

## **A small-business guide to intellectual property**

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The two most precious resources for any small-business owner are time and money. That's why when the subject of intellectual property comes up, many owners run in the other direction. They see images of expensive lawyers and use that as an excuse to ignore the topic, reasoning that it is a problem for big companies to worry about.

The trouble is, with the rise of competition through the Internet and on the global market, understanding intellectual property is more critical than ever for small-business owners. Let's explore some of the common fallacies:

1. For small-business owners, it's not worth the time or effort to secure intellectual property rights.

Daniel Lubetzky, chief executive of New York City-based Kind Snacks, had high hopes when he and his company attended the Natural Products Expo West in Anaheim, Calif., in March. And who could blame him, since his Kind Plus bars had been named the best new product at the Natural Products Expo East last October?

But it didn't take long before Mr. Lubetzky knew something had gone wrong: He kept hearing how one of his competitors had copied the packaging, look and feel of his bars.

Fortunately for Mr. Lubetzky, he had secured crucial components of intellectual property like trademarks, trade dress (the look and feel of a product) and Web addresses after founding his company. Unlike a patent, which can cost up to \$25,000 to secure, trademarks and Web addresses can be obtained relatively cheaply and without the aid of a lawyer.

With the legal documentation to back up his intellectual property rights, Mr. Lubetzky sent the offending company a cease-and-desist letter, which achieved the desired result. "Too many entrepreneurs forget there is more to I.P. than just patents," said Mr. Lubetzky, who happens to be a lawyer.

2. Once I get a trademark, my brand is safe.

It may be. But consider what happened to Tracey Deschaine, who runs a restaurant called Dixie Picnic in Ocean City, N.J.

When Ms. Deschaine opened her business in 2006, she secured trademarks on her business name and logo and on the name of her signature item, "upcakes," which are upside-down frosted cupcakes. The problem, she says, was that even though she had obtained the trademarks, someone monitoring the activity on the United States Patent and Trademark Office's Web site had spotted her application and secured [upcakes.com](http://upcakes.com) as the Web address, or U.R.L., before she could.

"I had no idea that even though I have a trademark, someone else could just go register the U.R.L.," she said. "I wish I had planned ahead and bought the site before I did that."

3. Having a patent gives me the right to produce something.

This is a very fundamental misunderstanding. Actually, what a patent does is give you the right to prevent someone else from producing what your patent covers. "Having a strong I.P. position helps ensure that other people pay you for your innovation like they would a toll on a road," Mr. Kocher said.

But even if you do have a patent, there's no guarantee that someone won't try to get around it. There's also no guarantee that you will win if you fight that person. But if you have your I.P. ducks in a row and a commitment to do whatever you can to defend those rights, you do have a fighting chance — even in a fight against a much larger company.

Consider the example of Cryptography Research, a 20-employee technology firm in San Francisco that specializes in data security. Beginning in 2004, the company made the decision to pursue litigation against the credit card giant Visa, which Cryptography asserted was infringing on its patents covering smart cards. To pursue the case against Visa, however, Cryptography's founder, Paul Kocher, knew he needed a serious war chest in addition to his patent portfolio.

That's why he decided to sell off another piece of his business, patents covering technology that protects Blu-ray discs from piracy, to Macrovision, which is now known as Rovi, in 2007 for \$45 million. "All of a sudden we became a formidable opponent for someone who thought we couldn't fight," Mr. Kocher said. In the end, the gamble paid off, as the two companies settled out of court, with Visa's agreeing to license the technology from Cryptography.

4. If I have a patent or trademark in the United States, I don't need to worry about the rest of the world.

It depends on your business model. Intellectual property rights, which also include country-specific U.R.L.'s, need to be obtained country by country, some of which protect them better than others. The cost can vary, too.

In Japan, for example, it is notoriously expensive to acquire patents. In addition, the annual fees required to maintain the patents there are often prohibitively expensive for small businesses, said Gary Johnson, chief executive of Blue Spark Technologies, a manufacturer based in West Lake, Ohio, that makes small, flexible batteries used in things like radio frequency identification tags.

"What we have done is to develop a strategy to go after I.P. protection in a limited number of countries that we think we are most likely to sell or manufacture in, like the U.S. and China," he said. "A lot of the choice comes down to what your business plan tells you." To decide what your international I.P. strategy should be, consult a lawyer and conduct some cost-benefit analysis to see if expanding your I.P. rights makes sense.

5. People who collect patents but don't actually make anything are "patent trolls," parasites who can make money only by filing lawsuits against real businesses.

The term "patent troll" was coined in the wake of the epic lawsuit fought between NTP, a small holding company, and Research in Motion, which makes the hugely popular BlackBerry. The focal point of the dispute was a patent for wireless e-mail delivery held by NTP — something that R.I.M. eventually would pay millions of dollars to license. But what most people remember about the story is the lawsuits and the notion that NTP was somehow in the wrong for trying to enforce its patent, mostly because it didn't make any products itself.

But consider that many inventors never set out to build a company, only to partner with someone who would bring their products to life. Thomas Edison, for instance, received more than 1,000 patents — many of which he licensed to other companies. "He created what we might consider the first innovation factory," says Mark Blaxill a co-founder of 3LP Advisors, an intellectual property consulting company based in Boston.

A more recent example is Trident Design, a company founded by an inventor, Chris Hawker, which patented and then licensed the design for the PowerSquid. Like Edison, Mr. Hawker's

company invents products, builds an intellectual-property wall around them and then licenses them to other companies.

The PowerSquid is now manufactured by a division of Phillips Electronics and sold by a spinoff of Trident called Flexity. "Our entire business model is leveraging our I.P.," Mr. Hawker said.

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