



Intellectual Property

In many businesses, intellectual property (IP) represents one of the most important assets. Unfortunately, because it is usually intangible, a significant number of business owners fail to realize just how valuable their IP really is. As a result, IP enters the public domain unprotected, much like leaving the till unlocked.

The term IP refers to creative and intellectual efforts protected by legislative and common law rights. It not only includes copyright, design, patent and trademarks, but also domain names, confidential information and business reputation.

Most corporations, small to medium enterprises and individuals involved in business in the 21st century will be faced with issues involving the protection of their IP. Because IP tends to receive such little attention within businesses, many business owners are unaware of their rights, unfortunately putting their hard work at risk. For business owners, registering IP enhances its value as it becomes secure and easily transferable.

IP is not protected by one piece of legislation. The applicable piece of legislation will depend on the nature of the IP concerned, such as copyright, trademark or patent. With the exception of copyright, you must take formal steps to register your IP and obtain the legal rights of ownership. Otherwise, you will have to rely on common law to prove ownership and prior use, which can be complicated.

In addition to registration, there are other strategies available to protect your IP, such as confidentiality and non-disclosure agreements which can be used with employees and third parties alike. Your lawyer can assist you to secure and protect your IP before problems arise.

Copyright

The Copyright Act 1968 protects original literary, dramatic, musical and artistic works, and also sound recordings, cinematographic films, radio and television broadcasts, and published editions of work.

Copyright does not protect ideas as such but only the particular form of expression in which ideas are embodied.

Copyright protection is free and gives exclusive ownership rights as well as rights to license others in regard to copying the work, performing it in public, broadcasting it, publishing it and making an adaptation of the work. Rights vary according to the nature of the work.

Although a copyright notice with the owner's name and date is not compulsory in Australia, it can help prove your ownership of the copyright if there is a breach, and is necessary to establish copyright in a few overseas countries. It can also act as a deterrent to potential infringers.

Depending on the nature of the work copyright generally lasts 70 years from the year of the author's death or from the year of first publication after the author's death.

Trademark

A trademark is used to distinguish the goods and services of one trader from another. It can include a letter, word, name, sign, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent.

While registration under the Trademarks Act 1995 is not compulsory, it gives the registered owner exclusive rights to use the trademark, and authorize others to use the trademark, in relation to the goods or services in respect of which the trademark is registered. Registration allows a registered owner to object to the importation of goods which have the mark (or a similar mark) displayed on them.

While registration of a trademark is not compulsory, it is advisable because it can be an expensive and time consuming exercise to take action under common law if your mark is infringed.

Patents

You could seek patent protection for any device, substance, method or process, which is new, inventive and useful. As a registerable right, a patent is legally enforceable and gives the owner exclusive rights to commercially exploit the invention for the life of the patent.

Patent applications are made to the Patent Office of IP Australia and can be either provisional or complete. A provisional application allows you to secure a priority date without having to complete a full specification of the device, substance, method or process.

A complete application is necessary to actually have a patent granted and may or may not be preceded by an associated provisional application.

Once registered, an Australian standard patent lasts 20 years, although annual maintenance fees are payable after 5 years.

Designs

Registration of a design is different to copyright of an artistic work in that the design must have an industrial or commercial use. To register a design it must be a new and distinctive shape, configuration, pattern or ornamentation which, when applied to a product, gives the product a unique appearance. Registration of a design gives the owner protection for the visual appearance of the product only.

Registration initially protects your design for five years and can be renewed for a further five years.

Confidential Information

Confidential information refers to facts, knowledge, documents or intellectual property that is not in the public domain and is shared under the expressed or implied obligation, legal or otherwise, not to disclose it or its contents. Valuable confidential information belonging to a business owner can be lost if appropriate management strategies are not put into place.

A confidentiality agreement is often used when dealing with employees or third parties to prevent them from revealing your confidential information after their employment or association with your business.

Proving a breach of confidentiality under common law can be complex and potentially very costly.

Ensuring that confidentiality agreements are in place will ensure you have evidence of what was agreed and protection through the law in the event of any breach.

Domain Name

A domain name refers to your online identity which, like other IP of your business, is important to your success. There are no proprietary rights in a domain name, but a registrant holds a licence to use the domain name for a specified period of time and subject to the licence terms and conditions.

Any person can register a domain name and they are generally issued on a first come, first served basis.

Registration of the domain name should be both at the global level (.com) as well as the domestic level (.com.au in Australia). Unfortunately, many businesses only register their name at the domestic level which limits the likelihood of non-Australian internet users locating their website and presents a competitor or cybersquatter with an opportunity to register the domain name at a global level. There are registration renewal fees payable in respect of any domain name. However, if your business is largely web-based, the insignificant fees will be largely justifiable.

Your IP overseas

In certain circumstances, you can extend your IP internationally. Processes for this vary depending on the type of IP, and can be complex. Your lawyer can provide further advice about your options.

Is your IP at risk?

Consider your business in its current status. Have you adequately valued your IP? There is a general misconception among business owners that registering your business name or company protects the various intellectual property rights associated with it. As I have highlighted, there is far more work to be done to truly value and protect your IP. Whether you have just purchased or set-up a new business, or whether you have already been operating for years, now is as good a time as any to take steps to value your IP, audit these valuable business assets and develop an effective protection policy.

MacDonnells Law is a full service, Queensland-wide law firm, with experts in every field of law. This enables us to provide our clients with all of the complementary legal services that may be required in highly complex intellectual property matters without the possible delays, costs or hassles which might otherwise be involved in obtaining external advice. For further information please contact one of our intellectual property experts.

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