
TRIBAL STRATEGY FOR INTELLECTUAL PROPERTY VALUE CREATION AND ECONOMIC DEVELOPMENT

THE NATIVE AMERICAN INTELLECTUAL PROPERTY ENTERPRISE COUNCIL

The Native American Intellectual Property Enterprise Council (NAIPEC) is a national, non-profit organization focused on helping to breathe life into new ideas in the Native American community. Our mission is to grow and cultivate invention, innovation and creativity, and to help support and sustain a new economic infrastructure through the strategic deployment of intellectual property (IP).

NAIPEC supports invention and innovation in the Native American community by helping individual inventors or tribal communities bring new concepts to market. NAIPEC is at the intersection of industry and academia, facilitating opportunity and helping create new knowledge-based enterprises. NAIPEC leads programs that support economic development initiatives in Indian Country, assisting Tribes, Tribal Businesses and Tribal Individuals in strategic business development and IP strategies.

OUTLINE

This paper outlines our approach and guidelines to Native Tribes and Tribal businesses, in assessing, acquiring and extracting value from IP; and how IP as an asset can be leveraged to generate value through innovation; economic development; workforce deployment; and the creation of new enterprise in Indian Country.

INTRODUCTION

We will consider how Tribes and Tribal Businesses might identify and assess IP in the form of patents and patent portfolios; how acquisition and tactical management of these assets can create value in Indian Country through; business development, licensing and asset protection, joint venturing and value creation; and how IP can be leveraged as both legal and business assets.

THE VALUE OF IP

Since President George Washington signed the first patent issued in the United States on July 31, 1790 - to Samuel Hopkins for a process of making potash, an ingredient used in fertilizer – the primary role of a patent was as a legal instrument to defend the right of the patent holder against infringement. Over the last 100 years, patents have also taken on a more strategic role as business, in addition to, legal, assets.

Patents however, can be seen as intangible assets, with little significant value by themselves, and it is only in the context of how the business uses the assets that value can be created.

IP's role as a complementary asset to their other assets - such as manufacturing or distribution, where a protected product or service can be produced – is area where IP plays a role in value creation.

Managing IP assets entails being aware of their role in the enterprise and focusing on how value can be extracted.

INTELLECTUAL PROPERTY AND INDIAN COUNTRY

In a keynote address to the World Intellectual Property Organization in 2004, Chulsu Kim, President of Seoul University, talked about the Korean Experience as a once under-developed economy.

"The intellectual property system was an important catalyst for the development of indigenous technology by (South) Korean companies, several of which have become global market leaders. Korea's spectacular transformation from a poor farming economy in the 1960s with a per capita income of less than US \$100 to a highly industrialized country with a per capita income of US \$12,000 today, resulted from a systematic economic and trade development policy that included incentives for technological innovation and the development of domestic intellectual property assets."¹

In many ways Native American communities in the United States exist as a parallel, often hidden economy.

While steps have been taken to assist and incentivize robust growth in Indian Country, many of the poorest communities today in the US are on Indian reservations², Native youth have the lowest High School graduation rates and highest drop-out rates³, and; according to research conducted by NAIPEC in 2012, Native Americans represent one of the lowest proportions of Patent holders among minority communities, in the US.

Yet, Native Americans have a history of innovation that is, at least, as strong as any other community in the world.

Long before the first European's discovery expedition washed ashore, some of the greatest civilizations in the world thrived in the Americas. Complete with major population centers; technologically advanced cultures that often radically engineered the landscape across the continent, to the point that even "timeless" natural features like the Amazon rainforest can be seen as products of human intervention, these civilizations ultimately fell under European expansion and the disease and cultures that came with it.

These first Americans lived fruitful lives with the benefits of creative and innovative discoveries ranging from arts, environmental sciences, metallurgy, medicine, astronomy, and many more areas of science and religion. Most of these discoveries were handed down from many tribal groups of formal and informal leaders. Many of these valuable discoveries have been overshadowed in the history books and lost in modern history.

Native Americans have always been resilient people which stems from a culture of natural and forced understanding on how to survive and adapt using innovation, with a creative understanding of how to adapt and thrive. Native Americans are known to be spiritual, creative people with a keen understanding

"Intellectual property protection contributes to economic growth in both developed and developing countries by stimulating innovation, cultural diversity and technical development as part of a larger policy framework. Properly used, intellectual property rights can also be key tools for the alleviation of poverty through trade.

*International Chamber of Commerce
"Intellectual Property:
Source of innovation, creativity,
growth and progress" - 2005*

¹ Chulsu Kim, Integrating Intellectual Property into the National Development Policy: the Korean Experience, keynote address at WIPO/KIPO Ministerial Conference on Intellectual Property for Least Developed Countries - 2004.

² According to the Economic Research Service at the U.S. Department of Agriculture, nearly 60 percent of all Native Americans who live outside of metropolitan areas inhabit persistently poor counties. - 2010

³ National Center for Educational Statistics, 2010

on how to adapt to surroundings. There exists a rich, and largely untapped, legacy of finding new ways to improve their environment and efficiently maximizing the ways of making simple things better.

As Plato described, *necessity is the mother of all invention*, and this adage, not only through history but also to our present and future need for growth as a people and a culture, applies as strongly as ever. Native American's proud history has always had a connection to art, sciences, and the ecology both as a way of life and as a method of striving to live.

Today more than any time in history, our modern world is in critical need for true innovation; Innovation that acts as a beacon for economic and global salvation. The contribution of Native Americans has the potential to be more valuable now than ever before.

In codifying the establishment of the Bureau of Indian Affairs, the Snyder Act of 1921 stated that:

"...the Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:

- *General support and civilization, including education.*
- *For relief of distress and conservation of health.*
- *For industrial assistance and advancement and general administration of Indian **property**."*

Intellectual Property, its protection, development and, importantly, its recognition as a key asset in economic development, has developed to a sophisticated level in the 21st Century. Native Americans represent an important source of innovation and invention, not only for the benefit of Indian Country, but also for the economy and well-being of the entire United States.

*"America stands at a critical juncture in our economic evolution, and intellectual property will play a key role in driving our economic growth and renewal...
...IP is – in effect – the global currency of innovation."*

–David Kappos

Under Secretary of Commerce for Intellectual
Property and Director of the United
States Patent and Trademark
Office - 2009 to 2013

This paper outlines tactical ways in which Native American Tribes and Tribal businesses can leverage IP assets in the creation, advancement, and management of critical element of economic advancement.

IP AS A BUSINESS ASSET

Managing IP to extract business value is a new and still evolving field. The greatest advances have been made in North America, driven by the need to produce ever more sustainable revenue streams to satisfy the capital markets. But companies in many other parts of the world are becoming increasingly aware of the potential of IP to enhance existing revenue streams or to create new ones.

“IP and Business: Managing IP as a Set of Business Assets”

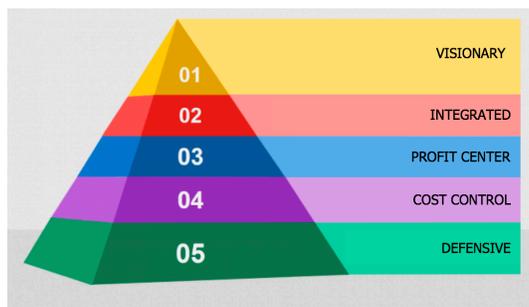
–Dr. Patrick Harrison

Visiting Faculty, World Intellectual Property Organization Academy. February 2008

In examining the potential value of IP and its management, looking at the process in three steps is useful in beginning the process:

1. What is the expectation for the management of IP as a business asset;
2. The roles IP plays, or might play, in supporting business objectives;
3. Creating and managing an IP strategy to meet these objectives.

EXPECTATIONS



In their book, *Edison in the Boardroom: How Leading Companies Realize Value from Their Intellectual Assets*, Julie Davis and Suzanne Harrison identify five levels of sophistication in the way that businesses might approach IP management.

This hierarchy, shown in this pyramid, is a useful way to think about expectations.

- **5. Defensive.** IP for defensive purposes only. The goal here would be to protect innovations, to ensure that they don't infringe the IP of others, and to obtain more IP. Costs associated in obtaining, maintaining, filing fees, enforcement and other legal expenses must be taken in account.
- **4. Cost Control.** This level still has elements of being defensive, but also focuses on finding ways to obtain protection **while** simultaneously minimizing the costs of creating and maintaining IP.
- **3. Profit Center** Businesses may begin to license out their IP, or otherwise to use it in support of their company business activity.
- **2. Integrated.** Businesses use IP across the enterprise. – by integrating into existing business lines, or creating new enterprises, pursuing joint ventures and alliances and licensing arrangements, and asserting the value of their IP in their industry sector, or in new ventures.

- **1. Visionary.** At this level of IP management sophistication, companies take a long-term view of the company's role in business and in its industry. They seek to use the company's IP to create more strategic value.

It should not be inferred from this pyramid that the highest level of sophistication equates to the “best” level of IP management. What matters is to determine which level best suits the needs and capacity of your particular company. A thorough understanding of what the company at large, as well as its executive management, expects from IP is an important first step toward determining whether, and to what degree, the firm aspires to obtain business value from its IP, or whether it wishes to obtain purely defensive value.

What business roles can IP play?

In the 2008 Intellectual Capital Management Gathering, major companies, including; Procter and Gamble, Hewlett Packard, Microsoft, Philips, Visa, Johnson, and Du Pont were asked to identify the different business roles that their companies have assigned to their IP. These are shown in the table below.

Objective	Patents	Trademarks	Know-how	Relationships
Conflict avoidance/ resolution	<ul style="list-style-type: none"> • Protection (exclude others) • Design freedom • Cross-licensing (defensive) • Litigation bargaining power 	<ul style="list-style-type: none"> • Protection (exclude others) 	<ul style="list-style-type: none"> • Protection (trade secret) 	<ul style="list-style-type: none"> • n/a
Revenue generation	<ul style="list-style-type: none"> • Patents: sales, licenses, infringement policing • Increased bargaining power • Market penetration • Increased speed to market 	<ul style="list-style-type: none"> • TM: sales, licenses, co-branding, infringement policing 	<ul style="list-style-type: none"> • Sales, licenses, joint ventures, strategic alliances, integration, increased speed to market 	<ul style="list-style-type: none"> •
Cost reduction	<ul style="list-style-type: none"> • Tax donation • Litigation avoidance • Access to technology of others • Improved knowledge transfer 	<ul style="list-style-type: none"> • Litigation avoidance • Access to technology of others 	<ul style="list-style-type: none"> • Litigation avoidance • Improved knowledge transfer 	<ul style="list-style-type: none"> • Reduced marketing costs
Strategic position	<ul style="list-style-type: none"> • Reputation / image • Competitive blocking • Barrier to competition • Consumer/ supplier control • Optimization of core technology 	<ul style="list-style-type: none"> • Name recognition • Consumer loyalty • Barrier to competition • Joint venture • Strategic alliance 	<ul style="list-style-type: none"> • Reputation / image • Barrier to entry 	<ul style="list-style-type: none"> • Reputation / image • Consumer loyalty • Barrier to entry

In determining business strategies, and how IP can play a role in creating new opportunities, it is important to critically evaluate the types of roles shown above and overlay them on the overall business objectives of the Tribal Business or enterprise. To the extent that these roles are appropriate for a Tribal

business, the development of a business or strategy plan should evaluate the expectations for IP management. These evaluation techniques would include:

1. Reviewing the business' strategic vision and strategic plan.
2. Evaluating what IP might do to support the business strategy and hasten its journey toward the long-term vision.
3. Determine which IP business roles seem most applicable.

IP STRATEGIES FOR INDIAN COUNTRY

For many years Native communities and businesses have relied on a small number of strategies for creating economic development and businesses opportunities on Tribal lands. Tribes do have a number of advantages that many other communities cannot offer, including:

Federal Tax Exemption

As sovereign entities, tribal governments are exempt from federal taxation.

⁴According to a 2012 article in "Forbes" magazine, in 2012, Native American tribes operated 422 gaming facilities on tribal lands with no Federal income tax obligation on earnings.

State Tax Exemption

State governments do not have the authority to tax tribal governments or the businesses of individuals living on Indian reservations when the income originates from reservation resources. This includes state property and income taxes.

Accelerated Depreciation

As of 2013, businesses that operate on Indian reservations may depreciate property used within the reservation at an accelerated rate. To illustrate, property that businesses must usually depreciate over three years can be depreciated in two years, five-year property can be depreciated in three years and 20-year property can be depreciated over 12 years. This reduces the property tax liability of businesses and creates an incentive to invest in businesses on Native American lands.

New Market Tax Credits

As of 2013, businesses and individuals who invest in Indian reservations may claim the New Markets Tax Credit. This program allows investors -- businesses and individuals -- who invest in Indian reservations to claim a tax credit of 39 percent of the cost of the investment. The tax credit is spread over a seven-year period. For instance, if a business invests \$100,000 to remodel a warehouse on an Indian reservation, the business may claim a tax credit of \$39,000

From its foundation, NAIPEC has sought to identify and help create new business opportunities in Indian Country, separate from dependence on such enterprises as 8A Contracting and Federal Procurement as minority enterprises; or from reliance on Gaming – as more States look to liberalize gaming laws and undermine the 'monopoly' status Native Tribes have enjoyed in many States since the passage of the Indian Gaming Regulatory Act of 1988 (IGRA).

⁴ FORBES Magazine: Oct. 11 2012. Native American Casino And Tax Rules That May Surprise You <https://www.forbes.com/sites/robertwood/2012/10/11/native-american-casino-and-tax-rules-that-may-surprise-you/#172060752306>

The acquisition, management and deployment of intellectual property assets represents an opportunity for Native Tribes to not only create new enterprise on Tribal lands, but also the prospect of becoming the lead, sole-source providers of products and technologies, that the Tribe owns as an intellectual property asset.

Tribal owned business enterprises may also enjoy the benefits of integrated management, Tribal government oversight, and the ability to formulate long-term planning across sectors, with the common interests of the Tribe as a whole paramount to developing the goals and objectives of any planning process.

There are a number of tactics that a Tribe or Tribal business might employ in considering the integration of IP assets into any business or strategic planning process:

- **SPONSORING OF INNOVATION AND IP CREATION** – Many Tribes currently work alongside educational and/or corporate entities in the co-development of technologies and intellectual property. Tribes can create and retain rights to this intellectual property and leverage the ownership of these rights in the creation or extraction of value from its use in industry.

NAIPEC is currently working with the Indian Energy and Economic Development division at the U.S. Dept. of Interior to sponsor regional support networks (TIP-HUBS) for Tribal inventors and innovators. These will provide access to third-party resources (such as SBA, University and Colleges, and organization such as the SCORE Mentor Network).

Tribes such as the Navajo in New Mexico/Arizona have a vibrant program working with NASA and have recently launched their own Navajo Tech Innovation Center, an initiative of the Navajo Tech University, aimed at sponsoring and supporting new enterprise on Navajo Tribal lands.

- **ACQUISITION OF PATENTS AND PATENT PORTFOLIOS** – Whether acquiring patents, or a portfolio of patents, directly from the inventor or from the current patent holder, the acquisition of IP assets in this manner creates a wealth of opportunities for a Tribe or Tribal Business. These include:
 - The identification, within a portfolio, of complementary technologies, and their associated IP instruments (patents) that support, or augment;
 - An existing Tribal enterprise
 - The strategic business development plan for the Tribe – new business opportunities on Tribal land
 - Existing or proposed joint ventures, or third-party outsourcing agreements with other Tribal entities **OR** non-Native businesses around the country, or world.
 - The exercise of the patent-holders rights, in terms of:
 - Licensing opportunities with existing or potential users of the patents
 - Prosecution of the patent-holders rights in instances of infringement
 - The retention of the IP asset as a foundational part of any future Tribal business strategic business planning, protecting the invention against future plans to leverage it as a part of proposed or envisioned business development plans.

The IP strategies that a Tribe or Tribal business might employ, are typically focused on unique needs, industry position, or tactics, contained within a long-term business plan.

We have identified four IP strategies that can act as a foundation for current or future planning and these can be seen in the context of the pyramid described above:

- **VALUE CREATION.** IP can be viewed as a business asset as well as a legal asset. IP managed centrally can open opportunities in licensing and joint ventures. Value is created from the direct use of the IP itself, expanding the opportunities to create business enterprises and agreements beyond the products and services protected by the IP.
- **STRATEGIC MANAGEMENT.** IP can be viewed as both a key corporate, and business asset. Both can reap significant value, by creating unique – and IP protected - business enterprises, shielding the business from competition by its ownership of the IP assets, and creating the position of being the unique provider, or holder of the technology. For this to be effective, Tribes should choose wisely the IP assets they create or acquire and be aware of both the economic and competitive landscape in which the IP asset plays primarily. This can also inform and guide the creation of strategic and business planning, with IP resources moving from intangible to actual, marketable and value-creating business assets.
- **RISK MITIGATION.** As a part of the Tribal asset portfolio IP is seen as a legal asset. This might involve focusing on process compliance, processing product clearances and protecting innovations in the marketplace. A key activity for those pursuing this strategy is portfolio building and cross-licensing to avoid litigation.
- **COST REDUCTION.** Creating and holding a portfolio of IP assets will also involve a cost reduction strategy. The effectiveness of IP protection program is enhanced by simultaneously looking at ways to make the portfolio as efficient and cost effective as possible, while retaining those assets that can, or might in the future, create value for the patent-holder.

Patent portfolios should be;

- Rigorously examined at the point of acquisition and at regular intervals, to identify assets that might be sold or transferred – together with their ongoing maintenance obligations.
 - Consistently monitored to eliminate unnecessary patents.
 - Enhanced by the creation or acquisition of new patents that protect business or innovation built around existing, owned patents
 - Managed effectively to; monitor and create standard country-filing lists, if necessary; minimize exceptions, tighten internal review processes, and, importantly, align the trademarks and brands with products built on the portfolio.
- **VALUE EXTRACTION.** To create and maintain the value of a patent or patent portfolio IP assets can be processed through one or more complementary assets (e.g. manufacturing or distribution, whether through Tribal owned businesses or with third-party enterprises) and then sell the resulting product or service.

At the same time, and simultaneously, IP assets can also be directly converted into revenue, by:

- Selling the patent or patents contained in a portfolio
- Licensing the technology that the patent protects

- Protecting the patent by exercising the rights of the patent-holder against infringement
- Creating joint venture enterprises, where the required business assets (manufacturing, distribution etc.) do not currently exist
- Forging strategic alliance to access to markets otherwise not available
- Creating the position of sole-source – and premium – provider, based on the patent ownership and management
- Creating new, Tribal-owned business enterprises based on the IP asset.

SUMMARY

Tribes and Tribal businesses have a unique opportunity to maximize their position, as indicated above, in the areas of tax-exemption and other fiduciary instruments. The addition of a comprehensive and active Intellectual Property Asset portfolio, and accompanying strategic plan, can enhance these opportunities by orders of magnitude

The creation, acquisition, strategic management and value extraction potential of carefully considered IP asset portfolios can maximize the amount of value extracted from each protected asset. Tribes have a unique opportunity to play in a new and profitable space, where the value of the IP assets it owns can create and maintain significant economic development and business opportunities for generations to come.