The basic shift in our economy from the Industrial Age to the Information Age is now upon us. Countless articles in business publications remind us daily that “Intellectual Capital” represents the most important asset of most government contractors. Contractors of all sizes in virtually all industries are facing the challenge of how to adapt to the knowledge era to enhance the performance and productivity of their businesses and organizations. In this new era, the speed of access to data and the quality of the information often determines the competitiveness of a business and ultimately its success or failure. In particular, small and growing government contractors that are able to extract reliable information, transform it into knowledge and efficiently meet customer needs will grow and prosper, while others will be left at the entrance ramp. Major changes in organizational structure and culture are affecting how and where we work, how and where we offer our products and services, and the types of legal issues that contractors are going to face in our global economy.

Intellectual capital is a difficult concept to grasp because it encompasses intangible items used to measure a company’s success and wealth. Most government contractors are discovering that intellectual capital may be hard to quantify, but essential for survival. Intellectual capital typically falls into the following three categories:

1. **Human Capital.** Everything in this category exists within the skills, experience and ability of your employees. Creativity, innovation and forward thinking drives a company forward and allows it to compete in an environment that is constantly becoming more complex and idea-dependant. Human capital is hard to measure, but is usually viewed in terms such as turnover and employee satisfaction.

2. **Organizational Capital.** This category only includes things owned by the company, such as patents, trademarks, copyrights, formulas and databases. Converting human capital into organizational capital is difficult and means collecting and retaining employee ability so it belongs to the company.
3. **Relationship Capital.** Putting an emphasis on the customer can be extended to any outside party that creates value for a company. This is especially true for the emerging government contractors whose primary assets may be key relationships with contracting officers and teams at government agencies. Some organizations have been keeping tabs on this information as it relates to its revenue base. Many are now recognizing the relationship between customer loyalty and increased profits.

Intellectual capital has become the new inventory of our global economy and it is critical that you work with qualified legal counsel in order to understand how the intellectual property laws are used to protect these key assets as well as to clarify ownership of these assets. Without knowing your inventory levels of intellectual capital, you cannot accurately allocate the proper amount of resources to develop your business in the most profitable direction. Taking the time to study all of your company’s assets may uncover attributes or strategies to use your capital in new ways to fully take advantage of your intangibles. The key is to match the intangible asset you are trying to protect and/or leverage with the most effective legal and strategic tools available.

As Peter Schwartz wrote in the September 2000 issue of *Red Herring*, “In the organization of today’s economy, it is knowledge that counts more than anything. Knowledge has value, but so does knowledge about knowledge. It is a world where the Internet spreads knowledge instantaneously around the world, and we get dramatic network effects. The more people that get on the Web, the greater its value. The rules of the new economy are shaped not by physics, but by information. Creating value is about creating new knowledge and capturing its value. The most important property is intellectual property, not physical property. And it is the hearts and minds of people, rather than their hands, that are essential to growth and prosperity of a company. Committed employees creating new ideas, delivering value, and innovating to create growth are the key assets of the new economy.

As a legal and strategic advisor to government contractors and technology companies who have grown through the leveraging of their intellectual property, our role is to:

- Work with clients to find their intellectual property and hidden intangible assets (intellectual property protection and leveraging audits, etc.);
- Protect the intellectual property (through registration strategies, confidential agreements, etc.);
- Develop strategies to leverage the intellectual property (through joint ventures, alliances, licensing, etc.); and
- Look at these strategies in comparison to other growth strategies as alternatives.
Our strategic analysis may include questions such as:

- What protectable competitive advantages has the company developed?
- What intellectual property law strategies can be used to protect ownership/use?
- How can this intellectual property be leveraged into revenue/profit streams?
- How can we use intellectual property to create substantial competitive advantages with durable revenue streams?

A contractor's ability to continue to grow its business and achieve success depends on its ability to invent and exploit new products and services in response to the needs of the contracting agencies; establish and build total working relationships with agency teams; open up new distribution channels; foster new production and training techniques; and adapt to changes in competition, consumer preferences or demographic trends. The government contractors management team's ability to identify, develop and protect intellectual property rights is critical. Doing so can help your company:

- Improve the overall value and rate of growth by increasing intangible assets;
- Creative competitive advantages and barriers for competitors to enter the marketplace;
- Understand the intellectual property rights of other firms;
- Create licensing opportunities and additional revenue sources;
- Build consumer goodwill and brand loyalty; and
- Provide maximum control over the development and ownership of the ideas and invention of employees.

Government contractors in today’s services-driven and technology-dominant economy are focusing on the protection and leveraging of their intangible assets in order to continue their development and succeed against their competition. This means that your team must devote greater amounts of time, attention and resources to building and protecting brands, customer relationships, goodwill, proprietary formulae, strategic alliances, cross-licensing and co-branding alliances, and other intangible assets. The company's ability to develop, recognize, protect and exploit these intangible assets is critical. To do so, however, you first need to understand the different categories of intellectual property and how each type is protected.
The term “intellectual property” is typically used to refer to the following kinds of intangible assets:

- Patents
- Trademarks and Brands
- Copyrights and Creative Works
- Customer Data Bases and Proprietary Information
- Trade Secrets and Confidential Information
- Trade Dress
- Know-How and Show-How
- Web Site Addresses and Designs (encompassing Trademark, Copyright and Trade Dress)

For example, at McDermott, Will & Emery, we have developed a proprietary legal and strategic review process known as the Intellectual Property Protection and Leveraging Analysis ("IPPLA"). The IPPLA is a joint effort between our corporate and transactional practice and our intellectual property registration and protection practices in order to provide the company with a realistic and creative audit and assessment as to what intellectual property assets the company has, the strength of these assets and the opportunities for leveraging these assets into new markets or revenue streams or to improve existing channels. Among the questions that are addressed during an IPPLA:

- What technologies have non-competing applications that could be licensed to others?
- What brands offer value in a brand-extension licensing or co-branding relationship?
- What distribution channels or partnering opportunities can be strengthened if the
contractor had greater control over these channels or relationships?

- What growth and expansion strategies are being used by the contractor's competitors? Why? How are their circumstances different, if at all?

- Where are the strategic/financial holes in the contractor's current licensing and alliance relationships?

- What is the contractor's on-line and e-commerce strategy? How could it be strengthened or improved?

Going through a strategic process such as the IPPLA is a particularly important growth step given today's economy and capital market conditions because:

- Government contractors of all sizes must protect what they have and use these intangible assets to penetrate new domestic markets or be the fuel for international expansion. The key challenge is how to keep growing in a slowing economy.

- **Capital-efficient growth** is the mandate of many CEO's and CFO's during these turbulent financial markets.

- Companies of all sizes and in all industries are under pressure to create new opportunities and new revenue streams from existing assets (technologies, systems, brand, relationships, know-how, etc.). The results of the IPPLA may also identify a need or an opportunity to restructure the company around the IP portfolio or create subsidiaries or spin-out companies based on IP leveraging opportunities.

- Government contractors and growing businesses need to periodically re-evaluate whether current distribution channels and market-partners are really working effectively to generate the highest and best shareholder value and income streams/profits (e.g. is this the highest and best strategy available to meet our objectives? What is origin of these relationships? What politics or red tape will we face if these agreements and relationships are re-evaluated? Should there be restructuring around a real or perceived imbalance in the economics of any existing relationships? Wall Street does not reward companies who make their licensees and market partners wealthy at the company's expense.)

- Contractors need to repair channels and relationships which are broken, ineffective or where greater controls over the channels would yield better results

- With high levels of employee turnover and competition for a qualified work force, it is more important than ever that employees are educated on their obligations to protect the government contractor's intellectual capital on an in-term and post-term basis.
From a licensing out perspective, many contractors may be sitting on a portfolio of patents, technologies and brands that can be licensed in non-competing ways to augment existing initiatives and core businesses such as the diagram sets forth below.

- **DIRECT USE AND APPLICATION IN COMPANY'S CORE BUSINESS (#1)**
- **LICENSED FOR A PARALLEL, NON-COMPETITIVE USE TO THIRD PARTY (LIMITED USE) (#2)**
- **LICENSED TO A COMPETITOR ABROAD (LIMITED GEOGRAPHIC AREA) (#3)**
- **CONSORTIUM (NONEXCLUSIVE) (#4)**
- **RESEARCH AND DEVELOPMENT (TO USER WHO HOPES TO FIND OTHER APPLICATIONS WITHIN NON-COMPETING INDUSTRIES/OPTION TO LICENSE) (#5)**
- **LICENSED TO AFTERMARKET SERVICE PROVIDER (SERVICE, MAINTENANCE, PARTS, ETC.) (#6)**

Even from a licensing in perspective, certain smaller contractors may not have the resources to conduct research and development at the same levels and may need or want to explore access to technologies and brands which are already established or readily-available on an off-the-shelf basis and coupled with training support and valued-added services or where Goliaths will partner with David to get access to resources and technology. There may also be licensing in opportunities, which when paired with the company's current technology portfolio, can create new products, services and market opportunities.

Technology licensing, brand-extension licensing, joint ventures and strategic alliances, business format franchising, outsourcing are all intellectual property leveraging strategies which are being regularly discussed and adopted inside today's corporate boardrooms, and need to be coupled with an effective IP portfolio analysis to be effective. Various intellectual property leveraging strategies are often precursors to capital formation transactions, such as venture investments and acquisitions, especially in David/Goliath transactions as well as peer-to-peer transactions.

In today's merger and acquisition frenzy, an IPPLA may be an excellent way for a growing government contractor to prepare for a buyer or a merger partner's due diligence
process in order to ensure that gaps in the chain of title are filled or any potential disputes over ownership are resolved. The results of the IPPLA may also be necessary to support the company's proposed valuation if and when it is a target in an M&A transaction. The IPPLA can also be a good opportunity to examine the company's current IP docketing and database management systems.

- In an environment of market relationships constantly changing and evolving, an IPPLA will help the company determine whether any assets in the IP portfolio are subject to the rights of third parties, which may exist by virtue of coauthorship, coinvestorship, joint venture, teaming, co-branding, license or statutory or contractual rights of termination or reversion.

- Many emerging growth contractors simply do not have the time, resources or expertise to identify development and implement new strategies for leveraging their IP portfolio without the help of a catalyst. Others simply may need a fresh look, a new perspective as to how their IP can be leveraged (classic "too close to the trees to see the forest" syndrome).

The driving force behind the need for an IPPLA may be the senior management of the government contractor, the chief patent counsel or even board members/external shareholders (or venture capitalists in earlier-stage venture-backed companies) who are pressuring the company to produce new revenue streams before another infusion of capital can or will be committed.

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ABOUT THE AUTHOR

Andrew J. Sherman, Esq. is an internationally-recognized authority on the legal and strategic aspects of business growth. Mr. Sherman is a senior partner with McDermott, Will & Emery (MWE), an international law firm with nearly 1,000 lawyers worldwide, where he manages a corporate and transactional practice representing Fortune 500 corporations as well as technology-driven, and rapidly growing businesses and government contractors. He is the co-developer and practice leader for the MWE Intellectual Property Protection and Leveraging Analysis (IPPLA) practice group and has written and lectured extensively on intellectual property protection and leveraging. He is a co-founder and Chairman of the Small and Emerging Contractors Advisory Forum (SECAF). He is the author of eleven (11) books on business growth, capital formation and the leveraging of intellectual property, including the best-selling and critically-acclaimed Raising Capital (Kiplinger’s, 2000), Mergers and Acquisitions from A to Z (AMACOM Books, 1998), The Complete Guide to Running and Growing Your Business, (Random House, 1997) and Franchising and Licensing: Two Ways to Build Your Business, (2nd edition) (AMACOM Books, 1999) and Fast Track Growth Strategies (Kiplinger) which was published in January of 2002. He has appeared as a guest and a commentator on all of the major television networks as well as CNBC’s “Power Lunch,” CNN’s
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