

Intellectual

Property Rights Debate

HEMANT BHATNAGAR



Flexible Rights That Create Wealth for All

By DOMINIC KEATING

Intellectual property is a collection of rights that generate wealth for all by providing incentives for new products, processes, creative works and services.

Products that we use every day like Philips® light bulbs, Nancy Drew® books and Campbell's® soup are protected by intellectual property. Existing models show how intellectual property is used with great versatility in the market place in order to meet the needs of owners, consumers and the public.

Intellectual property creates wealth directly by allowing individuals and businesses with new inventions, creative works and brands to create a niche in the market place. Indirectly, patents disclose these new inventions to the public. These ideas are

In October, Dominic Keating became the first U.S. intellectual property expert to be posted in India. He is a first secretary in the commercial section of the U.S. Embassy in New Delhi, where he works to promote high standards of intellectual property protection and enforcement, as well as cooperation between the U.S. and Indian governments on intellectual property matters. He was a patent attorney with the Office of International Relations at the United States Patent and Trademark Office from 2003 to 2006. During that time, he had responsibility for issues related to intellectual property and biodiversity, genetic resources and traditional knowledge, intellectual property and health. From 2001 to 2003, he was the intellectual property attaché at the U.S. Mission to the World Trade Organization. He also has experience as a patent examiner in the pharmaceutical, chemical and biotechnological sciences, as a trademark examining attorney specializing in computer and telecommunications related goods, and as a research scientist.



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often the basis for more new inventions, products, services and businesses. When intellectual property rights expire, the public may freely enjoy and build upon the underlying inventions, creative works and trademarks for eternity. Wealth continues to grow, based on these contributions.

Do you like to read? The advent of the printing press allowed printers to make and widely distribute copies of books. Previously, books were hand-copied and only available to the rich. The press also spurred the first copyright law in England, which protected the rights of authors. In

IPR

Is as Important for India as Infrastructure

An Interview with Deputy U.S. Trade Representative KARAN BHATIA
By LAURINDA KEYS LONG

India should be at the very forefront of rigorous intellectual property rights protection, Deputy U.S. Trade Representative Karan Bhatia said in a SPAN interview during his most recent visit to India. "I think it perhaps could be the most important thing India can do to secure its long-term development future," declared Bhatia.

SPAN: More important than building infrastructure?

BHATIA: India should have the strongest laws and the strongest enforcement because having that legal infrastructure in place is just critical to developing knowledge based industries. India has managed to develop a fairly competitive knowledge based industry. But it still is much, much smaller than that of the United States or Europe or even some of the developed Asian economies. So, there's only so far that I think India can go unless it develops a state of the art intellectual property rights regime, which means improvements to its patent law, improvements to its copyright law and a strong, focused, effective, centralized enforcement system. And, we're willing to help with technical assistance and training and so forth. But at the end of the day, the political will is going to have to come from India itself.

Many in India do not, however, see this as such a pressing issue.

I do think that it is going to be important for Indian business people, Indian students, those who really stand to benefit the most from this, to be heard. I don't disagree with those of the Indian government who say that there needs to be more popular appreciation and public awareness of the value of strong IPR protection. But, I also think that to some extent the Indian government can lead

and perhaps bring others along as well. That's what happened with the "open skies" agreement, to be honest with you. There was no great consensus among the Indian population that air fares to the United States were too high or that there were too few aviation connections. But the Indian government with the real leadership of Minister Praful Patel, the civil aviation minister, took a bold step forward and the results are demonstrating themselves with new air services, lower prices, more options. I think you sort of bring people along once they see that there are actual benefits. Sometimes you lead and others will follow.

What does IPR mean to India's majority, the rural poor, those in the agriculture sector?

It's the 25 percent of the Indian population that's actually going to drive its economic growth—which will not be the agricultural sector, it will be the knowledge-based sector—that needs intellectual property rights. I mean the IPR *is* the infrastructure for the knowledge-based economy. It *is* the roads. It *is* the telecommunications lines.

Some intellectuals, including prominent Indian journalists and writers, say that everyone copies, that's how ideas spread, and it's not such a big deal to buy a cheaper, pirated movie.

The same people who say IPR is not a big deal, everyone copies, will be the first to bemoan the brain drain from India to the United States. The reason there is a brain drain from India to the United States is because the best and the brightest from India can go to the United States, patent their products over there, or copyright their software over there and reap untold riches, because there are protections for the fruits of their intellectual labor.

the 1800s, under pressure from England, the United States began to provide copyright protection for foreign and domestic authors and creators (www.wipo.org). Domestic literature began to flourish.

The vibrant music, movie, literature and artistic industries of the United States have evolved under this system of ownership. According to industry estimates, the U.S. copyright industry contributed more than \$626 billion, or more than 6 percent of the U.S. gross domestic product, in 2002 (www.iipa.com).

How important is a job? The first modern patent law was passed in Venice in 1474. One of the first inventors to receive a patent was Galileo, for an invention to raise water in order to irrigate land. Patents are an essential part of the U.S. Constitution. They have become a cornerstone of innovation around the world by providing incentives for new inventions. The U.S. Constitution, in Section 8, says; "The Congress shall have Power...to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries..."

Strong patent laws provide incentives for new inventions that create wealth in the market place. For example, the United States Supreme Court clarified that living things are patentable under U.S. law in 1980. Since that time, the biotechnology industry in the United States has experienced tremendous growth and has brought countless, life saving inventions onto the market. Today, the United States leads the biotechnology industry with more than 1,500 biotech companies employing more than 900,000 people with salaries that average more than \$60,000 per year (www.bio.org).

Do you like soup? Trademarks have evolved from the earliest of times, when humans used marks to designate ownership. Cave drawings from as early as 5000 B.C., for example, show bison with sym-

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about your views on

Intellectual Property Rights.

We will publish some letters in our next issue

and on our Web site.

<http://usembassy.state.gov/posts/in1/wwwspan.html>

bols on their flanks. In 3500 B.C., Mesopotamian commodities were identified with cylindrical seals (www.lib.utexas.edu).

Today, trademarks are used in all aspects of commerce. They bring consumer recognition to products and add value to businesses. When Nestle purchased a British chocolate company named Rowntree in 1988, it paid half a billion pounds for its factories and stock. However, it paid 2 billion pounds for its

a trademark, for example. On the other hand, intellectual property rights must be positively exercised. The failure to do so, whether intentional or not, may result in others using an invention, creative work or trademark.

To illustrate the great versatility of intellectual property rights in the market place, four models are provided here.

First, the IBM® model makes part of a company's intellectual property portfolio

Licensing arrangements have the flexibility to take into account the needs of the parties involved. For example, they may be exclusive, non-exclusive, territorial (that is, different people can use a product in different parts of a country), and they may creatively address the issue of royalties.

In 1980, Stanley Cohen and Herbert Boyer patented a blockbuster method of replicating DNA. They licensed their invention out to more than 370 companies with a \$10,000 up front payment, an annual advance of \$10,000 and earned royalties of .5 percent to 3 percent of sales, depending upon the type and sales volume of the products.

Third, the Warhol model enforces intellectual property rights only against potential infringers who are seeking commercial gain. Andy Warhol had a successful career as an artist by building upon the works of others. He took advantage of the flexibility that other intellectual property owners demonstrated when he built upon popular icons such as Campbell's® soup. Although Warhol died in 1987, his foundation has a policy of not enforcing its rights against those who choose to build upon Warhol's works merely for the sake of art. However, the foundation actively enforces its rights against potential infringers who seek commercial gain (www.warholfoundation.org).

Fourth, companies following the vigorous enforcement model seek to defend many or all of their intellectual property rights. This model is particularly important to entities like The Walt Disney Company that have made large investments in research and development or creative works, or those that rely significantly upon brand recognition.

Intellectual property holds the key to the future. Of foremost importance is the preservation and advancement of the standards for the protection of intellectual property. Without intellectual property protections, we may not have Campbell's® soup for artists, inventors and business people to build upon. Great works like those of Warhol might never exist. As Peter Drucker, author of *Innovation and Entrepreneurship*, says, with intellectual property protection, "(i)nnovation is the specific instrument of entrepreneurship...the act that endows resources with a new capacity to create wealth" for all. 



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Cartoon characters Mickey Mouse and his girlfriend, Minnie, shown here at Hong Kong Disneyland Park debuted in the silent film Plane Crazy on May 15, 1928. The next day, according to The Chronology of Walt Disney's Mickey Mouse, by Ken Polsson, Disney applied for a trademark for the character and image of Mickey Mouse, which was granted four months later by the U.S. Patent Office. Mickey, and even the shape of his ears, are registered trademarks of the Walt Disney Company used in publishing, entertainment and hospitality spin-offs around the world. Although the copyright for the Mickey Mouse cartoons and comic books will eventually expire, allowing their use in the public domain, the Mickey Mouse image may be protected in perpetuity under U.S. trademark law (<http://www.uspto.gov>). The Walt Disney Company vigorously defends its trademark rights.

trademarks (www.wipo.int). Coca-Cola® has been ranked by *BusinessWeek* as the most valuable brand in the world, at \$67 billion. Products such as Campbell's® soup, Gillette® and Canon® also have great value in their brands. Some of these products might not be on the market today if they did not have trademark protection.

Intellectual property owners may exercise their rights flexibly or enforce them vigorously, depending upon their business model or philosophy. Owners may have the option of excluding others from selling a product, reproducing a book or using

available to the public. IBM® announced last year that it was making 500 of its patents freely available to anyone working on open-source projects such as the Linux® operating system. IBM® is the largest patent holder in the United States. It obtained 3,248 patents in 2004 and it created at least \$1 billion from licensing its inventions last year (www.ibm.com).

Second, the Cohen and Boyer model issues an unlimited number of licenses for a reasonable up-front payment and a moderate royalty. Intellectual property rights may be licensed in whole or in part.