

Intellectual Property's Competitive Advantage

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Intellectual Property, Competitive Advantage, and Government Contracts

The terms "competitive advantage" and "success" are closely related. Every company strives for a competitive advantage, even if they are not exactly sure what it is. All companies want to be the first to market, or to make a product faster, cheaper, or better than their competitors. If they can do that, they gain a "competitive advantage."

Such an advantage gives that company superiority because they can offer lower prices, a product with greater value, or both. And a company with superiority over their competitors can generate greater sales or margins, and is more likely to retain its customers.

How Intellectual Property Law Affects Competitive Advantage

There are two main types of competitive advantage:

- Comparative advantage
- Differential advantage

Comparative advantage (or cost advantage) is a company's ability to produce a good or service at a lower cost than its competitors. This allows the company to sell its goods or services at a lower price than the competition, or to generate a larger margin on sales. For example, Folger's coffee is one of the cheapest brands available, and many customers purchase it for precisely this reason.

Differential advantage is created when a company's products or services are different from their competitors and are seen by customers as superior. Starbucks coffee, for example, is far more

expensive than Folger's, but many customers believe Starbucks offers a better product and purchase it for this reason.

Thus, a competitive advantage enables a company to create superior value for its customers, and superior profits for itself. So where does intellectual property (IP) fit in? Actually, IP factors into both value and profits. When a distinctive and desirable feature is protected under the laws governing IP, such a position enables a business to provide a product or service that differs from its competitors.

More specifically, it enables the owners of the IP to deny others the right to practice or use their property. However, the fact that your offering is protected by intellectual property law can also be used as a cost advantage. If a competitor's next best option is more expensive, then the IP can also create a comparative advantage. Thus, a company's creative innovations, as well as their success in protecting intellectual property, are often directly tied to their success.

Intellectual Property Law and the U.S. Government

An important consideration if you hold the rights to IP is how the government fits in when it wants your product and might become your customer. This is easier to understand when you imagine two competitors going head-to-head. The one with the competitive advantage usually wins. But another aspect of competitive advantage and IP is the business-to-business exchange.

Companies that are customers are also in competition, and they too desire a competitive advantage. A business wants to secure a reliable source of goods or components that will not comprise their own products. If they use knockoffs or products with questionable IP rights, they run the risk of disrupting their business based on an IP challenge against its supplier. This is precisely why, when all else is equal, the company that holds intellectual property rights is a far more attractive licensor.

Will the Government Respect Your Intellectual Property Rights?

If the government wants your product, do they care if you have IP rights? Yes and no. The vast majority of government contracts include what is called the "authorization and consent clause" (48 CFR 52.227-1). To briefly summarize, this clause gives the right for a contractor to use, in the performance of its contracts, any invention described or covered by a U.S. patent. The same applies for copyrights. Remember, since the government grants the patents and copyrights, the government can write its own rules as to whether or not they apply to the government.

So if the government is your customer, why should you care about intellectual property? The reason is two-fold. First, in all practicality, the government does not go around authorizing companies to infringe on the IP of others to fulfill its own contracts. Indeed, there are executive policies in place outlining how the government respects and recognizes IP rights. And, if the government does authorize a company to infringe on IP rights, the government can be forced to pay the owner a reasonable royalty. So despite the government's ability to circumvent the law, there are still practical reasons to protect your property.

The second reason comes back to competitive advantage. The government does not have any competitors in the sense of a commercial market. But it is extremely cost sensitive. And the authorization and consent clause mentioned above does not extend to trade secrets. Thus, a properly crafted intellectual property protection strategy developed in consultation with an intellectual property lawyer can provide a company with a competitive advantage, even when dealing with the government. Such an advantage can spell the difference between success and failure, no matter who your customer is.



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