

# **Intellectual Property:**

Making It Personal

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## **Citizens Against Government Waste**

Citizens Against Government Waste (CAGW) is a private, nonprofit, nonpartisan organization dedicated to educating the American public about waste, mismanagement, and inefficiency in the federal government.

CAGW was founded in 1984 by J. Peter Grace and nationally-syndicated columnist Jack Anderson to build public support for implementation of the Grace Commission recommendations and other waste-cutting proposals. Since its inception, CAGW has been at the forefront of the fight for efficiency, economy, and accountability in government.

CAGW has more than one million members and supporters nationwide. Since 1986, CAGW and its members have helped save taxpayers more than \$1.3 trillion. CAGW publishes special reports, its official newspaper *Government WasteWatch*, and the monthly newsletter *WasteWatcher* to scrutinize government waste and educate citizens on what they can do to stop it. CAGW's publications and experts are featured regularly in television, radio, print, and Internet media.

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## Table of Contents:

### Chapter

#### [Introduction](#)

1. [The Changing Face of Piracy](#)
2. [The Dangers of Counterfeit Drugs](#)
3. [Music and Movies and Torrents, Oh My](#)
4. [Trademarks: Iconic Icons](#)
5. [Patents: To Create; Perhaps to Use, Perhaps to License, Perhaps to Litigate](#)
6. [Electronics, Software, and National Security: Pulling the Plug on Phony Parts](#)

#### [Conclusion](#)

#### [About the Authors](#)

#### [End Notes](#)

## Introduction

Most Americans do not think much about how property rights affect them in their daily lives. If they consider the subject at all, they are likely to be more aware of the monetary value of private property than intellectual property (IP). People will protect their valuables at home and work by locking their doors and installing security systems, and they usually have a good idea of how much their business, home, car, and investments are worth.

But few people realize that nearly every product they use is the result of someone's idea, or IP; nor are they likely to know the value of IP to the economy. And it is even more unlikely that they understand the impact of IP theft on either the creative process or the tens of millions of ordinary Americans who participate in that process.

## A Brief History of Intellectual Property Protection

During medieval times guilds, associations, or artisans were granted authority by the government to control the regulation and conduct of various industries.<sup>1</sup> In England, personal property and IP were traditionally viewed as distinct subjects with different origins. Personal or tangible property was viewed as “a creature of common law,” whereas copyrights and other IP were considered “largely a creature of statute.”<sup>2</sup>

The 1623 Statute of Monopolies provided for the exclusive control over an invention for a period of 14 years to the “true and first inventor.”<sup>3</sup> The Statute of Anne in 1710 granted an initial 14-year protection period with a possible 14-year renewal for protection of IP rights.<sup>4</sup>

In the United States, following the Revolutionary War every state had its own patent law, and every state except Delaware had its own copyright law.<sup>5</sup> The protection and promotion of IP was so important to the Founding Fathers that they included it in the General Welfare Clause, Article 1, Section 8 of the U.S. Constitution:

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.<sup>6</sup>

Unlike IP, personal property is protected under the Fourth and Fifth Amendments, not in the Constitution itself. During the First Congress, H.R. 43, the Copyright Act of 1790, was enacted and signed into law on May 31, 1790 by President George Washington. As one of the first laws enacted by Congress, the legislation provided copyright protection for books, maps, and charts and established both the U.S. Copyright Office and the U.S. Patent and Trademark Office (PTO). These agencies were tasked with cataloguing, analyzing, and protecting IP rights.

Musical compositions were not mentioned in the text of the act and would not be expressly covered by copyright until the Copyright Act of 1831. However, they were routinely registered under the 1790 Act and categorized as “books.”<sup>7</sup>

Unlike the PTO, there is no “Office of Personal Property” or a “Department of Personal Property.” In fact, Article 5 states that private property can be taken for public use with just compensation. Although the government can exercise eminent domain over private property under such circumstances, it has no similar right to take away IP.

The legal protection of IP has enormous value. It turns intangible assets into exclusive property that can be traded in the marketplace. A March 2012 report by the U.S. Department of Commerce Economics and Statistics Administration and the PTO found that direct employment

in the most IP-intensive industries in the U.S. accounted for 27.1 million jobs in 2010, and indirect activities associated with those industries provided an additional 12.9 million jobs for a total of 40 million jobs, or 27.7 percent of all jobs in the economy.<sup>8</sup>

In a comparative study on the value of IP, economists Kevin A. Hassett and Robert J. Shapiro estimated that “innovation in its various forms accounts for 30-40 percent of the gains in growth and productivity by the American economy during the 20<sup>th</sup> century.”<sup>9</sup> The study further found that the value of IP in the U.S. was between \$5 trillion and \$5.5 trillion in 2005.<sup>10</sup> By comparison, in 2010 that value had increased to between \$8.1 trillion and \$9.2 trillion, or the equivalent of 55–62.5 percent of U.S. GDP.<sup>11</sup>

In 2010, the value of IP comprised approximately 80 percent of a company’s total assets based on the Standard & Poor’s 500 Index.<sup>12</sup> This compares to the 1975 value of intangible assets comprising only 17 percent as IP, with the remaining 83 percent found in physical and financial assets.<sup>13</sup>

Internationally, some governments have been developing policies that threaten IP. The creative process will suffer as a result of such policies, because individuals and companies will not be willing to spend as much time or money on new IP if they believe the fruits of their labor will be taken away without sufficient – or any – compensation.

In a 2007 CAGW report entitled “Property Rights in the 21st Century: Don’t Steal This Paper or My Ideas,” one of this report’s co-authors examined four “myths and reality” surrounding the definition and use of IP. These premises hold true today.

#### **Four Intellectual Property Myths**

1. Myth: The price of information and ideas should be zero because products should be priced at marginal cost.

Reality: Economists reject marginal cost pricing because such policies destroy investment.

2. Myth: Intellectual property rights result in information and ideas being “locked down” by their owners.

Reality: The creators of art, books, movies, and inventions want their creations to reach as many people as possible, so long as they are compensated.

3. Myth: Intellectual property rights are monopolies that give their owners too much economic power.

Reality: Patents or copyrights support competition by encouraging inventors and creators to enter new markets; IP gives its owners no more economic power than any other asset.

4. Myth: Intellectual property rights benefit big firms at the expense of “the little guy.”

Reality: Patents are often the best protection that a small inventor has against large firms; copyright benefits creative ventures of many sizes, from solo musicians to big studios.

Strong protection of IP provides real benefits. Consider the following American inventions and whether they would have come about in a climate of weak IP protection:

- The telegraph in 1835<sup>14</sup>
- The phonograph in 1877<sup>15</sup>
- The light bulb in 1880<sup>16</sup>
- Air conditioning in 1902<sup>17</sup>
- The television in 1927<sup>18</sup>
- The point contact transistor in 1947-1948<sup>19</sup>
- Marshmallow Peeps in 1952<sup>20</sup>
- Magnetic tape cartridges in 1964<sup>21</sup>
- The cell phone in 1973<sup>22</sup>
- The microprocessor in 1973<sup>23</sup>

The value of these and future inventions relies on strong IP protection. This report will review copyright, trademark, and patent issues, as well as ongoing threats to IP protections from piracy, counterfeiting, and illegal sharing online.

Many individuals who buy a fake Gucci bag on the corner or illegally download a TV show, movie, or music, share the view of Hana Beshera, one of the founders of NinjaVideo, who served 16 months in prison for violating copyright laws. Even after she got out of jail, Beshera still believed that “the movie business is so large that skimming a little off the top doesn’t hurt anybody.”<sup>24</sup> IP theft is wrong at every level; its impact affects everyone associated with the creative process. Indeed, with more than 40 million Americans directly or indirectly working in an IP-related industry, one of the victims of IP theft might well be personally known to the perpetrator.

The importance of protecting IP rights cannot be overemphasized. The right to retain legal possession of, and benefit financially from, IP is constantly being threatened. The intent of this publication is to help educate the public about the value and importance of IP, the impact on individuals and the economy from the theft of IP, and how IP helps innovation flourish and economies around the world thrive.

## Chapter 5 –Patents: To Create; Perhaps to Use, Perhaps to License, Perhaps to Litigate

*“This is a great day for me. I feel that I have at last struck the solution of a great problem--and the day is coming when...friends converse with each other without leaving home.”* – Alexander Graham Bell, March 10, 1876, on the successful testing of the first telephonic transmission.<sup>205</sup>


On July 31, 1790, Samuel Hopkins was issued the first U.S. patent for improving “the making of Pot ash and Pearl ash by a new Apparatus and Process.” Pot ash was the nation’s first industrial chemical. Since there was no federal trademark or patent office at that time, the Hopkins patent was signed by President George Washington, Attorney General Edmund Randolph, and Secretary of State Thomas Jefferson. Two other patents were issued in 1790: one for a new candle-making process and the other for Oliver Evans’ flour-mill machinery.<sup>206</sup>

Since those first three patents were issued, 5.1 million patents have been approved by the U.S. government, including a record 302,948 patents in 2013.<sup>207</sup> That total was 49.7 percent of the 609,082 applications that were filed with the agency.<sup>208</sup> There were 571,612 utility patent applications, or 93.9 percent of the total patents filed. The rest of the patents were for design (36,064) and plants (1,406).

According to the PTO, a patent is a grant of a property right issued to the creator of an invention for a certain period of time.<sup>209</sup> Specifically, a patent “confers ‘the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States’ and its territories and possessions...”<sup>210</sup> Patents that were in force on June 8, 1995, and patents issued after that date are in force for a term that is the greater of the 20-year term, or 17 years from the patent grant.<sup>211</sup>

Once a patent is granted, the owner has several options: use the patent actively, hold the patent inactive, license the patent (both active and inactive) to others, or pursue claims of infringement against unauthorized users of the patent. Patent holders who cannot afford the cost of development, have been unable to license their inventions, or have no intent to develop their patents, have come to be labeled over the past two decades as non-practicing entities (NPEs). NPEs often include universities, individual inventors, and companies of all sizes, both domestic and foreign.

Approximately 2.3 million patents are considered to be “active.” Small businesses, individual inventors, research labs, and universities own 60 percent of all patents, yet those patents generate a miniscule 1 percent of licensing revenue. In fact, 95 percent of patents do not provide a single dollar of licensing revenue.<sup>212</sup> This inefficient commercialization of U.S. innovation annually wastes more than \$1 trillion in the potential value of patents by American firms that are failing to extract the full value of their IP.<sup>213</sup> This factor, in and of itself, has a significant impact on the U.S. economy, global competitiveness, and the nation’s ability to create high-paying, high-value jobs.



***On May 22, 1849,  
Abraham Lincoln was  
issued patent number  
6,469 for an invention  
for buoying vessels.  
U.S. Patent and  
Trademark Office.***

There are several reasons why patents are underutilized, including over-valuation, the cost and risk of litigation, and lack of internal resources. Unlocking these tangible assets would create added value and permit inventors to monetize their ideas. One of the most effective ways to achieve that objective is through licensing, which has been a standard practice since the patent system was established in the U.S. The third patent signed by President George Washington, for Oliver Evans' flour-mill machinery, was eventually licensed by Washington himself to modernize grain processing at the grist mill on his Mount Vernon estate.

According to Bowdoin College Professor of Economics B. Zorina Khan, "a remarkably high proportion of the great inventors extracted much of the income from their inventions by selling or licensing the rights to their inventive property."<sup>214</sup> Although Professor Khan was speaking about nineteenth century inventors, the same reality applies today.

For example, one-third of Qualcomm's revenue comes from licensing, accounting for 80 percent of the company's profits. Qualcomm, which holds the most important patents for code division multiple access (CDMA) chips, the standard used in 3G phones, gets paid between \$6 and \$7 for each smartphone sold.<sup>215</sup>

In the first half of its 2014 fiscal year, licensing comprised 70.2 percent of Microsoft's revenue and 93.7 percent of the company's gross margin. Licensing revenue is derived from Windows and Office for consumers, phone patent licensing, and commercial licensing.<sup>216</sup>

Although these companies have a clear vision of how to maximize the use and licensing of their patents, other companies both large and small, as well as universities and individual inventors, either do not have a similar mission or cannot find users or licensees for their patents.

According to the PTO, a license is a contractual agreement that gives a licensee the right to use the patent and prevents the patent owner from suing the licensee for infringement, as long as the licensee abides by the terms of the agreement in its use of the patent. These agreements usually limit the length of time, field of use, and geographic area. Licenses may be exclusive (one licensee) or non-exclusive (multiple licensees). In both cases, the patent holder retains title to the patent.<sup>217</sup>

There are many resources to help patent holders license their patents. Law firms that specialize in patents help inventors obtain, protect, and license their patents. The PTO website includes links to several independent inventor organizations, information about every state's attorney general office, and a list of the PTO's designated Patent and Trademark Resource Centers.<sup>218</sup> And, of course, there are numerous websites that provide guidance on how to license patents; these should be viewed with the usual caveats about randomly seeking advice on the Internet.

Some patent holders have taken their own steps to license underutilized patents. During a two-week period in April 2014, Pennsylvania State University conducted an online auction of 59 portfolios of patents. Although the university did not state whether the auction made any money, the process provided a better understanding of the market value of the patents. The auction will also help the university decide whether to renew or abandon the portfolios that were not licensed.<sup>219</sup>

While Penn State at least tried to obtain some return from its underused patent assets, many universities retain far too many patents because they believe they are worth more than they really are. However, the number of high-value patents is limited.<sup>220</sup>

According to a November 20, 2013 Brookings Institution report, 87 percent of universities that licensed patents did not break even on the costs related to research and development, patent filing, and patent maintenance over the prior 20 years.<sup>221</sup> That, of course, means that a small number of universities accounts for a significant amount of licensing revenue. In 2012, eight



universities that comprise the top 5 percent of licensing income earners took in 50 percent of licensing revenue and the top 16 percent earned 70 percent of licensing revenue. The Brookings report noted that “only 37 universities have been able to reach the top 20 of licensing revenue in any given year over the last decade.”<sup>222</sup>

According to surveys by the Association of University Technology Managers, universities “make more than 4,000 patent licensing agreements annually and collect about \$2 billion a year in licensing revenue.”<sup>223</sup> The Brookings report recommended several ways to improve the return to universities for their investment in patents, such as expanding the Small Business Technology Transfer program to universities and creating a new pool of federal funds that would be distributed “more equitably” to universities based on the number of faculty.<sup>224</sup>

However, before more taxpayer dollars are spent on technology transfer, universities should take advantage of the available opportunities to sell or license their patents through private sector companies. For example, two companies, PatentBooks and Patent Properties, have developed systems that offer patent licenses at disruptively low prices. PatentBooks offers patent users licenses to all of the patents it represents. Patent Properties, through its United States Patent Utility, offers patent users licenses to packages of the 50 most relevant patents as determined by a proprietary statistical analysis. Each approach is designed to create a marketplace for both creators and users of patented IP, as well as to reduce the impact that high litigation costs have on the ability of patent licensing to scale beyond the small percentage of patents currently being licensed.

PatentBooks was founded by Art Nutter in 2014. The company facilitates “cost-effective patent licenses between patent owners and patent users by aggregating patents relevant to a product, offering patent users a single price to license all the aggregated patents, and distributing the licensing income to patent owners according to the quality of their aggregated patents.”<sup>225</sup> The value of each patent is determined by TAEUSworks, which uses economic, technical, and legal parameters to evaluate and rate patents. The process was developed by the TAEUS International Corporation, which was founded by Mr. Nutter in 1992.<sup>226</sup>

PatentBooks permits patent owners to sell their patents on a voluntary basis and patent users to license all of the aggregated patents for a particular product. Patent owners can list their patents at no charge in PatentBooks and are paid licensing fees according to the value of their patents in three tiers as determined by TAEUSworks. The licenses are non-exclusive, and patent owners remain free to license their patents in any other manner.<sup>227</sup>

The PatentBooks website claims that the licensing system will be disruptive to several stakeholders in the patent marketplace. With more voluntary transactions online, there will be fewer bilateral licensing agreements, reducing the need for in-house licensing departments and their attorneys. There will be less work for patent litigation lawyers. There will be fewer lawsuits by patent trolls, because the value of patents will be published in Patent Books.<sup>228</sup>

Patent Properties, Inc. was developed by Jay Walker, the founder of priceline.com, who personally has more than 700 issued and pending U.S. and international patents and ranks as the world’s 11th most patented living inventor.<sup>229</sup> Patent Properties has stated that the company “develops and commercializes its unique portfolio of assets and is creating a disruptive licensing solution for the mass market of patent owners and users.”<sup>230</sup>

In November, 2014, Patent Properties is scheduled to release its United States Patent Utility, which the company’s website describes as “a neutral platform that will provide a full package of patent-related licensing, information and financial services at disruptively low prices to patent owners and users alike.” This “innovative way to license innovation” will be completely voluntary.<sup>231</sup>

The intent of the utility is to change the patent system from one that finds fault and generates lawsuits to a more reasonable standard of “‘no fault,’ based on ‘statistical probability’” as determined by a proprietary formula. The United States Patent Utility will also provide patent and product comparison testing, as well as market and litigation information. The company claims that this will be “the first time ... the huge un-served market of patent owners and users will be able to benefit from the invention marketplace by participating in a simple and affordable way.”<sup>232</sup>

In an August 18, 2014 interview in the *Stamford Advocate*, Walker and Patent Properties CEO Jon Ellenthal discussed the company’s approach to patent licensing. Walker compared providing access to large numbers of patent licenses by a single user at a reasonable price to the long-standing process used by ASCAP that allows radio stations to pay a single fee in order to obtain access to a large catalog of songs licensed by ASCAP. Walker stated, “by using simplicity, technology and common sense that works for everybody, and especially by keeping prices very low, we can replicate in the intellectual property and patent world what ASCAP did in the music world.”<sup>233</sup>

Although Patent Properties’ Patent Utility is focused on small and medium-sized businesses, Walker believes that larger companies, which also have a need to manage patent risk and access the innovation locked away in more than 2 million unlicensed U.S. patents, will find significant value in marketplace-based licensing. The cost per subscriber will be about \$1,200 for a package of 50 patents, plus a variety of other patent information services. Patent owners will receive 85 percent of the total licensing revenue achieved through the Utility, with owners of the more highly-valued patents in the 50-patent packages receiving a larger share of the overall licensing income than owners of patents with less statistical relevance to a user’s product or service.<sup>234</sup>

Villanova University School of Law Professor Michael Risch, an expert in patent law, said that the approach of the United State Patent Utility to charge a relatively low and flat price was something that he had not previously seen. He noted that the proposal would work if the inventions were sufficiently important for users to pay the fees for the patents.<sup>235</sup>

Both PatentBooks and Patent Properties appropriately assert that one of the results of their licensing programs will be a reduction in patent litigation. Another approach to that objective is being taken by RPX Corporation, which was founded in 2008 as “the first defensive patent litigation firm in the intellectual property market” and “a leading supplier of patent risk solutions ... to technology companies worldwide.”<sup>236</sup> The company “acquires high-risk patents and patent rights”<sup>237</sup> by buying them on the open market. RPX clients “generally receive a license to every patent we own, making each patent in the RPX portfolio one less patent that could be used in an infringement assertion against the members of our network.”<sup>238</sup> According to the company’s website, RPX has “acquired more than 2,000 patent assets in the open market, representing approximately 1,900 avoided litigations for our clients” as of June 30, 2014.<sup>239</sup>

According to a March 24, 2012 *Forbes* article, RPX uses its subscription fees to “buy and retire patents that could be problematic. Collectively buying patents is more efficient and cost effective. It’s like having a consortium without the hassle of creating one.”<sup>240</sup> RPX does not assert any of the patents it owns; the company will only defend those patents. Therefore, the value transferred from patent users to patent owners will occur “as efficiently as possible (without unnecessary and expensive legal conflict).”<sup>241</sup>

The company also provides risk management services, litigation insurance, and strategic advice. For example, RPX “combines a traditional claims-paying policy with proactive intervention into the patent market to reduce the likelihood and expense of NPE litigation.”<sup>242</sup>

In regard to NPEs, also called patent assertion entities (PAEs) or the more derogatory patent trolls (used by companies subject to a patent infringement lawsuit or a demand letter from a patent owner), there is an ongoing debate over whether the PAEs are doing anything differently than past patent holders in asserting their patent rights; whether they are a “problem” that needs to be addressed; or, whether they are “outliers” in the patent system.

On September 27, 2013, the Federal Trade Commission (FTC) announced that it would be seeking public comment to obtain information on approximately 25 PAEs in order to determine how they do business and to better understand their impact on competition and innovation. The FTC noted that “PAEs are firms with a business model based primarily on purchasing patents and then attempting to generate revenue by asserting the intellectual property against persons who are already practicing the patented technologies.”<sup>243</sup>

The FTC noted that PAEs are not considered to be non-practicing entities such as universities and other patent holders who are seeking to develop and transfer technology. The agency plans to issue two reports; the first will examine how the PAEs operate and the second will discuss how they impact competition and innovation.<sup>244</sup>

In an interview published in *Law360* on September 4, 2014, FTC Commissioner Joshua Wright said that the PAE report will “probably ... disappoint some people” who are looking for an up-or-down vote on PAEs, but it will nonetheless illuminate an “issue that is ‘chock full of theory and supposition.’”<sup>245</sup> Wright noted that data “doesn’t exist” which would determine whether the PAEs are a positive or negative factor in the patent system, and that the commission needs to start with the facts. He also stated that the FTC has the ability under either its consumer protection or competition authority to bring cases against PAEs regardless of the outcome of the two reports.<sup>246</sup>

The FTC is not the only federal agency looking into NPEs and PAEs. On August 22, 2013, GAO issued a report entitled “Intellectual Property: Assessing Factors That Affect Patent Infringement Litigation Could Help Improve Patent Quality.”<sup>247</sup> According to GAO, from 2000 to 2010, the number of patent infringement lawsuits fluctuated slightly. However, from 2010 to 2011, the number increased by about one-third. In a detailed analysis of 500 lawsuits from 2007 to 2011, GAO found that the number of overall defendants had increased by about 129 percent; NPEs filed about one-fifth of all lawsuits. GAO also found that software-related patents constituted about 89 percent of the lawsuits.<sup>248</sup>

Stakeholders told GAO that there were three reasons for the increase in patent infringement lawsuits: 1) many of these lawsuits are related to the prevalence of patents with unclear property rights; 2) the potential for large monetary awards from the courts can be an incentive for the patent owners to file infringement lawsuits; and, 3) companies are recognizing the patents as a more valuable asset than previously considered.<sup>249</sup>

The relationship between more patents and more patent litigation was also analyzed by Dr. Khan. She concluded that “...although it has increased over the past few years, the rate of litigation (cases as a percentage of patents), is still unexceptional. This is especially true since changes in legal rules (ironically intended to reduce litigation) have led to a nominal or administrative increase in the numbers of cases filed in the most recent years.”<sup>250</sup> The legal rules Dr. Khan alluded to have largely resulted from the enactment of the Leahy-Smith America Invents Act (AIA) on September 11, 2011.

Dr. Khan reviewed the pattern of patenting and litigation between 1790 and 2012 and found that the “per patent rate of litigation was highest in the era before the Civil War and during the subsequent market expansion that started in the 1870s.”<sup>251</sup> New innovations, such as “the

telegraph, telephone and automobile were invariably accompanied by an upswing in civil litigation.”<sup>252</sup> Dr. Khan noted that “‘vexatious’ and costly litigation about all areas of law – patents, property, contracts and torts alike – were inevitably associated with the advent of important innovations, and the moral here is that it is not possible to pre-assign labels that would predict who would act in a meritorious fashion and who would engage in unproductive behavior to drive out competitors.”<sup>253</sup> Indeed, not all NPEs are PAEs and not all PAEs are patent trolls.

Dr. Khan’s perspective on the history of patent litigation; FTC Commissioner Wright’s comments about the likely outcome of the agency’s study and its capacity to address any violations of law; and, the availability of marketplace alternatives to litigation should address many of the issues surrounding how PAEs impact the patent system.

In fact, there is a more serious challenge to patents than the level of domestic litigation. Several countries, particularly China, have been departing from international IP norms in order to pursue domestic economic goals. And according to FTC Commissioner Maureen Ohlhausen, decisions by the FTC itself may have given “some cover to the Chinese for their departure” from international standards.<sup>254</sup>

Commissioner Ohlhausen cited two FTC decisions involving standard-essential patents that restricted the ability of holders of such patents to seek injunctions. Describing her dissent in the cases, the commissioner said, “I worry that these actions may send the wrong message to our foreign counterparts that we do not place a very high value on intellectual property rights and that we failed to explain adequately why these cases are the exception rather than the norm.”<sup>255</sup> Despite U.S. court decisions and FTC statements that support the rights of patent holders in licensing matters, the commissioner heard Chinese officials citing the two FTC cases as settled U.S. law and, therefore, supportive of their policies on such matters.<sup>256</sup>

FTC Commissioner Wright expressed similar concerns about the FTC as well as the Department of Justice (DOJ) in his remarks to the New York City Bar Association on March 11, 2014. He said that antitrust laws could be used to limit IP rights, “especially in young and emerging antitrust regimes, and most notably China.”<sup>257</sup> In its September 2014 report on the implementation of China’s anti-monopoly law (AML), the U.S. Chamber of Commerce echoed those concerns stating, “China appears to be using the AML to promote industrial policy goals, even at the expense of competition” and has engaged in “systemic, officially sanctioned curtailment of IP rights.”<sup>258</sup>

In addition to his concerns over China’s AML, Commissioner Wright stated that both the FTC and DOJ should enforce antitrust laws equally for both IP and real property rather than establishing a separate, specific analysis for IP cases. Otherwise, special rules for IP could “promote hostility toward the exercise of property rights and their exchange,”<sup>259</sup> as well as create an ad hoc approach to enforcement that would make it more difficult to protect IP rights both in the U.S. and around the world.

At the same time the FTC and DOJ may be inadvertently helping to undermine IP rights in other countries, the U.S. patent system is becoming more closely aligned with the rest of the world. Before the enactment of the AIA, patents were provided to the “true and first inventor.”<sup>260</sup> The AIA increased efficiency and streamlined the patent application system to “improve patent quality and limit unnecessary and counterproductive litigation costs.”<sup>261</sup> The legislation also harmonized the U.S. patent grant process with the system used in most other countries.<sup>262</sup> In addition, the AIA provided a simplified definition of prior art, a comprehensively revised existing administrative proceedings for post-issuance of patents, and created several new administrative proceedings.<sup>263</sup>

On December 5, 2013, the House passed H.R. 3309, the Innovation Act, by a vote of 325-91. The legislation would require patent assertion letters to provide a detailed explanation of the patent being violated, as well as offer other discovery information. In addition, contrary to current law, the patent holder would be permitted to continue to use the patent in question until the matter was resolved and pay additional damages later if the case was decided unfavorably to the defendant. The Senate did not consider the bill, so the issue will be deferred to the 114th Congress.

Spurred by the attention paid to the issue in Washington and given the impact of abusive demand letters from some patent owners to end users of technology seeking monetary settlements in the face of litigation threats, bills have been either introduced or signed into law in 29 states since the beginning of 2013. For example, on August 17, 2014, Illinois Governor Pat Quinn signed a bill that would make it a violation of civil law if an individual sending a demand letter does not hold a patent or represent the patent holder, or if the patent has been overruled in court or expired.

Patent litigation has always had a proper role in the protection of IP. It may behoove Congress and state legislatures to be cautious in moving forward on legislation before the FTC issues its reports on PAEs. As Dr. Khan stated in her report, “data on patents granted, litigation rates over the past two centuries, and the role of non-practicing entities, indicate that these features of the current market in intellectual property are hardly anomalous. Indeed, they have been inherently associated with disruptive technologies that transformed the United States into the world leader in industrial and economic growth.”<sup>264</sup>

Eli Whitney’s invention of the cotton gin in 1794, Alexander Graham Bell’s telephone in 1876, and Thomas Edison’s development of the light bulb in 1879 were disruptive in their time, yet their positive impact was felt for many years. In modern times, the rate of technological advancement has accelerated these trends.

The next disruptor may be working in his or her parents’ garage or holed up in a college library. Or the upstart venture may be financed by an individual or group of financiers who have already been successful innovators.

In 2013, CNBC began a feature called “The Disruptors” to highlight how private companies were “disrupting the status quo in 10 traditional industries: energy, enterprise, financial services, healthcare, media, manufacturing, retail, telecom, travel & leisure.”<sup>265</sup> The network evaluated nominations from venture capitalists, reporters, business school academics, and startup investors to create the first top 50 list in 2013. The CNBC 2014 Disruptor 50 list covers companies in 27 industries “whose innovations are revolutionizing the business landscape.”<sup>266</sup>

In addition to their unpredictable, yet likely positive, impact on the marketplace, all of these companies have something else in common with the cotton gin, the telephone, and the light bulb: their success will depend in large part upon the creation and protection of their patents and other IP. An efficient licensing system allowing American innovation to reach the marketplace and contribute to global competitiveness will also be needed.

The U.S. must continue to lead the way in promoting and defending IP around the world; of special importance will be its effort to persuade other nations to adopt strong patent laws.

As Mark Twain aptly noted, “That reminds me to remark, in passing, that the very first official thing I did, in my administration – and it was on the first day of it, too – was to start a patent office; for I knew that a country without a patent office and good patent laws was just a crab, and couldn’t travel any way but sideways or backwards.”<sup>267</sup>

## Conclusion

IP rights have been paramount since the Republic was established. As James Madison noted in “Federalist Paper 43,” referring to the authority to promote science and the arts by providing exclusive rights to authors’ and inventors’ writings and discoveries (which became Article I, Section 8 of the Constitution):

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. The right to useful inventions seems with equal reason to belong to inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point by laws passed at the instance of Congress.<sup>316</sup>

The Founding Fathers understood that by protecting the individual rights of artists, authors, entrepreneurs, innovators, and inventors, they were promoting the greater public welfare. These fundamental privileges remain essential to ensure that IP will continue to have a substantial, positive impact on everyone’s life.

Patent holders need strong enforcement of IP laws in the U.S. and by its trading partners. New initiatives to license underutilized patents will increase the availability of hundreds of inventions while reducing the amount of patent litigation. Consumers must have assurances that they are buying safe and effective products that will not cause them harm, and taxpayers need to know that the government is not using fake parts in its weapons systems.

However, there are headwinds to the protection of IP rights. The Internet has spawned a new wave of IP piracy that includes counterfeit drugs being sold on fake pharmaceutical websites and music and videos being illegally downloaded from file sharing or torrent sites. Stealing IP and distributing it without just compensation to its creator has a far-reaching negative impact on the next independent filmmaker, struggling garage band, or young author.

The theft of trademarks creates confusion for consumers who believe they are purchasing specific brand name goods, only to find that the items are mislabeled, counterfeit, or even deadly. Some governments have passed laws that essentially strip trademarks from certain goods, in order to support social goals or policies. Other governments enforce antitrust laws or weaken IP laws to allow their domestic businesses to make a profit from the ideas and sweat of others. If more countries develop policies that threaten IP, there will be less incentive to invest in technology, research, and development, and the global economy will suffer.

Despite these barriers to IP rights, there are many countries that understand and promote the importance of IP for economic growth. As Great Britain’s ITV Director of Policy and Regulatory Affairs Magnus Brooke said, “A strong IP regime is an engine of growth, NOT a barrier.”<sup>317</sup>

Keeping this engine running smoothly, using the recommendations and concepts contained in this report and similar sources, will help the global economy continue to grow. In the U.S. alone, IP-related industries provide more than 40 million jobs<sup>318</sup> and account for between 55 and 62.6 percent of GDP.<sup>319</sup> Without the innovation propelled by IP, the global economy would be on a slow (or slower, in current circumstances) train going nowhere.

Everyone benefits from IP. If the Founding Fathers had not recognized its importance, the light bulb, the telephone, the cell phone, and the microchip might never have been invented. Strong IP protection is fundamental to keeping the engine of ingenuity on track for generations to come.



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Mr. Schatz is a nationally-recognized spokesperson on government waste and has been interviewed on hundreds of radio talk shows from coast to coast. He is a regularly featured guest on national television news programs and local news broadcasts. Mr. Schatz has testified numerous times on government waste issues before committees of the U.S. Senate and House of Representatives, as well as before state and local legislative and regulatory bodies.

During his 28 years with CAGW, Mr. Schatz has helped make CAGW a “leading government watchdog on fiscally conservative issues, like taxes and earmarks,” according to *National Journal*. CAGW was cited by *The Hill* for its leading role in successfully pushing for the congressional earmark moratorium, which was identified as one of the “top 10 lobbying victories in 2010.” *The Hill* has

named Mr. Schatz as a “top lobbyist” for five consecutive years, from 2010-2014.

His previous books include “End the Income Tax,” co-authored with Jack Anderson in 1997; and “Telecom Unplugged: Ushering in a New Digital Era,” co-authored with Deborah Collier in 2014.

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Ms. Collier holds a Bachelor of Arts (AB) degree in History from Ohio University. She is married to Kimo Collier, and has a son, Christian.



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