

## Deorbiting Your Own Intellectual Property Fight

### *Four Immediate Steps to Guard Against IP Theft*

Ponder, for a moment, the following hypothetical. You develop specialized technology for in-orbit robotic satellite assembly, repair and servicing. You store the technology at a theoretically secure customer site—a NASA research center. A competitor's employee accesses the technology during a period of competitive bidding for NASA contracts. The technology may allow the competitor to undercut your costs and technical competitive advantage. Hypothetical? Not for Space Systems/Loral.<sup>1</sup> The result; a lawsuit, *Space Systems Loral v. Orbital ATK*.<sup>2</sup> SSL asserts that an Orbital employee viewed and distributed SSL trade secrets. Orbital has fired the employee. Whatever the result, the litigation means that both SSL and Orbital are at a minimum dealing with an expensive distraction to their business models.

How can you avoid the above situation or lower your risk profile? By taking just a few proactive steps in advance.

1. **Execute NDAs Early and Often.** Nondisclosure Agreements (NDAs) should be a first line of defense, whether for a large corporation or a sole inventor. NDAs are typically thought of for protection before a meeting with a potential supplier or partner or before a Letter of Intent is executed in advance of a potential deal. This is an important use but it is too limited. Sales reps and job candidates should also sign NDAs. The standard procedure should require any nonemployee who interacts with the company on substantive business to execute an NDA. This is not as difficult as it may appear. For example, many companies now require every visitor to sign an NDA as part of the check-in process, in some cases using a touchscreen that provides a temporary visitor badge.
2. **Manage Your Employee and Partner Agreements.** NDAs, employee agreements and partnership agreements are only as good as they are relevant and in use. Updating employment and partnering agreements for accuracy and currency is critical. For example, in preparation of a large contract bid activity with over a dozen supplier partners, we looked to better align the team, and it was discovered that two partners were promised rights to the same secondary business market. If the oversight had not been corrected, litigation would have likely ensued upon a contract win. In the self-driving car business space, there is a labyrinth of partnerships, shared suppliers, JVs and investments.<sup>3</sup> Ford alone, in its Silicon Valley research site, is reported to be engaged with over 40 Silicon Valley startups.<sup>4</sup> Employee agreements in the self-driving car business most certainly can be disparate, and potentially in conflict, in terms and conditions and therefore demand active management.
3. **Be Deliberate about Your Intellectual Property.** All intellectual property, like business units and business markets, is not created equal. What worked in one business unit might not be appropriate for all business units, and what seemed valid during a market expansion push may not fit for a mature business. Categorizing your IP, for example, as enabling, sustaining or matured, will assist in structuring how or even if you need to protect it, or whether it is time to explore selling or licensing the IP. Allowing your business objectives to drive your IP approach, rather than the other way around, should generate an IP approach valuable for the business. For example, when negotiating partnerships for a new Boeing business unit, our objective was to demonstrate the value of applying modern aircraft cockpit automation to ground-based air traffic control. Wide dissemination of the results, and the IP, was deliberate. However, when managing a research group

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developing satellite tracking algorithms, the IP was protected as proprietary, to allow a potential future business advantage.

**Be Aware of Jurisdictional Issues with Employee Agreements.** In some circumstances, noncompete and nonsolicitation clauses will be an important part of your protective strategies. However, you need to be mindful about what various jurisdictions will permit when trying to enforce restrictive covenants against a current or former employee. For instance, in Colorado, noncompete restrictions are presumptively void with some exceptions including, most relevant here, if they are designed to protect trade secrets. However, they must be narrowly drafted and be reasonable in scope, geographic range and duration. California courts, on the other hand, are fundamentally hostile to restrictive covenants of any kind, so it is essential that your counsel is aware of where your resources will be operating and that you don't attempt to bind a California employee to the same kind of restrictive covenant that many other states would not hesitate to enforce. You may, however, gain some protection if you draft the agreement to preclude the employee from using or disclosing any trade secret information in any subsequent employment, or accepting any subsequent employment that requires him or her to use or disclose the company's trade secret information.

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<sup>1</sup> Irene Klotz, *SSL sues rival Orbital ATK over theft of trade secrets: lawsuit*, Science News, March 23, 2017

<sup>2</sup> *Space Sys./Loral v. Orbital ATK*, No. 4:17-CV-00025, (E. D. Va., filed Mar. 22, 2017).

<sup>3</sup> Chester Dawson, *Big Tech Reshapes Automotive Sector*, Wall Street Journal, March 14, 2017

<sup>4</sup> Tamara Chuang, *Hate Rush Hour? Let the Car Drive*, The Denver Post, March 26, 2017

*This document is intended to provide you with general information regarding IP theft. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.*