

Intellectual Property Assets: A Measure of Success

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Corporate giants usually point to stock value, market share, sales and net profits as some of the indicators of how well their companies are performing. Today, however, it might be argued that another important measure of how well companies are performing is the presence and volume of counterfeit and piratical product in the market place. During the past decade, international trade agreements, both global and regional, have had as their objective the reduction or elimination of obstacles to the movement of goods across borders. In addition, the rate of technological development has also added a new element to the trading system as information and content are transferred digitally across borders. While the intended beneficiaries are legitimate commercial enterprises, there is no doubt that criminals engaged in intellectual property (IP) theft, i.e., the production, trafficking and sale of counterfeit and piratical goods, have also benefited.

The illicit traders who traffic in goods that infringe IP, ie, trademarks, patents and copyrights, engage in illicit global trade that is estimated to be as high as half a trillion dollars per year. INTERPOL's Secretary General testified before a committee of the U.S. Congress in July 2003 and warned U.S. lawmakers that trading in counterfeit and piratical goods is estimated to be \$450 billion dollars and attracts organised criminal elements because of the profits available.

The "competition" from the counterfeiters and pirates is more than a revenue issue for IP owners, consumers and governments. The range of industries victimized by IP crime has grown increasingly complex and diversified. The expanded product lines subject to counterfeiting pose serious public health and safety hazards and, of course, the victimized companies have been making the case of economic injury for many years. While the damage to companies may be difficult to calculate because lost sales figures can only be estimated and damage to a company's reputation may be priceless, the reality of IP crime is that the counterfeiters and pirates seem emboldened by massive profits and, generally, ineffective enforcement measures.

The statistics, whether the source is the European Commission ("Commission") or the U.S. Government, tell the tale. On November 24, 2003, the Commission announced that in the first half of 2003 50 million counterfeit and piratical products were seized by the customs officials of the EU member states. By comparison, the Commission's announcement noted that in all of 2002 customs officials seized 85 million products. In the United States, the Department of Homeland Security's Bureau of Customs and Border Protection announced that 6,500 shipments were seized at U.S. ports of entry in fiscal year 2003 (October 1, 2002-September 30, 2003), estimating the domestic value of the seized goods at over \$94 million dollars, as compared to fiscal year 2002 when 5,793 shipments were seized and involved nearly \$99 million dollars in seized product. In New

York City alone, the police department seized over \$17 million dollars worth of counterfeit products in 2003—enough to fill 40 lorries.

As the corporate world knows and governments are beginning to understand, IP crime impacts all industries. The Commission's November announcement emphasized the ever-expanding product lines subject to IP theft, including foodstuffs, medicines, batteries and other consumer products. As the criminals expand into more product lines and target the successful products of legitimate companies, the community of corporate leaders is confronting well-funded, organized illegal competitors.

Corporate success in creating demand and a market for a product, which bears a recognized trademark (logo) and incorporates copyrighted and/or patented content, has given rise to the current wave of IP criminals that operate globally and with willful disregard for public health and safety as well as the laws intended to protect these assets. The seizure statistics above are evidence of a vast global trade in counterfeit and pirated products. In addition, the volume of seized goods should dispel any notion that today's counterfeiting and piracy is predominantly done by small "mom and pop" operations.

In view of this overwhelming challenge to IP owners and governments, what to do?

Raising Enforcement Standards

Often overlooked are the efforts currently underway to combat the crime of IP theft. Recognizing the enormous volume of counterfeit and piratical products flowing into the EU, European officials have taken steps to implement new procedures. The member states will have new border regulations going into effect on July 1, 2004. Council Regulation No. 1383/2003 is clearly intended to eliminate some of the burdensome aspects of initiating and utilizing border measures, e.g., eliminating the need to deposit security, and empowering the border enforcement authorities by increasing their authority to detain suspect goods when an application by the IP owner has not been filed.

Agreements concluded between trading partners in other parts of the world are raising standards to improve IP enforcement. Provisions in bilateral free trade agreements negotiated by the United States with its trading partners include requirements to empower authorities to take action ex officio in cases involving goods crossing the border and in cases of criminal trademark and copyright theft. In addition, goods intended for export and moving in-transit will no longer receive a "free pass" as these shipments will also be subject to enforcement actions.

Thus, free trade agreements present industry with new opportunities to engage government officials and underscore the need for such agreements to include higher standards for the protection and enforcement of IP assets. As many governments initiate free trade negotiations, an IP chapter that includes enforcement measures should become a routine part of the negotiation and the final pact. The failure to use free trade negotiations to improve protection and enforcement of IP assets is a missed opportunity

at a time when the World Trade Organization is unlikely to be the best forum to accomplish this objective.

Enforcement Strategies—Time to Reconsider?

Companies, individually and jointly, are working to address the theft of their IP assets, albeit each based on the level of threat posed. Increasingly, IP owners who are victimized by counterfeiting and piracy understand that even in the absence of direct consumer health and safety risks IP theft nevertheless poses potential harm to the community at-large due to the growing involvement of organised criminal groups and their use of the resulting profits to engage in other illegal activities.

Corporate investment to protect IP assets is not insignificant when it includes the cost of obtaining trademark registrations and patents in the markets where enterprises are commercially active. The acquisition of rights and the efforts to protect the rights include a small army of people to monitor the market, take enforcement action, if necessary, engage law enforcement, lobby government agencies and other steps. Thus, while the enforcement aspects of IP asset protection have expanded to include incorporating various security technologies in products or on packaging and tightening supply and distribution chains, there is no chorus of IP owners shouting that the anti-counterfeiting and anti-piracy problem is being dramatically reduced around the world.

Therefore, one question that must be asked is whether the concept of “enforcement”, i.e., enforcement training, investigations, raids, seizures, prosecutions and imposition of penalties, is an inherent obstacle to more effective corporate strategies. Because “enforcement” tends to be viewed as a narrow set of activities, the conventional considerations may be unconsciously preventing strategists from undertaking a wholesale reassessment of what “enforcement” might constitute. The actions usually considered as enforcement are, in fact, *reactions* to an already bad situation at the end of a product’s business process, which involves hundreds of steps including product idea, research and development, marketing (promotion/advertising), acquisition of rights, etc.

Thus, at a time when corporate IP owners are being asked to underwrite a greater share of the cost of public sector technical assistance (capacity building) in the area of IP protection/enforcement, it is worth reconsidering what “enforcement” should constitute. The various security technologies employed by industry and new standards for protection of copyrighted content on the Internet are proactive elements to enforcement, but more is clearly needed.

Reshaping enforcement strategies requires the acceptance of some realities. First, improving substantive enforcement provisions will be slow and implementation even slower. Second, the objective to completely eliminate counterfeiting is unrealistic given that the total elimination of any type of crime is unrealistic. Third, regardless of the legal enforcement framework or the use of security technologies, counterfeiters and pirates don’t care and are not deterred about massive resources to catch and punish those at all levels of the criminal operation.

Strategic reassessment has many facets. First, the conventional aspects of an enforcement strategy must be retained. Second, in view of any enterprise's desire to be successful with a product and investing in a new product with success as an objective, enforcement considerations should be a component of product development as early as possible, even if it is simply a budget line item recognising the issue. Third, because of the greater reliance on private sector participation and funding of technical assistance programs (capacity building), enterprises should take advantage of the opportunity.

There are many ways for intellectual property owners to provide assistance. First, however, companies should make the case of their contributions to the local economy by noting the financial investment, number of local jobs (direct and indirect), tax revenues through corporate and wage taxes and other economic contributions. Second, aside from licensing local enterprises, the "enforcement" training programme might include more information about the value of IP by having corporate representatives explain how the commercialisation of IP can generate revenue, e.g., demonstrating the importance of choosing a trademark and marketing the trademark to gain consumer loyalty. A programme aimed at local enterprises is likely to cultivate local allies to combat IP crime. Although not directly on enforcement, an educated group of local enterprises should contribute to higher levels of respect for intellectual property.

Next, industry needs to employ the technologies it has developed to deliver more training and education. Industry's existing expertise and geographical reach allows it to create and distribute whatever training and education materials it wishes to put forward. Technology will allow industry to create and control the content, provide it in many languages and put it into the hands of students, consumers, law enforcement officials, judicial officers, legislators and others. Given the investment in developing product and enforcing rights, employing technology should be a priority in all training and education programmes to compliment face-to-face training programmes.

Finally, if companies invest more to combat intellectual property crime, what is the financial return? There is no concrete answer. The only answer there may be is to say that the company and its products remain vibrant, competitive, and profitable in the market place.