

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-0515

Memorandum

To: Members, Committee on Small Business
From: Committee Staff
Date: July 9, 2018
Re: Hearing: "Innovation Nation: How Small Businesses in the Digital Technology Industry Use Intellectual Property"

On Wednesday, July 11, 2018 at 11:00 a.m., the Committee on Small Business will meet in Room 2360 of the Rayburn House Office Building for the purpose of examining how small business owners in the digital technology industry utilize intellectual property and the issues they face when navigating the intellectual property processes.

I. Background on Digital Technology and Small Businesses

Digital technology allows small businesses to sell their products and services all over the world. Not only does digital technology benefit small businesses by lowering their operating costs, developing market automation, and improving customer relationships, but small businesses can expand by entering the digital technology industry themselves. More than just taking advantage of digital tools to improve a pre-existing small business, small businesses are becoming the digital tools, and small businesses in the digital technology industry continue to emerge. While each company is unique, these small businesses have developed first and foremost because of their utilization of technology. As a result of their unique innovations, small businesses create intellectual property, but in turn face challenges in protecting their ideas.

According to a report by the United States Chamber of Commerce, Morning Consult, and Facebook, 84 percent of small businesses use at least one major digital platform to provide information to customers.¹ Moreover, 75 percent use tech platforms for sales.² Clearly, technology is changing the way small business is conducted. Digitally advanced small businesses realize significant benefits. The top 20 percent most digitally advanced small businesses earn twice as much revenue per employee, are three times as likely to be creating jobs, and are three times as likely to have exported over the previous year.³ Nevertheless, 80

¹ C_TEC ET AL., EXAMINING THE IMPACT OF TECHNOLOGY ON SMALL BUSINESS: HOW SMALL BUSINESSES USE SOCIAL MEDIA AND DIGITAL PLATFORMS TO GROW, SELL, AND HIRE 6 (Jan. 18, 2018), available at https://www.uschamber.com/sites/default/files/ctec_sme-rpt_v3.pdf.

² *Id.*

³ DELOITTE, CONNECTING SMALL BUSINESSES IN THE US 4 (2017), available at <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-connected-small-businesses-Dec2017.pdf>.

percent of small businesses are not taking full advantage of digital tools simply because they are unaware of them.⁴

Digital technology also plays a vital role in the American economy. The United States is the largest technology market in the world. The tech industry accounts for about 9.2 percent of direct economic value in the United States, or approximately \$1.6 trillion.⁵ Additionally, net tech employment accounted for 7.2 percent of the overall workforce in the United States, and the tech industry employed 7 million people in 2017.⁶ The average tech industry wage is also 10 percent higher than the average national wage.⁷

II. Background on Intellectual Property

Intellectual property plays a vital role in protecting creative and innovative products and ideas, including digital technology, and contributes significantly to the American economy. America's intellectual property is worth \$6.6 trillion, which is more than the nominal GDP of any other country.⁸ Intellectual property-intensive industries employ over 45 million Americans, and jobs in these industries are expected to grow faster over the next decade than the national average.⁹ Intellectual property also accounts for 52 percent of all merchandise exports in the United States, or nearly \$842 billion.¹⁰

There are four main types of intellectual property: patents, trademarks, copyright, and trade secrets. Each type of intellectual property has different attributes and criteria that must be met in order to be protected.

A. Patents

A patent is a grant of a property right from the United States government that permits the owner to “exclude others from making, using, offering for sale, or selling” an invention in the United States and the right to exclude others from importing the invention into the United States for a limited amount of time.¹¹ The United States Patent and Trademark Office (USPTO) is responsible for issuing patents. Generally, a patent protection lasts for 20 years, starting from the date the application for the patent was filed, and is subject to maintenance fees. After the patent has expired, any member of the public is free to use, manufacture, or sell the invention. One study found that most patenting firms are small businesses, but because they patent less

⁴ *Id.* at 1.

⁵ COMPTIA, CYBERSTATES 2018: THE DEFINITIVE NATIONAL, STATE, AND CITY ANALYSIS OF THE U.S. TECH INDUSTRY AND TECH WORKFORCE 15 (2018), available at https://www.cyberstates.org/pdf/CompTIA_Cyberstates_2018.pdf.

⁶ *Id.* at 10.

⁷ *Id.* at 15.

⁸ GLOBAL INNOVATION POLICY CTR., *Why is IP Important?*, <https://www.theglobalipcenter.com/why-is-ip-important/> (last visited July 6, 2018).

⁹ *Id.*

¹⁰ *Id.*

¹¹ 35 U.S.C. § 154(a)(1); U.S. PATENT & TRADEMARK OFFICE, *General Information Concerning Patents* (Oct. 2015), available at <https://www.uspto.gov/patents-getting-started/general-information-concerning-patents>.

frequently, the majority of patents in the United States are held by a small number of large firms.¹²

B. Trademarks

A trademark is a word, name, phrase, symbol, design, or a combination thereof, that identifies and distinguishes the source of the goods of one party from others.¹³ Similarly, a servicemark is the same as a trademark except that it identifies and distinguishes the source of a service instead of a product. A trademark generally lasts as long as it is used and is defended against infringement. Like patents, trademarks are issued by the USPTO and applications can be filed online. A trademark registration is valid for 10 years and may be renewed in 10-year periods as long as the trademark is used in interstate commerce.

C. Copyright

Copyright is a protection for the authors of “original works authorship” from the time the works are created in a fixed form.¹⁴ Copyrights can be granted for many types of work, including literary, dramatic, musical, artistic work, as well as books, songs, plays, jewelry, movies, sculptures, paintings, and choreographic works. Computer software and business materials such as marketing materials are also protectable by copyright. Certain works such as titles, names, short phrases, ideas, methods, and processes are not protected by copyright.

A copyright protection can be obtained from the United States Copyright Office, and registration generally consists of a small filing fee. Generally, copyrighted works are automatically protected from the moment of their creation for the life of the author, plus 70 years after the author’s death. Similar to trademarks, a person does not have to register a work to be protected by copyright. However, registering a work provides important advantages. For example, a registered copyright allows the author to establish a public record of a copyright claim, which can be used to bring an infringement suit in federal court.

D. Trade Secrets

A trade secret consists of any information that derives economic value from not being known to the public and that is subject to reasonable efforts to maintain its secrecy.¹⁵ This can include marketing plans, financial projections, secret recipes, or other methods of conducting a business. Trade secrets are protectable as long as the information is a secret, has commercial value, and reasonable steps are taken to protect the information. There is no registration system for trade secrets, and there are no formalities to obtain rights to a trade secret. Businesses often use nondisclosure agreements to maintain the confidentiality of trade secrets.

¹² U.S. PATENT & TRADEMARK OFFICE, INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: 2016 UPDATE 4 (2016), available at <https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf> [hereinafter 2016 UPDATE].

¹³ 15 U.S.C. § 1127; U.S. PATENT & TRADEMARK OFFICE, *supra* note 11.

¹⁴ 17 U.S.C. § 102; U.S. PATENT & TRADEMARK OFFICE, *supra* note 11.

¹⁵ DEBORAH E. BOUCHOUX, INTELLECTUAL PROPERTY: THE LAW OF TRADEMARKS, COPYRIGHTS, PATENTS, AND TRADE SECRETS 7 (Cengage Learning ed., 5th ed. 2018).

III. Intellectual Property Considerations for Small Businesses in the Digital Tech Industry

With the increasing use of digital platforms to inspire small business innovation comes responsibility in protecting the idea. In the process of protecting an idea, many small businesses face hardships and challenges. Intellectual property rights provide a small business with a sense of ownership over their product and can prevent other companies from stealing their idea. Additionally, securing intellectual property rights ensures that a small business is marketing an original idea and not accidentally stealing somebody else's, which could lead to massive legal battles. Specifically, challenges can arise because business owners may not fully understand which intellectual property protections to choose from. Additionally, they may undervalue their intellectual property, may not have an in-depth IP strategy and may not fully protect their confidentiality. Confidentiality is a major threat to a small businesses' intellectual property because if it is not protected, intellectual property can become public knowledge.¹⁶

Entrepreneurs and small business owners have generated more than 63 percent of new jobs over the last two decades, and small businesses represent about 96 percent of employer firms in high-patenting manufacturing industries.¹⁷ Unfortunately, many small business owners are not aware that they should protect their innovative products and ideas through intellectual property protections. Those small business owners who are aware of intellectual property rights do not always know how to navigate the intellectual property process, and it can be very expensive.

A. *Small Business Awareness of Intellectual Property Protections*

Small businesses can be at a disadvantage compared to large businesses because they do not always have the knowledge or resources to prevent the theft of their ideas and products. A study by the USPTO found that only 15 percent of small businesses that conduct business overseas know that they need to file for intellectual property protections abroad.¹⁸ In 2012, the Small Business Administration (SBA) and USPTO released a joint report on international patent protection for small businesses.¹⁹ The report found that many small businesses may benefit from extending patent rights outside the United States, but few were aware of the necessity or the mechanisms available to accurately and effectively pursue an international patent. The report determined that the USPTO and the SBA are well positioned to build upon several successful current intellectual property education and training programs in order to reach more small businesses.

¹⁶ UPCOUNSEL, *Intellectual Property for Startups: Everything You Need to Know*, <https://www.upcounsel.com/intellectual-property-startup> (last visited July 6, 2018).

¹⁷ U.S. SMALL BUS. ADMIN. OFFICE OF ADVOCACY, FREQUENTLY ASKED QUESTIONS 1, 4 (June 2016), available at https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf.

¹⁸ INT'L TRADE ADMIN., *Why Should Small Businesses Protect Their Intellectual Property?*, STOPFAKES.GOV, <https://www.stopfakes.gov/article?id=Why-Should-Small-Businesses-Protect-Their-Intellectual-Property> (last published July 26, 2016).

¹⁹ See U.S. PATENT & TRADEMARK OFF. & U.S. SMALL BUSINESS ADMIN., INTERNATIONAL PATENT PROTECTION FOR SMALL BUSINESSES (Jan. 2012), available at https://www.uspto.gov/sites/default/files/aia_implementation/20120113-ipp_rpt.pdf.

B. Navigating the Intellectual Property Process

The idea of navigating the intellectual property process can be daunting to many small business owners. Additionally, small business owners may not always know which intellectual property protection they should be obtaining, as many products or ideas can qualify for multiple types of intellectual property protections. Conducting research to determine which intellectual property protections to obtain and filing for those protections can take a significant amount of time for a small business owner who is not familiar with the process.

C. Cost of Intellectual Property Theft

The theft of intellectual property can be financially devastating for a small business owner. According to the Federal Bureau of Investigation, intellectual property theft costs billions of dollars every year to American businesses.²⁰ Thieves also specifically target small business owners and startups because of their limited financial ability, and often the business owner cannot afford to file lawsuits against them. Additionally, hiring an attorney to help a small business navigate the intellectual property system can be very expensive.

However, intellectual property can play an important role in helping a small business grow. For example, a 2015 study found that, on average, intellectual property right-holding firms earn 20 percent more in revenue per employee and pay, on average, 20 percent more in wages.²¹ The difference is even more significant for small businesses, as they earn 32 percent more in revenue compared to their counterparts who have no intellectual property protections.²²

IV. Conclusion

Intellectual property can play a vital role in helping a small business grow and protect their innovative and creative ideas and products, especially in the digital technology industry. Small businesses are also beginning to rely more heavily on digital technology to grow their businesses. However, small business owners do not always have the tools they need to successfully navigate these systems or determine which intellectual property rights they may be entitled to. This hearing will further explore how intellectual property can help small businesses in the digital technology industry, and how to better prepare them for navigating the intellectual property system.

²⁰ FED. BUREAU OF INVESTIGATION, *Intellectual Property Theft/Piracy*, <https://www.fbi.gov/investigate/white-collar-crime/piracy-ip-theft> (last visited July 6, 2018).

²¹ 2016 UPDATE, *supra* note 12, at 4.

²² *Id.*