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If you really want to **enhance** your company's intellectual assets, so that you can optimize their full value, then implement the best practices described in this Guide for their protection, risk avoidance, and valuation.

What you'll learn

- ▶ When does enhanced IP (such as patents, mark registrations, copyright registrations, etc.) make strong business sense?
- ▶ Which common IP risks can be easily avoided, which are usually correctable, and which tend to destroy value?
- ▶ What value-added legal practices should your company demand for its patents and marks?
- ▶ What techniques can be used to value intellectual assets?
- ▶ How should likely returns be adjusted to account for IP risks?
- ▶ What factors can strongly influence likely returns, investments, and risks for different types of intellectual assets?
- ▶ How should your company prepare for successfully harnessing the value of its intellectual assets?





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Even if your company already has an arsenal of IP, there are a number of reasonable steps it can take to enhance that IP prior to attempting to harness its value and power. Equally importantly, the likelihood is high that your company has overlooked the potential, and even the existence, of many of its valuable intellectual assets. This section will introduce best practices for determining and optimizing the full value of all your company's intellectual assets and properties, so it will be well-positioned to harness and exploit that value.

Choosing Your Weapons

Get Instant Protection

A few simple adjustments to its practices can allow any company to inexpensively protect its intellectual assets immediately upon their creation.

Protect your company's know-how and trade secrets now!

At a minimum, always immediately label each item that includes or embodies know-how or a trade secret with your company's name and the phrase "Proprietary and/or Confidential". Doing so puts everyone who encounters that item on notice of your company's rights in those intellectual assets.

Next, verify that anyone who potentially encounters your company's know-how or trade secrets is under a clear written obligation to treat those intellectual assets with respect (e.g., don't steal them, maintain their confidentiality, etc.). Ask me to briefly review those written agreements for any major vulnerabilities that might leave you, and your valuable intellectual assets, exposed.

As resources allow, verify and improve your company's physical and digital security, to slow "leakage" of your know-how and trade secrets. I would be happy to consult with you or perform a brief audit to help you determine your company's current secrecy vulnerabilities and how to correct them.





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Promptly secure your marks!

At a minimum, always immediately include a trademark indicator (TM) or service mark indicator (SM) with at least the first use of any of your company's mark on a given page, product, etc.

Next, verify that your company uses its marks correctly. This is not trivial. I have identified over 40 serious, common, yet easily avoided vulnerabilities that could allow hostile licensees, crafty infringers, and blatant pirates to legally steal your company's marks and the expensive goodwill you have built up around them. At least half of those vulnerabilities are related to how a mark is used, regardless of whether that mark is registered.

Feel free to contact me to explore your company's current mark vulnerabilities and how to correct them.

Protect your creative works instantly!

At a minimum, always immediately include a copyright notice on each of your company's copyrightable works (artistic creations), including every article, training manual, software program, photo, video, product brochure, web page, and advertisement, etc.

If the work seems to have at least moderate commercial value, register the work so that it qualifies for statutory damages if infringed.

Explore Enhanced Protections

For many intellectual assets, providing inexpensive instant protections is adequate. Some assets, however, really need much stronger protection, such as patents or federal registration. Although these enhanced protections are discussed in considerable detail in my free Guide, "[Empowering Intellectual Property – Step 5 – Secure](#)", I provide a few additional insights on them here.

Research Patentability

Before your company obtains a patent, it will spend many thousands of dollars preparing and filing a patent application that describes and claims the innovative concept, and after





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waiting several years for examination, at least several more thousands of dollars prosecuting that patent application to issuance. So doesn't it make sense to verify that your company's odds of actually receiving a patent on that concept are reasonably good?

Of course, I write patent applications in a manner that reduces or eliminates all of the legal risks that I can control. But regrettably, I can't actually *control* whether or not your innovative concept is truly patentable. What I can do, however, is help your company, via one or more patentability searches, substantially lower the risk that it will discover rather belatedly (after spending tons of money) that others invented your company's concept first, thus preventing your company from earning a patent on it.

The primary value of a patentability search is that it typically:

- identifies what features of the innovation likely are not patentable
- clarifies what features remain to pursue
- informs patent application drafting so that only likely patentable features are claimed

After you have reviewed the patentability search Guide, we typically discuss differences between your company's innovation and what is described in the found documents. If the differences are not substantial from a patentability perspective, I often will recommend abandoning the pursuit of a patent for that innovation, or enhancing the innovation sufficiently that it extends to a patentable and valuable concept. If there are substantial differences, such that your company's original concept (or possibly a somewhat revised version of that concept) does appear to be patentable and sufficiently valuable, I typically will recommend that we work together to prepare a patent application that claims and describes how to implement that concept. With a reasonable idea of the extent of the found prior art, I can draft those claims to define your company's innovative concept to avoid that prior art.

Hopefully, the above explanation clarifies why it makes great sense to try to determine whether a concept will be patentable before investing substantial sums chasing a patent.





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But innovative concepts are not the only type of intellectual asset that can benefit from searching before filing an application for enhanced protection.

Research Registrability

Just as with innovative concepts, plenty of money and time can be saved by an early registrability search that seeks to eliminate from consideration those marks that very likely are not appropriate for federal registration.

The primary value of a registrability search is that it typically:

- evaluates the potential strength of the mark
- identifies whether the mark is likely to be registrable
- informs brand development and marketing decisions

Determining whether your company's desired mark is registrable typically starts by evaluating the descriptiveness of the mark, followed by determining whether the mark (or one that is confusing similar to it) has already been registered and/or is already in use.

If the desired mark does not seem to be improperly descriptive, I next review existing U.S. Trademark Office federal trademark registrations to see whether your desired mark already has been registered by someone else. If it has, the Trademark Office's assigned examining attorney likely will not allow you to register your desired mark.

If requested, I also will research whether certain similar marks to your desired mark have been registered, such that your use of the desired mark likely would cause confusion in the relevant market, and thus be both unregistrable, and a potential infringement.

When a considerable investment will be made in your company's desired mark and/or where RARE values justify it (see below), I will coordinate an advanced search, which can include searching state and/or foreign registrations, web-based uses of the mark, and/or use of the mark in periodicals or other literature.





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Just as with patentability searches, occasionally, during my search, I identify a registration or use of a mark that appears to be a “direct hit”, such that it “kills” your company’s ability to register and/or use its desired mark. When that happens, I pause the search, inform you of my findings, and work with you to determine whether it is worthwhile to continue the registrability search or to halt it right away and possibly save your company some money.

Early, and sometimes repeated, evaluations of the registrability of marks, and likewise, the patentability of innovative concepts, can help to avoid several risks, especially the risk of spending time and money pursuing mark registrations and patents that simply will not be issued. Of course, there are many other risks that can negatively impact not only whether a patent or mark registration will issue, but also your company’s ability to successfully enforce those protections and harness their value. So we turn next to better understanding those risks and how to reduce or eliminate them.

Avoiding Unnecessary Risks

If you really want to know whether your company’s IP portfolio is at risk, and perhaps ruined, via any of over 120 serious, common, and easily avoided vulnerabilities that could allow hostile licensees, crafty infringers, and blatant pirates to legally steal your markets, then I certainly can help.

Patent Risks

Are your company’s patents crippled by any of over 50 serious, common, and easily avoided vulnerabilities that could allow hostile licensees, crafty infringers, and blatant pirates to legally steal the market for your company’s mission-critical innovations?

Risky Business – A Widespread Culture of Value Destruction

Over **99%** of recently surveyed U.S. patent *applications* had fundamental **drafting** flaws that could have been easily avoided at essentially no cost at all to the patent applicants.





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Similarly, over **99%** of recently surveyed issued U.S. *patents* had at least one fundamental **prosecution** flaw that could have been easily prevented with effectively no additional expenditure.

What I find astonishing is that courts have repeatedly warned patent attorneys to avoid these flaws, in some cases for over 10 years!

In the meanwhile, the presence of these unnecessary flaws infects the resulting patents with substantial legal risks, in many cases so severe that potential licensees likely will devalue, ignore, or challenge the patents, competitors easily will avoid liability for infringing those patents, and the patent owners will lose the ability to maximize the value and power of their innovations.

I have studiously cataloged the vast majority of these flaws and created powerful, proprietary, and *patent-pending* software that can automatically analyze any published U.S. patent application or patent for their presence and potential impact.

Senseless Risks – A Closer Look

Building on my strong litigation background, I know and stay very current on the relevant patent law. I have systemized and leveraged my extensive knowledge, creating a powerful, *patent-pending*, document analysis tool. My innovative software tracks over 100 patent metrics, including numerous risks and benefits springing from how a patent application is drafted and/or prosecuted. Many of those metrics can have substantial impact on the value of the resulting patent. To show their impact, I have linked these metrics to some of the court cases that expose risky practices and punish the patents that take those risks. My ground-breaking tool includes a powerful search engine that can analyze nearly any patent document, such as a patent application or issued patent, for evidence of these metrics, and grade that document accordingly, thereby providing a meaningful *quantitative* measure of just how severely the value of the corresponding patent has been compromised (or possibly *enhanced*) by how it was written and/or prosecuted.

My research conclusively proves that the vast majority of patent applications are written and prosecuted in a manner that is simply oblivious to their impact on patent licensing





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and litigation outcomes. In contrast, as you will see, my patent drafting and prosecution work consistently and substantially outperforms the norms, based on dozens of objective statistical measures.

How do I know? Using my unique custom-designed software tools, I have surveyed tens of thousands of patent applications and patents. I have statistically analyzed the found patent documents according to over 100 metrics of relevant risks and benefits. I link each of those risks and benefits to the relevant court decisions. And those court decisions provide patent-opposing lawyers with the tools they need to help their otherwise apparently infringing clients avoid liability for infringement, or worse yet, invalidate the resulting patents so that they can't be enforced against anyone. So I have the survey data, and its appropriate analysis, that undeniably prove my points.

The results of my surveys and analysis are simply astounding, even to me, and I already knew that most of what passes for good patent work is in fact filled with serious errors, risky practices, and downright ignorance of the law. For example, over **93%** of 8000+ recently surveyed patent applications needlessly included a single legal risk that has been repeatedly explained, harshly criticized, and loudly discouraged by the top federal patent court for unquestionably the past 14 years, and arguably for over 30 years. Yet even today, typical patent applications keep on taking that risk, simply mindless of the potential harm. And that is only the tip of the iceberg. My analysis proves that the problem is much, much worse.

Consider those 8000+ patent applications I studied, which included every utility patent application published by the USPTO for a particular week in April 2010. Less than **1%** avoided 4 basic drafting risks that are very well-known among patent litigators, and would have cost the drafters of those applications essentially nothing to bypass. Even worse, these easily-avoided risks have substantial potential to inflict severe penalties on the patents that eventually result from those patent applications, as conclusively proven by what has happened to other patents having the same risks when their owners tried to assert those patents against competitors in the federal courts. In particular, some of the patents that have taken these risks have been invalidated, meaning that with the stroke of a judge's





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pen, they became completely worthless, and could not be asserted against anyone. In other lawsuits, the patent's claims were interpreted so that the competitor was found not to infringe, thereby completely avoiding liability, and allowing the competitor to continue profiting from the patent holder's market with impunity.

Building Quality Patents by Adding Real Value

Obviously, the patent applications I draft and prosecute carefully avoid these risks, at essentially no additional cost to my clients. And sometimes I am even able to fix the risks earlier patent attorneys created. But I actually go much, much further. In addition to avoiding and sometimes correcting value-destroying risks, I build value-enhancing benefits into each patent application I draft and prosecute. In a moment, I will describe one of those benefits, but first, a little background.

No reasonable expert will dispute that, as a group, U.S. patents issued for pharmaceuticals are by far the most highly valued patents in the world. Some of these "pharma" patents are responsible for protecting literally billions of dollars in profits each year. Given that value, you would expect the owners of these patents to demand quality that goes well above and beyond that of the garden-variety patent. And in general, the pharmaceutical industry "gets it". Upon analyzing typical pharma patents, one of the most striking things that distinguishes them is that, compared to the average patent, the pharma patents tend to define over twice as many of their claim terms.

Why is defining claim terms a good thing? Because although a patent provides its owner with the legal rights to exclude others from making, using, importing, or selling the patent's inventive concepts, it is only the claims of that patent that define the scope of those concepts. That is, the claims define what infringes and what does not. And because words are almost always open to different interpretations, defining the words used in the claims tends to narrow those interpretations, thereby removing many opportunities to define an inventive concept such that it is invalid or not infringed. Simply put, definitions add substantial value to patents.





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Patent case law proves this point again and again and again. The failure to define claim terms has repeatedly led the courts to interpret patent claims so that they are found legally invalid or not infringed, thereby undermining or destroying the patent owner's case, along with the value of their cherished patent.

The pharmaceutical companies apparently have learned this lesson reasonably well. Simply stated, appropriately defining claim terms tends to produce substantial benefits when asserting a patent, whether via licensing or litigation. But why should only mega-billion dollar pharma patents be entitled to this benefit?

I firmly believe that every patent should be written to take advantage of the benefits of defining its claim terms. So while the typical patent attorney only defines an average of 3 claim terms per patent application, with the help of my powerful, *patent-pending* software, I go the extra mile, and define an average of over *111* claim terms in each of my patent applications. That's right. An average of over **111 versus 3**. It doesn't take a rocket scientist to see the value.

So while others continue to weaken their client's patent applications by ridiculously building in huge unnecessary risks, I meticulously avoid those risks, and instead add proven benefits that tend to greatly enhance the value to my clients of their resulting patents.

Want to learn more? Give me a call and let's talk about how I can build quality patents that can tremendously enhance the value of your company's IP portfolio. And in the meanwhile, let's take a brief look at how I also can reduce risks and add value to your company's marks.

Marks at Risk

Are your company's marks undermined by any of over 40 serious, common, and easily avoided vulnerabilities that could allow hostile licensees, crafty infringers, and blatant pirates to legally steal your company's brands and the valuable goodwill you have painstakingly built-up in those brands?

Over 66% of U.S. mark registrations that I recently surveyed suggested fundamental vulnerabilities that could have been easily avoided at little to no cost. Feel free to contact me





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to discuss some of the most commonly-occurring flaws, and how I can help your company easily avoid them.

Knowing Your IP's Value

There are times when you just intuitively know that a given intellectual asset is worth protecting and exploiting. Other times, intuition commands the opposite conclusion. But what about the vast gray middle ground, where the value of securing and capitalizing on a given intellectual asset is somewhat unclear? What should be done with it? How can you be reasonably sure?

Generally, there are 2 basic approaches to determining value, or “valuing”. First, *qualitative* approaches tend to rely on relative comparisons of non-numerical attributes. Example attributes can include:

- How necessary are rights to this IP for others to compete?
- What alternatives are available?
- How easily can infringement be detected?

Yet answers to such qualitative questions can leave a hunger for numerical, that is, *quantitative* analysis that considers these answers, but also weighs the answers to other, more easily measurable questions, such as:

- What will it cost to obtain this IP protection?
- How long will it take to obtain that protection?
- What are the odds this IP will be respected by competitors?
- How much would competitors likely pay to license this IP?
- For how long will this IP be relevant to the market?





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Fortunately, after studying this issue thoroughly, I have developed a thoughtful analytical technique for quantitatively valuing IP at nearly any desired degree of depth. My powerful technique provides values that can be easily understood, analyzed, and compared, thereby promoting sound decision-making.

Looking closer, based on my extensive study of valuation, it is clear that if you really want to figure out the value of your company's intellectual assets and properties, so you know which to pursue, and which to kill off before wasting thousands of dollars, you first need to learn the Risk-Adjusted REturn on investment (RARE) value of each of those assets.

Although I won't belabor the details here, I am happy to show you the way. Contact me to learn:

1. What factors influence likely returns (profits)?
2. What investments are typically required for IP protections?
3. How does timing impact returns and investments?
4. What risks should be weighed?
5. How do likely returns, investments, risks, and timings vary across different types of IP protections?
6. How are RARE values estimated for IP?
7. What RARE values are reasonable thresholds for various business stages and IP types?

Identifying Prospects

To best exploit the value of your company's IP, your company should determine who it wants to target with that IP. A good way to start is by identifying categories of prospects, then narrowing the categories, and finally selecting particular targets within the narrowed categories.

I have developed substantial experience in this area, and would be happy to help your company explore this topic in detail.





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Preparing to Negotiate

At this stage, your company has developed strongly-protected intellectual assets. Those assets clearly fulfill critical market needs. Your company's marketing materials persuasively communicate the value of those intellectual assets to well-chosen targets.

What else do you need to succeed? Plenty. And I can help.

Carry a BIG Stick

Any intellectual asset that has real power is energized by 3 main prongs:

1. robust market desire;
2. strong legal protection; and
3. plenty of financial muscle.

If the market does not care about your intellectual asset, then infringement of your rights to that asset are unlikely, and damages flowing from any such infringement probably will be minimal. Moreover, if the market does not want implementations of your intellectual asset, there will be little to no sales volume, revenues, or profits. Estimating the financial impact of the market's demand is the role of my RARE valuations. Growing the market's desire is the role of your marketing communications. But even huge market demand, by itself, is not enough to assure sustained profits.

When the rights to your intellectual asset are not strongly protected, you likely will not be able to successfully recover for infringement of those rights. On the other hand, if your company has developed strong IP rights, protected using my thoughtful, value-enhancing techniques, those rights often will speak for themselves, command healthy respect in the market, and discourage smart competitors from venturing too near.

But not all competitors are smart, and some feel they are large enough to roll-over smaller players. So even when your company holds strongly secured rights in a very desirable intellectual asset, you still must have sufficient financial ability to enforce your rights. And enforcing IP rights, such as via IP litigation, can be a very expensive endeavor.





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IP litigators are unquestionably very expensive. For example, even when the damages sought are relatively modest, litigating a mark or copyright infringement suit can easily cost your company over \$300,000, and patent infringement suits that don't settle beforehand typically cost between \$700,000 and \$7,000,000 to litigate to a final enforced judgment (and those costs exclude any damages awarded!).

Nevertheless, most such suits do settle long before the legal costs become sky-high. Still, fear of those costs can allow a reasonably well-funded company (such as one that wields a good IP assertion insurance policy) to drive poorly-funded competitors (such as those that do not hold a good IP defense insurance policy) from the market, or into paying a substantial, perhaps crushing, payment to settle the case.

That is, IP assertion insurance can level the playing field by allowing a small company to successfully assert selected IP rights against a deep-pocketed competitor. With IP assertion assurance, a small company can be secure in the knowledge that, in exchange for the payment of relatively moderate premiums, it has the financial muscle it needs to endure sustained infringement litigation while exercising control over its litigation attorneys, strategies, and settlement terms. Feel free to ask me more about this vital topic.

Stay Vigilant

Intellectual property protections, such as patents and registered marks, provide their owners with exclusive rights to the underlying intellectual assets. Those rights can include the legal power to exclude others from making, importing, using, offering for sale, and/or selling implementations of the intellectual asset.

Yet even before such rights have been secured for your company's intellectual assets, you can identify potential infringers, licensees, and business partners, and identify techniques for keeping an eye on them. In my free Guide, "[Empowering Intellectual Property – Step 3 – Survey](#)", you will find helpful explanations of how to survey the market and identify those prospects who are most likely to care about your intellectual assets. Many of these targets are also potential infringers, licensees, and/or acquirers.





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By carefully tracking the activities of a likely target, you can stealthily gather evidence, and build a strong case, without necessarily prematurely tipping-off the target. In the meanwhile, you can investigate, analyze, and prepare strategies and tactics for enforcing your intellectual assets.

Thus, by silently performing such “discovery” and by thoughtfully strategizing, your company can take control of the enforcement process long before alerting the target, and can greatly reduce its costs if litigation is ultimately required.

So at the right time and on your preferred terms, after preparing to take whatever enforcement action is needed, you can persuasively present your case to the target, and thereby drive your desired outcome.

With that guidance in mind, let’s finally turn to the myriad ways in which your company can profit from its well-protected intellectual assets. I cover that final topic in my free Guide, “[Empowering Intellectual Property – Step 7 – Harness](#)”.

Free Tips

Like my free Guides? Then [click this link](#) to sign-up to periodically receive, via e-mail, my free Tips for empowering your intellectual property.

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