

# Intellectual Property

Intellectual property (“IP”) has been recognised as a separate branch of the law for centuries – it is not some new thing that has just emerged at the end of the last decade. However, IP has become a key to doing business more successfully. Intellectual property may be any of the following:

- Patents
- Designs
- Trade marks
- Copyright
- Circuit Layout Rights
- Plant Breeder’s Rights
- Confidential information

You might own or be using intellectual property without even being aware of it. If it is properly identified and managed, intellectual property can add a lot of value to your business. If it is not, you can lose a lot of opportunities and it can cost you a lot of money.

We can help you to identify your intellectual property, protect it, and then help your business to grow by assisting you to commercialise your intellectual property.

You can benefit from our extensive experience in helping people to recognise and protect their trade marks, inventions and other intellectual property, and to properly commercialise that intellectual property. Whether you have a trade mark, invention or design that you want to capitalise on, or a good idea and the opportunity to make use of it, we can help you to investigate your alternatives, advise you on which of those alternatives is most suitable for you, and help you to carry out the various steps required to put them into practice.

Many companies do not manage their intellectual property well. This is often because many of their staff have not been trained to recognise intellectual property assets in the first place, or to be aware of when they are infringing intellectual property rights belonging to other people. We can help you to identify the various forms of intellectual property and to gain the maximum advantage from it.

## Patents

You may be able to protect a new invention or process by applying for a patent. To get patent protection, a patent must be registered. If you do not keep your invention secret, and register it within time, you may not be able to get patent protection. In order to obtain a patent, the invention must be:

- Novel
- Inventive
- Useful

Speak to us if you think you are entitled to get patent protection for your inventions. We can assist you in determining whether you have a patentable invention, and can work with your own patent attorney, or with any of a range of other patent attorneys around the world.

## Designs

Designs must be registered under the Designs Act, and protect the form of expression of your idea if they are registered.

If you do not register a design which is capable of being registered, you will not be able to stop somebody else from infringing your design, and you might lose any copyright protection you have.

You can register designs for a particular style of furniture, a bottle, container or packaging, or the “look” of many things.

## Trade marks

Trade marks are a name or mark or other distinguishing feature identifying where goods or services come from. Although they can be registered or unregistered, you can get much better protection by registering your trade marks.

It is now also possible to register colours, sounds or smells as trade marks, if they are used and rendered in a manner which is distinctive of your goods or services.

You might still be able to stop other people from using your trade marks if they are not registered, if you can prove that you have been using the trade marks for a long enough period of time, and that you have gained enough of a reputation in the use of the trade marks for your goods or services.

## Copyright

Copyright protects the expression of the idea, and not the idea itself. It exists the moment a new idea is physically expressed in a material form, without having to apply for registration. Computer software can be protected by copyright.

If you get anybody else to create logos, artwork, computer software, documents, advertising material, content or websites for you, you should make sure that you have a written agreement stating that you will own any copyright that is created. If you don’t, you might not own the copyright even if you have paid for the material.

Speak to us to learn what you can protect by copyright, how to claim copyright, and how to stop somebody else from breaching your copyrighted material.

## Circuit layout rights

Circuit layout rights automatically protect original layout designs for integrated electronic circuits and computer

chips, without the need for registration.

The Circuit Layouts Act gives the owner the exclusive rights to:

- Copy the layout in a material form;
- Make integrated circuits from the layout design; and
- Exploit it commercially within Australia.

Although these rights are closely related to copyright, they result from the Circuit Layouts Act 1989 (Cth), and give rights in an original layout for a period of ten years from the time of the first commercial exploitation of the layout, provided the first commercial exploitation occurs within ten years of the creation of the layout in the first place.

### **Plant breeder's rights**

Plant Breeder's Rights can be obtained by registration of new plant varieties under the Plant Breeder's Rights Act 1994 (Cth), and protect new varieties of plants by giving to the breeder exclusive rights to propagate and market a new plant variety or its reproductive material.

To obtain protection under the Plant Breeder's Rights Act, you must:

- Show that the new variety is distinct, stable and uniform; and
- Demonstrate by trials that your variety is clearly distinguishable from any other commonly known plant variety.

Protection is available for 25 years in the case of trees and vines, and 20 years in the case of other plant varieties, after examination and registration of an application for a new variety.

### **Confidential information**

Confidential information can consist of trade secrets, know-how or other information that is valuable to you.

This type of Intellectual property only remains valuable to you if it remains secret or confidential. A classic example is the recipe for Coca Cola, which has never been patented, but is now more valuable than when it was first made.

Speak to us to make sure that you have a valid and binding confidentiality agreement with any people to whom you plan to disclose your confidential information – including your employees – if you have valuable information or trade secrets that you want to keep confidential.

### **Establishing appropriate business structures**

When you have identified your intellectual property, it is important to manage and exploit your IP assets to produce the best return. Prior to exploiting your IP, you should look carefully at your business structure and ask:

- Do you own the IP you want to commercialise?
- Is your business structure suitable for marketing and commercialising the IP?
- Are you in the best position to exploit the IP, or should you licence somebody else to commercialise it?
- Do you want to sell the IP asset outright or licence somebody else to use the IP and pay you a royalty?
- Are you properly protected for product liability or warranty claims?

You should answer these questions before deciding whether to go ahead with marketing or licencing the IP developed by you.

You should make sure that you have in place the appropriate procedures to identify intellectual property when it is created, and to ensure that any intellectual property that is created is assigned to your company. You should do a complete audit of your intellectual property and of these procedures on a regular basis. This can reduce the risk of your business losing value and help you to maximise your intellectual property.

### **Commercialising your intellectual property**

Once you have identified and protected your intellectual property, you can then commercialise that intellectual property and maximise the return from it. Intellectual property can be more flexible than more tangible assets, and you may be able to separate the ownership of the asset from the use of it. You can sell all or part of the intellectual property in different territories around the world, or you can license a third party to market and sell the IP in different territories around the world. You should consider requiring:

- payment of a purchase price or "up-front" licence fee;
- payment of an annual licence fee;
- payment of ongoing royalties based on sales of the asset or products produced as a result of using the IP;
- minimum sales of products or payment of minimum royalties during various periods;
- ongoing development of the intellectual property or products produced as a result of using the IP;
- maintenance and ownership of any improvements to the intellectual property or products.

Hercules Constan can help you to determine which of the various alternatives for exploiting the asset is most appropriate for you. We can help you to negotiate and draft the agreements you need for the sale, licence or other commercialisation of your intellectual property.

### **Valuing your intellectual property**

It is sound business practice to value the intellectual property of your business. The value of patents, brand names, goodwill and other intellectual property also has to be included in the balance sheets of companies. This makes it more important for you to work closely with your patent attorney, your accountant and your lawyer, to recognise the intellectual property in the first place, adequately protect it, and properly value it in accordance with recognised accounting principles.

Intellectual property, clearly valued and identified in the balance sheet of a company, can be of great benefit to a company, particularly where mergers or acquisitions are involved. A proper valuation can strengthen the general asset position of the Balance Sheet, enhance the net asset value per share and assist with obtaining finance.

### **Current developments**

The law relating to intellectual property is changing at a rapid rate, to try to keep up with the pace of change of technology in this area. Examples of these developments

are the increasing use of the Internet, and the ability to easily and cheaply stream or download music, movies and software.

The Copyright Act now includes a technology-neutral right of transmission and communication to the public, and enables authors of copyright works to protect moral rights. Keeping the law relevant in this area is made more difficult by:

- Digitalising and copying electronically stored material makes it easier to produce copies as good as the original. This, together with the ability to more easily change the font and format of copied material, makes detection of copying and infringement more difficult.
- Increasing globalisation and use of the Internet enables access to, copying and transmission of information on a much greater scale.

Although these technological changes can make protecting your intellectual property more difficult, they also make it more important that you protect your IP in the first place, by:

- claiming copyright for your original works and properly marking those works as copyrighted material belonging to you;
- registering patents, designs and trade marks belonging to you wherever possible;
- making sure that your licence and distribution agreements contain valid clauses protecting your ownership of the intellectual property and your right to use the IP;
- marking your trade secrets and other valuable information as "confidential", and maintaining their secrecy;
- investigating and using any reasonable method for encrypting or protecting your intellectual property from copying or tampering.

Hercules Constan can help you to maximise the benefit you can get from your intellectual property assets. We aim to help you take advantage of opportunities that you might not otherwise have been able to, and add value to your business.

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Note: This is intended only as a brief introduction to some of the legal aspects of names and trade marks and is not intended to be legal advice. You should not rely on this summary as a substitute for appropriate legal advice suited to your particular needs. You should seek and retain the advice of one of our solicitors if you require a comprehensive and up to date analysis of the law relating to your particular circumstances.

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