EXECUTIVE SUMMARY

	TRADE SECRET	PATENT	COPYRIGHT	TRADEMARK TRADE DRESS UNFAIR COMPETITION
What is Protected	Any technical or business information which is SECRET and which gives the holder an advantage over a competitor who does not possess the information	INVENTION - can be a process, machine, thing which is made, composition of matter, or an improvement of any of these *(there also are design and plant patents, which are not fully discussed)*	Copyrighted work - literary works, software, dramatic works, music, lyrics, dances, pictures, sculptures, movies, sound recordings, architectural works	Words, phrases, and logos used as: TRADEMARK (used on tangible goods) or SERVICE MARK (used with services): TRADE DRESS (visual appearance
How to Protect	Use reasonable measures to keep secret - no registration available	Apply for patent	Apply for federal registration	Actual use: apply for federal and/or state registration for federal, also intent-to-use application + later actual use
Who Applies for Protection	No application process	First inventor or assignee	Author	User or licensor of user
Term of Protection	Unlimited duration until no longer a secret	20 years from filing of first application (17 years from date of issue for older patents)	Life of author + 50 years, or 75/100 years	Unlimited duration until abandoned Federal registration - 10 years (renewable)
Protection Provided	Right to prevent unlawful use or disclosure	Right to exclude others from making, using, selling (and offering) and importing into U.S.	Right to prevent unauthorized copying or public performance	Right to exclude others whose use may cause confusion or mistake
Enforcement	Suit for tort - state court or federal court (diversity)	Suit for infringement - federal court	Suit for infringement - federal court	Suit for infringement - federal or state court
Federal or State Law	State common law/statute	Federal only	Federal only	Federal and State common law/statute

INTELLECTUAL PROPERTY (IP)
&
INTELLECTUAL PROPERTY RIGHT (IPR)

IP	IPR
Invention	Patent, Trade Secret
Know-how, Invention	Trade Secret
Brandname	Trademark
Work of Authorship	Copyright

One protects IP and exploits or defends IPRs

HOW TO MODERNIZE AN IP SYSTEM

1) modernization and strengthening of national IP legislation,
2) installation of an effective IP administration,
3) adherence to all relevant and important international IP treaties,
4) creation of appreciation in all sectors of the importance of IP in economic and cultural development,
5) improvement of judicial mechanisms for the enforcement and defense of IPRs, and
6) establishment of regional, centralized IP systems and offices.

KFJ/Ruh/2.27.06

CREDOS•INSIGHTS•TRUISMS
on
Intellectual Property Rights and Technology Transfer

- The defense of intellectual property rights today is the new frontier as were the human rights yesterday.
- An effective IP system is indispensable to technological development which leads to economic growth and social welfare.
- An IP system should be part of a country's infrastructure from the outset rather than something that one thinks about after reaching a fairly advanced stage of development (Robert Sherwood).
- There are no viable alternatives to the present patent system which is the only system "that is compatible with the system of market economy" (Professor Carlos Fernandez-Novoa).
- An IP system does benefit nationals, not just foreign corporations; after all there is genius and creativity everywhere but they need nurture and protection.
- Of the four incentives provided by a patent system, namely, to invent, to disclose, to "invent around" and to invest, the incentive to invest is the most important.
- A patent and other IP are property and are not and cannot be monopolies (a patent does not take from the public and give to the individual; on the contrary, it takes from the individual and gives to the public).
- "Everything under the sun made by man is patentable" (U.S. Supreme Court in the *Chakrabarty* decision); hence, there should virtually be no exclusions of subject matter from patentability.
- Subject matter that is viewed as too important to be protected (e.g.in life sciences) is, on the contrary, "too important not to be protected" (Professor Thomas Field).
- Some countries have gold, some have oil — and some have technology and those that have gold and oil do not consider them part of the "common heritage of mankind" and accordingly give them away for free (Naboth Mvere, former Controller of IP, Zimbabwe).
- Lead times for commercializing inventions have become longer in all areas and not just the pharmaceutical area and hence conventional periods of three or four years till lapsing or compulsory licensing are out of step with present R&D realities.
- Patents and trade secrets are not mutually exclusive but complementary; they "dovetail" (U.S. Supreme Court in the *Bonito Boats* decision); thus, the question is not whether to patent or to padlock but rather what to patent and what to keep a trade secret and whether it is best to patent and to padlock, i.e. exploit the overlap.
- "Trade secret law and patent law have coexisted in this country for over one hundred years..... the extension of trade secret protection (even) to clearly patentable inventions does not conflict with the patent policy of disclosure." (U.S. Supreme Court in the *Kewanee Oil* decision).
- Multiple forms of protection can and should be utilized and integrated by exploiting the overlap between the various IP categories, especially in modern fields of technology; this provides fall-back positions, achieves synergistic effects and thus optimizes exclusivity (Professor Jay Dratler).
- Depending on the type of innovation, *sui generis* protection should be available in lieu of the present one-size-fits-all patent system, e.g. utility models for minor inventions.
- Technology transfers, licensing and investments are ever so much easier to carry out and accomplish via patents and other IPRs as vehicles or bases.
- Importation of technology leads not only to export of products but also to export of adapted, improved technology (reverse technology transfer).
- The days when technology transferors took advantage of transferees (in developing countries) are gone, the realization having taken hold that the only viable license is one that results from a win/win approach and passes the fairness test.

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PATENTS AND MONOPOLIES

Reasons why a patent per se is not a monopoly

1. A monopoly is something in the public domain that the government takes from the public and gives to a person (like in the famous British case of the playing cards). An invention is something that did not exist before and was not in the public domain. It is something novel, that upon publication of the patent (application) enriches the public domain with the knowledge of the invention, and upon expiration of the patent, enters into the public domain, free to be used by anyone. A true antithesis!

2. According to our patent legislation, a patent is "personal property", like any other personal property (35 U.S.C. § 261). The term "monopoly is a nasty buzzword that appears absolutely nowhere in the patent statute." (Chief Judge Markey)

3. According to the 1995 DOJ/FTC Antitrust Guidelines, patents are "comparable to any other form of property," are "not presumed to create market power" and licensing patents is "generally pro-competitive." This marks a 180-degree turn in their policy.

4. The Supreme Court also has dropped the old "monopoly" rhetoric, replacing it by "a recognition that the right to exclude in intellectual property is no different in principle from the right to exclude in physical property." (Judge Easterbrook)

5. Patenting is a neutral act and a patent does not grant the positive right to make, use and sell the patented invention but merely the negative right to prevent others from making, using and selling such an invention.

6. A patent is not a guarantee that the patentee will ever earn anything from the right to exclude others.

7. There are almost always alternatives available to the public — prior art alternatives, alternatives that are obvious and hence not patentable and alternatives provided by improvement inventions.

8. If anything, patents intensify competition; they can lead to many improvement patents as competitors are motivated to "invent around." Patents are "potential antimonopoly agents." (Judge Rich)

9. The patent right or property is too severely restricted in terms of duration and scope by beset by three dozens of reasons for invalidity and unenforceability to be considered a monopoly.

10. Even if a patent is misused and becomes temporarily unenforceable, it still is not a monopoly, unless there was market power. Misuse can be purged and when dissipated, enforceability is restored.

11. McCarthy's Desk Encyclopedia of Intellectual Property also asserts that "A Patent Is Not a 'Monopoly'" and decries that "Misuse of Term Persists."

Because of the extremely negative connotation of the term "patent monopoly" that inventors and innovators are reprehensible monopolists rather than great public benefactors, better terminology to use is: patent property, patent grant, patent right, exclusivity. Also to be avoided: "artificial monopoly," "desirable monopoly," "legal monopoly," "limited monopoly" or "temporary monopoly."

Let's stamp out "unthinking monopolophobia" (Chief Judge Markety) and"slander of patents." (Robert Sherwood).

Karl F. Jorda/2.27.06

"NOTHING THAT CONGRESS COULD DO TO HELP FARMING WOULD BE OF GREATER VALUE AND PERMANENCE THAN TO GIVE TO THE PLANT BREEDER THE SAME STATUS AS THE MECHANICAL AND CHEMICAL INVENTORS NOW HAVE THROUGH THE PATENT LAW..."

THOMAS EDISON (1930)

Too important not to be pulled