

CHAPTER 1

INTELLECTUAL PROPERTY AND INTANGIBLE ASSETS IN THE WORLD TODAY

Intellectual property is the central resource for creating wealth in almost all industries. The foundation of commercial power has shifted from capital resources to intellectual property. In fact, the definition of capital resources is shifting. No longer does the term “capital resource” bring to mind balance sheets of cash or pictures of sprawling manufacturing plants. Capital resources are now dominated by intellectual property such as technological know-how, patents, trademarks, copyrights, and trade secrets.

Corporations once dominated industries by acquiring and managing extensive holdings of natural resources and manufacturing facilities. Barriers to entry were high because enormous amounts of fixed asset investments were required to displace well-entrenched players. Today companies that once dominated industries are finding themselves fighting for survival. Upstart companies are creating new products and services based not on extensive natural resource holdings or tangible property but on intellectual property resources. Management of these properties will distinguish the winners from the losers in the decades ahead.

Intellectual property has attained an extremely important status within the fabric of our society and livelihood. Enterprises, and even whole industries, are built on an intellectual property foundation. We depend on intellectual property in our businesses and careers; a significant portion of us earn our living creating and maintaining intellectual property; we are entertained by it, educated by it, communicate with it, and are made and kept healthy by intellectual property.

1.1 SOME HISTORY

Intangible assets have been with us throughout human history. It required a merger between innovations and the rule of law before intellectual property could be identified as a special form of intangible, but the creativity has always been there.

In the world before the Industrial Revolution, early humans moved away from a hunter-gatherer economy to an agricultural based economy. Early humans roamed across large expanses in search of animals to hunt. Self-sufficiency dominated this model. A major shift occurred when early humans decided to stay in one place and grow the materials needed for survival. As an enterprise, agriculture employed virtually everyone in the world and used them in a series of repetitive tasks, done sequentially every season: preparing the ground, seeding, tending, harvesting. Then the cycle was repeated. In the agricultural paradigm, the amount of sun, rain, and temperature were vital to a successful season. People

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became accustomed to dealing with cycles measured in terms of days and seasons. Most farms were small and capable of supporting only one family, reinforcing humankind's desire to be self-sufficient. Over time, however, it became clear that the agricultural society was constrained by two key elements: labor and land. Farming at a higher level of output—above mere subsistence—required more land and more labor. Expansion of the agricultural economy required collective work and abandoning elements of self-sufficiency.

The Industrial Revolution created a new paradigm. Fueled by a worldwide affluence and an expanding population, the Industrial Revolution was triggered by technology and the realization that some products could be mass-produced and sold much more cheaply than similar handcrafted products. The new paradigm of economic behavior evolved into one requiring large amounts of capital for the purchase of buildings, machinery, and equipment. Companies were formed to raise the needed capital, and individualism took another step backward. The new companies soon learned not only that the cost of producing their goods meant controlling the manufacture of products, but also that vertical integration enhanced cost controls and profits. Soon large companies were acquiring the suppliers of coal, suppliers of rail transportation, and finally the retailers that sold the manufactured products. The new megacompanies sought to become entirely independent with regard to all of the functions required to obtain raw materials; produce subassemblies, component parts, and finished goods; and retail them to the consumer. Self-sufficiency once again stirred but this time the collective took the shape of megacompanies.

Today, the Intellectual Property Age is on us. Although the new paradigm is yet to be played out fully, clearly the trend again continues away from independence and toward a vital need for the talents of others. Interdependence is at the root of the paradigm shift that is taking place. Technology management in the future will center on leveraging technology that is owned to gain access to technology that is needed. Sharing technology is a concept many will find difficult to accept, but accept it they must. As Denis Waitley writes in *Empires of the Mind*, "The leaders of the present and the future will be champions of cooperation more often than of competition. While the power to maintain access to resources will remain important, 'the survival of the fittest' mentality will give away to survival of the wisest, a philosophy of understanding, cooperation, knowledge, and reason."¹ Access to vital resources has changed because fixed material assets no longer make up the most important resources. Gaining access to technology means cooperating with other companies, even competitors, in order to gain access to their knowledge-based resources. Independence is again being replaced by interdependence. Waitley succinctly explains, "The future leaders will only get what they want by helping others get what they want."

Part of the changes brought about by intellectual property has been the creation of new institutions and ways of doing business.

The mix and makeup of the intellectual property that supports us is continually changing, for example, the Internet, itself resting on communications technology, computer power, and software, enabled by the extreme proliferation of personal computers. The Internet has reminded us once again how moveable and perishable intellectual property can be. Intellectual property, unlike other forms of property, is not described geographically. Even in the beginning, the skills of a craftsman moved with him and those he taught, wherever their inclinations took them. Movement was slow, however, dependent as it was on human footpower. Now, intellectual property moves instantaneously and globally. We could send these very words almost anywhere in the world with a few

1. Denis Waitley, *Empires of the Mind—Lessons to Lead and Succeed in a Knowledge-Based World* (New York: William Morrow and Company, Inc., 1995), p. 8.

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mouse clicks. Once done, that action would remove this document from our control, save for the intellectual property legal structure that is in place to enable us to retain rights to this creation and exploit it ourselves or to transfer some or all of those rights to another.

This explosion of intellectual property has led to conflict. One of the buzzwords in the technocratic world is *convergence*. As an example, the difference between a telephone instrument and a computer was once very clear. Now a cell phone can function as a mini-computer (and a digital camera as well!), and we can use our personal computers to communicate. Once, all of the intellectual property connected with telephony: patented and unpatented technology, copyrights and trademarks, was separated by commerce and fields of use from all of the intellectual property connected with computers. That is no longer the case, and these bodies of intellectual property, and the companies that own them, more frequently collide as they protect their rights. To add another dimension, we can understand that a body of technology or a trademark developed and residing in China could have, for many years, peacefully coexisted with confusingly similar intellectual property in Germany. No longer. There has been geographical convergence as well.

1.2 LEGISLATION CREATED INTELLECTUAL PROPERTY

On September 5, 1787, the Committee on Detail reported to the Constitutional Convention that Congress should have the 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 writings and discoveries.”

That recommendation was unanimously adopted without recorded debate, and the provision was incorporated into the final draft of the Constitution. Such a constitutional clause is highly unusual in that it instructs Congress how to promote the progress of the useful arts—namely by securing to inventors the exclusive rights to their discoveries. It is even more unusual in that nowhere else in the Constitution is there any provision for an exclusive right to be granted to any individual or group of individuals; only authors and inventors are so blessed.

America was not the first nation to recognize special rights for inventors.

The patent institution was established by the medieval Venetian state, which articulated the basic feature of the law to *spur* innovation through the incentive of limited-time exclusivity by demanding the demonstration to the public of a working model and promising to seize and destroy counterfeit product. Patent rights arise because inventing is an expensive process and costs must be recouped to provide incentives to invest. If others can cheaply appropriate an inventor’s innovation, calling it their own without having invested time and energy in it, investments in innovation will not be made.

...Venice institutionalized the right of patent in 1474 in a statute that contained all the main features of contemporary patent law, including requirements that the device be novel, be actually constructed (reduce to practice in modern jargon), and be made public. It also required that it be examined (although the examination was rather informal), that there be term limits to exclusive rights, and that there be remedies for infringement. Finally, the Venetian statute declared that the inventor must teach others how the invention worked and be granted exclusivity in return.

...France, the eighteenth-century textile manufacturing center, also relied on the patent to promote manufacturing innovation and the state itself. The first design patent statute, established by the silk manufacturing guild to encourage creativity within its ranks, was enacted in 1711....British settlers in the New World brought the English patent practice with them, writing laws in Massachusetts (1641), Connecticut (1672), and South Carolina (1691). As the new nation established itself Thomas Jefferson “set the course for the US patent institution when he authored the 1793 Patent Act.”²

2. Michael P. Ryna, *Knowledge Diplomacy, Global Competition and the Politics of Intellectual Property* (Washington, DC: The Brookings Institute, 1998), pp. 21, 24, 25.

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Many important inventions were first discovered and developed by small companies and inventors who sought personal success: for some as wealth, for others as fame. Without the patent system, likely we would not have the economic power that we enjoy nor the quality of life we cherish. The Continental Congress had in mind the creation of a country and system of self-government like none ever tried before—a system that protected the rights of individuals above all else, a system where the governing body had only the powers granted to it by its citizens. The protection of the fruits of inventive energies seems a natural extension of the Miracle at Philadelphia. Economic prosperity and military strength were imperative for the new experiment to work. By stimulating and encouraging innovation, the United States has achieved economic prosperity that all other systems of government can only envy. Probably the first international recognition of the eminence of American invention came at the Crystal Palace Exhibition in London in 1851. The London *Times* said, “It is beyond all denial that every practical success of the season belongs to the Americans.”³

And about the turn of the twentieth century, a Japanese official, Korekiyo Takahashi, was sent to the United States; he subsequently reported, “We have looked about to see what nations are the greatest, so that we can be like them. We asked ourselves, ‘What is it that makes the United States such a great nation?’ and we investigated and found that it was patents, and we will have patents.”⁴

Despite the Japanese appreciation of the U.S. patent system, attitudes have not always been favorable toward patents. Patents grant exclusivity, and antitrust laws work to eliminate monopolies. For quite a while, these two were seen to be in conflict. Licensing limitations by patent owners and the acquisition of similar patents by a single company were seen as restrictive to a competitive economic environment. Liberal attitudes about infringement diminished. Patent rights and the U.S. Treasury Department blocked acquisitions involving keystone patents and trademarks.

New thinking sees U.S. intellectual property laws as a complement to the encouragement of a competitive environment. The Justice Department is more likely than ever to see intellectual property rights as enhancements of competition. First, patent laws create an incentive for companies to research, develop, and commercialize new products and services that can be delivered in a more efficient manner. In addition, the laws encourage the disclosure of information that otherwise would be jealously guarded. Through licensing, this information can be shared and exploited in the most efficient manner. Patent values are again enhanced by this thinking because licensing decisions and limitations are not automatically seen as restrictive and conflicting with antitrust laws. Royalties go hand in hand with value.

Strengthening legal protection around the world for all other intellectual properties, such as trademarks and copyrights, provides similar benefits to these assets and supports high values.

1.3 NEED FOR INTELLECTUAL PROPERTY VALUATIONS

Intellectual property has become part of every aspect of life. As a result the reasons for valuing it encompass all aspects of our society. We have been called on to value intellectual property for some of the following purposes:

- *Transaction Support.* Intellectual property is being exchanged more often as an independent asset. Individuals sell inventions to corporations. Universities sell inventions to corporations. Corporations sell trademarks and patents to each

3. Ibid.

4. Ibid.

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other. In all of these cases, the price must be determined and valuation opinions must be developed. Often the values involved are enormous. In such cases corporate managers are required to get outside opinions of value that show that the price of the transaction is fair.

- *Bankruptcy.* Intellectual property values play an important role in bankruptcies. Value opinions are needed for presentation in court as debtors scramble for assets that can satisfy their losses.
- *Licensing.* When the owner of intellectual property is considering licensing a property, the outright value is also a consideration. As an alternative to licensing, consideration is often given to selling the property. In such cases a value opinion is needed.
- *Strategic Alliances.* Often two independent entities come together to form a third entity for the purposes of exploiting new technology. Each party brings different contributions, which often include intellectual property. In order to determine the relative ownership of the new alliance, a value for the independent contributions is needed.
- *Estate and Gift Taxes.* As patents, trademarks, or copyrights are part of an estate, they must be valued. These properties are also becoming the subject of gifts. Patents are given to children. The recipient of the gift enjoys future royalties when the gifted patents are licensed. Value exists in these gifts, and valuation opinions are needed for income tax purposes.
- *Marital Dissolution.* In one case, the value of patents owned by the husband had to be determined as part of the marital assets. As intellectual property is owned by more individuals, its value will play an important part in divorce proceedings.
- *Infringement Damages.* A growing trend in litigation involves patent and trademark infringement. The damages analysis is directed at determining the damages caused by the infringer. The conclusion is not necessarily a fee-simple amount but still involves much of the same type of analysis discussed throughout this book.
- *Intercompany Transactions.* The transfer of intellectual property between related parties comes under the scrutiny of various taxation authorities. As a result, we have valued patents and trademarks that were the subject of domestic and international transfers.
- *Collateral-Based Financing.* As intellectual property becomes the dominant asset of companies, it also becomes the primary collateral on which banks are willing to make loans. Banks are asking for valuation opinions for patents, trademarks, and copyrights as security for their loans.
- *Attorney Malpractice.* Sometimes a patent attorney inadvertently fails to obtain patent rights that should have been obtained. In such instances an opinion of the value that was lost is required for presentation in court.
- *Accounting Requirements.* Acquisitions require that buyers properly state the value of purchased assets on their balance sheets. Since acquisitions are driven by intellectual property and since these assets dominate acquired companies, valuations for accounting statements are becoming common reasons for valuing intellectual property.
- *Regulatory Requirements.* Initial public offering (IPO) documents are more often referring to the importance of the intellectual property of the company that is

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being taken public. Since intellectual property often dominates these companies, a valuation opinion is sometimes presented within the IPO document.

- *Ad Valorem Taxes.* Property taxing authorities traditionally have been limited to taxing the value of fixed assets. Some of the valuation techniques they use capture value that is intangible in nature. In some instances the value of intellectual property and intangible assets must be valued so that appropriate property tax bases can be determined.

1.4 INTELLECTUAL PROPERTY EXPLOITATION

One of the main sections of this book concerns the economic principles relating to the exploitation of intellectual property, with a primary focus on licensing.

Intellectual properties are now at the very core of corporate success. Properties such as patented technology and world-class trademarks are the basis for capturing huge market share, commanding premium prices, and maintaining customer loyalty. They are also in scarce supply. This combination of power and scarcity makes such assets very valuable. Companies that possess such assets will grow and prosper. Those without access to intellectual property will stagnate for a while in low-profit commodity businesses and eventually fade out of existence. Future success therefore requires that companies somehow gain access to intellectual properties. They must create them, buy them, or arrange to borrow them. As a result, licensing and strategic alliances will play a dominant role in future corporate deal making. At the core of these strategies will be intellectual property—especially technology and trademarks.

Companies are seeking to expand product lines, increase market share, minimize new product development costs, expand market opportunities internationally, and reduce business risks. Companies are also seeking to create corporate value for investors. All of this can be accomplished by exploiting patents, trademarks, and copyrights. It is important also to consider the consequences of not having access to intellectual property. Without intellectual property, profits are low, growth is lacking, and corporate value is lost. Corporate managers realize more than ever that access to intellectual property is key to their ability to create corporate value and, more important, key to continued corporate survival. The forces driving the licensing and joint venturing of intellectual property include time savings, cost controls, and risk reduction.

(a) **TOO EXPENSIVE ON YOUR OWN.** Even the largest companies cannot fund all the intellectual property programs that they may desire. Research programs can run into hundreds of millions of dollars annually, and trademark costs can reach billions of dollars. A major force behind the desire to form strategic alliances is the high level of investment needed to create new intellectual properties.

One of the first major joint ventures of the 1990s was the combination of pharmaceutical product lines from DuPont with the distribution network of Merck & Co. The new joint venture company was equally owned by the two companies. Its name was DuPont-Merck. DuPont had a product line of drugs but needed help with international distribution. The time and cost needed to create its own network of sales staff were formidable obstacles to fast growth and return on the research effort that DuPont had in the new drug line. Part of DuPont's worries included the remaining patent life associated with some of its drug products. By the time a self-created distribution network was established, some of the valuable products would be off patent. Full exploitation of patents required that sales be maximized during the premium price years that would exist before generic products hit the market. DuPont needed a way to tap its full market potential fast.

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Merck had annual sales that ran above \$6.5 billion. It also has one of the largest research and development budgets in the world. Even so, Merck has limitations as to the number of new drugs that it can discover, investigate, develop, and commercialize. Access to a new line of already commercialized products was a great attraction to Merck.

The DuPont-Merck joint venture saved DuPont both time and money. It gave DuPont immediate access to an international distribution network. Merck gained immediate access to a whole new product line that would have cost enormous amounts of time and money to develop.

This joint venture is a classic case of how the factors of time and cost drive strategic alliances that are founded on access to intellectual property. It also illustrates how strategic combinations of key intellectual property can reduce the investment risk associated with new strategies. If DuPont had attempted to build its own international distribution network, the cost would have been high and the time needed long, and there was no assurance that it would successfully construct a network that could move the goods. Merck enjoyed a reduction in investment risk by gaining access to the profits associated with the DuPont product line. If Merck had embarked on its own plan to duplicate the DuPont product line, there was no assurance that it would have been completely successful. Furthermore, there existed the risk that the Merck product line could have ultimately infringed on the DuPont product line. The two companies saved research funds, gained immediate access to commercialized intellectual property, and reduced business risk. Judy Lewent, chief financial officer at Merck & Co., told the *Wall Street Journal* that the DuPont-Merck deal “added about a third to our research capacity.”⁵

The cost to establish and maintain world-class trademarks is no different. Huge sums of money are required and customer recognition takes time. One of the first mega-launches of a new product in the cosmetic industry was Yves Saint Laurent’s 1978 Opium party to introduce his new fragrance. In attendance were Cher, Truman Capote, BBC correspondents, the crew of *60 Minutes*, and leaders of the fashion industry. The party cost \$250,000, which in 1978 was a staggering amount for a single party to launch a new product. The total launch budget was \$500,000. It turns out that those were inexpensive times. Similar launch budgets now run between \$20 and \$25 million. Joseph Spellman, executive vice president at Elizabeth Arden, said, “Today everything is global.... The competitive level is way up. The packaging, concept, advertising, staging—all of it has to be fabulous. The attention is always on big productions, so launches have escalated to mega proportions.” The reason for the high costs to launch new product names was simply and accurately described by Edith Weiner, president of Weiner, Edrich, Brown, Inc., trend trackers and marketing strategists, when she told *Mirabella* magazine, “There’s a product glut.... It’s getting harder and harder to get people’s attention.” And this is exactly why an established trademark that already has an attentive audience is valuable.

(b) IMPOSSIBILITY OF MASTERING ALL THE NECESSARY TOOLS. Beyond time and cost factors are capability limitations. Products have become more complex. Mastering all of the divergent technologies that go into a single product is not always realistic. Consider the new battery technology that stores electricity mechanically instead of chemically. Such technology may be the breakthrough needed to make electric-powered automobiles a reality. The new technology may possibly power a car for 600 miles on a single charge. Conventional chemical-based batteries have a range potential of 100 miles at most. The new battery technology is the product of American Flywheel Systems, a company comprised

5. “Financial Prescriptions for Mighty Merck,” *Wall Street Journal*, June 30, 1992, p. A17.

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of former scientists from the Environmental Protection Agency and military aerospace researchers. The new battery is referred to as a flywheel electromechanical battery that stores energy kinetically. It operates on the same principle that drives the ancient potter's wheel. A heavy mass rotates at a very high speed inside a vacuum enclosure suspended by magnetic bearings and controlled by sophisticated electronics. The first electric car was created 100 years ago, but chemical batteries required frequent recharging. The old batteries also involved toxic waste, subjected other car components to corrosives, and introduced an explosion potential. Flywheel batteries were studied in the 1970s but could not be perfected until recently. Advanced technological development in three separate fields of science were required before the flywheel battery could become viable. Advances in composite materials, computers, and electromagnetics were all required to make the flywheel battery a reality.

A confluence of three critical technologies in materials, magnetics, and computing speed were needed to make the flywheel battery a viable technology. Lightweight but strong materials, such as graphite, have come into being recently. In 1990, the army tested a flywheel battery that used graphite components having a tensile strength of 52,000 pounds per square inch. Graphite now has a tensile strength of 1 million pounds per square inch. The second critical breakthrough occurred in computer power. Faster computers allow the performance of millions of calculations and the simulation of thousands of prototypes. This breakthrough allows scientists to turn ideas into working machines more quickly. The third direct scientific advance involved the development of magnetic bearings. These electromagnetic fields allow objects to spin in vacuums without friction. All of these technologies are needed for just one product idea, illustrating the problem currently challenging most companies. Technology is becoming more complex. Investigating any one of these critical technology areas requires a multidiscipline understanding of a wide variety of sciences such as physics, chemistry, and electronics. Advanced knowledge in each discipline is required, not just one specialty and a superficial understanding of the others. Corporations are a lot like people. A professional architect with expertise in marina design cannot cope with the complexities of modern life without outside assistance. Tax-preparation services, medical treatment, lawn services, and many other areas of individual expertise must be acquired from others in order for the architect to survive. Corporations, too, have their specialized areas of expertise, but to deliver the products of tomorrow, these specialized corporations will need to incorporate into their products advanced aspects of different technologies. This will require specialized knowledge that they do not possess and will require them to participate in corporate transactions that are centered on sharing access to technology.

Speaking to the *Wall Street Journal* about pocket-sized cellular telephones, where wireless telecommunications technology must be integrated with portable computing, information services, and satellite technological know-how, John Sculley, former chief executive officer of Apple Computer, Inc., said, "No one can go it alone anymore."⁶

1.5 LEGAL ATTITUDES ENHANCE VALUE

When intellectual property laws were administered inconsistently, owners of trademarks and especially technology were lucky to get requests for license deals. Infringement did not carry the same potential for financial ruin as it does today. When a potential licensing

6. "Getting Help: High-Tech Firms Find It's Good to Line Up Outside Contractors," *Wall Street Journal*, July 29, 1992, p. A1.

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partner approached a technology owner, the leverage needed to demand high royalty rates was not very strong. Enhanced legal protection around the world has made patented technology and trademarks more valuable than ever before. Given this, royalty rates for licenses and joint venture equity splits are moving to higher levels, and intellectual property owners are less interested in outright sales of their valuable properties. In the United States, the patent system was dramatically strengthened with the creation of the Court of Appeals of the Federal Circuit (CAFC). It is the only court in the nation that handles patent and trademark case appeals. The continuity of the court's thinking and decisions has strengthened the rights of patent and trademark owners. It has made willful infringement a very risky proposition. Damage awards by courts are higher than ever before. Several decisions have upheld damage awards that have bankrupted the infringer. Patent rights have been reinforced to such an extent that the value of patents has risen to new heights. The exploitation opportunities of licensing are greatly enhanced and royalty income has risen as a result. The enhanced protection has trebled the avenues by which intellectual property can be exploited safely. Instead of only deriving profits from internal use, the licensing option is now well protected and joint venture projects are becoming common. Instead of deriving only one stream of income from intellectual property, we are more likely to see three: internal use, licensing, and joint ventures. Each of these represents another source of earnings growth that adds to the value of companies.

Legal protection of intellectual property is not limited to the United States. Germany, Great Britain, Japan, and France are all providing strong legal protection for intellectual property. Even the Third World recognizes the importance of protecting these vital assets. IBM was successful in stopping five companies within the People's Republic of China from assembling knockoffs of the IBM PC. Trademark infringement cases are now common in China's provinces. Legal protection around the world is advancing in recognition that intellectual property is the most important asset and must be protected. Much of the GATT treaty negotiations focuses on the proper means for protecting internationally exploited intellectual property. The value of patents and trademarks as a result is enhanced along with the opportunities to expand economic exploitation.

1.6 WHEN INTELLECTUAL PROPERTIES COLLIDE

The third major section of this book concerns the quantification of damages in the setting of infringement litigation. Such litigation is becoming more frequent as business managers are becoming much more sensitive to the role of their intellectual properties in support of earnings and as geographic and technical convergence continues.

The strength and value of patents allow owners to negotiate higher royalties. The new and favorable attitude toward patents originated in the Carter administration and came to fruition in 1981. The patent system was fundamentally strengthened with the creation of the Court of Appeals of the Federal Circuit (CAFC). It is the only court that handles intellectual property-based appeals in the nation. Its decisions have clarified and made uniform U.S. Law. Under 35 U.S.C. 283 (1952) courts may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.

Prior to 1981, when infringement cases were initiated, preliminary injunctions were granted only when there was a reasonable likelihood that the infringed patent could be proven both valid and infringed. While preliminary injunctions typically were granted in trademark and copyright cases, they were seldom granted for patents. The owner of the infringed patent was required to prove the validity of the patent in order to be granted a

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preliminary injunction. Such proof was possible only in those cases in which prior court decisions had found the patent valid. Therefore, injunctions were rarely granted for patent cases. Infringing on an existing patent was not risky because an infringer could continue to exploit an infringing product or service while a court case dragged on. In cases where infringement was decided, damage awards typically were expressed as royalties in amounts that represented what would have been negotiated had the infringer taken a license before beginning the infringing activity. Prior to the creation of the CAFC, infringement was almost a risk-free strategy. The worst consequence an infringer faced was payment of the low royalty that should have been negotiated initially.

Currently, the Federal Circuit standard has placed the burden of proving a patent invalid upon the infringer. This standard supports the patent owner. Infringers must provide clear and substantial proof of invalidity. Otherwise, the patent owner is considered to have a valid patent. This standard of presumed validity is very powerful and renders infringement both costly and risky. Entire manufacturing plants may be shut down and entire workforces indefinitely suspended. As substantial investments by infringers can be rendered worthless, infringement is more costly than ever. This new attitude strengthens the U.S. patent system, making patents even more valuable. Another shift in the legal system that enhances patent values is the willingness of juries to grant huge awards. In addition, where willful infringement is proven, the damage award can be increased to three times the actual amount of damages. The effect can be substantial. In the case of *Procter & Gamble v. Paragon Trade Brands*, the damage award to P&G forced Paragon into bankruptcy.

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