation has many in governments around the world and industry calling for more action to combat, stabilize and reduce the threat from counterfeit and pirate goods, there have been some obstacles thrown in the path of more enforcement or, perhaps more accurately, higher enforcement standards.

Faced with an evolving global market of counterfeit and pirate products, IPR owners and some governments recognized the shortcomings of the WTO TRIPS enforcement provisions. With the aim of addressing the proliferation of counterfeit and pirated goods, Japan announced in 2007 the desire to pursue an international framework to raise IPR enforcement standards through the Anti-Counterfeiting Trade Agreement (“ACTA”). ACTA expanded on the TRIPS enforcement text by attempting to strengthen existing provisions and closing some enforcement gaps that were not addressed by TRIPS. In addition, the development of the internet since the negotiations of the TRIPS text meant that IPR enforcement in the digital environment needed to be addressed and provisions were included in ACTA.
Despite three years of negotiations to conclude an ACTA text in 2010, it has yet to enter into force. A U.S. Congressional Research Service report indicated that the Agreement was in a state of uncertainty, an understatement after the European Parliament rejected the Agreement. As a result of the vote in Europe, none of the European Union’s member States will be able to be a party to the Agreement in its current state. Whether ACTA comes into force is a debatable at this point. At least in Europe, the debate about some of ACTA’s provisions centered on vagueness of language and possible intrusions into civil liberties with millions of emails sent to members of the European Parliament.

The ACTA challenge was to move an Agreement among a number of countries from words in a document to entry into force, which has yet to happen. Sometimes, however, simply discussing IPR enforcement can run into roadblocks. At the June 2012 WTO TRIPS Council meeting, an exchange between national delegations arose over an agenda item to address information sharing to secure supply chains against counterfeit trademarked items. India objected to the agenda item due to the vagueness over the use of the word counterfeit and as it might make reference to the quality of goods, which would be broader in scope than it believed was intended in TRIPS. Other government delegations expressed support for some of the objections raised by India. Interestingly, South Africa, supporting India’s objection to including the agenda item also added that “there was consensus that counterfeiting and piracy had reached very alarming level, which continued to rise. At the same time, the main actors, such as governments, right holders, the civil societies, international organizations, relevant institutions, scholars, academics and practitioners generally disagreed on the actual level of piracy and counterfeiting.”

Although the U.S. and Japan were able to address the issues of counterfeiting and piracy, this was not without objection as some governments wanted it understood that enforcement was not a permanent agenda item for the TRIPS Council. What arose during this meeting was a line between developed countries and those that participated in the ACTA negotiations whose industries, consumers and markets were being harmed by infringing goods and developing countries such as India, China, and Brazil tended to object to the Council’s attention to the IPR enforcement issue on a continuing basis.

The TRIPS Council debate makes clear that although thousands of enforcement actions have occurred to remove counterfeit and pirate products out of the market, some might question the severity of the problem while acknowledging the alarming level of infringing goods. The challenge of gauging illegal conduct is always a problem because it is impossible to know about every illegal action that takes place and, as a result, there are estimates and educated guesses regarding the value of counterfeit and pirated goods in any given local or national market.

As the global trading community continues to combat IPR theft, the estimates regarding the value of counterfeits and pirated products grow. The International Chamber of Commerce’s BASCAP commissioned a study that estimates that the value will be in the range of $1.2 to $1.7 trillion dollars by 2015. This value includes international trade in infringing goods, trade within national boundaries and trade in pirated digital content online, meaning that the estimate is broader than the OECD’s estimates that were limited to only the international trade in infringing goods.
The numbers may be argued simply because they are estimates. What cannot be as easily dismissed is the reality of what is counterfeited and pirated and seized by enforcement officers. What consumers stop to consider that contact lenses would be counterfeited? Do U.S. consumers think that counterfeit contact lenses would or could make it to store shelves in the U.S. or is that something that happens only in poorer countries? The fact that U.S. authorities have seized counterfeit contact lenses demonstrates the breadth of goods subject to counterfeiting.43 Today, nothing is out of bounds and this point is constantly reaffirmed.

It is because of these and thousands of other cases over the years that have prompted the governments to include stronger IPR enforcement provisions in their bilateral free trade agreements and economic partnership agreements. Although ACTA may not enter into force in the near future, many of the enforcement provisions that were negotiated in ACTA are already in place and required because of previously negotiated bilateral agreements.

The TRIPS enforcement provisions were overtaken by technology and the imaginations of counterfeiters, pirates and organized crime groups practically from the beginning, but certainly within a few years after TRIPS implementation. Its shortcomings became painfully clear as the proliferation of the trade in infringing goods exploded not simply in numbers, but also in the scope of products criminals were willing to make and sell.

The numbers - whether the estimated value of the counterfeit and pirated goods or the haul in seized goods - will probably continue to get bigger. Industry and enforcement authorities can continue the enforcement campaigns and will be able to point to large numbers of goods seized, shipments stopped, people arrested and prosecuted. And, these concrete statistics may be sufficient to justify more specialized enforcement units, dedicated IP courts, enlisting an ever bigger army to combat counterfeit and pirate goods, but it should eventually lead us to ask if there is something we are not doing or is there something we may be doing but not efficiently or with sufficient resources.

Enforcement actions do provide us with concrete statistics regarding what has been seized, the number of items seized, how many people were arrested, indicted, imprisoned, and other related actions such as bank accounts and other property seized. Nevertheless, the nearly two decades of concrete results that can be counted and calculated have not done much to lower the volume or value of the counterfeit and pirated goods in global trade. After looking at the numbers, is there any way to reach a consensus and agree that something else needs to be done to combat counterfeiting and piracy? Something is missing from the IPR actions being taken or perhaps something needs to complement the enforcement.

Given the threats to consumers and IPR owners arising from the high volume of infringing goods, the need for enforcement is not at issue. There may be some basic “add-ons” that can be the complementing factor, but the problem for bean counters is that quantifying results may take time.
Chapter 5


2 Interview: Dr. Kunio Mikuriya, Secretary General, World Customs Organization, INTA Bull., Vol. 69 No. 17 (2014).

3 Id.


6 Paul Polman, CEO, Unilever, Member of the International Chamber of Commerce’s Business Action to Stop Counterfeiting and Piracy (BASCAP), http://www.iccwbo.org/News/Videos/2014/A-private-sector-view-of-counterfeiting-and-piracy-from-Unilever-CEO-Paul-Polman/.


14 Id.


16 Id. at p. 18.

17 Id. at p. 19.


24 Esther Han, Customs Steps Up War Against Counterfeits, Seizing Record Number of Fakes, Sidney Morning Herald, Oct. 6, 2014; Esther Han, Counterfeit Seizures Double as Crime Groups Get Ever Smarter, The Age (Australia), Oct. 6, 2014; 2014 WLNR 2770593.

25 Esther Han, Customs Steps Up War Against Counterfeits, Seizing Record Number of Fakes, Sidney Morning Herald, Oct. 6, 2014


27 Id.


41 Id.

Chapter 7: Back to Basics—Awareness and Education

Today’s technologies allow us to send ourselves reminders, emailing ourselves, and using our electronic calendars for tasks that need to be done. The technology is also great because it has made the task of recalling some of the basic reasons why IPR is important. Some of the justifications for addressing IPR in TRIPS and in the U.S. trade laws were wrapped in the rhetoric of economic growth and jobs.

At the same time that the rhetoric was about economic growth and jobs, there was a lean to enforcement. A U.S. Commerce Department official acknowledged as much in 2006 when speaking at a World Intellectual Property Day forum by indicating that the U.S. Government had turned its focus toward enforcement thereby failing to address the issue of the benefits that could be gained from intellectual property protection. The 20th anniversary of TRIPS is an opportunity to re-commit to IPR through actions related to the links between IPR and economic development and growth. This is not to say that nothing in this arena has been done, but it seems to be a good time for the benefits of IPR to come out from the long shadow cast by the IPR enforcement thrust.

It is worth recalling that in the TRIPS era the IPR rhetoric linking IPR to jobs and economic growth has been a constant theme. Even before the TRIPS obligations went into effect a U.S. Justice Department official stated that IP “is the engine for jobs and economic growth, now and in the future” and that IP “provides the foundation for jobs and economic growth.” At the WIPO, a former Director General characterized intellectual property as “a power tool for economic growth”. The general idea about the importance of intellectual property as a key element or tool for economic development and growth has been repeated often and coming from government officials in diverse parts of the world.

In Jordan, the Minister of Industry, Trade and Supply, noted the importance of IPR to the overall business environment and supporting innovation in various industry sectors. Gambia’s Attorney General and Minister of Justice, speaking at the opening ceremony of an event organized by the African Regional Intellectual Property Organisation, stated that “in order to optimize this knowledge [of the people], the formulation of appropriate research, science, and technology policies which drive innovation and economic development, is imperative” and “an essential tool in these policies is an efficient and functioning intellectual property system”. The Minister for Culture in Bangladesh was quoted as saying that “to get the benefit of intellectual property in socio-economic development there has to be a greater public awareness.” Whether it is the Minister of Trade and Industry in Botswana or the President of the United States, highlighting IPR’s importance has become a basic policy point to raise.

In the U.S., the relationship between IPR and the economy was highlighted in a 2012 report, Intellectual Property and the U.S. Economy: Industries in Focus. The report indicates that 40 million jobs are directly or indirectly associated with IP intensive industries and that the IP intensive industries accounted for over a third of U.S. gross domestic product. As the report notes, aside from the IP intensive industries, it is difficult to identify enterprises that do not have IPR assets given the use of logos, trade names and designs used commercial activity.
Similarly, in the EU, there are IP-intensive industries. Examples of these industries are listed as in the machinery, pharmaceutical and creative sectors and are responsible for an estimated 56 million jobs.\textsuperscript{10}

Although government officials are raising the importance of IPR awareness in developed, developing countries and least developed countries, there seems to be a gap between the political and policy rhetoric and the reality as reflected in the U.S. and U.K surveys and studies regarding business sector IPR usage, understanding and management of IPR. If the respondents to the surveys mentioned in the previous chapter come close to an accurate reflection of the state of IPR awareness and knowledge in the U.S. and U.K., one of the possible “take aways” is that somewhere between the political and policy talk and the activities occurring in the business sector and elsewhere are not connected as much as many may think.

While the U.S. 2012 report underscores the jobs link to IP intensive industries and their contribution to the country’s gross domestic product, it should not be assumed that all those who work for the companies in the IP intensive industries appreciate the importance of IPR owned by their employers or others. In addition, while those who engage in research or in software development may appreciate and value their specific work and the patents or copyrights that arise from their efforts, they may not be as sensitive to respecting forms of IPR that they are not working with on a daily basis. In other words, a chemist or engineer might regard highly the patents that arise from their work, but may not be so keenly aware of or recognize the importance of copyrights, trademarks and designs either of their own companies or those of other companies.

If there is a sincere effort to link the IPR issue to economic development, growth, and jobs, there should be a redirecting or expanding some of government’s and industry’s resources to improve and enhance the fundamental understanding regarding the link between the activities in enterprises to IPR. One cannot simply make references to development, growth, jobs and IPR and expect that the desired results will occur. There is a gap that must be bridged between activity, recognizing potential IP assets, growth and jobs.

\textit{The Gap}

At a policy and political level, statements are often made about IPR, its importance, its potential to contribute to wealth generation or development. These statements are made at conferences where high level government officials are speaking to other high level government officials or where industry representatives are interacting with and speaking to law enforcement, but the gap is in speaking to the so-called “public” and “consumers” who may never read or hear about these seminars, conferences and workshop programs. This is why there are comments like those expressed by the Secretary General of the Thai-Italian Chamber of Commerce, bemoaning the IPR violations plaguing manufacturers of well-known Italian branded products in Thailand.\textsuperscript{11} The Secretary General acknowledged that tougher law enforcement actions alone would be insufficient to protect Italian IPR owners because the consuming public lacked awareness of the importance of IPR.\textsuperscript{12} In 2011, three and a half years after the comments of the Thai-Italian Chamber’s Secretary General, a World Bank official was quoted to have commented that Thailand ranked low among middle income countries in IPR protection,\textsuperscript{13} tending to indicate that little had been done or little progress, if any, made. Of course, being a WTO member from the
time of its creation, the Thai Government should have been aware of its IPR obligations once TRIPS was negotiated and concluded, realizing that there would be a need to improve IPR awareness.

Thailand is not alone and is not an exception. For example, in 2010, the head of Pakistan’s intellectual property office indicated that a massive IPR awareness campaign was needed in order to increase the level of respect for IPR. The “lack of awareness” hurdle exists around the world as one commentator notes that Indian small and medium enterprises likely lose millions due to their lack of IPR awareness. In Malaysia, a similar sentiment was expressed by officials from the government’s intellectual property office, stating in 2009 that Malaysian companies were unable to realize their economic potential due to a lack of awareness of intellectual property. Furthermore, as Malaysia has been participating in negotiations to conclude the Trans-Pacific Partnership trade agreement, government officials, again, indicated that among Malaysian companies awareness of the need to protect their IPR remained low.

Speaking, generally, in reference to the East African Community countries, a Ugandan official from the Ministry of Trade indicated that despite the fact that the TRIPS agreement had provided least developed countries with a ten year transition period and an extension of that transition period, countries needed a second extension. The Ugandan official indicated that most EAC member states still lacked sufficient IPR awareness and knowledge base to implement their TRIPS obligations. Given the Ugandan official’s acknowledgement that the government was continuing to have challenges in implementing their obligations, it begs the question about what the general populace (the “public” and “consumers”) knows about IPR. In view of the fact that government officials interact with officials from other governments and international organizations, it would suggest that they would be more knowledgeable regarding IPR than the general population. This suggests that in the nearly two decades since TRIPS went into effect in developed countries little has been done on a broad scale to raise IPR outside of government offices.

In 2008, it was noted in India that intellectual property had become a buzz phrase for policy makers yet the irony was that a large number of educated people were unaware of IPR. More recently, the lack of IPR awareness was highlighted as a continuing problem in India. India’s Controller General for Patents, Designs and Trademarks reportedly remarked that India’s industry sector was not sufficiently aware of the benefits of intellectual property as a tool for wealth creation. Lacking awareness of IP as a tool for revenue generation translates to failing to appreciate the potential value of assets and, thus, failing to take appropriate steps to protect those assets. This should not be surprising if compared against the results of surveys conducted among enterprises in the U.K. and the U.S. as noted in previous pages.

The underlying issues have to do with fundamental questions related to educational and information dissemination efforts centering on what IPRs are and how they can be beneficial. When addressing the issue of how IPRs can be beneficial, it is worth clarifying beneficial for whom and from what perspective. There is the line of education or “awareness raising” regarding the benefits to the current owners of existing IPRs by trying to convince the public (consumers) to purchase only genuine goods. The other line of education and awareness raising would be to motivate people and encourage them to act on their own ideas and inform them
about the ways in which a layer of IP protections can provide the potential for revenue generation.

Thus, bridging the gap between the IPR policy and political rhetoric and what IPR is about requires a much greater degree of thought about what we are talking about than the current wave of talking points.

**Awareness Raising: Just say No?**

Raising awareness about IPR has multiple routes and points of emphasis. One of the basic directions “awareness raising” can take is to try and persuade consumers to stop purchasing infringing goods. Over the years, this approach has been taken often, but based upon the anecdotal evidence relating to the continuing proliferation of infringing goods in the vast array of product lines it would seem that this approach has had very limited success in reducing demand.

During the TRIPS period, beginning in the mid-1990s, there have been numerous campaigns with this line of emphasis. In 1998, Singapore adopted and used the slogan "Stop piracy! Be original! Buy original!" in anticipation of its citizens purchasing infringing goods during the holiday season. From the slogan, it is easy to see that it was an appeal to consumers to resist infringing goods. In 2009, the a Washington, DC-based trade association teamed with other trade groups and New York City to launch its “Get Real” awareness campaign included messaging warning that purchasing infringing goods funds a variety of criminal activities.

More recently, similar slogans have been used with the same general objective of dissuading consumers from purchasing infringing goods. In December 2013, the Japan Patent Office (“JPO”) announced a campaign using the slogan “Buy Genuine Products, Be a Real Person”. The JPO followed up its 2013 campaign with another that was kicked off on December 1, 2014 with the slogan that translates generally to “No fakes”, targeting youth and attempting to dissuade them from purchasing fake goods. In addition to government campaigns, private sector initiated campaigns have had messaging that is, generally, the same with a very recent 2014 awareness campaign that would be driven forward by national governments and anti-counterfeiting associations using the slogan, “I Buy Real, Fakes Cost More”.

Awareness campaigns have introduced the notion of dangers posed to the consuming public if they purchase infringing goods. Some of the campaigns provide a general warnings while others are more specific regarding fake alcoholic drinks, electrical products, and medicines. Needless to say, the list of infringing goods in the stream of commerce is endless. Thus, today’s efforts to warn and caution consumers includes references to almost every type of product in the ongoing effort to reduce consumer demand for products that can pose a direct threat to consumers’ health and safety.

In addition to the appeal to consumers to resist purchases of infringing goods, consumer oriented campaigns warned that purchasing infringing goods could be providing funds to drug dealers, organized crime groups, and paramilitary organizations. After the September 11, 2001 terrorist events, the warnings to consumers took on the note of concern that purchasing counterfeit and pirated goods could be providing funds to terrorist organizations. The terror
funding possibilities were examined by the U.S. Congress during hearings in July 2003 and was underscored by the testimony of INTERPOL’s Secretary General, focusing on the link between infringing goods and funding terrorist groups.35

These “awareness” efforts will continue and, to some extent, have to continue because of the widespread production, distribution and sale of infringing goods that pose health and safety risks to consumers worldwide. Nevertheless, the calls from many quarters to increase enforcement actions (law enforcement, customs, etc.) tends to tell us that the existing levels of enforcement and the warnings published in articles that cover these events are failing to have the impact on demand that the campaigns were aimed to have and the demand for infringing goods, including those that pose public health and safety risks, remains constant.

These campaigns, having similar messages and slogans, boil down to a simple message to consumers, asking them to shy away from or turn their backs on infringing goods. They encourage consumers to use their common sense to question any deals that sound too good to be true and urge them to do some inspecting of the sources offering the goods and, ultimately, make sure that the source of the goods and the sellers are the appropriate places and sources where one would find genuine products. In developed economies, consumers have more information and resources available to them to do these things that are being asked of them. This is less so in developing and least developed economies for a variety of reasons.

But, a serious question that governments and IPR owners should also pose to themselves is whether their messaging about IPR is too narrow and/or simplistic to expect consumers to just say no to infringing goods. The examples of the slogans, whether from 1998, 2009, or 2014, and their results thus far raise the question whether a much more expanded effort that includes something altogether different needs to be added these awareness campaigns. The “buy real” and “buy genuine” slant in these campaigns benefit the current universe of companies and service providers and come across to some consumers as simply self-serving messages.

Would IPR owners and the trade groups that represent them continue to call for more enforcement actions and stronger penalties if these “get real”, “buy real” and “be real” awareness campaigns coupled with all of the enforcement activities were significantly reducing counterfeiting and piracy? Given the current statistics for ongoing enforcement efforts, this is not a question that needs answering at this point.

Awareness Raising: The Hard Work

It is, however, time to explore that other line of IPR awareness raising. There are a number of issues to address if a sustained education effort is to be pursued. But, it is not as if no one or no institution is engaged in this hard work. There are people and institutions pursuing these efforts, but there may not be all the headlines and attention to these efforts similar to the more interesting stuff related to enforcement actions such as raids, undercover operations, seizures, arrests, jail and the other cops and robbers elements of IPR enforcement.

The reality is that IPR is tough stuff for most. But, it isn’t if we are not trying to convert everyone into an IP lawyer. As hinted at in the beginning of this work, most people around the
world who have been exposed to the commercial world of goods and services that they purchase and use have a knowledge base sufficient for the kind of IPR related awareness and education that can invest them in wanting to know more about IPR. However, one basic thing that may be helpful in the exercise is to have a starting point that is completely non-legal.

In reference to China, the phrase “enabling environment” was used to discuss the system of IPR protection and enforcement, but here, this phrase is useful in discussing whether the IPR owning community and governments are creating an enabling environment to improve the understanding and application of IP for individuals and enterprises. From a government’s perspective, it is not enough to respond to existing businesses complaining of inadequate IPR protections and enforcement. Governments that are stating the appropriate IPR talking points need to create an environment whereby people and enterprises understand how to benefit from taking ideas and moving forward to action and implementation in the market place.

Creating this enabling environment has its own resource demands for an army of people able and capable of making the abstract IPR stuff understandable to people who have no desire to be IP lawyers mired in the details of laws and regulations, but who want to make things, improve things and engage in commercial activity. The consuming public, which includes people who are budding entrepreneurs or those who want to be entrepreneurs, want a message that is not the usual “don’t buy fakes”, but the how to benefit from IPR.

First and foremost, there needs to be some blunt honesty about IPR. IPR is about money or, put another way, it caters, to some extent, to individual and corporate greed. It takes only a moment to understand that this goes back to the underlying basis for IPR protection, as emphasized by so many government officials and policy makers that IPR contributes to generating revenues and creating jobs, but is phrased in a manner that sounds “nicer”. The reality is that companies that have developed strong IPR portfolios are using these assets to generate revenues and increase income. The U.S. Congressional debates of trade laws and the addition of provisions to protect IPR abroad was all about exploiting IPR in foreign markets so that U.S. IPR owners doing business abroad could make money.

While some may have a negative reaction to this bluntness, the informal polls taken in my workshops inform me that the vast majority of young people and business people would like to have more money and if there is a link between IPR and more money, they are ready to listen. Over the past decade, my experience has been that people are more interested in hearing about how to generate money from IPR than to hear about what might result from people being arrested, jailed, etc.

Having identified one of many “angles” of the message, this is just the beginning of addressing an “enabling environment” for IP. While IPR enforcement’s importance should not be diminished, the debates over development agendas and how to help economies grow demand that IPR be addressed from the economic growth and development perspective as much and as often as the IPR community and governments discuss enforcement. Moving forward, there should be better balance in the resources dedicated to IPR and economic growth and development.

Chapter 7


9 Id. at pp. vii.


11 Thai-Italian Chamber to Promote IP Awareness, [Bangkok Post](http://www.bangkokpost.com), Sept. 12, 2007.

12 Id.


32 *Counterfeit Market Link with Drugs Crime; Drive to Call Foul on Fake Goods Racket*, Evening Mail (U.K.), May 17, 2000, 2000 WLNR 5944842.


34 *Bid to Beat the Pirates*, Daily Record (Glasgow, Scotland), June 30, 2005, 2005 WLNR 10276884.


Chapter 8 Subsection:

Down to Business

All too often, lawyers and government officials engage in an abstract discussion or presentation about IP’s contributions to economic development and growth. Simply stating what is to be taken as a given without showing or demonstrating how this might be the case may alienate those we are trying to reach. We still have far too many officials and industry representatives stating that consumers and the public (including those in business based on studies in developed economies) lack IPR awareness. It is time that more effort is made to avoid the abstract approach and engage in ways that show or demonstrate what is meant by IPR’s potential contributions to economic growth and development.

A general observation that is important to state explicitly is that no person takes the steps to risk his or her savings or those of investors to fail. Those who seek to start a business or expand an existing business take those risks, usually, because they hope to succeed and grow. These risk takers, whether the risks are small or large, are not taking the actions to end up in a worse position than before they took the risk.

One area to explore and pursue is internal to an enterprise or planned enterprise. Internal to an entity, substantial decision-making and activity must occur. A participatory exercise can explore these activities and decision-making requirements and start to identify where potential IP exists and what types of potential IP may be acquired. A second area of exploration is how the activities and decisions of an enterprise interact within an economy so that we can see how one entity may impact others in the economy, including governments at various levels.

An examination of these two areas in greater depth might provide some insight into how we can demonstrate the entrepreneurial/business activity link to IP and identify how development and growth might occur as a result of the activities. Based on some of the comments made in places such as India, Malaysia, Pakistan, and Thailand about the low levels of IPR awareness and lack of respect for IPR, it may be worth starting to connect the dots as if an enterprise is just being formed.

Preliminarily, people tend to know that funds are needed, whether they are starting a new enterprise or expanding an existing one. Plans have to be prepared to make the core product of the business or plans for the service to be offered. The simple flow chart above is not intended to be all-encompassing, but to facilitate the connecting of dots and a discussion about economic and commercial activity, growth, and development and, eventually, IP.

One important issue that is not identified above is determining the name of this new entity. In addition to the product or service, what do we call this enterprise? This may be part of the initial bundle of decisions that must be made.

The decision to act on the idea of a product or service is likely taken after some market survey and research regarding the need for the product or service and the potential of success. The individual or group will likely have some type of business plan, even a simplistic plan that
provides basic details about the product or service and how to proceed to production and marketing.

The group should also consider some other interesting facets of a new entity. Although technology has made some things easier, it is worth cataloguing some basic needs, for example:

- Basic business equipment—e.g., mobile phones (this implies a phone service provider), fax machines, copiers, computers
- Office furniture
- Equipment/machinery to make the product
- Raw materials necessary for the product (implies a source for these materials)
- Location where the work will be done (including water, power sources)

These five items are the beginnings of a long list, but enough to initiate a discussion. First, to the extent that a new entity needs any of these to start operations, we need to realize that before it generates any income, it may contribute to the economy and to the revenue stream of existing enterprises. Thus, the mere fact that a new enterprise begins to operate at any level may mean increased economic activity due to its need to purchase equipment, raw materials, etc., from existing businesses, thereby increasing business for others. Thus, it is important to keep in mind that while it may not be generating revenues for itself, others in the economy benefit from the entry of this new enterprise even if the level of commercial activity is low.

While there are people involved in this new enterprise, it may not yet be able to hire staff or pay those who are involved in the startup, but the potential for jobs exists. Nevertheless, the entity is engaging in commercial activity due to the vendors it engages. Moreover, the existing businesses that are used to ship and transport items to the new entity are other beneficiaries of the new entity’s entrance into the commercial community.⁹

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Although this discussion centers on a new entity, an existing company that is taking steps to expand into new products will probably have similar effects on the economy because of increased needs. Regarding any new product, before it is offered to the consuming public, it will go through the phase to create a prototype, testing, refining, and improving the product. Simply consider:
• How many times will a chef try a new recipe before she is happy with the final product and places it on a menu?
• How many times will a singer rehearse a new song, change the lyrics, change the instruments being used, or replace a musician to get the right sound?
• How many times will a design be changed to improve the aerodynamics of a car?

Anyone who has ever written an article, prepared a presentation for a conference, or created a PowerPoint presentation has likely engaged in rewriting or editing articles and presentations, as well as editing or reordering the PowerPoint slides in an effort to improve the product. Why would it be any less intense when an entity is preparing a product for market? The difference with a business entity is the ripple effect it can have on the economy.

Along the spectrum of product development, information will be gathered that may be used to improve the product, saved for future versions of the product, or discarded, but regardless, there is likely to be abundant product-related information collected. Documenting the work and the changes to a product in its development stages is important, as this leads to refinement if the budget allows or a decision to defer some changes because of budgetary or functional constraints. All of these internal activities are aimed at producing a well-functioning, safe, and reliable product, whether it is toothpaste or a jet engine. To the extent that the information collected has value to the entity and the product’s function, performance, and effectiveness, it is worth maintaining and preventing widespread dissemination to those who may not need the information, even within the entity, and especially with regard to potential competitors.

It is valuable to question why an entity has chosen a particular product to make and market.

• Is it similar to other products, but with something different to offer
• What makes the product different from other similar goods in the marketplace?
• How is this difference accomplished?

The answers to the questions above may result in a consideration of processes developed to make the product better and different or, perhaps, the development of new tools or machinery that leads to attaining the uniqueness of the product. This might give rise to a discussion about whether the entity has developed something that is patentable or something to be retained internally as a trade secret. The product development process may give rise to things that might be worth protecting. Whenever consumers think of particular products as having “quality,” what does that mean? Consistency of performance? Reliability? Another way to think about quality in items like power tools, home appliances, motor vehicle components, mobile phones, timepieces, etc., is to consider the research, development, testing, and all the work devoted to improving functions of items and, ultimately, the possibility of the many patents that might have been acquired to protect the constantly improving function that results in high-quality, reliable products.

A walk down the dental hygiene aisle provides ample evidence of this. Look at all the items that emphasize teeth whitening, whether in toothpaste or in strips. Though a strip may not be expensive, the perceived value of developing and marketing the product was sufficient for a company to file and obtain patents to protect its strips that adhere to the teeth and deliver a
substance that whitens the teeth.\textsuperscript{10} Moreover, the patent owner took steps to stop others who may be marketing items that infringed the patent to protect the investment made in developing the product.\textsuperscript{11}

Ultimately, an entity wants to reach the point of actual marketing of the product. But, again, some internal decisions must be made:

- What is the name of the product?
- Will there be a logo on the product?
- What kind of packaging will be used, and will it bear a name or logo?

In the snacks aisle of a grocery store, how often is there a clear plastic bag with the words “potato chips” printed on the bag, void of anything else? How often is an item or its packaging in a department store devoid of any reference to a manufacturer or other company name? The same question can be asked about all the parts and items in any other type of store or sales environment. Consider the development of the competitive bottled water market and think about what confronts the consumer. The bottles may be clear, but those bottles bear an array of labels, phrases, words, and logos.

These internal activities give rise to triggering events for decision-making. Given all of the above, the IP awareness, education, and teaching opportunities arise. From the perspective of the new or future entrepreneur whose products are at the core of the discussion, the real dot-connecting opportunities relate to:

- The name of the business and the potential trade name as a form of IP
- The data collection relating to research and product testing that may qualify as trade secrets because of the commercial value of the information (test data or other data) and its perceived advantages vis-à-vis competitors
- The refinements or tweaks to the new product and how its function may give rise to the possibility of seeking a patent (Remember the cup lid in Chapter 1?)
- Marketing your product with an identifier (a word or phrase, a color or combination of colors, or both, or fragrance or figurative element) that consumers easily see and relate to your company based on what appears on the product and its packaging—choosing a mark (trademark)

It is important to underscore the possibilities of one or more of the different forms of IP while talking through what a new enterprise is going to make. Connecting the activities to the various forms of IP should increase awareness of IP to the enterprise’s business activities. More important, discussing the possible benefits of securing the rights for the business is critical. The ability to identify what the business has done and how a particular form of IPR protects the product and gives the enterprise legal protection that can provide a protective buffer for the product is crucial to improve IPR awareness.

For purposes of educating and raising awareness, it is essential to link an enterprise’s product to the various forms of IPR that may be secured for it. A single product will often have various forms of IPR that may be available to it as part of an overall strategy. IP rights are an overlay of
legal protections that an enterprise can seek in an effort to create market space for the product. As an example, a consumer does not see the patented delivery system of the whitening substance and the way it might cause the whitening, but the consumer wants the results in appearance (whiter teeth) that the strips can provide. To market the strips, the company found a way to refer to the product using another IPR tool to market. It acquired legal rights in the trademark, Whitestrips®. Using patents and trademarks, for a rather inexpensive product, the owner has protection against those who infringe both the invention that is protected by the patent and the mark used to promote and market the product.

Given the importance of promoting products and services, today’s enterprises have more avenues for promoting products. In addition to the traditional modes of promoting products in print advertisements, television, radio, etc., today’s digital environment—e.g., corporate websites, auction sites, and social media—gives the enterprise greater opportunities to promote a product using a registered trademark. (This is also a curse if the product becomes a hot item and competitors, legal and illegal, begin to copy the mark without permission or use something similar enough to cause consumer confusion.) Nevertheless, having the legal overlay of protection for a mark to promote the product or service does provide some certainty as to the use of the mark.

An entity’s decisions related to promotion and marketing provide an opportunity to raise awareness and sensitivity to copyright issues that need to be addressed. What is the content of the promotional material? Will it have music, artwork, dialogue, background scenes (some or all of these)? While copyright ownership issues may be a natural consideration for individuals and entities engaged in software, music, movies, videogames, and books, copyright issues may not be so obvious to others. But consider the text related to print advertisement or the scripted words in a radio or television car commercial or the music used in commercials. Numerous works are used (text, music, scripts) that constitute copyrighted content or copyrightable content.

From an educational perspective, a copyright discussion that arises from a marketing conversation can evolve into a much more detailed discussion about copyrights generally. It would seem to be a short hop from a discussion about a thirty-second television commercial and its copyright elements to one about a feature-length film’s more complex production that involves more people, more copyrighted works, greater investment, etc. In addition, the same can be said for the music that might be used in radio, Internet, and television advertisements, posing the question of whether one seeks to obtain permission to use existing music and lyrics or commissions something new.

Rather than simply stating that there are many people involved and that it may be expensive to produce copyrighted works, go through an exercise and demonstrate the work that is involved. An awareness/education session should urge attendees to create the list of people and things needed to create that perfect song or movie. The problem is that consumers hear or see the finished product, but are not challenged to work through some of the steps involved in getting to the point when a song or movie is finished. For example, how many people can read a two- or three-paragraph script without making a mistake? How easy is it? How long does it take to create a finished painting on a canvass? How long did it take a novelist to develop characters and scenes and edit the novel before it was published? Opportunities to link internal decision-making
to IPR-related issues exist throughout the decision-making process; therefore, opportunities to raise IPR awareness are abundant.

Thus, combining products that have earned consumer confidence due to consistent and reliable performance—i.e., attaining a level of quality (patented components) and aggressively marketing (using much copyrightable content) with chosen marks (words, symbols, color combinations, etc.)—leads to market entry and activity. To the extent that an entity meets with success in the marketplace, it is likely that the hard work of producing a good product has possible IPR-protectable elements.

The IPR-economic growth and development link is not difficult to address if started at basic levels of discussion. IP does not need to be addressed at the outset of the discussion of a new enterprise entering the commercial environment. IP as a consideration of an enterprise’s tool for revenue generation can arise gradually as a result of a natural discussion about the business.

Before there are any revenues into the new entity, it needs to be aware of its expenditures. A budget with line items should identify real and potential outlays, including these and other categories of expenditures. There may be early minimal outlays for basics, such as electricity to operate the facility, and, though it may not occur on Day 1, there need to be employee salaries, taxes, and other required payments accounted for in reality or in budgeting plans.

When connecting the dots, what is important to note is that the entry of a new entity into the commercial environment has positive economic results for others already active in the economic environment. The new entity’s needs results in increased revenues to others whose products and services are needed by the new entrant. Thus, as for the existing commercial actors, the new entrant is a new customer, another opportunity for them to generate revenues. (Is this contributing to the economy? Growth?)

The purpose of placing the government on the revenue recipient side of the arrow is to recognize that governments, whether local, state/provincial, or national, have a real financial stake in
economic and commercial activity. Usually, there will be government fees to one or multiple levels of government. Some type of fee will most likely be required to start a business and operate it. From an IPR perspective, the submission of an application to acquire legal rights in patents, industrial designs, trademarks, and other forms of IPR will require the payment of fees to the relevant office that oversees and administers the process of receiving, reviewing, and acting on applications.

More important, from a government perspective, the government should interpret the applications for various forms of IPR as not simply enterprises seeking to protect something they have created, but as an investment in that particular national economy. Generally, the applications reflect a desire on the part of the enterprise to invest and be commercially active in the economy. Thus, it is important for governments to act efficiently to process applications and for governments to deliver on their array of governmental functions (various regulatory and standards-setting requirements, infrastructure, judiciary, rule of law, etc.) to provide an economic environment that offers a fair opportunity for enterprises to compete commercially (an enabling environment).

Another way of seeing some of these links between an enterprise and other economic actors is by looking at the rather undeveloped town in the photo, below. There are various dashed lines connecting a new enterprise (bottom center) to other actors in the economy. One dashed line connects the raw materials factory (upper center-right) to the startup enterprise in the bottom center. In reality, the line goes in two directions because the new enterprise must pay for the materials to get materials for its product. Another actor in that process might be a transport company that hauls the materials to the enterprise.

Within the enterprise itself, much activity occurs unseen. This could be anything from a laboratory (requiring a great deal of equipment) for a pharmaceutical company to a large area to sew apparel products (requiring machinery and textile products). The goal is to sell finished products. The dashed line shows the connection between shops in the center right of the map sending revenues to the enterprise. Again, the link that is not seen is the line that would normally exist between the enterprise and buyer and the possible transporter of the goods from the enterprise to the seller. All of these actors in the community are engaging in commercial activity and revenues are being generated. To demonstrate the contribution that an enterprise might make to the community via taxes is shown through the dashed line from the enterprise (bottom center) to the local government (left center). A set of dashed lines emanates from the local government to the police and fire departments (top left), the school (lower left), hospital (lower left/center), and the park (center). This is to reflect that taxes paid will, hopefully, be used to improve these services and others, which may include public transportation, road repair, water systems, etc.

The point is that in raising awareness and educating consumers and the public about IPR, it requires some fundamental discussion to emphasize the point that no enterprise operates in a vacuum. Thus, a visual that shows the commercial relationships in a simplistic way attempts to demonstrate this connectivity of enterprises in an economy.
The central challenge for any enterprise is whether it can succeed and grow with the product(s) or service(s) it is offering. While not every new enterprise will succeed, it is worth recognizing that enterprises of every size and, usually, regardless of their wealth, will choose a logo, word, name, colors, or a combination of these to use on the product, website, signage, or on other materials to promote themselves and/or their product or service.

The use of logos, words, names, colors, or a combination helps promote consumer familiarity with a product or service. Again, the familiarity, whether resulting in a positive or a negative reaction to a product or service, facilitates the consumers’ decision-making. Thus, we have a function of the mark and, if registered, a protected trademark. The trademark will likely evoke a mental reaction about the quality of the product, as well, whether good or bad, and contribute to the decision-making process, though this process may be made in an instant.

Therefore, the importance of the IPR overlay on products and services should not be understated, given the role the IPRs play in decision-making as to what consumers choose and why. The quality of a product may be the result of well-functioning components that are patented (protected) and then marketed under a registered mark that is readily recognized in the marketplace. Quality can become a revenue generator that allows an enterprise to expand production (needing a larger facility), seek an increasing number of materials suppliers (benefitting others in an economy), increase its workforce because of demand (jobs), generate tax revenues for the government (directly and through payroll taxes), and require additional services to operate efficiently. Thus, the interactions among an enterprise and the various other actors in an economy should not be ignored, but emphatically underscored.

Connecting the dots when discussing commercial activity should not be void of a discussion about IPR. Any observant individual wandering city streets will have a problem finding a business that does not use something to identify itself. Do we walk down streets and see a simple sign that says “Bank,” or do banks usually have specific bank names and accompanying logos?
In the legitimate economy, competitors work to distinguish their products from those of others. Most do this by constant research, trial and error, and testing and refining to make their products better than those of their competitors, whether it is by function, design, or some other way. And consumers are able to distinguish those products quickly because of the visible trademarks used. The combination of patents, designs, trade secrets, copyrights, trademarks, and other forms of IPR that can overlay a single product allows competitors of similar goods to engage in stiff, but legal competition. The process of constantly looking for an advantage through that research, trial and error, testing and redesign, and marking with the use of trademarks allows for the growth in size, revenues, and jobs to occur.

Simply consider a couple of companies. The Ford Motor Company reported that in December 2012 it employed approximately 171,000 employees around the world. We know that it started with far fewer employees, but given its ability to improve its product, protect its developments, and find ways to maximize production methods (the assembly line), it has continued in business and maintains a Ford-registered trademark that was originally filed in 1909. Ford landed in the eighty-fourth spot on the list of the top 100 most valuable brands, with an estimated brand value of more than $11.8 billion. Product improvements that have been protected in the past and continue to be protected, coupled with marketing, advertising, and use of a readily recognizable trademark, have likely contributed to the company’s long-term success, which generates revenues for a massive workforce—i.e., jobs.

In recent years, however, the Internet has been the place to be for some businesses. While Ford has been around for a century, Amazon is a much younger company, incorporated in 1996, with a global workforce that has already surpassed 88,000 people. In addition to its technology-based activities, one of its early decisions was to file an application to secure legal rights to amazon.com as its trademark. Just as impressive as its global workforce size that has grown in such a short time is the fact that it has far eclipsed the brand value of a company such as Ford. Amazon placed tenth on the list for brand value, with an estimated brand value of $64.2 billion. Amazon’s ability to exploit technology and promote itself in the digital environment demonstrate that new entrants into the commercial environment can succeed, but they also rely on various forms of IPR to protect new online products and services. Thus, although the digital environment is young, new enterprises continue to use the IPR system to protect themselves and their inventions, content, and tools for marketing and advertising.
The challenge of raising awareness about IPR is, for the most part, taking advantage of an opportunity with groups of people to simplify the IPR discussion without drowning in too much complexity and legalese. When connecting the dots, visual displays and challenging people should be integral parts of the process. To inject some fun into the process, one interesting challenge would be to see whether those involved in some of the IPR awareness-raising sessions can use IPR to have their communities transform from the image of an underdeveloped town (with the connecting lines above) to the one above.

In many ways, the IPR awareness and education challenge continues to be at basic levels if one reads and hears the repeated refrain that there is a lack of awareness. Proceeding on the basis that these complaints and concerns about the lack of awareness remain high, it is incumbent on the proponents of IPR to become more fully engaged and invested in the education of a broader swath of the population. This engagement should target especially the young adults and future entrepreneurs in ways that are not so closely bound to a narrow enforcement message, but one that focuses on the potential personal financial rewards arising from creative ideas converted into goods and services having the benefits of the IPR overlay.

Chapter 8

See the video presentation of this discussion at www.galaxysystemsinc.com/ipr. The presentation is a thirty-minute excerpt of a longer ninety-minute presentation delivered at the U.S. Patent and Trademark Office on July 6, 2009 (on file with author).

12 WHITESTRIPS, Registration No. 2,462,481.
15 FORD, Registration No. 0074530 (filed Mar. 26, 1909).

AMAZON.COM, Registration No. 2,078,496 (filed Oct. 23, 1995).

Chapter 10—Subpart

FINAL THOUGHTS AND CONSIDERATIONS

In 2014, it is worrisome and troubling when an INTERPOL criminal intelligence officer from its Trafficking in Illicit Goods and Counterfeiting unit is quoted saying, “Many people are not aware of the many everyday products which are being counterfeited”.1 Given the thousands of IPR related events that have occurred around the world, the media attention to IPR enforcement actions and the political policy rhetoric and debates on IPR during the past two decades, the quote begs the question, “what have we in the IPR community done wrong?”

The INTERPOL official’s quote indicates that the message is either not being delivered to the right audience or many people have tuned out when it comes to enforcement messages. There are many other possible reasons why people are not aware of the risks related to infringing goods, but part of the problem surely lies with messengers and their delivery. Unfortunately, having a good slogan for an IPR enforcement campaign is not the same as having results in improving IPR awareness and respect for IPR. Simply creating a slogan and hoping for public attention to it through a press release or follow-on enforcement operation does not ensure that there is public consumption of the message.

The IPR owner community and its many representatives, i.e., trade associations, need to get beyond listing what governments need to do to improve the IPR environment. Having said this, it is a fact that needs to be acknowledged that thousands of IPR training programs and other events are funded by IPR owners and their associations.2 Nevertheless, releasing a statement calling “on the Association of Southeast Asian Nations (ASEAN) and its 10 member states to do more to promote the value of intellectual property (IP) as a key driver for the region’s growth and economic development, and to step up intellectual property right (IPR) enforcement actions to stop counterfeiting and piracy and other IPR infringements that are hurting the region’s economies”3 should ask what the IPR owners and the group issuing that call will do as well. Again, the organization, on behalf of IPR owners, calling on these governments to do more should also commit to a series of on-the-ground IPR activities to raise IPR awareness and educate the business community and partner with educational institutions to address IPR benefits and how IPR might contribute to economic improvements.

A call such as the one above for governments to do more should be accompanied by a list of proposed training/education seminars and workshops that will be delivered to business groups and universities in those countries. Given where we are after 20 years of TRIPS, we should expect more and do more.

There are far too many officials around the world stating that there is a lack of IPR awareness in their countries. In addition, there are far too many who have stated that small and medium enterprises do not understand the benefits of IPR, including in some developed economies. It is somewhat unrealistic to expect that in least developed countries and those at the lower end of developing countries, there is sufficient IPR knowledge and expertise among government officials and in the private sector to engage in the type of IPR education and awareness campaign that is necessary to make any progress in the short term.
IPR owners or the groups that represent them must become foot soldiers in the effort to raise IPR awareness. The real need is to engage in face-to-face IPR basics: what it is, how it can be used, and identify the benefits to both enterprises and individuals. If there is a sincere commitment to improving the national economic landscapes around the world by improving respect for IPR, IPR owners and their many association representatives will have to commit to traveling to places that are less luxurious than Cancun, Paris, Dubai, and Istanbul.

Similarly, those governments that are the most vocal about improving the IPR environment among their trading partners must get beyond quick fixes and a statistics driven approach. While it is “easier” to have numbers for seizures, arrests, prosecutions, number of items seized or confiscated, number of patent and trademark applications filed and granted/issued, raising IPR awareness and IPR education is difficult work to the extent that it is unlikely to have benefits overnight. Additionally, government agencies creating IPR related websites and counting visits may provide big numbers, but the numbers should not be interpreted as improving IPR awareness.

Overall, the war on fakes needs to be a war to improve the IPR curriculum and the materials used to raise IPR awareness. The war on fakes is, to a great extent, a challenge to the private sector IPR proponents to fund efforts at awareness and education that have nothing to do with any specific company, product sector or commercial interest, but rather to improve general knowledge related to IPR.

Governments that are the loudest IPR proponents should take a look back at the rhetoric that is constantly repeated and examine if the economic elements of their statements are supported by the capacity-building/technical assistance activities of their agencies. It is far too easy for government officials to have talking points about how IPR can contribute to economic development and growth while most of their assistance program budgets are devoted to enforcement.

The time has come when the war on fakes must be better balanced between enforcement and addressing IPR’s benefits. The latter is time intensive and will take a large number of people rolling up their sleeves and engaging in face-to-face sessions. But, if experience is a guidepost, it is much more fun to be in a room with people and explore how IPR’s benefits may put currency in their pockets than to talk about confiscating someone’s goods and putting people in prison.

2 During my tenure at the International AntiCounterfeiting Coalition (IACC) (1999-2005), member companies routinely funded training programs in the U.S. and abroad and provided additional funding beyond their annual membership dues to finance IPR training and other special projects. As a result of member financing, the IACC was able, for example, to deliver training in Thailand, underwrite the first IPR enforcement event conducted by Harper’s Bazaar, and develop a TRIPS enforcement training CD-ROM.

4 These are four cities where Global Congress to Combat Counterfeiting and Piracy have been held. Brussels, Lyon, and Geneva are the other three as of this writing. [http://www.ccapcongress.net/archives.htm](http://www.ccapcongress.net/archives.htm).