

Fineprint

In this issue:

- 1 Developing an Intellectual Property Strategy
- 3 Rural Fires – who is liable?
- 4 Ending Marriages of Short Duration
- 5 "Reading of the Will"
- 6 Postscript

Developing an Intellectual Property Strategy

An integral part of your business strategy

There's no question that an intellectual property (IP) strategy should be aligned with business strategy. What needs to be better acknowledged, however, is that IP issues can actually drive most organisation's strategic considerations.

If the majority of the value of your business is in its intangible assets, it makes sense that your organisation's framework is based around those assets and associated IP issues – rather than trying to dovetail an IP strategy into a less than effective business plan. This article takes into account the existing DNA of a business when developing an IP strategy.

Organisational type

Individuals often need resources such as money, expertise, staff or distribution outlets. Instead of a comprehensive IP strategy they may only need to know what few steps should be put into place to attract a commercial partner to provide the resource required.

For SMEs, internal structures need to allow for growth. As fast adopters, SMEs are of a good scale to instil an effective IP framework.

Research organisations invariably have issues surrounding their researchers' desire to publish and to develop a culture more biased towards science, rather than business. As well, many interactions are around research contracts where

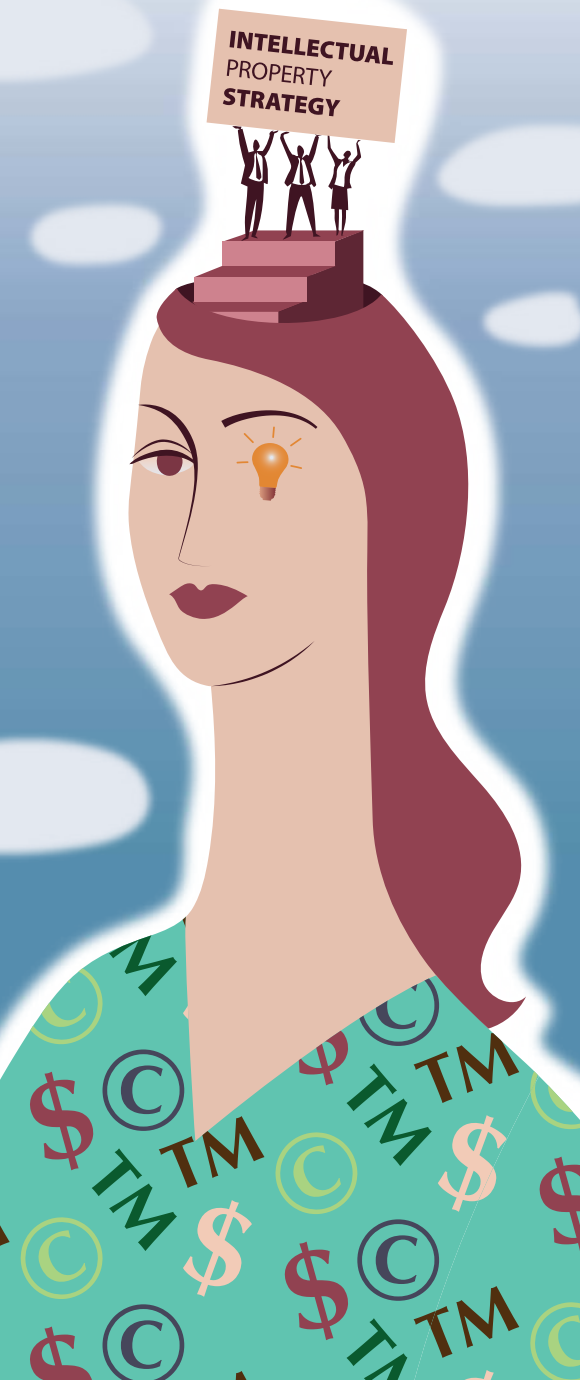
ownership of the resulting IP can be ambiguous.

Therefore an IP strategy must include stringent publication and ownership policies and associated template agreements, a training policy to increase the awareness of intellectual property amongst the research staff and a means to encourage them to communicate IP issues to their commercial arm.

Corporates are often large and can be unwieldy. Their IP strategies, therefore, should have strong guidelines on management responsibilities and communication to ensure there is a consistent approach to IP issues. It will be invaluable if there is an in-house counsel or a strong relationship with an IP firm. Also important are regular IP strategy meetings.

Culture

An organisation's culture can strongly influence how systems are developed and introduced. Understanding what motivates staff is important as this could affect whether inventor award schemes are introduced and what form they take.



Customer relationships count too. While the correct legal approach may be to lock down ownership of IP in all third party dealings, this approach could adversely affect existing 'friendly' customer relationships.

IP audit

An audit of existing IP shouldn't just include the basics. Documentation of unregistered assets such as know-how, copyright, etc is essential. Ownership issues should be documented along with conditions of use. As well, and of great importance, is the scope of protection. An IP audit therefore helps identify gaps in protection, risks (particularly in terms of internal systems, ownership and conditions of use), opportunities – as current IP protection may be broader than the current business model requires, and whether you are spending money on redundant projects."

IP creation

It's expensive and difficult to grow a business that has a weak IP position as a result of choosing inappropriate trade marks or developing unprotectable products.

It can also be financially disastrous to invest heavily in a marketing campaign or product manufacture only to find that you cannot enter a market because of freedom of operation issues. Then there's the loss of reputation if you have to recall a product.

A good IP strategy ensures having an IP strategist, or well-trained staff, at brainstorming meetings.

Competitive advantage/barriers to entry

The decision on whether to invest in formal IP protection is largely linked to the value of the competitive edge it provides or maintains. With a new product or brand, the focus should be on developing features that will persuade a consumer to purchase the product or service – and then protecting those features.

A competitive edge can also be maintained through other barriers to entry, including key people, niche markets, exclusive supply of key ingredients, regulatory approval (eg: FDA), first to market (unlikely) and disorganised competitors.

Exit strategy

An exit strategy can depend on your company's strategic direction or the product lifespan.

For short-lived products, either formal IP protection is forsaken or deterrent applications can buy enough time to gain traction in a market.

Companies in for the long haul need a managed process. A comprehensive IP portfolio helps if a trade sale or an Initial Public Offering is planned. Patent and trade mark applications can be timed so that you aren't committed to complete the applications (and incur major costs) before the actual sale.

Third party interactions

Third parties can include employees, suppliers, contractors, customers and partners. Regrettably, much IP is lost because of third party interactions. Your IP policy should ensure that these interactions are defined. These include employment contracts, key person insurance, succession planning, confidentiality

agreements, development agreements, documentation protocols, visitor protocols, award schemes (for employees) and licences.

Markets

The market will determine where to file for IP protection and define the scope of the IP protection.

IP legislation differs by country and your strategy needs to accommodate this. For example, we recommend prioritising Asian TM filings as First to File has priority over First to Use. Understand that medical treatment and software can only be patented in some countries. Know-how cannot be licensed in others.

You should examine competitor and/or collaborator activity – not only where they market your product, but also where it's manufactured. For example, you may choose to file an application in a small market if it can stop a competitor manufacturing in that market and exporting elsewhere.

It also pays to know your product's complementary industries. This way you can license your IP to non-competing industries and create alternate revenue streams.

Freedom to Operate searching should be considered at the start of a project.

Timing

Sometimes timing can be dictated by the type of organisation and the subject matter it relates to. It's possible to delay filing applications or shift application filing dates if a project is taking time to become market ready. To provide this flexibility you need to ensure that marketing and research cannot publish until the IP position has been clearly considered.

Your strategy should ensure R&D milestones are met before you invest heavily in IP protection.

Resource

IP protection and associated systems must be budgeted for in terms of time, expertise and funding. Ask yourself these questions:

- *Can you afford to have staff conducting preliminary IP searching?*
- *Is it smart to negotiate with distributors to share in the IP investment?*
- *Should you license the manufacture and distribution of products (and associated IP) to other parties in selected markets?*

The resource that can be diverted to IP indicates the level of development of a limited or expansive IP policy.

Putting it together

Systemic weaknesses identified within an organisation will need policies to plug the gaps. These need to tie back into communication lines, education of staff, employment contracts and other third party agreements.

Any gaps identified in your IP audit should also be plugged. If an opportunity to gain broad protection has passed, then use some creativity to decide what alternatives are still available.

Finally a regular review process needs to be organised. This can be a formal audit and/or regular meetings with an IP strategist to ensure that your business and the IP strategy are in synch and working well together. ■



Rural Fires – who is liable?

Every year our fire service is kept busy battling blazes in rural areas which cause substantial damage to the landscape and cost hundreds of thousands of dollars to put out. So who is responsible for the costs associated with fighting the fire and any damage caused by the fire?

Liability for rural fires is covered under the Forest and Rural Fires Act 1977. Prior to this, you could be liable if you were negligent or if a fire had been deliberately lit and it escaped from your land. The Act simplified the position by imposing liability on the person who caused the fire, regardless of negligence.

If you're responsible for a fire starting you will almost certainly be liable for the damage caused to other properties and the costs incurred in fighting the fire. In some circumstances you could also be held liable for the actions of your employees or third party contractors.

Avoiding liability is rare

You can only avoid liability in very limited circumstances – where the fire was accidental and the circumstances leading to the fire were extraordinary. In 2003, the High Court made an exception to the standard rule in the case of a truck and trailer driver who had a tyre blow out causing a roadside fire¹. The driver had kept his vehicle properly maintained and inspected, and was unaware that the tyres had blown or that the wheel rims were scraping on the road generating sparks, leading to a fire. The court found that the particular combination of events leading to the fire was extraordinary and a fire could not have been anticipated by the driver. The driver was therefore not liable for the damage caused by the fire.

Steps to take

The question then is, if you live in a rural area, what can you do to limit your exposure to liability?

- *Think about your property and the particular challenges that it would face in a fire.* Every property has different characteristics which impact on fire risk. Examples are isolation, lack of adequate water sources for firefighting crews, condition of your farm tracks and the presence of power lines on your property. What precautions can you take to reduce those risks?
- *For employers:* Keep your employees up to speed about fire risk and good fire safety practices.

- *Check your insurance policies carefully.* Make sure your policy covers the loss of your own property, loss to third parties and cover for fire suppression costs.
- *Ensure that you understand your obligations and any exclusions or limits that may apply to your policy.* Check your policy limits, including the level of cover for fire suppression costs under the legislation. The costs of putting out a rural fire can be considerable. A large fire in Marlborough earlier this year cost an estimated \$1.4 million in firefighting costs.
- *Think about the type of activity being undertaken on adjoining land as well.* If there's adjoining forestry land you may want to extend your limits.
- *Check that your insurance covers all activities being carried out on your property.* A Nelson couple had built three small tourist cabins on their lifestyle block². Ashes disposed of from one of the cabins by the couple started a fire causing damage of more than \$1 million. As the couple had chosen not to insure the tourist business because of the cost, they could not rely on their general lifestyle policy to cover the majority of their costs. And as they hadn't separated the ownership of the property from the operation of the tourism business, the property was exposed to any legal challenges.
- *Be aware that your insurance policy will have a reasonable care condition* requiring you to take reasonable steps to minimise the risk of fire. A breach of this condition may result in you not being covered. When it's a restricted or prohibited fire season there will be a greater degree of care required from you in carrying out activities in high risk areas.

It's impossible to avoid the risk of a fire altogether. However, if you take steps now you can reduce the risk and ensure that if there is a fire you are covered for all losses.

The Forest and Rural Fires Act 1977 is currently under legislative review with the expectation that new legislation will be passed in the next couple of years. It's not expected however that the provisions relating to liability for fires will change to any great degree. ■

1 *Tucker v New Zealand Fire Service Commissioner* [2003] NZAR 270

2 *Nelson Forests Limited v Three Tuis Limited* [2013] NZHC 856 and *Garnett v Tower Insurance Limited* [2011] NZCA 576



"I give this marriage a year"

Ending marriages of short duration

Whirlwind romances can be wonderful and dramatic things. We've all been taken by surprise at some stage in life by a friend announcing a wedding to someone they haven't known for long but insists 'this is the one'. Hollywood loves the Las Vegas style wedding too. Sadly, however, some of these more dramatic pairings don't stand the test of time and the law makes special provision for what's known as a 'marriage of short duration'.

The Property (Relationship) Act 1976 (usually known as the PRA) applies to anyone who has been in a relationship whether it's a marriage, a civil union or a de facto situation.

Marriages of three years plus

Under the PRA the rule of thumb is that property is divided equally after separation although there are various exceptions, particularly where prenuptial arrangements are in place.

The definition of property under the PRA includes tangible and intangible property. Tangible property includes items such as houses, cars, furniture, jewellery, money, equipment and so on. Intangible items are such things as business interests and superannuation benefits.

All property owned by both parties has to be considered and classified, and must be disclosed to the other partner regardless of when it was acquired. In some situations a specialist valuer will be needed to help sort this out.

Marriages of short duration

The PRA defines a 'marriage of short duration' as one lasting for less than three years. The 50/50 rule only applies to marriages of short duration when the contributions to the relationship are equal.

In a 2012 decision¹, the High Court held that "*the determination of the duration of the parties' relationship is fundamentally a determination of the fact*". The courts will look at the factual matrix and circumstances of a particular couple.

When dealing with the property division in a 'marriage of short duration' the court must consider if the contribution of one spouse to the marriage has clearly been disproportionately greater than the contribution of the other spouse. The contributions of each person are set out in section 18 of the PRA and include:

- Care of any child of the marriage (this can include step-children)
- Management of the household and the performance of household duties
- Provision of money, including the earning of income, for the purposes of marriage
- Acquisition or creation of relationship property, including the payment of money for those purposes

- Payment of money to maintain or increase the value of:
 - The relationship property, or
 - The separate property of any spouse or any part of such property
- Performance of work or services in respect of:
 - The relationship property, or
 - The separate property of any spouse or any part of that property
- Forgoing of a higher standard of living than would otherwise have been available, and
- Giving of assistance or support to the other spouse (whether or not of a material kind), including the giving of assistance or support that aids the other spouse in the carrying on of his or her occupation or business.

Once all of these factors are considered the courts then decide who gets what.

The principle is straightforward – at least in theory. Spouses are entitled to an equal share in the relationship property unless the contribution of one is considered to be clearly greater than that of the other.

Interestingly if a marriage or civil union of short duration (even if very brief) is ended by one spouse dying, it will be treated as a marriage or civil union of long duration. This means the surviving partner is entitled to an equal share of the property unless a court considers that would be unjust.

Different for de facto couples

The rules for dividing property when a relationship is of short duration (usually less than three years) are different for those in a de facto situation.

In a de facto relationship of less than three years, orders can only be made if the court is satisfied there is a child of the de facto relationship or an applicant has made a 'substantial contribution' to the de facto relationship and the failure to make an order would result in a 'serious injustice'.

If you're concerned about asset protection and the division of relationship property, do talk with us early on in your separation.

Sadly not all whirlwind romances have the Hollywood ending even if they do begin with an Elvis impersonator in a chapel in Vegas! ■

¹ RSQ v BQ [2012] NZFC 272

'Reading of the Will'

Busting some of the myths regarding Wills

There are a number of common assumptions made about access to a person's Will and what happens after the Will-maker has died. Television and movies often contain scenes in which, after a person's death, the estate lawyer and all the beneficiaries get together for a formal reading of the Will. While there's nothing to prevent this from happening, there's no requirement to do so and it rarely happens in New Zealand. Usually the estate lawyers write to each of the beneficiaries named in the Will to advise them of their entitlements.

Who is entitled to a copy of a person's Will?

A Will is a confidential document belonging to the Will-maker. It only comes into effect on the Will-maker's death. No-one (without the consent of the Will-maker) is entitled to a copy before the Will-maker dies. Lawyers are required by the rules under the Lawyers and Conveyancers Act 2008 to keep all information relating to a client confidential. A person's property attorney or property manager, however, can obtain a copy of the Will. Property managers and property attorneys can obtain the court's approval of a new Will and therefore need to know what any existing Will says in case, unwittingly, they sell or dispose of an asset that is specifically gifted under the Will.

Of course, you may wish to provide a copy of your Will to certain people while you are alive. These could be, for example, the executors you have named in your Will, or your spouse or partner. Alternatively, you may just wish to let them know who holds the Will. This will avoid your family spending time trying to locate your Will after you have died.

On a person's death, the only people entitled to a copy of the Will are the executors and beneficiaries named in the Will. The usual practice in New Zealand is for residuary beneficiaries (those entitled to a share of the residue of the estate once all specific legacies and debts are paid) to receive a full copy of the Will. If you're receiving a specific amount of money or particular item, you are notified about that particular gift but are not usually given a copy of the Will.

Will registry

There's no central registry in New Zealand where all current Wills are held. However, once probate of a Will has been obtained (probate is the process of proving the last valid Will in the High Court and is required for estates with assets worth more than \$15,000 at any one institution), a copy of probate with the Will attached is held in the High Court and becomes a public record. Occasionally people record in their Wills the reasons why they have disposed of their assets in a particular way. You should be careful doing this, as the probated Will becomes a public document, and therefore so will your reasons. Providing an explanation for why you have dealt with your assets can be helpful, however, if a claim is made on your estate. An alternative way is to record your reasons in a separate note which is held with the Will but doesn't form part of it. The note will not be produced for probate and therefore will not become a public document.

Distributing the estate

Many people think that once probate is obtained the proceeds of the estate can be distributed immediately. This is not always the case; best practice in New Zealand is to wait about six months before distributing the estate. This allows time for the executors to be notified of any claims to be made on the estate, property to be sold and estate affairs to be sorted out. In most cases, if a claim is made on an estate, the claimant must notify the executor of their claim within six months of the grant of probate. Executors can be held personally liable if a claim is made within six months and the estate has already been distributed. In some cases the distributions can be ordered back into the estate. ■

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Postscript



Select Committee's recommendations on Health and Safety Reform Bill further delayed

The long-expected Select Committee recommendations on the Health and Safety Reform Bill have, again, been delayed. This legislation heralds the greatest change to New Zealand's health and safety law in more than 20 years.

The government has indicated that the Select Committee's recommendations will now be delivered on Friday, 24 July. ■

Better online support for youth mental health

The revamped Lowdown website launched in June this year will provide young people with more accessible and responsive online mental health support.

"It is estimated that one in six young people suffer from depression or anxiety. It is important young people have the right support at the earliest opportunity," says Health Minister Dr Jonathan Coleman.

The Lowdown website provides young people with the tools to be able to recognise when they are experiencing depression or anxiety, and it gives them the right information and support.

The new website, which can now be accessed on a mobile phone, provides more self-help functions and includes videos from young people. There is also a forum for young people to share experiences and get advice and support.

The website also has new content on anxiety and the target age group has been realigned to 12-19 year olds to complement other programmes such as the Prime Minister's Youth Mental Health Project.

The Lowdown is part of the National Depression Initiative. The government's Rising to the Challenge 2012 mental health plan included a refresh of the Initiative.

The Lowdown can be found at www.thelowdown.co.nz ■

New tenancy website launched

A new tenancy services website designed to be a one-stop shop for all tenancy-related advice has been launched by the Ministry of Business, Innovation and Employment. There's comprehensive information for both tenants and landlords on their legal responsibilities and how to resolve disputes.

The site has useful sections on starting a tenancy; rent, bond and bills; maintenance and inspections; ending a tenancy; disputes; forms and templates (with checklists); and unit titles.

To find out more, go to www.tenancy.govt.nz ■

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