

BUSINESS LAW SEMINAR SERIES

INTRODUCTION TO INTELLECTUAL PROPERTY

TYPES OF INTELLECTUAL PROPERTY

PATENTS – for new or improved products or processes

A patent is a right granted for any device, substance, process or method which is new, inventive and useful. You cannot patent mathematical models, artistic creations, schemes, plans, or other purely mental processes.

Patents are legally enforceable and give effective protection if you have invented new technology that will lead to a product, process or composition with considerable long-term commercial gain.

There are two types of patents:

- A standard patent gives long-term protection and control over an invention for up to 20 years.
- An innovation patent is a relatively fast, inexpensive protection option, protecting an invention for up to 8 years.

This is not automatic - you must apply for a patent to acquire exclusive rights to commercially exploit your invention. In return, patent applicants must share their know-how by providing a full description of how their invention works. This information becomes public and usually provides the basis for further research by others.

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TRADEMARKS - to distinguish the goods and services of one trader from those of another

A trade mark can be a letter, phrase, word, logo, number, sound, smell, picture, shape, an aspect of packaging or a combination of these.

It is used to distinguish the goods and services of one trader from those of another. A trade mark gives you the legal right to use, license or sell it within Australia for the goods and services for which it is registered.

Trade mark registration is not compulsory but it is recommended. Registering a trade mark ensures you have exclusive use of your name within Australia. On the other hand, protecting an unregistered trade mark can be time-consuming and expensive.

Before deciding on a trade mark to register it is best to brainstorm a range of trade marks which you think could be suitable. Once a trade mark is selected, you must always conduct a thorough search of the trade marks database and other goods and services existing in the market to ensure that you will not be infringing any existing trade marks.

A trade mark can be a valuable marketing tool

A suitable trade mark should be an essential part of the marketing strategy for your goods and services. The public will identify a certain quality and image with goods and services bearing your trade mark. It can become an important means of maintaining goodwill and reputation with your clients and improving your bottom-line!

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DESIGNS - for the shape or appearance of manufactured goods

A design is the overall appearance of a product. The visual characteristics that form the design include the shape, pattern, configuration and ornamentation which, when applied to the product, give it a unique appearance.

A registered design can be a valuable commercial asset

Registration of a design gives you protection for the visual appearance of the product but not the feel of the product, how it works or what it is made from.

Before filing an application, you should search existing design records. If your design is not new and distinctive, any registration you receive could be revoked as a result of examination and your registration could be worthless. You may also face legal action if you infringe the design rights of the owners of other similar designs.

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COPYRIGHT - for original material in specific categories

Copyright protects the original expression of ideas, not the ideas themselves. It is free and automatically safeguards your original works of art and literature, films, music, sound recording, computer programs and broadcasts from copying and certain other uses. Copyright is not registered in Australia.

Copyright material is protected from the time it is first written down, drawn or painted, taped or filmed. It will also enjoy protection under the laws of other countries who are signatories to the international treaties, of which Australia is a member.

Copyright protection gives exclusive rights to license others in relation to copying the work, publishing it, broadcasting it, performing it in public, and making an adaptation of the work. Rights differ according to the nature of the work. For example, the rights granted for artistic works are different to those for literary and musical works.

Copyright does not protect you against independent creation of a similar work. Legal actions against infringement are complicated given that a number of different copyrights may exist in some works - mainly films, multimedia products and broadcasts.

A copyright notice can be a valuable deterrent

In Australia, although a copyright notice with the owner's name and date is not necessary, it can help establish your ownership of the copyright. In a few overseas countries, a copyright notice is necessary. It can also act as a deterrent to potential infringers.

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CONFIDENTIALITY/TRADE SECRETS

A trade secret is both a category of IP and a strategy for protecting your IP. It can be an effective safeguard for some technologies, confidential information, know-how and other forms of IP.

A confidentiality agreement is frequently used to prevent employees from revealing your secret or proprietary knowledge during and after their employment with your business.

Make sure you support your trade secret with signed confidentiality agreements with every person who has knowledge of the secret. If an agreement is breached, you will have evidence of what was agreed and be protected through the law.

When is a trade secret strategy appropriate?

Maybe your IP is unlikely to result in a registrable right, or maybe you want to retain exclusive use beyond the term of a patent.

A trade secret strategy is suitable when it is hard to copy the manufacturing process, construction or formulation from the product itself. Trade secrets are difficult to maintain over longer periods or when a larger number of people are made privy to the secret.

Caution

Secrecy does not prevent somebody else from inventing the same product or process independently and exploiting it commercially. It does not provide exclusive rights and you are at risk when employees with this knowledge leave your firm.

Under common law, proving a breach of confidentiality can be complicated and is potentially more expensive than defending registered rights.

Apart from signing confidentiality agreements, it may be prudent to ask contractors and employees give written undertakings not to:

- compete with your business either during the period of their employment or after they leave for a reasonable period of time; and
- use or disclose your confidential information to other parties for their own benefit or for the benefit of any other party.

It is usually easier to prove breach of confidentiality than enforce a restraint of trade clause.

From a practical point of view, you ought to have contractors and employees agree to such provisions at the commencement of their employment. It is more difficult, once the relationship has commenced to force contractors or employees to agree to restraints of trade and confidentiality provisions.

These undertakings, are difficult to impose and need to be prepared by your legal adviser, as you need to be vigilant that the undertaking does not limit the employee's or contractor's right to earn a living.