RECOMMENDATION 3
Create Freedom of Action through Intellectual Property

The third recommendation is: start with the premise that intellectual property is most valuable insofar as it creates freedom of action for your organization rather than as an offensive weapon against others. In doing so, recognize also the extent to which your brand may be wrapped up in your intellectual property. This is another strong reason why the battlefield metaphor can distract you if you rely on it to the exclusion of other conceptions of intellectual property. And this part of the argument applies equally to any kind of organization, whether a for- or nonprofit one.

There are many kinds of freedom of action that intellectual property can help establish for your organization. I’ll highlight three here.

The first is the most obvious and important: if you hold intellectual property, you can choose whether to exploit it in the marketplace or do something else with it. If you
don’t gain these rights initially, you may be frustrated in terms of what markets you want to enter, what deals you want to do, or how you want to relate to your customers or competitors, patrons or students, listeners or visitors. The asset class of intellectual property is fundamentally about ensuring that you can compete when and how you think best for your organization.

The Samsung smartphone example is instructive here. The most significant aspect of intellectual property assets is their ability to enable your organization to compete in the manner and at the time you wish to do so. Before Samsung—or any other device maker for that matter—could take on Apple and RIM in the smartphone market, Samsung’s executives had to analyze its intellectual property assets, determine whether there was a shortfall in terms of the rights they had amassed to date, make decisions about whether to aggregate more assets, and then integrate the process of design into the process of assessing the risk of entering the market with an incomplete set of rights. This is one of the primary jobs of the intellectual property strategist: to work closely with engineers and their managers to determine if what they want to do will result in a trip to the courthouse to fight with a competitor over whether they’ve got the right to enter the marketplace with their new product or service. The difference in the experience of an organization that is able to enter a new market successfully and one that is held up by a lawsuit, demanding an
injunction against the introduction of a product or service, is vast.

In some industries, huge patent portfolios have created a détente between large organizations, where one cannot sue another for patent infringement because too many of their own products violate the intellectual property rights of the organization that they were considering suing. The intellectual property regime is sustainable and effective where it creates the ability for you, and your partners and licensees, to do something.

A second form of freedom of action enabled by intellectual property is tightly related to knowledge management. Intellectual property can help your organization to function more effectively. For the intellectual property you have developed within your organization, its primary function may be simply to help your organization to do its work better. Intellectual property, for instance, can help you to become an increasingly data-driven enterprise. The data that your organization collects about its own work along with the actions of your customers or competitors may not be something that you sell as analytics but it also may be the crucial grist for the mill of cost cutting, development of new markets and products, or simple process improvements along the way. Put differently, the process of knowledge management—a field unto itself—is central to a great organization’s productivity, even if it does not seem to affect anything external to the company such as
revenues in a direct way. Your organization’s intellectual property strategy should be integrated with your knowledge management strategy in ways that support the organization’s operations and growth.

Last, your intellectual property is inextricably linked to how you establish, manage, and use your brand as an organization. The person responsible for your intellectual property strategy ought to have a strong connection to the person responsible for your brand image. These concepts are related in ways that matter a great deal to the value assigned to your organization and your relationships with your customers. The obvious connection between intellectual property and brand is through the trademarks you own.

It’s important to appreciate from the start the extent to which your brand value is intertwined with intellectual property rights. The way that you treat your intellectual property can affect how your customers and others in the marketplace come to view your organization. For a large, admired organization—think of Johnson & Johnson, General Electric, the New York Public Library, the Guggenheim Museum, and the Louvre—its brand itself is among its greatest assets. The organization’s brand is integral to its overall enterprise value. The trademark of an iconic organization like Johnson & Johnson is enormously valuable, as are individual product trademarks, such as Band-Aid (evoking safety and reliability in treating minor wounds,
for instance) or Neutrogena (evoking cleanliness and a certain stylishness). These trademarks have value because they convey trust, and stand for a positive relationship between customers and products developed over many years.

The clever use of your intellectual property can also help to burnish your brand, company’s reputation, and relationship to your customers without fear of misappropriation or interference with your brand’s long-term value to your organization. On Twitter, the broad platform that allows users to post messages of 140 characters or less, people play an open, unstructured game called “What Disney show are you?” Users of Twitter use a code known as a hashtag to associate their username with the name of particular Disney shows. This game offers Disney executives terrific insight into their customer base, draws connections between their intellectual property and their customers, and builds brand awareness across properties. Such a strategy draws on the concept of crowdsourcing not just as an intellectual property-gathering strategy but also as a manner of building relationships with a community in service of brand development.

But in other respects, this recommendation is extremely tricky. The hard part is to determine when and how to enforce your intellectual property if someone else appears to be violating your rights. There is a tension here that cannot be wished away, between protecting what’s rightly yours to control and letting others make use of your assets.
There are many reasons why an organization may choose to enforce its intellectual property rights to the fullest extent that the law allows when third parties violate those rights. From a public relations standpoint, though, it’s equally important to know when not to overreach. Sometimes, the best way to improve your brand is to give away or license intellectual property to others, or look the other way when your intellectual property is violated.¹ Your lawyer will be able to give you a better sense of the risks if you decline to enforce your rights in a given instance; it is important to ask. There’s no reason why having a strong intellectual property strategy means you have to become an enterprise known as a bully. Sharing can be good for a brand. It is also good to be known as a fair player in the marketplace—honestly licensing to and from others for the benefit not just of the organizations involved but your customers too.

Consider the cautionary tale of Disney and the piñatas in South Central Los Angeles.² Disney and four other organizations filed copyright and trademark lawsuits against small businesses that sold Winnie the Pooh piñatas for children’s birthdays from stores with dirt floors. The story of these lawsuits traveled far and wide due to coverage in the *Los Angeles Times*. Similarly, a Web site called UnhappyBirthday.com advocates against Time Warner for “actively” enforcing its copyright interest in the song “Happy Birthday.”³ In the mid-1990s, the American Society
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of Composers, Authors, and Publishers ran into a public relations quagmire concerning whether it threatened Girl Scout leaders with lawsuits over campfire singing. And sometimes the licensing of your brand can include risks. If you let someone else use your brand, they may do something with it that brings trouble to you and your company. Consider the experience of Yahoo! in licensing its brand to a Chinese partner, Alibaba. When the Chinese police used data from a Yahoo! mail account held by muckraking journalist Shi Tao as part of the evidence to jail him, Yahoo! suffered from a public relations, government relations, and legal nightmare. Yahoo! executives in Sunnyvale, California, claim they had little to do with the incident, but the costs of the damage were paid mostly by the company at large, not its partner operating the local brand in China. In licensing your brand to others, you may be limiting your ability to build long-term value in the brand directly as well—in other words, you potentially may be limiting your freedom of action in the future, depending on how you structure the deal.

You may also run a degree of risk if you overreach in trying to protect intellectual property that is not yours, or not yours alone. Starbucks ran into a problem when the coffee company sought to establish a trademark in some of the most famous coffee brand names in Ethiopia. The company included the word “Sidamo” in one of its trademark applications in the United States. Starbucks was also
accused of working through a trade association to oppose Ethiopian coffee growers’ ability to establish formal trademark interests in these names in the United States. Whatever role the company in fact played in the process, the news media reported widely that Starbucks was costing Ethiopian coffee farmers hundreds of millions of dollars per year through bullying tactics related to intellectual property. The perception of overreach was sharply at odds with Starbucks’ efforts to promote itself as a socially conscious company on a global scale.

The core concept is that intellectual property assets should be developed, managed, and used in a way that emphasizes ongoing freedom of action for your organization. In other words, don’t let intellectual property get in the way of achieving your core goals. It can become a distraction for some organizations instead of a driver to get you where you want to go. You may make a short-term, revenue-oriented decision to maximize your return on these assets, but you should do so with your eyes open about the longer-term consequences of those actions. The freedom that you can gain or give up in the longer run is often the most important thing to bear in mind when you are making day-to-day decisions about your intellectual property.