INTELLECTUAL PROPERTY: PROTECTING THE INTELLECT OR THE PROPERTY?

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*A careful consideration of the fundamentals of the mind's creative processes shows us that arriving at an intellectual property (IP) is effectively like issuing a 'share' in IP's business of exploiting knowledge and information. In consonance with Mr. Buffet's philosophy that price of a company's share should not be considered indicative of the value of the company, the process of creating an IP is not an appropriate indicator of the value of the IP. Therefore, an IP's true value is determined by the quality of knowledge or information embodied in a creative work or an invention itself and not necessarily by the process utilized to arrive at it. It is also more accurate policy-wise to base protection of an IP upon the value of the creation or invention rather than on the process used to arrive at that IP.***

I. INTRODUCTION

Price is what you pay, value is what you get.[1]

The ten simple words that appear above summarize multi-billionaire investor Warren Buffet's philosophical stance on investing. This philosophy emphasizes that there is a crucial difference between the price one charges for something and its true value.[2] That is, in the investment world it is important to recognize the reality that stock market *prices* are both volatile and rarely accurate, a natural result of humans being prone to regularly getting "carried away by periods of 'irrational exuberance' or 'bouts of panic'."[3] Contrarily, the *value* of the company largely remains stable, mainly because when purchasing

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** Abstract supplied by the Board of Editors.

1 Warren Buffet, *Berkshire's Corporate Performance vs. the S&P 500*, *Report to Shareholders*, February 27, 2009, available at www.berkshirehathaway.com/letters/2008ltr.pdf (Last visited on May 9, 2013).

2 Edward Rizzo, *Price is What you Pay, Value is What you Get*, January 20, 2011, available at http://www.timesofmalta.com/articles/view/20110120/business-features/price-is-what-you-pay-value-is-what-you-get.346185 (Last visited on May 9, 2013).

3 *Id*.

a share of a company, the investor buys into the assets of the business, the value of which ultimately depends on how the business itself is structured.[4]

This powerful notion of distinction between price and value can be readily applied to the world of intellectual property ('IP'). Specifically, the process of creating an IP (which in this paper can be in the form of individual or group talent, time commitment, energy, labor, and even financial expenditure—and is thus to be distinguished from patent law's 'patentable processes'), is related to Warren Buffet's reference to the price 'paid' for the IP. Mr. Buffet's concept of 'value' is analogized in IP to the value placed on the invention[5] or creative work (that is, the IP itself). Just as in Mr. Buffet's philosophy, where the price paid for a share in a company should not be considered indicative of the value of the company (and one must thus analyze the business itself to gain a sense of its value), so too is the process for creating an IP rarely a true or even fair indicator of the protection the IP deserves.

There is little doubt that IP plays a critical role in most nations' economies and heavily impacts their standards of living. Indeed, IP has been described as the economic exploitation of 'knowledge and information'.[6] Furthermore, "[i]ntellectual capital is recognized as the most important asset of many of the world's largest and most powerful companies".[7] In order to understand the reasoning behind so many societies' recognition of intellectual products as protectable 'property' and thus answer the oft-posed policy-based question of exactly what we 'should be' protecting (i.e., the creation itself or the process of creating it), it is necessary to begin the analysis by paying due credit to the source of all IP: the intellect.

After the fundamentals of the mind's creative processes are considered, it will become clear that, analogous to Warren Buffet's investment philosophy, arriving at an IP is effectively issuing a 'share' in IP's business of exploiting knowledge and information. Thus, the IP's value is determined by the quality of such knowledge or information embodied in a creative work or an invention itself, and not necessarily by the process utilized to arrive at it.[8]

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4 *Id*. (These assets can be "tangible assets (such as property, equipment and financial assets) as well as intangible assets such as the goodwill or brand name").

5 35 U.S.C., §101 (The 'invention' can be a "new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof").

6 Monisha Deka, *Pre-Professional Intellectual Property Education*, 46 IDEA 143, 143 (2005) (quoting Rita Hayes, Speech, *Promoting Intellectual Property for Economic Growth*, 36 Vanderbilt J. of Transnatl. L. 793, 795 (2003)).

7 Kelvin King, *The Value of Intellectual Property*, *Intangible Assets and Goodwill*, June, 2003, available at http://www.wipo.int/sme/en/documents/value_ip_intangible_assets.htm (Last visited on May 9, 2013).

8 It shall be demonstrated that while the process of creating the IP should have no legal recognition *per se*, the creative or inventive processes are nevertheless more than adequately recognized in circles outside the legal world. This, as will be discussed further in Section II, includes media attention and general acclaim in the inventor or author's social and professional circles.

Put simply, and in tune with Warren Buffet's notion, the price paid for (i.e., the process of arriving at) an IP should not be considered if one seeks to accurately judge the value (i.e., protectability) of a creative work or invention. The benefits of such a result-focused policy on IP protection become apparent when one considers not only the underlying current policies and theories behind IP law, but also the real-world benefits. Supporting examples of this notion are presented throughout this paper as well.

This paper explores the reasoning behind the argument which seeks to exclude "the process of creating or inventing" from determining legal protection of the creation or invention. Accordingly, Part II of this paper begins by analyzing the ground from which all IP sprouts, the human mind, and how this supports the argument for a process-product distinction in IP protection. Part III follows by summarizing how the four main bodies of IP law[9] achieve the ultimate goal of promoting progress in science and useful arts by awarding protection to the value created rather than the process of creating it. Finally, Part IV closes with an overview of the main points covered herein, and leaves the reader with a sound takeaway message derived from Warren Buffet's investment philosophy, customized for application to the IP realm.

II. INTELLECTUAL PROPERTY'S COMMON ROOTS: ALL IP STARTS AT THE SAME PLACE

When determining whether one's process (i.e., mental approach or methodology) in arriving at an intellectual property should play a role in determining its protectability, it is necessary to begin the discussion with an analysis of where IP ultimately begins.

A. THE ULTIMATE ORIGIN OF ALL INTELLECTUAL PROPERTY: THE HUMAN BRAIN

The human brain "is the most complex organ in the human body," which produces "every thought, action, memory, feeling and experience of the world".[10] Physical evidence of the astonishing complexities in the interactions of the mind's biological components is readily apparent in each individual's strengths and weaknesses.[11] These strengths and weaknesses are translated into

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9 The four main bodies of intellectual property law discussed herein are: patent law, copyright law, trademark law, and trade secrete law.

10 Helen Phillips, *Introduction: The Human Brain*, September 4, 2006, available at http://www.newscientist.com/article/dn9969-introduction-the-human-brain.html (Last visited on May 9, 2013).

11 Grace Rubenstein, *Brain Imagery Probes the Idea of Diverse Intelligences: MRI Scans Show that Human Abilities Come in Many Combinations*, April 1, 2009, available at http://www.edutopia.org/multiple-intelligences-brain-research (Last visited on May 9, 2013) (Brain research has shown that "the complex abilities apparent in individual kids are reflected on the inside, as

how humans respond to problems and how each human is capable of developing unique solutions to those problems.[12] Accordingly, some solutions are found through a painstaking process of trial and error, while others may be seemingly effortlessly and sometimes 'accidentally' discovered. As an example, this principle can be applied to the process of creating an artistic or other original work. Some people are considered blessed, for instance, with a talent for painting portraits. On the other hand, others may struggle to accomplish that same task, and may not even be able to create a comparable work at all. Still, these same individuals who exhibit weaknesses in one area or field may find a "balance in talents" by having superior strength in another.[13] This rich variety of abilities grant the world great wealth in the power of diversity in the ways and methods in which problems can be solved and in which creativity can be manifested.

Examples of the differing styles of problem solving and creativity are abound in the production of works of various kinds. In the musicians' world, focused repetition (i.e., practice), inspiration, and even one's unique perspective on life are attributed as governing how a song is written (and even how it is played and sung).[14] Regarding paintings, it took Michelangelo four years of labor and planning to complete his famous work on the Sistine ceiling in Italy,[15] and yet, as historians agree, Leonardo Da Vinci also spent four years painting

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well as the outside. Parts of the brain involved in reading, math, music, and personal relationships are different – larger or smaller, more or less active– in every child. And perhaps most surprising, scientists have established that learning and practicing certain skills can cause the corresponding brain areas to morph and grow").

12 *See*, *e.g.*, Nancy C. Andreasen, *A Journey into Chaos: Creativity and the Unconscious*, 9 Mens Sana Monographs 42 (2011), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3115302/(Last visited on November 24, 2013) ("The creative process is characterized by flashes of insight that arise from unconscious reservoirs of the mind and brain. During the creative process, the brain works as a self-organizing system").

13 *See generally* John Robert Dew, *Are you a Right-Brain or Left-Brain Thinker?*, 29 Quality Progress 91 (1996), available at http://bama.ua.edu/~st497/pdf/rightorleftbrain.pdf (Last visited on November 24, 2013) (Pointing out that individuals have "developed comfortable patterns of thinking that are reinforced in the neural networks of [their] brains" and in order to "achieve [one's] full potential", one must understand one's own mind, and that of others, in order to appreciate the differing personalities that result from varying brain 'dominance' among individuals).

14 Tom Jacobs, *The Musician's Brain*, Pacific Standard March 17, 2008, available at http://www.psmag.com/science-environment/the-musician-s-brain-4698/(Last visited on November 24, 2013) (Finding in musicians that "one fundamental part of the creative process can be traced to specific brain activity"); *See also* Robin Frederick, *Notes on Songwriting*, available at http://www.robinfrederick.com/write.html (Last visited on May 9, 2013) (Urging aspiring songwriters to consult sources "that have emotional energy" for the writer); Write a Song, *Getting Started With Songwriting*, available at http://www.writeasong.org/(Last visited on May 9, 2013) (Explains that "[s]ong writing is a great way to express creativity and to share thoughts [and] emotions with others").

15 Jamie Katz, *The Measure of Genius: Michelangelo's Sistine Chapel at 500*, Smithsonian.com, April 10, 2009, http://www.smithsonianmag.com/arts-culture/The-Measure-of-Genius-Michelangelos-Sistine-Chapel-at-500.html (Last visited on November 26, 2013).

the celebrated, yet much-smaller-in-size, Mona Lisa.[16] In the inventive sector, the glue on the widely used 'POST-IT® Notes' was not even considered for its present purpose until six years after the glue itself was originally formulated for its then-failed use as 'super glue'.[17] It took a so-called 'flash of inspiration' to recognize its potential as the ideal glue for temporary paper fixation on an object. At the other end of the spectrum as far as labor and time required to achieve a useful result, Thomas Edison and his team of researchers famously arrived at the improved, long-lasting light bulb after experimenting with thousands of different types of filaments to achieve the desired glow and longevity.[18]

Given the above examples, it would be unfair and indeed highly inaccurate to, for example, claim that art lovers gain more pleasure from viewing Leonardo Da Vinci's Mona Lisa than Michelangelo's Sistine ceiling painting simply because more work (or process) per unit surface area of painting and more agony in getting the work of art 'just right' was (arguably) involved in Da Vinci's work. Both of these artists invested a great deal of time and effort into their creative works, and society values them immensely, regardless of the time and effort invested per unit area of painted surface. Similarly, sales of both POST-IT® Notes and light bulbs have hit the same order of magnitude (i.e., $Multi-Billions USD),[19] and consumers are likely to be completely unaware that one innovation was the result of a "flash of genius" process while the other was the result of a painstaking trial-and-error process. If there are so many ways to manifest a product of the mind, legal protection of those solutions cannot and should not be awarded based on the process one takes to arrive at them.

B. CREATIVITY IN INTELLECT SUPPORTS A VALUE-BASED PROTECTION APPROACH

History has shown that the most extraordinary discoveries and works have come from truly surprising sources. Take grapheneas an example. Graphene is a transparent, one-atom thick layer of carbon that is remarkably

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[16] Lairweb, *Mona Lisa*, available at http://www.lairweb.org.nz/leonardo/mona.html (Last visited on September 27, 2012).

[17] Post-it® Brand Products, *About Post-it Brand*, available at http://www.post-it.com/wps/portal/3M/en_US/Post_It/Global/About/About/(Last visited on September 17, 2012).

[18] Enchanted Learning, *The Invention of the Light Bulb: Davy, Swan and Edison*, available at http://www.enchantedlearning.com/inventors/edison/lightbulb.shtml (Last visited on September 27, 2012).

[19] *See* Ben Block, *Life-Cycle Studies: Post-it Notes*, *World Watch Institute*, 2013, available at http://www.worldwatch.org/node/6387 (Last visited on November 24, 2013) ("Post-It-Notes now generate some $1 billion annually and dominates the self-stick note market."); IBIS World, *Lighting & Bulb Manufacturing in the US: Market Research Report*, June, 2013, available at http://www.ibisworld.com/industry/default.aspx?indid=780 (Last visited on November 24, 2013) (Reporting the U.S. lighting & bulb manufacturing industry to have a revenue of $3 billion USD).

"[one] hundred times stronger than the strongest steel".[20] Its applications are no less extraordinary. Graphene can be a critical component in manufacturing faster computers, more stable biosensors for diagnosing diseases, lighter satellites, and safer cars.[21] Prior to 2004, few scientists believed such a material could be produced at all, even with the most sophisticated equipment and brilliant scientific minds working to achieve this goal.[22] Then, two physicists surprised the world by discovering graphene using materials found in almost every household in the developed world: scotch tape and pencil lead.[23] These two simple ingredients held the key to the discovery of what has been described as the thinnest and strongest material in the universe.[24]

To be sure, the key components of all noteworthy achievements, hard work and persistence, played a critical role in discovering graphene as well. But what graphene's Nobel Prize-winning discoverers claim as uniqueness in their approach (or process) to their discovery is a research strategy that specifically focuses on "unexplored area[s] of research".[25] Just think: if IP protection was based even in part upon one's process (e.g., labor, time, etc.) it takes no stretch of the imagination to foresee the legal chaos and unpredictability that would result if courts and agencies took into account the unique, non-traditional research approaches used to arrive at this monumental discovery.[26]

To the above point, some may argue that placing too much emphasis on results rather than process would in effect provide a disincentive to progress by slowing incentives for achieving more efficient and economical 'processes'. This is simply not the case because such an argument fails to take into account the fact that there are other forces in play that serve to incentivize innovation and creativity. Broadly speaking, these are economic forces. Factors such as competition and the quest for market advantage, an in-depth discussion of which goes beyond the scope of this paper, provide the necessary

20 Class for Physics of the Royal Swedish Academy of Sciences, *Scientific Background on the Nobel Prize in Physics 2010: Graphene* in The Royal Swedish Academy of Sciences 6, October 5, 2010, available at http://www.nobelprize.org/nobel_prizes/physics/laureates/2010/advanced-physicsprize2010.pdf (Last visited on November26, 2013).

21 *Id*.

22 Stefanie Blendis, *Graphene: 'Miracle Material' Will be in Your Home Sooner than You Think*, October 6, 2013, available at http://www.cnn.com/2013/10/02/tech/innovation/graphene-quest-for-first-ever-2d-material/(Last visited on November 24, 2013) (Graphene's co-discoverer, Professor Andre Geim, before his monumental discovery acknowledges that, "my physics intuition, developed over the last thirty years, told me that this material shouldn't exist. And if you had asked 99.9% of scientists around the world they would have said the idea of [graphene] was rubbish and that graphene shouldn't exist, [but] our intuition was completely wrong").

23 *Id*.

24 *Id*.

25 Andre K. Geim, *Author Commentaries – 2008: U. Manchester's Andre Geim: Sticking with Graphene—For Now*, August 2008, available at http://archive.sciencewatch.com/inter/aut/2008/08-aug/08augSWGeim/(Last visited on May 9, 2013).

26 It should be noted here that although the compound itself may not be patentable, there is still the option for obtaining patents on the end uses of or method for obtaining the graphene.

encouragement for innovation and optimization in efficiency in order to, among other goals, gain in financial prominence and competitive prestige.[27]

It follows then, and again, if there are so many ways in which a solution can be achieved, and if the world's most perplexing mysteries can be solved by means ranging from extraordinarily difficult to unimagined and simple means (as shown in the graphene discovery example above), why should protection of those solutions be determined by the processes involved in arriving at them, when nature itself proves there is no 'fixed equation' for such achievements? The answer is, simply, that it should not.

III. LEGAL RECOGNITION OF THE VARIED APPLICATION OF BRAIN POWER BEHIND IP: PATENTS, COPYRIGHTS, TRADEMARKS, & TRADE SECRETS

It has been demonstrated from the discussion above that society can benefit from inventions and creative works regardless of the amount of time and energy that has been put towards converting ideas into reality, and thus the process involved in arriving at an IP can be largely indeterminate of the IP's ultimate value to society. The focus of IP protection, therefore, should rest on the value of the creation or invention, and not on the process used to arrive at it. The United States' IP policies, for example, regard "[IP] rights as comparable to rights to physical property",[28] and provide an excellent example of protection focused on the IP rather than the process of creating the IP. The four main bodies of IP law in the vast majority of World Intellectual Property Organization ('WIPO') member states,[29] which are patent law, copyright law, trademark law and trade secret law, and their role in furthering the notion that the IP itself deserves protection and not the road travelled to arrive at it, are summarized below.

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[27] *See* Rachel Brandenburger, *Promoting Innovation Through Competition*, U.S. Department of Justice (2011), available at http://www.justice.gov/atr/public/speeches/279093.pdf ("Today it is widely recognized that the successful promotion of innovation requires both competitive markets and the protection of intellectual property rights because each drives innovation in complementary ways. Competition between companies is a key driver of innovation and technological change [because it] pushes companies to innovate in order to profit from their innovations by being the first to develop and bring a new product to market or by increasing market share").

[28] Clarissa Long, *Intellectual Property Rights in the Developing World*, July 1, 1997, available at http://www.fed-soc.org/publications/detail/intellectual-property-rights-in-the-developing-world (Last visited on May 9, 2013).

[29] *See* World Intellectual Property Organization, *WIPO Member States*, available at http://www.wipo.int/members/en/(Last visited on May 9, 2013) (While the United States' IP laws are cited, much of the information contained herein is based on materials from the World Intellectual Property Organization, of which the United States of America is but one state member. There are currently 185 member states (including most of the world's developed and many developing nations), and the entire list can be requested from WIPO).

A. PATENT LAW: PROTECTING NEW, USEFUL & NON-OBVIOUS INVENTIONS

United States patent law (and copyright law as well, which is discussed below) traces its roots back to the U.S. Constitution, which grants Congress the power to pass laws to grant time-limited monopolies for certain types of works in order to "promote the progress of science and the useful arts".[30] "The economic philosophy of compensating the inventor for sharing his invention with the public was the primary reason for the Patent and Copyright Clause in the U.S. Constitution."[31] It is important to note that the focus is on the invention,[32] and the inventor's process of arriving at the invention—be it painstaking trial-and-error or a "flash of genius"—is largely immaterial for obtaining protection. Similar recognition of patentable inventions is afforded by other WIPO member states.

A patent itself is defined by WIPO as "a document, issued, upon application by a government office (or a regional office acting for several countries), which describes an invention and creates a legal situation in which the patented invention can normally only be exploited (manufactured, used, sold, imported) with the authorization of the owner of the patent".[33] Further, "'[i] nvention' means a solution to a specific problem in the field of technology".[34] Of note is the fact that there is no mention of the approach(e.g., experimentation, trial-and-error, etc.) the inventor took to arrive at the invention. Rather, the protectability of an invention is dependent on whether it is something that valuably promotes progress in science and the useful arts, i.e., encompasses "patentable subject matter, [has] industrial applicability (usefulness), and possesses novelty, and it must exhibit a sufficient 'inventive step' (be non-obvious)".[35] This creates recognition for the inventor's contribution, while at the same time paying respect to the demonstrable fact that everyone processes information differently and ultimately it is the value that the invention gives to society that is protectable,and not the process used to arrive at it.

It would be appropriate at this juncture to point out that the argument for focusing on the invention itself should not be interpreted to imply that sheer hard work, struggle, and obstacles overcome to arrive at the invention are

[30] The Constitution of the United States, 1989, Art. I, §8, cl. 8.

[31] Xuan-Thao Nguyen, *Collateralizing Intellectual Property*, 42 GA. L. REV. 1, 6 (2007) (Citing U.S. Const. Art. 1, § 8, cl. 8, which states, in part, "The Congress shall have Power to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

[32] 35 U.S.C., §101 (The 'invention' can be a "new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof").

[33] World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use*, *Patents*, *Introduction*, 2004, available at http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch2.pdf (Last visited on May 9, 2013).

[34] *Id*.

[35] *Id*.

not relevant at all. In fact, they are indeed recognized, and in very significant ways (albeit not necessarily in the legal sense). For example, when a scientist discovers a new drug or an engineer designs a novel sensor for detecting radioactive materials in airports, acclaim and recognition for the work stem from sources outside the legal arena. Regardless of a patent being granted, the inventor gains a high level of prestige, not only in his or her own professional community but often in the public realm as well. The latter, of course, is dependent upon the extent to which the invention is exposed, recognized, and valued. Newspapers may report the inventor's efforts, and other interested sources may document the inventor's persistence and his or her triumph over the odds. The inventor may choose to write technical papers for publication in prestigious journals in his or her field of expertise. Professional conferences in the field of invention will seek to publicize the work as well. Further, the inventor or his invention may be the subject of commercialization efforts, the marketing of which may further exploit the inventor's inventive process used to arrive at his invention. The list goes on and on. In short, the 'process' or approach of arriving at the patentable invention are already justly given their due credit in ways that do not and, because of the above-discussed inherent lack of uniformity of mental processes, should not require legal recognition, which generally favors a policy of simplicity, uniformity, and predictability.[36]

B. COPYRIGHT LAW: PROTECTING ORIGINALITY IN TANGIBLE CREATIVE WORKS

"Copyright law is a branch of that part of the law which deals with the rights of intellectual creators".[37] Further,

> "[c]opyright law, however, protects only the form of expression of ideas, not the ideas themselves. The creativity protected by copyright law is creativity in the choice and arrangement of words, musical notes, colors, shapes and so on. Copyright law protects the owner of rights in artistic works against those who 'copy', that is to say those who take and use the form in which the original work was expressed by the author."[38]

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[36] *See e.g.*, Regulation (EC) n. 650/2012; European Parliament Directorate-General for Internal Policies, *Citizens' Rights and Constitutional Affairs*, July 2012, available at http://www.europarl.europa.eu/document/activities/cont/201212/20121220ATT58404/20121220ATT58404EN.pdf (Last visited on November 24, 2013) (Citing rulemaking's objectives as being for simplicity and predictability); WhiteHouse.Gov, *2010 Joint Strategic Plan on Intellectual Property Enforcement*, June 2010, available at http://www.whitehouse.gov/sites/default/files/omb/assets/intellectualproperty/intellectualproperty_strategic_plan.pdf (Last visited on November 24, 2013) ("So long as the rules and rights for intellectual property are predictable and enforceable, Americans will continue to lead in the effort to improve global prosperity").

[37] WIPO, *supra* note 33, 40 (Copyright and Related Rights, Introduction).

[38] *Id*(emphasis supplied).

Here again, the product, and not the approach used to achieve it, is what should be protected. Not only does this value-based policy of legal protection recognize the multitudinous ways in which a person can utilize his or her individual talents to create a copyrightable work, it also serves to prevent legal recognition and favoring of one process of thinking over the other (the choice which, in and of itself, can be a subjective, unpredictable consideration, dependent on each individual creator of the original work's approach and the determiner of the legal protection's preferences).

Regarding the process and mode of creation of copyrightable works, here too there are avenues for non-legal recognition of the 'process' involved in creating an original work. For example, if a painter creates a new, unique painting, he or she will gain in popularity, and will perhaps even establish social and financial prominence. Here too, newspapers will undoubtedly publicize the author's success and document his or her road to prominence. Television stations will carry stories commemorating the author's work, and in all likelihood will also document the 'story' behind the creation. The painter may even receive offers to purchase the painting, and the painter's struggle or the amount of time taken to create that painting may dictate what the "fair market value of the painting" really is when he or she decides whether to accept a particular offer. If the work is unique enough, or even pleasing enough despite its uniqueness, scholars specializing in that particular style of painting may write articles describing the painter's work, which might include notes on the 'inspiration' that guided the painter in creating this work. The sheer randomness behind public appeal and subjectivity[39] involved in popularity trends in this sector of IP serve to negate any necessity for a law based policy that affords legal protection that is determined by the author's approach used to arrive at a particular result.

C. TRADEMARK LAW: PROTECTING THE CONSUMER FROM DECEPTION

Trademarks trace their roots to the ancient world, where craftsmen cleverly devised symbols unique to themselves in response to a growing need to establish the source of their goods.[40] With industrialization, the importance of trademarks gained widespread recognition as market-oriented

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[39] 17 U.S.C. §102, House Report No. 94-1476 (U.S. Copyright Law, for example, states that "the definition of copyrightable 'pictorial, graphic, and sculptural works' carries with it no implied criterion of artistic taste, aesthetic value, or intrinsic quality").

[40] WIPO, *supra* note 33, 67 (Trademarks, Introduction) (The trademark concept dates back thousands of years. "As long as 3,000 years ago, Indiana craftsmen used to engrave their signatures on their artistic creations before sending them to Iran. Manufacturers from China sold goods bearing their marks in the Mediterranean area over 20,000 years ago and at one time about a thousand different Roman pottery marks were in use, including the FORTIS brand, which became so famous that it was copied and counterfeited").

economies began to grow.[41] Since competing manufacturers and traders could offer consumers great varieties of goods in similar categories, and the quality and price (among other characteristics) could be equally varied, it became clear that "consumers need to be given the guidance that will allow them to consider the alternatives and make their choice between the competing goods".[42] As a result, "the goods must be named,[and the] medium for naming goods on the market is precisely the trademark".[43]

In trademark law, the idea of the 'price paid' (that is, the approach or methodology) for achieving the IP, i.e., the trademark, is somewhat relevant, though indirectly, to the value of the mark. This is because when consumers are enabled:

> "to make their choice between the various goods available on the market, trademarks encourage their owners to maintain and improve the quality of the products sold under the trademark, in order to meet consumer expectations. Thus trademarks reward the manufacturer who constantly produces high-quality goods, and as a result they stimulate economic progress."[44]

So here, the process for arriving at the IP is relevant in determining its protectability. For the trademark owner to maintain his right to the mark, it must continually function to "distinguish the products or services of one enterprise from the products or services of other enterprises."[45] The mark must also not have a 'misleading character', or "violate public order or morality".[46] These 'protectable' features of the mark must be maintained by the trademark owner in order to maintain legal protection of the mark. The true test for ascertaining the effectiveness of a trademark is to see whether the consumer effectively associates the mark with the source of the goods or services.[47]

While it is clear there is indeed a naturally requisite process involving effort and ingenuity incumbent on the trademark owner in order to maintain protectability for his or her trademark, aside from the requirement that the mark be 'distinguishable', the rest of the effort is focused on maintaining

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41 *Id*.

42 *Id*., 67, 68 (Trademarks, Introduction).

43 *Id*., 68.

44 *Id*.

45 *Id*., 71 (Trademarks, Criteria of Protectability); United States Patent & Trademark Office, *Maintaining a Trademark Registration*, available at http://www.uspto.gov/faq/t120052.jsp (Last visited on November 24, 2013) (In the United States, for example, "[f]or a trademark registration to remain valid, an Affidavit of Use. . . must be filed (1) between the fifth and sixth year following registration, and (2) within the year before the end of every ten-year period after the date of registration").

46 WIPO, *supra* note 33, 71.

47 *Id*.,72 (Trademarks, Requirement of Distinctiveness).

consistency in, or even increasing, the quality of the products or services that are provided (which is the requirement of trademark law to secure and maintain protection, and which defines the value of the mark).[48] This is, quite naturally and coincidentally, in the owner's best economic and social interests. So here again, the process of arriving at the IP (i.e., the distinguishing mark itself) is appropriately irrelevant in determining its protectability as an IP. The trademark could have been painstakingly arrived at, both physically and financially, but if it does not perform its intended function of allowing consumers to associate the mark with its owner, then no amount of effort invested in coming up with mark can properly serve to afford legal protection to the mark.

D. TRADE SECRET LAW: LEGAL RECOGNITION OF A COMPETITIVE EDGE

Trade secret law is an interesting IP sector for discussing whether the processes involved in arriving at an IP should determine the IP's protectability. As will be discussed below, trade secret protection is generally recognized as depending on both the process and value of the trade secrets. However, the value-focused protection model overrides here as well.

"Trade secrets are protected against unauthorized use and disclosure by various statutory means and these provisions vary in each country".[49] Depending on the country, trade secrets often involve contract law, tort law, or both, and "a legal definition of a trade secret rarely exists".[50] In general, however, protection of trade secrets is largely dependent on several factors, including:

> "[1] the extent to which the information is known to the public or within a particular trade or industry, [2] the *amount of effort and money expended by the trader* in developing the secret information, [3] the *value* of that information to the trader and to his competitors, the extent of *measures taken*

[48] *See* Elmer William Hanak, III, *The Quality Asurance Function of Trademarks*, 43 Fordham L. Rev. 364 (1974) (Arguing that "[i]f the origin of a product is of concern to a consumer, it is only because the manufacturer's [i.e., trademark owner's] products have come to be associated with a certain level of quality").

[49] WIPO, *supra* note 33, 150 (Violation of Trade Secrets) ("Some countries have special provisions for the protection of trade secrets either under specific legislation on unfair competition or as part of another law. Other countries treat trade secrets as an aspect of tort law. Still other countries have enacted criminal, administrative, commercial or civil law provisions prohibiting the unauthorized use or disclosure of business secrets."); *See also* Dawn Rudenko Albert, *Trade Secrets in the United States*, Intellectual Asset Management, 2010, available at http://www.iam-magazine.com/issues/article.ashx?g=e85a7dee-1c0f-42e0-8573-6cf922e57c1d (Last visited on November 24, 2013) (In the United States, trade secret law issues are governed by individual states' laws, but "there is a trend towards achieving some uniformity, with 46 states having adopted various statutes modeled after the Uniform Trade Secret Act (USTA)").

[50] *Id*., WIPO.

> *by the trader* to guard the secrecy of the information, [4] the value of that information to the trader and to his competitors, [5] the extent of measures taken by the trader to guard the secrecy of the information and [6] *the ease or difficulty* with which the information could be properly acquired by others."[51]

From the above list of factors, it is of importance that in trade secret law, *both* the value of the information and the process (i.e., effort and money expended in developing the trade secret information) are explicitly at play. Further, when the above factors are combined with the extra subjective requirement that the "trader involved must have a considerable interest in keeping certain information as a trade secret",[52] it is clear that here, the price paid or the process used to arrive at an IP does play a role in determining its value or protectability.[53] However, a key difference between trade secret law and the other three forms of IP protection is that the information that is the subject of a trade secret is only protectable to the extent that it *remains* a secret, and trade secrets themselves are not subject to the fully exclusive rights of industrial property law.[54] So if a competitor discovers the trade secret, or if the trade secret is somehow disclosed,[55] the owner of the former trade 'secret' may be entitled to legal damages.[56] But the trade secret itself may no longer get

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[51] *Id* (emphasis supplied).

[52] *Id*.

[53] *Id*. (So long as patent applications are not published by the patent office, inventions that qualify for patent protection can also be the subject of a trade secret).

[54] *Id*.

[55] *Survey of Additional IP Developments*, 28 Berkeley Technology L. Journal 1112, 1128 (Citing Aqua Connect, Inc. v. Code Rebel, LLC, No. CV 11-5764-RSWL (C.D. Cal. Feb. 13, 2012) (In the United States, reverse engineering a trade secret-protected item can potentially provide grounds for alleging trade secret misappropriation, depending on whether the reverse engineering was done despite an explicit confidentiality understanding. For example, a California District Court found that "breach of an End Use License Agreement prohibiting reverse engineering was not sufficient to establish a cause of action for misappropriation of a trade secret [because] breach of an End Use License Agreement did not elevate reverse engineering to the level of 'improper means,' nor did it create a 'duty to maintain secrecy'."); *But see* Crowell Moring, *Circuit Court Reinforces that Neither Lack of Novelty nor Ability to Reverse Engineer are Defenses to Trade Secret Misappropriation*, January 30, 2012, available at http://www.crowell.com/NewsEvents/AlertsNewsletters/IP-Insights/Circuit-Court-Reinforces-That-Neither-Lack-Of-Novelty-Nor-Ability-To-Reverse-Engineer-Are-Defenses-To-Trade-Secret-Misappropriation#.Uobxd42GF0w (Last visited on November 24, 2013) (However, reverse engineering itself is not always a way to safely expose the trade secret without consequences. An example was seen in 2011 in Avid Air Helicopter Supply v. Rolls Royce Corp., where the Court, in determining whether there was trade secret misappropriation despite the misappropriated information being allegedly readily acquired by reverse engineering, focused not only on misappropriation of the trade secret-protected documents, but also on the "time and energy that would be required to ascertain the [trade secret] information publicly").

[56] Marc J. Pensabene & Christopher E. Loh, *How to Assess Trade Secret Damages*, Managing IP Magazine June, 2006, available at http://www.ipo.org/wp-content/uploads/2013/04/Howtoassesstradesecretdamages.pdf (Last visited on November 24, 2013) (Further,

protection, for it is no longer a secret, as the principle that "the mere exploitation of another's achievement is consistent with the principles of a free market system"[57] generally governs courts' rulings. Incidentally, this also reflects what is often considered a dilemma that individuals face in deciding whether to pursue IP protection of their invention i.e., whether to fully disclose in exchange for time-limited protection and 'guaranteed' exclusivity or withhold disclosure and maintain a trade secret potentially indefinitely.[58] Therefore, to an extent, the process or 'price paid' for a trade secret does indeed determine its 'value', but once the secret is discovered (or otherwise when it is no longer a secret), the amount of work or effort expended to acquire that IP may no longer be relevant for maintaining protection of that trade secret.

IV. CONCLUSION: "PROCESS IS WHAT YOU DID, VALUE IS WHAT YOU PROTECT"

The preceding sections serve to demonstrate that, with the limited exception of trade secrets, it is far more accurate policy-wise to base protection of an IP upon the value of the IP itself, and to not factor in the process of having arrived at that IP. This argument is not meant to downplay the value of hard work, inspiration, and in some cases, inexplicable luck in arriving at an IP. These processes are usually recognized one way or another by way of media attention, prestige in the author or inventor's field, and economic success. Further, various routes and faculties of one's intellect can be enlisted to create, develop, or invent the IP. Therefore, an attempt to codify or objectively dictate what kinds of intellectual approaches are qualified for heightened legal (IP) protection would lead to widespread uncertainty in the application of such inevitably subjective standards, and might even discourage people from boarding on certain trains of thought for fear that it will not result in any meaningful protection of any resulting IP. This will inevitably result in failure to capture the true value of the IP. Therefore, applying Warren Buffet's investment philosophy of a price-value distinction to process versus protection in intellectual property law, one can conclude that the "Process is what you did, Value is what you protect".

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legal damages for revealed trade secrets are generally related to misappropriation and unjust enrichment).

57 WIPO, *supra* note 33, 150.

58 *See e.g.*, Gene Quinn, *AIA Oddities: Trade Secrets*, *Re-patenting and Best Mode*, IP Watchdog Inc, September 18, 2013, available at http://www.ipwatchdog.com/2013/09/18/aia-oddities-trade-secrets-re-patenting-and-best-mode/id=45108/(Last visited on November 24, 2013) (Concerning both previous and newly passed U.S. patent laws, full disclosures are a requirement in order to be eligible for patent protection; trade secrets can be patented, but the full disclosure requirements for patentability must still be met).