

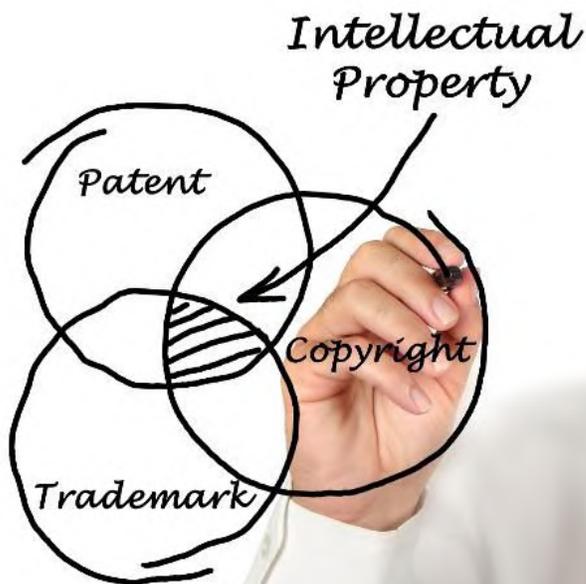
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# Averting IP Debacles: A 'Lessons Learned' Checklist For Smart Companies



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*I write about the intersection of business and public affairs.*



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Intellectual property (IP) challenges for U.S. corporations can take many forms. Sometimes that can mean failing to recognize the threat of a cyber breach.

At other times, that can mean ignoring copyright infringement litigation until it's too late, or neglecting to track down a competitor's patents, or foot-dragging while filing for trademark protection, or not being zealous enough in preserving trade secrets.

The ultimate lesson to learn? Few issues can injure an established corporation or bring down a promising venture more quickly than mishandled intellectual property (IP) concerns.

Look no farther than Apple, which this spring was forced by a Texas jury to pay \$502.6 million in damages after it ruled that iMessage, FaceTime and other Apple offerings [infringed on VirnetX's patents](#) in a dispute that took eight years to resolve.

Or look at Google, which recently lost its initial appeal on a multi-billion-dollar copyright infringement case against Oracle that could have profound repercussions on the technology software industry if the ruling [stands](#).

Staying on top of emerging IP trends, sidestepping IP potholes and embracing proactive communications measures can determine a company's ultimate success. A company's CEO and board members have no choice but to accurately assess their IP risks – and take the necessary steps to mitigate them.

It's apparent from such recent studies as [The 2017 Global Patent & IP Trends Indicator](#) that IP activity has significantly increased worldwide, with most new filings coming from the U.S., Europe and China.

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It's also evident that corporate counsels are worried about the potential effect of the [European Unitary Patent \(UP\)](#) and its [Unified Patent Court \(UPC\)](#), both of

which are aimed at streamlining patent filings. Officials are trying to create a single patent across the EU that can be administered by a single court, thereby saving money and aggravation.

The UP and its court affiliate were slated to go into effect in 2018. But both have been delayed, in part because of the U.K.'s Brexit vote and in part because of misgiving leveled by Germany's Federal Constitutional Court.

The EU controversy illustrates the tension surrounding patent rules and why IP remains such a big priority in corporate suites. Companies, even those in bricks-and-mortar industries, have little choice but to exercise IP due diligence. Indeed, identifying IP assets and confirming their availability is part and parcel to any business transaction, maintains Gaston Kroub, a founding partner of [Kroub, Silbersher & Kolmykov PLLC](#), an IP boutique firm in New York.

“Whether it’s in the area of patents, trademarks, copyrights, or trade secrets, the evolving nature of IP law demands that companies of all sizes take a proactive approach to dealing with IP issues,” says Kroub, the author of a recent *Above the Law* [article](#) on 2018 IP trends.

“Of special concern are the high costs of defending against intellectual property claims brought by others, both in terms of hard costs in the form of legal fees and the like, and soft costs in the form of unwanted business disruption and negative publicity. It is critical, therefore, for companies to work with internal or outside IP counsel to ensure that appropriate levels of attention are paid to IP issues in a timely manner, especially when it comes to assessing the risk of receiving an infringement claim because of a specific product or service offering.

“As with most things, being proactive when it comes to IP issues can help reduce the impact of potential business problems arising out of unforeseen events like an infringement claim,” he says.

With Kroub’s warning in mind, what communications lessons can companies implement to reduce their IP risks and create a smarter internal and external approach to IP?

- **Give IP the priority it deserves.** The higher the stakes, the more important the IP due diligence. Don't wait until the transaction is practically finished to identify competitive patents or begin considering the exposure of your proprietary offerings. Identify key risks and vulnerabilities on day one and constantly update the list.
- **Give every division a stake.** Given confidentiality, not every member of your executive team can be part of the IP exercise, but every *division* ought to be. Legal, marketing, communications, public affairs and IT should all be part of your IP task force. With the potential of artificial intelligence (AI) to revolutionize labor-intensive IP administrative tasks, shorten decision-making processes, and increase the ability to analyze large amounts of data, companies now have the ability to put strategic decision-making first, without worrying that there are too many cooks in the [kitchen](#).
- **Protect your own “state secrets” first.** If there isn't consensus on those patents, trademarks, service marks, et al., that are integral to your continued marketplace success, you need to develop it in a hurry. Your untouchables list – and the protection action that list demands – needs to be understood by every top- and junior-level staffer in the company. Look at the March 2018 suit filed by Match Group against dating app Bumble, which was founded by former employees of Match's Tinder dating service. Trade secret misappropriation allegations stand out, especially when you note that features of Bumble allegedly mirrored ideas developed for Tinder right before the employee severance agreements were [up](#).
- **Get some credit for your own IP.** If it would further your business objectives to give wider visibility to your trade- and service marks and other intellectual property, then engage marketing, communications and advertising in some smart outreach. Such visibility could pay dividends for a deal down the road or just now in the planning stages.
- **Make sure you know what's going on overseas.** If going global in any way is part of your business plan, then your company needs to adopt a global approach to IP strategy. If your company applies for single patent protection in many different countries, then you need to be advised on

country-specific processes and **challenges**. As the EU's current confusion demonstrates, the IP field requires constant monitoring. Regulatory and litigation risks vary from locale to locale.

- **Keep is simple.** There are few issues more complicated than IP law. You will be wise to remember Proverbs 17:28: "Even a fool is thought wise if he keeps silent, and discerning if he holds his tongue." Most non-IP lawyers on your team will nod in agreement with your strategy rather than risk asking what they fear is a stupid question. Continuously dumb down the issues at stake so that you are certain everyone on the team understands the issues. Remember, IP is traditionally the combination of legal and scientific training. But IP litigation is fought in the worlds of business, law, politics, and communications.

In today's hyper-competitive business climate, no company can afford to fall behind the IP curve. Better to take to heart Benjamin Franklin's adage that "By failing to prepare you are preparing to fail."

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