

# WHAT BUSINESSES NEED TO KNOW ABOUT IP.

## Business and IP: What role does intellectual property play in business, and why should you care?

Intellectual property (IP) is often the most valuable but least understood asset of a successful business. It belongs to a broader class of assets known as intangible assets which according to a 2015 research report by Ocean Tomo<sup>1</sup>, represent on average 84% of company value. This compares with just 17% back in 1975.

So what is driving growth in the comparative value of intangible assets? To answer this, we need to understand what they are, and the role they play in business.

### Understanding intangibles

As the name suggests, intangible assets are non-physical and non-monetary. They comprise things like know-how, processes, brands, skilled people, confidential information, strong customer relationships and culture, as well as more formalised forms such as patents and trade marks.

What's characteristic of nearly all intangible assets is that they often represent the primary means by which a company creates sustainable competitive advantage. Consider the value of Apple's brand, Facebook's user base, Amazon's processes, for example. All are significant drivers of value helping underpin and sustain the company's position in the market.

Over 80% of a company's value is now considered to come from its intangible assets, which encompass a wide range of things such as know-how, processes, brands, skilled people, confidential information, customer relationships, and culture, as well as more formalised IP rights, such as patents and trade marks.

<sup>1</sup> <http://www.oceantomo.com/intangible-asset-market-value-study/>



In an era where businesses are increasingly competing on new ideas and innovation rather than control of physical assets or raw materials, intellectual property has therefore become one of the most effective means of creating a proprietary, defensible market advantage. How so you may ask?

## Where intellectual property fits in

In broad terms, intellectual property assets are used to:

- strengthen a company's ability to exploit new markets through exclusive or monopoly rights;
- help distinguish products or services in the market;
- create customer loyalty and repeat business;
- minimise the risk of others copying or benefitting commercially from your inventions or innovations;
- provide a means by which to extract commercial value from break-through technologies;
- secure lucrative partnerships or customer contracts;
- send strong signals to customers or competitors around expertise;
- attract investment.

Invariably, it is by cultivating one or more forms of intellectual property that a company's fortunes take off. That may sound like a simple formula for business success, but it doesn't mean it's easy or straightforward to apply.

## Know your value drivers

A business that can identify what intellectual property is central to its core business or competitive advantage, and importantly, how best to leverage it for long-term value creation, will have a far better chance of success. This calls for a strategic approach that integrates and aligns intellectual property and how it's managed to the business' overall commercial objectives – a topic we cover in more detail in the next article.

In the meantime one thing's for sure, when over 80% of a company's value can be attributed to intangible assets, they can't be ignored.



Ceri Wells is a founding partner of national intellectual property law experts James & Wells. He has been involved in patent drafting, litigation, trade mark ownership, unfair competition and copyright matters for around 30 years and specialises in working with start-up companies, venture capitalists and seed-funding organisations to encourage and commercialise NZ innovation.

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## IP strategy and your business: tips for getting this right from the outset

In the first article of this series we talked about the value that intangible assets represent to a business. On average, over 80% of a company's value can be attributed to these assets which include formal intellectual property (IP) rights such as patents and trade marks as well as things like brand, reputation, processes, confidential information, customer relationships and know-how.

The reason for this is that a business' intellectual assets often represent the primary source of fuel for generating long-term value. It follows therefore, that there are considerable benefits to understanding what role intellectual property plays in your business strategy and how you can leverage it to achieve your objectives and desired outcomes. In simple terms, this calls for the development of an IP strategy (a topic we deal with in more detail in this article).

Too often however, IP strategy is treated as an afterthought - as something that is managed separately or is created in response to an external threat from third party IP or a lost opportunity. This heightens the risk of making costly mistakes that could have a material impact on your ability to commercialise your IP, or to compete effectively in future.

To avoid falling into this trap here are our top tips for how to get your IP strategy right from the outset.

A business' intellectual property is regarded as a primary source of fuel for generating long-term value. Too often, however, the development of IP strategy is treated as an afterthought. This can lead to costly mistakes.



## An integrated approach is best

Firstly, integrate and embed intellectual property thinking into your overarching business strategy from the start. The more tightly aligned, the better.

## Early identification is essential

Secondly, identify as early as possible what intellectual property is owned or generated in your organisation and where and how it fits with your ability to sustain or grow your business. You will most likely discover it's a range of things.

Maybe it's know-how in a manufacturing process or a piece of technology that addresses a customer pain point you've identified. Perhaps it's the shape of a product or its packaging that helps it stand apart in the market – Hershey's kisses, Kit Kat chocolate and Pringles are all good examples. It could be a unique formulation, for example a pharmaceutical or nutraceutical, or a recipe that few others can reproduce, as is the case with Coca-Cola. Maybe it's a method or way of doing something that transforms how your customers transact with you, such as Amazon's 'one-click' shopping cart.

Whatever it is, the key is to identify and capture your intellectual property in a timely and systematic way. Identify and record who in your business created something and when they did so; retain drawings, plans and prototypes; obtain assignments from staff if necessary, but you'll need to be able to prove ownership.

Don't wait until you get to market to think about securing formal intellectual property rights for a new technology, for example - it will be too late. When it comes to certain types of IP rights such as patents, issues of timing, disclosure and confidentiality can mean the difference between securing those rights or not.

You can avoid costly mistakes by getting a few things right from the start:

- Embed IP thinking into your overarching strategy
- Identify as early as possible, what IP you own or generate, and record it
- Recognise that different IP rights can play different roles in your business
- Appreciate that IP is an asset and needs to be managed as such



## Different IP rights, different uses

Thirdly, recognise that intellectual property rights come in many forms, each of which can provide a different competitive advantage or commercialisation opportunity. Rarely does a successful business rely upon just one form of IP protection. It's typically a combination of rights that create the value. What that configuration looks like and when and how to implement it is determined by having a great IP strategy in place.

## View and manage your IP as an asset

Lastly, treat your intellectual property as what it is – an asset. By definition, assets have the capacity to accrue financial or other benefits in future, and yet many businesses regard things like brand outlay or R&D as expenses rather than an investment in assets that have the potential to provide a return.

Shifting to an asset mentality will help shape and align key strategic decisions around the activities that are vital sources of value creation in your business. Managed well, your intellectual property can then become a powerful tool for attracting more customers, improving margins, increasing productivity or competing more effectively in the market.

Be aware however that having an IP strategy and executing it well is not a sure-fire path to success. The most successful businesses integrate an effective IP strategy alongside a validated value proposition, excellent operations, customer service and marketing.



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## The big question: to protect your IP or not?

In the second article of this series, we provided tips on how to get the intellectual property (IP) strategy for your business right from the outset. We emphasised that early identification and capture of your IP is vital if you want to maximise its commercial potential and avoid making mistakes that cost you dearly down the track.

In this article, we deal with the question that is perhaps most often asked when it comes to IP - whether or not to protect it. The short answer is it depends on several factors including the type of business or organisation, its objectives, strategy and budget - and this is just the beginning of the conversation!

### Understanding the basics of IP

For context, let's cover off some fundamentals.

Intellectual property embodies the ownership of intangible creations of the mind – the innovative idea behind a new technology or the design or shape of a product, for example. Although intangible, the law recognises intellectual property as a form of property which can be sold, licensed, transferred, damaged or trespassed upon in the same way that tangible property can be, such as land.

It is important that both the scope and ownership of intellectual property are clearly defined to enable the legal rights of the owner to be enforced. Such rights fall into two broad categories: registered and unregistered.

Determining whether to protect your IP or not is one of the most important decisions you will need to make as a business owner/leader. Many factors come into play, including knowing what role IP plays in your organisation, and how you plan to leverage it for competitive or commercial advantage, now and in the future.



## Registered and unregistered IP rights

Registered IP rights, as the name suggests, involves a formal registration process and includes things like patents, registered designs and trade marks. Unregistered IP rights are automatically accrued and include things like copyright, confidential information and trade secrets. Whether registered or unregistered, each IP right provides a different form, duration and scope of protection.

Encapsulating the value of intellectual property into your overall strategy will help determine how best to approach questions of IP protection and management, and what forms of protection are fit for purpose.

## What's the driver for protection?

Next, understand why you want or need to protect your IP. Is it to leverage your business to create new sources of revenue? To deter competitors from copying aspects of your business or technology? To distinguish your product or services in the market? Appeal to potential buyers or investors? Maybe it's to enhance your ability to monetise R&D? Or to provide a window of opportunity to build sales momentum? It's probable that you'll discover there is more than one good reason to consider formal protection.

Doing your homework and getting good advice will go a long way toward helping you make the right decisions for the right reasons, at the right time.

## Be IP savvy

Get good advice and be smart about your IP strategy. Use the process to sharpen your thinking around competitors and the market in which you operate, and carefully weigh the benefits and costs of different forms of protection against the backdrop of your overarching strategy. A wealth of competitive intelligence and insights can be gleaned from the IP system just by knowing what to look at, or for.

## Think and plan big picture

Recognise that intellectual property evolves over time, and that IP rights are jurisdictional. Try to take a long view of your business and consider your marketing and distribution strategies also. What jurisdictions or markets do you plan to launch in, and when? Where are your suppliers or partners located? What does your product or service roadmap look like? All these variables will have a part to play in deciding on the right protection strategy for your business.



## Assess your risk position

Engage an IP expert to help you identify any infringement risks upfront. This may require something as simple as searching a trade mark register to identify similar or identical brand names – or it could extend to conducting a more comprehensive patent or freedom to operate search. This is particularly important before entering a new export market. The important thing is to recognise that it's possible to avoid costly legal complications if you do your homework and assess infringement risk early on.

Remember, IP rights are only one piece of a complex jigsaw puzzle. The more you understand about the nuances, costs and benefits of different forms of protection and how to extract maximum commercial value from them, the better the decisions you will likely make around protection.



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## The different forms of IP protection: which ones are right for your business?

In previous articles, we've dealt with the bigger picture of understanding intellectual property (IP) and your business, what role it plays in value creation, how to approach IP strategy, and things to consider when deciding whether to protect your IP or not.

It's now time to delve into a bit of the detail around the different forms of IP protection, and which ones are right for your business.

But first a few words of caution. If the Holy Grail for business is to secure a monopoly over a product or service that everyone wants, then it might stand to reason that the best IP rights are those that confer monopoly rights. Unfortunately, it isn't as black and white as that.

Choosing which forms of protection are right for your business depends on a cocktail of factors, not least of which is what it is you're seeking to protect and why, whether it's technology or product-directed, and the benefits/costs of such protection.

Let's start with understanding unregistered IP rights.

Choosing which forms of IP are right for your business depends on a few factors including, what you're seeking to protect or achieve through protection, whether it's technology or product-directed, and the relative costs/benefits of acquisition, management and enforcement.



## Copyright

Copyright exists automatically on the creation of certain original works. It applies to musical, dramatic, artistic or literary works (including models, drawings, sculptures, software, books, advertising copy). It protects the way in which an idea is expressed but not the idea itself. If you're in the content business (producing music, books, film, software and the like) copyright comes into its own.

Less well known is that copyright can also apply to the shape and configuration of a product or its packaging or promotional materials. As a consequence, there is likely to be copyright in most replicable products you create.

Copyright is not a property right like a patent or a trade mark registration. As the name suggests, copyright confers the 'right to copy'. So it doesn't confer a monopoly, but it may offer the ability to stop unauthorised copying of any product, artistic work or literary work (including software). Copyright therefore doesn't provide the strongest form of protection for innovations. That's more the territory of patents and registered designs which we discuss a bit later in this article.

## Confidential information and trade secrets

Confidential information and trade secrets can be good forms of protection for things such as the way something is manufactured or the ingredients used in a new product formulation - providing they can be kept confidential or secret. That's the key, and for some businesses it may simply not represent a high enough threshold for sustainable competitive advantage.

The recipe for Coca-Cola is the best-known example of a well-kept trade secret. Over decades extreme care has and continues to be taken by the Coca-Cola Company to keep it that way. But this isn't the only form of IP protection employed either. The company also invests heavily in protecting and enforcing its trade marks, get up and packaging designs.

Copyright is used to protect the way in which an idea is expressed, but not the idea itself. It applies to original works (e.g. music, literature, drawings, designs), as well as the shape or configuration of a product or its packaging.

Confidential information and trade secrets refer to formulations, recipes, know-how and valuable commercial information, whether documented or not. They must remain confidential or secret to be effective forms of protection.



## Trade marks

If your main market advantage is driven by the distinctiveness or provenance of your brand, product or service, you will want to consider trade mark protection.

A trade mark helps distinguish your products and services from others and can comprise any marking such as a word, phrase, symbol, picture or any combination of these. A trade mark can also be a colour, shape, sound, or even a smell if capable of being represented graphically.

Trade marks are signs that help distinguish your product or service in the market and can comprise words, symbols, sounds, smells and colours.

Registration of a trade mark confers on the registered owner the exclusive right to use that mark in relation to the specified goods and services (known as classes), and in the jurisdiction(s) for which registration has been granted. Some businesses use registration to restrict the same mark or confusingly similar marks from being used by others.

A good example of a recent trade mark stoush was that between French fashion label Christian Louboutin and Dutch company Van Haren. Van Haren was found to have infringed Louboutin's 'trade mark' red soled high heel shoes. The court ruled that it didn't matter that Van Haren's shoes were different shapes. The trade mark registration was designed to protect the application of that colour to a specific part of a product.

## Registered designs

Then there are designs and patents. Registered designs protect aspects of the appearance of an article – its shape, pattern, configuration, or ornamentation – but not its functional aspects unless these aspects also contribute to its aesthetic appearance. If the look of your product is a key influencer in a buyer's purchasing decision then a design registration can provide stronger protection against would-be copiers than is available under copyright.

Registered designs protect aspects of the appearance of an article – its shape, configuration, pattern, or ornamentation – but not its functional aspects.



## Patents

Patents provide protection for the ideas embodied in novel technologies, products and processes. They cover a principle or idea and not just a single physical form of an invention, so the monopoly granted by a patent can be wide in scope and cover many variations of a basic product or process.

Most breakthrough technologies or processes involve significant investments of money, time and effort. While the thresholds for acquiring and owning a patent are considered a lot higher than other forms of protection, the benefits can often far outweigh the costs in the long-run.

A key advantage of patents is that they represent one of the strongest forms of protection against the copying or exploitation of an invention. Sometimes, the mere existence of a patent (or even a patent application) can be enough of a deterrent.

Furthermore, the owner of a patent is granted a 20-year monopoly right over the manufacturing, marketing, licensing or sale of the invention covered by the patent, providing a lucrative window of opportunity to secure a strong foothold in the market. Unprotected innovation doesn't afford the owner as much of an advantage, and is far more difficult to sell or license.

One doesn't need to look far to find evidence of the commercial value of patents which tend to play a particularly vital role in high-tech, high growth industries from software, electronics and electrical innovations, to aviation, healthcare, pharmaceuticals, chemicals, biotech and more. However, investment in R&D and the rate upon which returns can be generated from its output can take time and there isn't always a direct correlation, so it pays to find the right balance.

What can be said is that if your business involves the development of a new product, technology, or improvement to an existing product or technology, and has the potential to pass the tests of novelty and patentability (topics we will cover in a future article), then there is every reason to seek expert advice from a patent attorney as early as possible.

Patents protect the ideas embodied in novel products, technologies, processes and improvements to existing products and processes. They cover how things function, a principle or an idea, and not just a single physical form of an invention.



Of all the forms of protection discussed in this article, patents are the trickiest to navigate, the easiest to get wrong, and the costliest to acquire – so you want to get it right.

## Don't be put off by the process

In the early stages a business' only assets may be its intellectual property. Yet, IP protection and management is sometimes viewed as too complex or costly to consider or is put off until it's too late.

The process doesn't need to be daunting. It does however need to be owned, otherwise you run the very real risk of forfeiting valuable intangible assets that may be the principal well-springs of your business' value and competitive edge.



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## Investment and IP: what might investors want to know and how to be pitch-ready

So far in this series we've talked about the role intellectual property (IP) plays in business, reasons to protect it, and the different forms of protection that exist.

If your business has grown to the point of needing a serious injection of funds to sustain or accelerate momentum, chances are you will be thinking about investment.

So let's turn our attention to investment and IP. What might investors want to know, and how can you be pitch-ready for IP-related questions?

### Be credible by being prepared

Raising capital to finance expansion and growth can be exciting and anxiety-inducing, sometimes both at the same time.

Whether you are planning to get in front of venture capitalists, angel investors, private equity funds or the public with a crowd-funding initiative, being well prepared is crucial. In simple terms this means delivering a pitch that grabs the attention and interest of your potential investors, and that provides clear answers to questions of strategic importance.

In addition to all the usual suspects, such as who's on your team, what customer problem you're solving, why your value proposition is a winner, and how large the market is, investors are also likely to look for evidence of intellectual property smarts.

Raising capital to support a hungry, growing business can represent an exciting milestone for your company or organisation. Whether you are tapping venture capital, private equity or angel investors, pitching doesn't need to produce 'Dragon's Den' style anxiety.



Do you have a good grasp of the role IP plays in your business and how that translates in a commercial or competitive context? Is there a solid IP strategy in place and is it being effectively managed? What steps have been taken, or are being taken to mitigate potential risks of infringement?

Being well-rehearsed not only in the terminology of your intellectual property, but what form and function it has in your business, will go a long way toward building credibility with your audience.

Being well-prepared, rehearsing and knowing what you're talking about, will go a long way toward connecting with your audience with credibility and authenticity.

## A check-list to get you started

Set out below is a check-list of IP-related questions that investors might probe. Some are obvious - others less so. Bear in mind that not all investors will show interest in the detail, but most will want assurance that you're on top of your IP position. It's better to err on the side of thorough preparation than to wing it.

- Is your IP strategy commercially or legally-driven? Technology or product-directed?
- Where do you see the opportunities for commercial exploitation of your IP? For example, is it licensing, franchising or sale? Or is it in protecting the value of your product in market and a growth strategy driven by continuous innovation?
- What IP is owned and used, and who owns it? Remember to include registered and unregistered IP rights here. In some businesses, customer or supplier contracts may be as or more valuable than registered rights.
- What protection is in place already and where (i.e. which countries, jurisdictions, or classes)?
- What is the status of your registered IP? Granted, pending, under examination, not yet examined?
- Has any IP been acquired or licensed in? Why?
- Is there an effective process in place for capturing and controlling your IP and managing your IP portfolio?
- Have any risks of infringement – by your business on the rights of others, or by others on your rights – been identified? What steps are being taken to avoid, mitigate or prosecute them?
- How does your IP position stack up against your competitors'? Have you established freedom to operate in the markets which you want to be in?

When it comes to explaining or responding to questions about your intellectual property, school up by running through the check-list provided in this article. Not all investors will want to know the detail, but all it takes is one.



- What level of investment has there been in IP protection to date; what level is expected in future?
- What's the (technology) life-cycle of your product or service category?
- Has the business' IP been formally valued? If so, by who, and what method?

## Make the connection

Be mindful when pitching that investors are typically looking for authenticity and a compelling believable story. Help them see the connection between IP and your competitive or commercial advantage by tying your answers back to how it drives value (and ultimately returns) in your business. This is far more likely to resonate than a humdrum of legal or technical soundbites.

Bottom line: when you get in front of potential investors know your stuff, but more importantly, know why it's important to your audience and be clear in how you articulate it.

Don't risk winging it.  
Demonstrate that you take your business seriously and help your potential investors understand why they might want to as well.



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## Mistakes to avoid making with your IP: things you need to know from the get go

As with anything that you want to do well, getting to grips with the ins and outs of intellectual property (IP) and the ways in which it can be leveraged in your business requires a combination of curiosity, constant learning and the right advice and expertise at the right time.

For some entrepreneurs and business owners, rookie mistakes can lead to lessons being learned the hard or expensive way. The good news is that there are ways to avoid some of the more common pitfalls.

Here's our top 10 list of things you need to know from the get go.

### 1. Keep quiet

For some forms of IP protection timing is everything. As a rule, keep things quiet and don't be tempted to publish, publicise or promote prematurely. The cone of silence isn't just a pithy phrase that gets bandied around in IP-land. It serves a very real purpose.

### 2. Apply the 'value' litmus test

When developing IP of any form ask 'how is this adding value to my business or value proposition?' Aim to always align activities and investment to your strategy and apply the 'value' litmus test to make sure that what you're protecting is worth protecting.

Here are ten behaviours that will help strengthen your position:

1. Keep quiet
2. Apply the 'value' litmus test
3. Use non-disclosure agreements
4. Keep good records
5. Read the fine-print
6. Take a broad perspective
7. Search and research upfront
8. Control confidential information
9. Own the process
10. Be proactive



### **3. Use non-disclosure agreements**

Don't be afraid to ask a potential partner or supplier to sign a non-disclosure agreement (NDA). This will help set expectations of both parties from the outset. If the other party refuses to enter into a confidentiality agreement then you may want to revisit if they are the kind of person or company you want to deal with.

### **4. Keep good records**

Keep accurate, complete records of IP creation, ownership, and transfer. It's good house-keeping and you never know when you may need them – especially if you need to rely on rights to copyright.

### **5. Read the fine-print**

A lot can happen pre-money, pre-launch or pre-market validation. You might sign up to become a member of an incubator, apply for government grants or funding, talk to investors, forge supply arrangements, or all the above. Be careful to read the fine-print of any contracts you sign in the process as some will most definitely contain terms or conditions around intellectual property. Remember to be circumspect and only share what is essential or covered by confidentiality clauses.

### **6. Take a broad perspective**

Be careful not to rely solely on a single form of IP protection. Take a broad view of your intangible assets and think about the entire value chain or product lifecycle. There may be hidden gems lurking in your know-how, the expertise of your people, or your way of doing business.

### **7. Search and research upfront**

If your value proposition is built on an innovation or invention it's a good idea to conduct a search of existing patent literature prior to investing a large amount of money or effort in R&D. This may save you from wasting valuable resource or potentially avoid infringing the rights of others. It can also illuminate the competitive landscape.



## 8. Control confidential information

Manage and control the distribution of your ideas and know-how – internally and externally – with appropriate agreements and policies. Theft of trade secrets can happen, and if you don't have the right contracts in place with staff, contractors or third parties, you can inadvertently lose control of your IP through accidental or malevolent means.

## 9. Own the process

Take ownership of the process but don't take this to mean IP is DIY territory. You may be able to carry out some aspects yourself such as preliminary searching or research, but there are risks to this approach. If you're serious about your IP and its value to your business invest in expert help - it will more than pay for itself in the long-run.

## 10. Be proactive

Proactively manage and enforce your IP rights. A bit like car registrations or subscriptions, some IP rights need to be renewed at regular intervals to be maintained. Others need to be used to remain valid. Some, like patents and copyright, have fixed durations and either need to be replaced or updated.

There's a saying that goes along the lines of 'when we know better, we do better'. Apply that to how you approach intellectual property and your business, and you'll be in good shape.



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