

Commoditizing Intellectual Property Rights: The Practicability of a Commercialized and Transparent International IPR Market and the Need for International Standards

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In a small recording studio in New York on January 15, 1965, Nina Simone sang the unforgettable lyrics to the song titled “Feeling Good”: “It’s a new dawn, it’s a new day, it’s a new life for me, and I’m feeling good.”¹ It is safe to believe that the talented singer was not crooning about the prospective outlook on intellectual property rights. Nevertheless, today the words bring new meaning to the current intellectual property context. It is certainly a new dawn, a new day, and a new life for intellectual property holders, and they should all be feeling good about it. Intellectual property rights (IPRs), inefficiently applied and arbitrarily valued potential money-earning assets, are on the brink of becoming consistent and transparent articles of trade.

INTRODUCTION

We have always lived in a “knowledge society.” Knowledge, or shared information, is at the core of social capital and development. It has been “at the heart of economic growth and the gradual rise in levels of social well-being since time immemorial.”² While the complexity and specialization of shared information advances, the profound importance of knowledge will never change. The creation of ideas, to be embodied in new products, processes, devices, methods, and business strategies, however, is regarded today with new urgency. Such urgency is not created by a reinvigorated compulsion for social capital. Indeed, that need has never waned. Instead, it is the economy, a newly coined “knowledge-based economy,”³ which demands that such a premium be placed on invention and innovation. This

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¹ The Nina Simone Web, *Feeling Good*, <http://boscarol.com/nna/html/where/feelinggood.html> (last visited Nov. 20, 2008).

² Paul A. David & Dominique Foray, *Economic Fundamentals of the Knowledge Society*, 1 POL’Y FUTURES IN EDUC. 20, 20 (2003).

³ *Id.* (“‘Knowledge-based economy’ . . . is a recently coined term. As such, its use is meant to signify a change from the economies of earlier periods . . .”).

demand has been met with adequate supply. Yet, supply and demand are without a robust and transparent marketplace through which transactions can be facilitated with optimal ease. This article will discuss such a marketplace, its legal and administrative viability, and whether existing international legal agendas are ready to support this phenomenon.

Part I will discuss the characteristics of IPRs that enable them to become freely transferable articles of trade. Specifically, intellectual property regimes afford property rights to ideas, adding value to intangible assets when recognized through a legal system. Free transferability and legal mechanisms which protect the owner of an IPR instead of the creator facilitate an arena that incentivizes the exchange of this value.

A “knowledge-based economy” has brought new suppliers of intellectual property to the table. Nevertheless, increased public recognition of the benefits posed by cross-market licensing and the exchange of IPRs as a versatile and valuable commodity has created the need for an open market for trading intangible rights. As costs increase for maintaining large corporate intellectual property portfolios, and as new technology continues to usurp its predecessors at an alarming rate, old and new rights holders alike need to realize a quick return on their investments. Because of the high transaction costs associated with finding potential buyers and negotiating deals, a transparent and practical international marketplace is advantageous.

Part II sheds light on the current wave of activity in the IPR market. IPR auctions have attempted to commoditize IPRs and bring transparency to the marketplace. Should auctions successfully construct a transparent marketplace, new market participants may be induced to an opportunistic trading forum that could have the equity groups and pension funds investing in IPRs.

The feasibility of an open market for IPRs will be the focus of Part III. A theoretical discussion of the legal implications will be followed by considerations of the practical administration of a commoditized IPR market. Emphasis will be placed on market transparency, buyer due diligence, and IPR valuation.

Finally, in Part IV this paper will attempt to explore the current international system for regulating the trade of intellectual property. While the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) and World Trade Organization (WTO) framework may contemplate the exchange of goods and services encompassing IPRs, it does not adequately provide for a market which will require a higher level of standardization in the areas of antitrust protection and procedural and administrative functions.

Lawmakers and intellectual property holders, worldwide, should begin to embrace the idea of IPRs as a valuable and versatile article of trade. It is

not here yet, but it is coming . . .

I. IPRS: REALIZING THE POTENTIAL TO REALIZE A GAIN ON CREATIVE INVESTMENT

The concern with instilling an incentive to create is not new. Our forward-looking Founding Fathers were quite aware of the significance of new ideas in a flourishing economy. The Constitution reserves exclusive rights to authors and inventors to “promote the progress of science and the useful arts”⁴ These rights were granted with the purpose that such exclusivity and control would afford the creator an opportunity to be rewarded, presumptively with money, for any costs incurred through the creative process. In effect, it is the profit motive that becomes the incentive to create, secured by legal protection of IPRs. Protectionists argue that without legal protection, opportunistic creation cannot be assured.

Legislators across the international spectrum have taken heed to the protectionist argument, affording virtual property rights to intangible ideas in the form of substantial legal protection.⁵ While the debate continues to evolve around the optimal level of protection,⁶ certain rights are granted to the owner of an IPR. It is significant, here, to distinguish between the creator of the intellectual property, and the owner of the government-granted rights associated with that intellectual property, for they may not be the same person. All rights which initially vest in the creator of intellectual property may attach to a subsequent owner of that intellectual property, whether by sale, license, assignment, or gift. The most important attributes of those rights are (1) exclusivity of control over the intellectual property, (2) free transferability of one or all rights, and (3) the ability of the owner to set a price for the license to use, or the ownership of, those rights.⁷

⁴ U.S. CONST. art. I, § 8, cl. 8.

⁵ Alden F. Abbott, Assoc. Dir. Policy & Coordination, Fed. Trade Comm’n, Remarks at the APEC High-Level Symposium on IPR in Xiamen, People’s Republic of China: The Harmonization of Intellectual Property Rights and Competition Policy (Sept. 8, 2005), available at <http://www.ftc.gov/bc/international/docs/abbottipchina.pdf> (“Intellectual Property . . . is a highly valued asset, and it has been granted substantial legal protection by the nations of the world.”).

⁶ *Id.* (“Given the importance of intellectual property in fostering economic progress, one might wonder whether our economies might progress even faster if intellectual property was more freely available for others to use and build upon — i.e., treated more like a public good than private property. I believe the correct answer is ‘No.’”).

⁷ *Id.*

A. *Exclusivity of Exploitation is the Paramount Principle of Intellectual Property Ownership*

The importance of exclusive control over an idea is extracted from a theory not too far from Locke's Labor Theory,⁸ which creates the assumption that by mixing our labor with something, we make that thing our own. Fundamentally, "[i]deas and expressions and inventions are all the product of mixing our labor, in this case our mental labor, with the common property of preexisting ideas and information."⁹ In essence, a government-granted monopoly¹⁰ is endowed to the rights owner for all prospective opportunities to manage that idea. Such control exists through legal positivism only; it exists if and only to the extent that it is recognized by law. As one professor explains:

Intellectually or artistically gifted people have the right to prevent the unauthorized use or sale of their creations, just the same as owners of physical property, such as cars, buildings, and stores. Yet, compared to makers of chairs, refrigerators, and other tangible goods, people whose work is essentially intangible face *more* difficulties in earning a living if their claim to their creations is not respected. Artists, authors, inventors, and others unable to rely on locks and fences to protect their work turn to IP rights to keep others from harvesting the fruits of their labor.¹¹

Generally, economists argue that this practice artificially creates intellectual scarcities.¹² Yet, the legal allocation of intellectual property rights does not attempt to confer a right of exclusive possession of information-goods unless they are kept completely secret.¹³ Unless intellectual property is created to be utilized for internal benefit only, such

⁸ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287–88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (“The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his.”).

⁹ Jim Harper, Dir. of Info. Policy Studies, Cato Inst., Remarks at the Cato Institute Conference on Copyright Controversies: Freedom, Property, Content Creation, and the DMCA (Apr. 26, 2006), in CATO POL’Y REP., July/Aug. 2006, at 15.

¹⁰ Jesse Walker, *How Intellectual Property Laws Stifle Popular Culture*, REASON, Mar. 2000, <http://www.reason.com/news/show/27635.html>.

¹¹ Thomas G. Field Jr., *What is Intellectual Property?*, FOCUS ON INTELLECTUAL PROPERTY RIGHTS, Jan. 2006, at 2–3, <http://usinfo.state.gov/products/pubs/intelprp/iprbook.pdf>.

¹² See Michele Boldrin & David K. Levine, Economic and Game Theory: Property Rights and Intellectual Monopoly, <http://www.dklevine.com/general/intellectual/coffee.htm> (last visited Nov. 19, 2008).

¹³ David & Foray, *supra* note 2, at 38 (“Indeed, to claim a right of possession one must be able to describe the thing that is owned, but no sooner do you describe your idea to another person than their mind comes into (non-exclusive) possession of it . . .”).

as a trade secret, secrecy would be inefficient behavior for any rational, profit-maximizing intellectual property creator. Instead, disclosure is incentivized because the right to exploit an idea is given value in a “knowledge-based economy.” Therefore, the right of exclusivity is the distinct right of beneficial economic exploitation.¹⁴ “This device allows the organization of market exchanges of ‘exploitation rights,’ which, by assigning pecuniary value to commercially exploitable ideas, creates economic incentives for people to go on creating new ones, as well as finding new applications for old ones.”¹⁵

B. *The Free Transferability of an IPR Supplements the Exclusive Exploitation Right, Providing an Open Channel for Efficient and Profitable Exchange*

The inherent characteristics of intellectual property tell us that it cannot be an efficient article of trade. Knowledge “certainly does not resemble conventional commodities of the sort that are widely traded in markets.”¹⁶ Indeed, physical property and intellectual property are different “properties.”

Physical property is a rivalrous and scarce resource, which adds to its intrinsic worth. Furthermore, property rights in tangible goods, from an economics perspective, help facilitate efficient transactional interaction “in the context of scarcity.”¹⁷ Without such property rights, transaction costs would be extremely high because resources such as time and energy would be spent ensuring exclusive possession and protection.

Intellectual property is a non-rivalrous good: An idea and its expression can be used concurrently, by more than one person, and repeatedly without being thereby depleted.¹⁸ Therefore, without more, there is no real private commercial value to be captured in a new idea. Marketable value is only added when exclusive *rights* to exploit that idea or expression are conferred by a legal regime. This tells us that the commercial

¹⁴ *Id.* (“What the creation and assigning intellectual property rights does . . . is to convey a monopoly right to the beneficial economic exploitation of an idea (in the case of patent rights) or of a particular expression of an idea (in the case of copyright) that has been disclosed, rather than being kept secret.”).

¹⁵ *Id.*

¹⁶ *Id.* at 37.

¹⁷ Harper, *supra* note 9 (“If I have an apple and you want to eat it too, we can’t both eat it without bumping our faces together and making quite a mess. In economic parlance, an apple is a rivalrous physical good. No two people can possess it at the same time.”).

¹⁸ David & Foray, *supra* note 2, at 38 (“[I]f Marie eats the last slice of cake in the kitchen, that piece cannot also be consumed by Camille, whereas, both girls may read the same novel either simultaneously or sequentially, and in so doing they will not have rendered the story any the less available for others to enjoy.”).

value is actually in the rights to control intellectual property, and not in the intellect itself.¹⁹

The benefit of the free transferability of IPRs, then, means the benefit of the unrestrained exchange of the rights to exploit an idea or its expression, and not of exchange of the idea itself. The right to freely transfer exploitation rights effectively provides for efficiency in the use of ideas and their expressions, for property rights will be allocated to those who are prepared to pay the most for them. In doing so, “the workings of intellectual property markets . . . tend to prevent ideas from remaining in the exclusive (secret) possession of discoverers and inventors who might be quite uninterested in seeing their creations used to satisfy the wants and needs of other members of society.”²⁰

C. The Right of the IPR Owner to Determine a Price for the License or Sale of that IPR Assists in the Efficient Use of Intellectual Property

The crux of IPR laws is to encourage creation by providing an opportunity to profit from risky and costly innovative endeavors. In the United States., there will always be a prospect of potentially high profit, for “there is no violation under U.S. antitrust law for unilaterally pricing an IPR license ‘too high.’”²¹ Nevertheless, pricing an IPR higher than its worth will inevitably deter its sale or licensure. In this light, an IPR which is invaluable to the owner, such as a patented technology used to gain a competitive advantage in the market, will be priced above that which any potential buyer might pay. Although the owner has a monopoly over that intellectual property, if he or she wishes to sell or license the right of exploitation for a profit in an open and transparent market, however, market mechanisms will force the price to meet demand.²² The IPR will go to the market participant who will pay the most for it or values it more. Besides the case where an IPR “troll”²³ wishes to defensively collect IPRs so that competitors may not obtain them, a buyer will generally have a more valuable use for the intellectual property than the seller. Thus, efficiency is effectuated.

¹⁹ It should be noted that there is social value in nearly every idea, but the focus of this comment is private commercial value.

²⁰ David & Foray, *supra* note 2, at 38.

²¹ Abbott, *supra* note 5.

²² The monopoly position will ensure a price somewhat above that which would be optimal in a pure competition model, but to be sold it will have to be priced reasonably to meet demand.

²³ Perry J. Viscounty, Michael Woodrow De Vries & Eric M. Kennedy, *Patent Auctions, Emerging Trend?*, NAT'L L.J., May 8, 2006, at S12 (“[‘Troll’ is] a term sometimes used to describe patent holding companies that do not practice the patents they hold.”).

D. *IPR Holders are Realizing the Potential for an Open and Transparent Market Where They Can Realize a Gain on Their Creative Investment.*

The recent increase in the supply of intellectual property to the marketplace has produced an abundance of creative and innovative content without adequate means for exploiting and applying it.²⁴ The traditional channels for marketing, selling, or licensing a valuable IPR are no longer sufficient to sustain the rapid influx and the need for transparency. Ideas must be introduced to the market quickly, or else “the next best thing” will usurp the market and the former idea will be stagnated and valueless. Generally, intellectual property is introduced to the market through one-on-one negotiations between attorneys, which are facilitated by private connections. This process is both costly and time-consuming.²⁵ It also facilitates inequities in the marketplace resulting from disparities in bargaining power.²⁶

The values of intellectual property are rising. In fact, they are “becoming too large to trade in a clandestine market.”²⁷ Worldwide sales of IPRs surged with the birth of the digital economy. Annual transactions increased from just \$10 billion in 1990 to \$200 billion in 2007.²⁸ IPR holders are recognizing the rise in value, but more importantly, they are recognizing the saleable nature of the IPR. “[I]ndividual IP rights are increasingly viewed as commodities in their own right and not merely as business tools in the hands of specific enterprises.”²⁹ This position has cultivated a growing need for transparency in the marketplace, where IPR holders, or potential sellers, can find potential buyers. Moreover, transparency is needed to standardize the valuation of IPRs, and to create an arena for open information that will lead to completely informed decisions.

Both old and new IPR holders have a vested interest in the development of a transparent marketplace. Creators generally lack the experience, know-how, and business sense to market their IPR. “[M]ost independent inventors flounder when it comes to getting a patent into the

²⁴ See United States Patent and Trademark Office, Table of Issue Years and Numbers, for Selected Document Types Issued Since 1836, <http://www.uspto.gov/go/taf/issuyear.htm> (last visited Nov. 20, 2008).

²⁵ Kevin J. O’Brien, *Licenses, Once Protected, Are Now Up for Auction*, INT’L HERALD TRIB., May 13, 2007, at 12, available at <http://iht.com/articles/2007/05/13/business/ip14.php> (“Many sellers are hoping for a new sales channel for IP, which is costly to market through the traditional method of hiring patent attorneys to negotiate with potential buyers.”).

²⁶ See *id.* (“Smaller sellers, who often lack the clout to obtain large IP royalty fees in negotiations with corporations, are . . . hoping for better profits [through an IP auction].”).

²⁷ See *id.*

²⁸ See *id.*

²⁹ IPKat, Making a Bid for Monopoly Power, <http://ipkitten.blogspot.com/2007/06/making-bid-for-monopoly-power-ip.html> (June 3, 2007).

hands of the right investor or manufacturer.”³⁰ If they have the resources, they will pay an attorney to do this for them. A corporeal IPR market will open new channels for the creator to realize a gain on his creative investment by bringing visibility to an otherwise concealed marketplace.

Corporations and entities that boast large intellectual property catalogues experience hefty costs in managing and maintaining such catalogues.³¹ Meanwhile, many patents might serve useful functions in other market sectors or industries.³² A transparent market that facilitates cross-market licensing and sales of IPRs would be a lucrative alternative to maintaining patents that are not still highly valued by these entities.

For these reasons, a market is soon to develop. IPR holders will no longer be funneled through traditional outlets, where IPR sales are “primarily accomplished through private transactions, brought about by a loose network of [IP] professionals and innovators who [rely] primarily on private introductions and targeted pitches to put deals together.”³³ Instead, a “more liquid, more public, and more robust market” for IPRs will continue to emerge.³⁴

II. THE NEW MARKET: IP AUCTIONS AND BEYOND.

Market participants have followed the lead of various entrepreneurial companies in creating the new trend: IPR auctions. While the statistical success of these auctions has not been overwhelming, their lasting effect on the market will be great.

A. *IP Auctions Have Brought Needed Transparency to the Market.*

In April of 2006, Chicago-based intellectual property management company Ocean Tomo hosted the world’s first live IPR auction in San Francisco.³⁵ The event recorded sales of almost \$3 million.³⁶ Since the San Francisco auction, Ocean Tomo has hosted auctions in Chicago and New York, and they plan to organize further auctions in chosen U.S. cities.³⁷

³⁰ Sabra Chartrand, *Patents*, N.Y. TIMES, Aug. 9, 1999, at C7.

³¹ O’Brien, *supra* note 25 (“Bayer wants to cut the cost of maintaining 80,000 patents.”).

³² Ann-Kristen Achleitner, Eva Nathusius & Stephanie Schraml, *Quantitative Valuation of Platform Technology Based Intangibles Companies* 4 (Ctr. for Entrepreneurial and Fin. Studies, Working Paper No. 2007-02, 2007), available at <http://www.cefs.de/files/200702-cefs-wp.pdf> (“Contrary to technologies with a single application, platform technologies can serve as cross-market technologies.”).

³³ Viscounty et al., *supra* note 23.

³⁴ *Id.*

³⁵ O’Brien, *supra* note 25.

³⁶ Viscounty et al., *supra* note 23.

³⁷ See Ocean Tomo Auctions, Spring & Summer 2009 IP Auctions, <http://www.ocean->

In May of 2007, one year after the Ocean Tomo auction, the first European auction was held in Munich by IP Auctions, a Hamburg company comprised of European patent lawyers, intellectual property assessors and private investors.³⁸ A few weeks later, Ocean Tomo hosted their first European auction in London. However, nearly two-thirds of the “lots” offered for sale went unsold.³⁹

Poor sales percentages at most of the auctions to date have caused many critics to deem the auctions to be failures. The day after the San Francisco auction, a Wall Street journal headline read “Public Auction for Patents Fails to Sway Buyers.”⁴⁰ Another source declared that the “Ocean Tomo Patent Auction Falls Flat.”⁴¹ Still, many commend the concept and are quick to qualify its shortfalls as conditions of a developing market.⁴² While the auctions “may not . . . [live] up to some expectations, the strong interest in the concept of public patent auctions . . . signals an emerging trend toward a more liquid, more public and more robust market for patents.”⁴³ Importantly, “the trend is likely to continue.”⁴⁴

The concept of auctioning intellectual property is not completely novel, however. Public auctions have been held for IPRs in the context of bankruptcy or dissolution of a business.⁴⁵ Furthermore, private auctions have been held for particular IPRs, in which the seller or a representative invites a selected group of potential buyers to bid on the IPR.⁴⁶ Still, truly public mass-IPR auctions of the magnitude of that which Ocean Tomo has organized is a new model. It will also have the largest effect on the emerging market for IPRs.

The real success exhibited by these auctions is the ability to bring sellers and buyers to a common public forum, providing visibility to the marketplace. The transaction costs associated with finding potential buyers and negotiating deals are erased, at least for a short time.⁴⁷

tomo.com/auctions.html (last visited Jan 11, 2009).

³⁸ O’Brien, *supra* note 25.

³⁹ IMPACT, IP Auction Sets New Record Price, http://impact.freethcartwright.com/2007/06/ip_auction_sets.html (June 4, 2007, 16:42).

⁴⁰ Don Clark, *Public Auction for Patents Fails to Sway Buyers*, WALL ST. J., Apr. 7, 2006, at A11.

⁴¹ Posting of Lawrence B. Ebert to IPBIZ, http://ipbiz.blogspot.com/2006_04_01_archive.html (April 30, 2006, 10:03).

⁴² IMPACT, *supra* note 39 (“[T]he market is still developing and the fact that almost two-thirds of the lots went unsold and most of those that did sell went for less than expected is an indication of that fact.”).

⁴³ Viscounty et al., *supra* note 23.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See O’Brien, *supra* note 25 (“For a decade, Webasto, based in the Munich suburb of

An advantage for the seller, the unique public auction model provides a sense of urgency to the transaction.⁴⁸ Effectively, it shifts the burden from the seller to the buyer. By providing a visible public platform on which an IPR may be offered for sale, the IPR becomes available to competitors who may obtain the valuable asset by offering a higher bid. In the context of direct competitor auction-participants, the right of exclusive exploitation effectively increases the value of the IPR, and therefore increases the sale price to the seller.

The auction model provides benefits for potential buyers as well. Companies will not have to worry about the sale of valuable patents in its respective market to competitors without its knowledge. In this light, transparency is just as important to buyers. Furthermore, prices for IPRs will become public information. This should help standardize intellectual property valuations and ensure that buyers will pay a market price. Consider the following:

With the typical market transaction shrouded in secrecy, potential buyers often are unaware of the intellectual property acquisition opportunities in the marketplace, and consequently are unable to act to pursue them. This often results in their learning about IP which was for sale only after receipt of a licensing or notice letter. This has rendered, and will continue to render, companies susceptible to unforeseeable actions. Conversely, the public nature of the auction enables companies with a licensing interest, or interest in pursuing the development of new technologies and/or portfolio diversification, equal opportunity to know of and pursue opportunities. By making the forum for IP transactions public, the auction provides the market with intelligence of what is available for acquisition as well as assuring that the buyer will pay a true market price for IP assets.⁴⁹

For this reason, “there are sure to be more live, public patent auctions in the near future.”⁵⁰

B. *The Next Step: Entrepreneurs Attempt to Take the IPR Market Online*

The public auction model is quite new, and it is just now starting to find success.⁵¹ Nevertheless, entrepreneurs have experimented with the

Stockdorf, has spent millions negotiating the sale of licenses for its vehicle solar panels to automakers like Mercedes-Benz, Volvo, Opel, Volkswagen and Audi.”).

⁴⁸ *Id.* (quoting Andrew Ramer, president of Ocean Tomo Auctions, saying “[t]he auction is a unique platform; it creates a sense of urgency . . .”).

⁴⁹ Ocean Tomo Auctions, About Page, http://www.oceantomo/auctions_about.html (last visited Jan 11, 2009) [hereinafter About Ocean Tomo].

⁵⁰ Viscounty et al., *supra* note 23.

⁵¹ The latest Ocean Tomo Auction in Chicago on October 24 and 25, 2007, saw a

online forum. While business models differ, they all attempt to shape the market for IPRs while creating visibility for buyers and sellers.

Several start-up companies have attempted to facilitate transactions by creating a central online database of IPRs offered for sale by inventors.⁵² Generally, these companies assist the transaction by providing seller contact information for potential buyers that register with the site.⁵³ Some of them provide for the actual transaction to take place over the internet.⁵⁴ Other sites offer much more than just a forum for the exchange of IPRs. These companies provide complete intellectual property portfolio management consulting services,⁵⁵ as well as an online exchange of intellectual property.⁵⁶ Finally, other companies offer online intellectual property valuation services to the exchange forums, including to Ocean Tomo's live public auctions.⁵⁷

The online birth of an IPR market created a stir.⁵⁸ Perhaps ahead of its time, the market was still developing, and first movers struggled to control the susceptible features of trading IPRs. Those that initiated the movement did not fully consider crucial aspects of a successful IPR market, such as complete information,⁵⁹ buyer and seller anonymity,⁶⁰ due diligence,⁶¹ and

transaction success rate of fifty-one percent, recording over \$11million in sales. See Erin Coe, *Ocean Tomo Gains Ground With Patent Auction*, LAW360, October 31, 2007, http://ip.law360.com/registrations/user_registration?article_id=38977.

⁵² See Free Patent Auction, Free Patent Auction lists Patented Inventions Available for Sale or License <http://www.freepatentauction.com> (last visited Dec. 27, 2008); see also IPmenu, <http://www.ipmenu.com> (last visited Nov. 19, 2008).

⁵³ See Free Patent Auction, *supra* note 52.

⁵⁴ See Taus, <http://www.taus.com> (last visited Dec. 1, 2008); See also Yet2.com, Using This Site, <http://www.yet2.com/app/about/usingsite> (last visited Jan. 11, 2009). Occasionally, a patent has been sold on the online auction megastore, such as U.S. Patent No. 5,806,094, entitled "Light Weight Upper Torso Outer Garment Assembly For Use By a Child." See Viscounty et al., *supra* note 23.

⁵⁵ See About Ocean Tomo, *supra* note 49.

⁵⁶ See Yet2.com, *supra* note 54.

⁵⁷ See PatentCAFE, <http://www.patentcafe.com> (last visited Dec. 23, 2008); See also Taus, *supra* note 54.

⁵⁸ Chartrand, *supra* note 30.

⁵⁹ *Id.* (writing about an online patent exchange that was introduced in 1998, but currently is not functioning. "The descriptions were so brief as to be of little use to an interested buyer: A patent for a wireless color camera, for example, was described only as a 'low-cost wireless color camera, utilizing new CMOS camera technology.' There was no definition of CMOS technology for the uninitiated, and no further explanation of why this particular camera was innovative enough to win a patent and pique the interest of investors. [A random look at other listings found that they all] skimmed on detail.").

⁶⁰ *Id.* ("A lot of inventors are very, very cautious about going online . . .").

⁶¹ See Kevin O'Brien, *Technology Auction Falters in Europe*, INT'L HERALD TRIB., May 21, 2007, <http://www.iht.com/articles/2007/05/21/news/ip.php> ("[O]rganizers did not give buyers enough time to evaluate purchases of complex manufacturing licenses. Prospective purchasers had six weeks to study the intellectual property offered and perform 'due

standardized intellectual property valuation. In order to successfully commercialize IPRs, a viable and advantageous marketplace for both buyers and sellers must take into account these important features.

III. PRACTICAL AND ADMINISTRATIVE CONCERNS

The practicability of a completely fluent IPR market will incur obstacles that other commoditized markets do not. Specifically, (1) transparency must be effectuated without compromising any participants' preferred anonymity or confidentiality, (2) buyers must be given adequate opportunity for necessary due diligence, and therefore dealings may require sufficient prior notice and the disclosure of complete information, and (3) intellectual property must be accurately valued despite its legal requirement that it be novel and unique. Despite these hindrances, a healthy market is not only viable, but it is advantageous for the intellectual property community and a knowledge-based economy.

A. *Transparency Can Be Effectuated Without Compromising Anonymity and Confidentiality Considerations*

Reluctance to enter into a transparent forum has somewhat slowed the development of the IPR market. The founder of *patentauctions.com*, inventor Brian Donzis, realized quickly that “[a] lot of inventors are very, very cautious about going online.”⁶² This is understandably so, for publishing details of a patent may compromise the patent's ingenuity and provoke others to reproduce the idea before it has entered the market. Buyer anonymity is also important in the intellectual property context. Although corporate sellers may have to risk selling to a competitor, buyers of intangible assets may wish to remain anonymous so that those assets may become a competitive advantage not known by its competitors. Furthermore, involvement in intellectual property transactions and auctions could be susceptible to subsequent litigation over intellectual property misappropriation or in which intellectual property must be valued. For this reason, companies facilitating IPR exchanges must be very conscientious of buyer anonymity.⁶³ Still, market transparency must be achieved, and complete information must be available to minimize risk.

Transparency may be achieved in various ways, depending on the medium. The effectual instrument will be the central body hosting the auction or transaction. This neutral facilitating body must act as a redactor

diligence' of legal and financial checks”).

⁶² Chartrand, *supra* note 30.

⁶³ See About Ocean Tomo, *supra* note 49.

of sensitive information while still making critical information available. In the live auction setting, anonymous bidding may take place by neutral agents or representatives, such as proxies appointed by the principal bidder and supplied by the central organizer. It is important that “[s]uccessful [b]idders . . . be identified by paddle number only,” or by some other anonymous means.⁶⁴ Furthermore, due diligence procedures and communications between the buyer and seller may be facilitated through a medium, so that parties to the transaction may remain anonymous.⁶⁵ A buyer may contact the central body first, and the central body would then relay any communications to the seller, who then may communicate with the buyer directly or through the central body. In the online transaction or auction setting, anonymity may be more easily effectuated through the use of anonymous usernames and/or email addresses.⁶⁶ An online secure data library containing all relevant information concerning a listed IPR may be set up for buyers to conduct their due diligence. Ocean Tomo practices both of these strategies for its live auctions.⁶⁷ Finally, to instill seller and buyer confidence, agreements may be offered, and should be entered into as a condition of market participation, promising not to use any party’s involvement in an exchange or auction to enforce an IPR in any subsequent action.⁶⁸

Using such mechanisms, complete information about the IPR for sale may be disclosed in a public forum, while sensitive information about the IPR holder or potential buyer may be kept confidential. Thus, market transparency can be achieved without compromising important anonymity concerns that might otherwise make participants reluctant to enter the market.

B. Proper Due Diligence Can Be Facilitated By Timely and Adequate Notice, and Through Central Due Diligence Libraries

In the wake of recent United States patent litigation, effective worldwide IPR due diligence is more important than ever. In *NTP, Inc. v. Research in Motion, Ltd.*,⁶⁹ patents originally issued by the U.S. Patent and Trademark Office to a Canadian firm, Research in Motion, Ltd., were held

⁶⁴ See Ocean Tomo Auctions, Conditions of Sale, http://www.oceantomo.com/auctions_fall_cos.html (last visited Jan. 11, 2009) [hereinafter Conditions of Sale].

⁶⁵ Ocean Tomo Auctions, Due Diligence, http://www.oceantomo.com/auctions_due_diligence.html (last visited Jan. 11, 2009) [hereinafter Due Diligence].

⁶⁶ For example, individuals who interact with one another on yet2.com are able to list their technology anonymously rather than maintain anonymity through a third-party. See Yet2.com, Using This Site, *supra* note 54.

⁶⁷ Due Diligence, *supra* note 65.

⁶⁸ *Id.*

⁶⁹ 418 F.3d 1282, 1325-26 (Fed. Cir. 2005).

to infringe prior patents held by a U. S. firm, NTP, Inc. The result cost the infringing firm \$612.5 million.⁷⁰ Commentators have criticized the USPTO for issuing low quality patents.⁷¹ Indeed, the decision “highlights the importance of owning high quality patents, or conversely, the risks associated with poor quality patents that the U.S. Patent and Trademark Office can later invalidate . . . and along with losing patent validity, the patent owner also loses their entire patent investment.”⁷²

Due diligence is onerous in the IPR context because of the dynamic faculties of intellectual property, some of which may cause an investment in an IPR to prove worthless. Besides reviewing all pertinent information regarding the creation, registration, assignment, or license of the intellectual property, a buyer should seek review of any cease and desist or demand letters, any threatened or pending litigation, any settlement agreements, and any security interests or security agreements concerning the intellectual property.⁷³ This list is not exclusive.

In a commoditized IPR market, buyers must be given adequate time to conduct due diligence. Without adequate time, buyers will be hesitant to make risky investments, and the market will not develop. The insignificant sales at the first European auction in Munich in 2007 were attributed to the lack of time allotted for bidder due diligence.⁷⁴ Manfred Petri, the general agent for IP Auctions, the firm that organized the event, stated that six weeks “simply wasn’t enough time,” and that “buyers need at least three months to do the complex legal checking to make informed bids.”⁷⁵

While the due diligence process may have stymied the success of the Munich auction, six weeks should be adequate time if sufficient notice is achieved and complete information is readily available to potential buyers in a central library. Due diligence takes time because of difficulties in collecting and organizing all of the relevant information from various sources. In a fluid IPR market, it is the seller’s responsibility to produce this information, and the facilitating body’s responsibility to organize it in a central library. Once the information is gathered and organized, the review

⁷⁰ See *Settlement Ends Blackberry Case*, BBC NEWS, Mar. 6, 2006, <http://news.bbc.co.uk/2/hi/business/4773006.stm>.

⁷¹ See Press Release, PatentCafe, Artificial Intelligence Used for Patent Auction Due Diligence; Evaluation Reports for April 5-6 Auction Gauge Patent Quality (Mar. 16, 2006), <http://www.prweb.com/releases/2006/03/prweb359421.htm>.

⁷² *Id.*

⁷³ Rauer L. Meyer, *Intellectual Property Due Diligence: A Must When Assets are Transferred*, Aug. 5, 2002, http://www.constructionweblinks.com/Resources/Industry_Reportss_Newsletters/Aug_5_2002/IP_due_diligence.htm.

⁷⁴ *European Intellectual Property Auction Generates Poor Sales*, EU AUCTION INFO, May 21, 2007, <http://euauction.info/2007/05/21/european-intellectual-property-auction-generates-poor-sales/>.

⁷⁵ *Id.*

process should not take more than 6 weeks.

The lack of sales in the Munich auction is more appropriately attributed to inadequate notice, something that should fix itself as the market for IPRs, and specifically for IPR auctions, gains popularity and visibility. Growing awareness of the potential for turning IPRs into cash through public forums such as live IPR auctions and online exchanges will breed adequate notice. Potential buyers will watch the market and remain informed. Therefore, as the market develops, so long as complete information is available in an accessible centralized library, such as that utilized by Ocean Tomo,⁷⁶ at least four to six weeks prior to an auction or transaction, due diligence can be sufficiently effectuated.

C. A Transparent Market Will Help Standardize IPR Values By Creating a Market Price Through Increased Comparability

Intellectual Property valuation has proven to be an unsolvable enigma for IPR market participants. Owners “rely on software tools or third party services to quantify a [IPRs] value, and accept at face-value a single ‘score’, or a (\$) dollar value analysis that the software or service computes.”⁷⁷ The services combine and evaluate interactive indicators of IPR value.⁷⁸ Though insightful, the services are not accurate at predicting a sale price for IPRs. At Ocean Tomo’s June 2007 auction in London, a company called TAEUS was exhibiting its IPR valuation service.⁷⁹ It “rate[d]” the listed IPRs for sale, “giving each a score of between 2.4 at the lowest and 3.5 at the highest.”⁸⁰ One patent that sold for £2.85 million had a score of 2.5, but another patent that sold for £50,000 had a score of 2.8.⁸¹

Reliance on these separate services will continue “until a solution is provided by which [holders] can in fact intelligently assess the disparate legal, commercial and technical attributes of a patent.”⁸² While each of these attributes will demonstrate a different value depending on the IPR, all three must be considered interactively for an accurate valuation. Still, in a transparent marketplace, market mechanisms will influence the price that is paid for an IPR, despite its estimated value. As one critic of valuation

⁷⁶ Conditions of Sale, *supra* note 64 (“[Ocean Tomo] has requested each Seller to provide documents and related information relevant to each of Seller’s Lots that, in Seller’s view, are appropriate for due diligence by Bidder. Such documents and information received by OT from Seller [are] made available in the Data Rooms.”).

⁷⁷ Andy Gibbs, *PatentCafe’s New Online Tools Analyze Patent Value*, IP FRONTLINE, June 15, 2005, <http://www.ipfrontline.com/depts/article.asp?id=4231&deptid=8>.

⁷⁸ *See id.*

⁷⁹ IMPACT, *supra* note 39.

⁸⁰ *Id.*

⁸¹ *See id.*

⁸² Gibbs, *supra* note 77.

services has proclaimed, “[t]he difficulty with valuing IPR is the same as valuing a company – at the end of the day you can make estimates but the best test of value is what someone will pay.”⁸³

In a transaction involving the exchange of an IPR, both the potential investor and the IPR holder will value the IPR differently. The investor will assess the current value of the future financial return the IPR could provide, probably amortized over a given term, and discounted for risk and inflation.⁸⁴ In short, this is the current value of the future royalty stream.⁸⁵ The holder will value the IPR by what the market will pay for it. In the context of privately negotiated transactions, “this means there is no automatic ceiling on the price and negotiations will determine the level.”⁸⁶ However, in an open market where public auctions and online exchanges will provide transparency to the marketplace, transaction participants will become more informed, and market mechanisms will influence a market price for IPRs that will reduce reliance on bargaining power and IPR valuation services.⁸⁷ Effectively, prices paid for IPRs will become public information, a useful tool that parties to IPR transactions have not yet enjoyed. Such publicity will assist in comparative analysis, and competitive market forces will help stabilize otherwise arbitrary prices for IPRs. Eventually, buyers will pay a market price.⁸⁸

Standardizing IPR valuations through market mechanisms will only occur if a robust market develops. In 2000, an expert at the WIPO Asian Regional Forum on the Intellectual Property Strategy for the Promotion of Innovative and Inventive Activities asserted this evident position:

[A] market valuation of assets is the most straightforward and acceptable approach as it results from the judgment of a buyer and seller on what is a fair value. For comparable market valuations to be

⁸³ IMPACT, *supra* note 39.

⁸⁴ BUREAU OF WIPO, SEMINAR ON INTELLECTUAL PROPERTY LICENSING AND DISPUTE RESOLUTION 7 (1998), *available at* http://www.wipo.int/sme/en/documents/valuationdocs/arb_lic_cai_98_4.pdf.

⁸⁵ JOHN TURNER, VALUATION OF INTELLECTUAL PROPERTY ASSETS; VALUATION TECHNIQUES: PARAMETERS, METHODOLOGIES AND LIMITATIONS (2000), *available at* http://www.wipo.int/export/sites/www/sme/en/documents/valuationdocs/inn_ddk_00_5xax.pdf.

⁸⁶ INT’L BUREAU OF WIPO, *supra* note 84.

⁸⁷ IPKat, *supra* note 29 (“[T]o the extent that the prices paid for individual lots are known and publicized, it will be far easier for licensors, licensees, purchasers, vendors, lenders, infringers and everyone else to develop an intuitive sense of how much an IP right is worth . . .”).

⁸⁸ Ocean Tomo Auctions, http://www.oceantomo.com/auctions_about.html (last visited Nov. 21, 2008) (“By making the forum for IP transactions public, the auction provides the market with intelligence of what is available for acquisition as well as assuring that the buyer will pay a true market price for IP assets.”).

valid there must be an active market that is trading comparable assets. This occurs in trading common assets like motor vehicles and houses. If these market conditions do not exist, finding reasonable comparisons becomes more subjective and hence, valuations become less reliable.⁸⁹

The expert followed with a note on the state of the IPR market in 2000: “[I]n the case of trading IP assets themselves, the market is not normally sufficiently active, nor is there sufficient public information about details such as price and IP characteristics, to allow reliable comparisons.”⁹⁰ In the last six years, however, companies such as Ocean Tomo,⁹¹ Yet2,⁹² and IP Auctions,⁹³ have entered the IPR market as facilitators of auctions and other IPR transactions. Their presence has initiated a growing recognition of the potential for commercializing and commoditizing IPRs, and has led to the inception of a market where transparent comparability will soon develop real market prices. While experts “[doubt] that the IP valuation industry is about to be put out of business,” they advise observers to “keep an eye on what the institutional investors are doing: once the pensions funds are bidding, we’ll know that IP auctions have come of age.”⁹⁴

IV. INTERNATIONAL IMPLICATIONS, TRIPS, AND THE NEED FOR A SUPPLEMENTARY AGREEMENT

A transparent market of the kind that is soon to unfold will have international implications of no small significance. Because market prices will be fundamentally correlated with the amount of protection an IPR will be given in respective countries around the world, achieving international protection standards is important. The TRIPS,⁹⁵ which came into effect through the framework of the WTO on January 1, 1995, is the most comprehensive multilateral agreement on intellectual property. It provides a floor for protection that signatory members must implement nationally and presents the opportunity for such members to require more protection than this floor. Specifically, Article 1 Section 1 provides the following “Members shall give effect to the provisions of this Agreement. Members

⁸⁹ Turner, *supra* note 85, at 9.

⁹⁰ *Id.*

⁹¹ Ocean Tomo Auctions, *supra* note 88.

⁹² See yet2.com, *supra* note 54.

⁹³ IP Auctions, <http://www.ipauctions.com> (last visited Nov. 19, 2008).

⁹⁴ IPKAT, *supra* note 29.

⁹⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement”⁹⁶

Therefore, TRIPS addresses the need for minimal protection standards. TRIPS was designed, however, to provide protection for IPRs in international trade with regard to the goods and products that encompass those IPRs. It does not contemplate a commoditized international marketplace for IPRs themselves.⁹⁷ Such a marketplace will generate antitrust, ethical, and disclosure problems that will also need a foundation for international standardization that does not currently exist.

A. Antitrust and Restraint-of-Trade Implications of a Robust IPR Market Are Not Adequately Covered By TRIPS

It is easy to envision how an open IPR market might be abused to effectuate circumstances that will restrain competition and trade. Monopoly powers are conferred with the ownership of IPRs.⁹⁸ An open market for IPRs provides the ability to buy monopoly powers without limit, and a single person or entity may have the means and wherewithal to corner a market through such purchases.

Exploiting the market in this regard is even more dangerous in certain developing countries without adequate antitrust laws. The market would allow entities in those countries to gain monopoly positions where they could not be gained before due to insufficient resources for developing new technologies. In other words, a transparent and fluent IPR market would allow developing countries to play “catch-up” faster, but without adequate legal means to regulate such development. As one professor has explained, “Within some of the advanced industrialized countries there are effective competition policies, which work to mitigate the risks that results from the abuse of monopoly power associated with [an IPR]. But most countries do not have comparably effective anti-trust policies”⁹⁹

TRIPS only considers anticompetitive practices in the intellectual

⁹⁶ *Id.* art. 1 § 1, at 96.

⁹⁷ In Articles 3 and 4, with regard to national and most favored nation treatment for the protection of IPRs, TRIPS defines “protection” as involving matters pertaining to the “availability” and “acquisition” of IPRs, TRIPS, *supra* note 95, art. 3-4, at 322 n.3, and Article 62 mentions that members “may require . . . compliance with reasonable procedures and formalities,” TRIPS, *supra* note 95, art. 62 § 1, at 346, pertaining to the acquisition of IPRs. This minimal consideration of the exchange of IPRs is inadequate to support a robust market for reasons that will be explained later in this article.

⁹⁸ See Boldrin & Levine, *supra* note 12.

⁹⁹ Joseph E. Stiglitz, *Knowledge as a Global Public Good*, in GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE TWENTY-FIRST CENTURY 308, 314 (Inge Kaul et al. eds., 1999).

property context with minimal weight, setting forth the following in Article 40:

Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market.¹⁰⁰

While “licensing practices” and “conditions” may be broadly interpreted language, they surely do not contemplate the widespread possibilities for abuse in a commoditized market for IPRs. This position is given further support by the examples of anticompetitive practices offered by the authors in Article 40: “. . .exclusive grant-back conditions, conditions preventing challenges to validity and coercive package licensing.”¹⁰¹ Even more significantly, Article 40 only sets forth that members “*may* adopt . . . measures to prevent or control such practices,” and does not require some minimum standard as it does with IPR protection.¹⁰² Without such a minimum standard, entities in those countries without effective antitrust policies may abuse the market for IPRs. Not only might this be harmful for industries and consumers in those countries, but sellers might be dissuaded from entering the market for fear of selling to an IPR “troll,” resulting in a restraint of trade. Therefore, in anticipation of a robust international IPR market, a supplemental multilateral agreement is needed that *requires* certain antitrust policy standards for members.

B. *Procedural and Administrative Standards Must be Required*

A fluid international market for IPRs will be slow to develop without international standards for administrative and procedural aspects of IPR acquisitions. Disparities will burden cross-border sales, and sellers and buyers will dispute administrative responsibilities, including devices such as international trade certifications and registering transfers of IPRs in respective government offices.

Article 62 of TRIPS only provides that “[m]embers *may* require, as a condition of the acquisition . . . of . . . intellectual property rights . . . compliance with reasonable procedures and formalities.”¹⁰³ Although TRIPS was authored at a time when a robust market for IPRs had not been established, standards for procedures and formalities associated with the acquisition of IPRs need to be introduced and required today. The option to

¹⁰⁰ TRIPS, *supra* note 95, art. 40 § 2.

¹⁰¹ *Id.*

¹⁰² *Id.* (emphasis added).

¹⁰³ TRIPS, *supra* note 95, art. 62 § 1 (emphasis added).

adopt such compliance measures will only slow the development of the beneficial market, for resources will continue to be expended to evaluate the disparities in transaction formalities. This will inevitably deter market participation. Therefore, the developing international IPR market needs a supplemental multilateral agreement that *requires* certain procedural and administrative standards associated with the acquisition of IPRs.

CONCLUSION

It is certainly a new dawn, a new day, and a new life for intellectual property holders, and they should all be feeling good about it. The government-granted rights encompassed in an idea allow the owner of that idea to capitalize on an investment. Until recently, turning IPRs into cash was only effectuated through private negotiations and closed circles, consuming an owner's time and money. A new market for IPRs, however, has been initiated with the public IPR auction setting, a business model that is here to stay. The new market, once fully developed, will provide transparency, liquidity, and access that did not exist through traditional outlets. It will win favor with both sellers and buyers of IPRs. Furthermore, this market will instill an everlasting incentive to create by providing a public forum with more opportunities for turning creative investment into profit.

The challenges this market faces are many. Specifically, (1) transparency must be effectuated without compromising any participants' preferred anonymity or confidentiality, (2) buyers must be given adequate opportunity for necessary due diligence, and therefore dealings may require sufficient prior notice and the disclosure of complete information, and (3) intellectual property must be accurately valued despite its legal requirement that it be novel and unique. These issues can be solved.

Anonymity and confidentiality considerations can be neutralized if a facilitating body acts as a redactor of sensitive information while still making critical information available. The body must play the role of a switchboard, relaying communications between sellers and buyers while providing a centralized and accessible library for due diligence.

Due diligence can be effectively completed if sellers are responsible for disclosing information to the facilitating body, who must set up an accessible library in which buyers can review the information anonymously. This is easily done online in a secure data room using usernames and passwords. Finally, sufficient notice will breed itself once the market is developed, for the burden will shift to the buyers to stay abreast of the market and remain knowledgeable about what is being offered, lest they miss out on something valuable that a competitor might obtain.

IP valuation services will become less relied on as the market becomes developed. The presence of companies such as Ocean Tomo has initiated a growing recognition of the potential for commercializing and commoditizing IPRs, and this has led to the inception of a market where transparent comparability will soon develop real market prices. Buyer confidence will rise once comparability becomes practicable, for they will gain assurance that they are paying what the market would pay, and not what their attorney negotiated in a private deal based on arbitrary estimations, as is done currently.

Finally, a supplementary multilateral international agreement needs to be implemented, requiring minimum standards for antitrust protection, as well as for procedural and administrative duties associated with the acquisition of IPRs. TRIPS was authored without contemplating a robust IPR market in which monopoly powers can be purchased and daily cross-border transactions will involve valuable intangible assets. The TRIPS Council will need to convene at some point in the near future to consider the international implications of the transparent, liquid, and robust IPR market that will soon develop.