Effective Intellectual Property Management for Small to Medium Businesses and Social Enterprises

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IP Branding, Licenses, Trademarks, Copyrights, Patents and Contractual Arrangements

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INTRODUCTION

Intellectual property (IP) management is a topic of significant concern for all organisations, irrespective of their size and nature. It is, however, an area of corporate management that has often been neglected or overlooked by small and medium size enterprises, and even more so by smaller third sector enterprises. The reasons are varied and include a lack of money, knowledge, time, or a combination of these factors. The intrinsic value of IP is often underestimated and receives little attention from smaller organisations—yet it is an integral part of any organisation's asset portfolio. Often, effective IP management strategies can make the difference between the success and failure of an organisation. This book focuses on ways in which small and medium size enterprises—including social enterprises—can protect and manage their IP. It deals with the importance and value of IP, and the specific needs and requirements of SMEs in relation to IP management, highlighting problematic issues and providing structural guidance in relation to IP management. The book draws on qualitative research conducted in Australia in this area of the law, identifying the unique challenges faced by third sector SMEs in managing their IP, and providing practical strategies for effective IP management and protection.

CHAPTER ONE

AN OVERVIEW OF IP IN THE SME AND SMSE CONTEXT

Introduction: Intellectual Property, Intellectual Capital and Intellectual Property Rights Management

This first chapter provides an overview of intellectual property (IP) in the Small and Medium Size Enterprise (SME) and Small and Medium Size Social Enterprise (SMSE) context, and explains the nature of IP as intellectual capital (IC). It introduces the basic components of IP rights—copyright, trademark, patents, and trade secrets—and outlines the fundamentals of IP management. This chapter also considers the philosophical debate and importance of achieving a balance between protecting IP and the importance of access to IP in the interests of innovation. This chapter also outlines the particular significance of IP in the SMSE context and the challenges faced by third sector enterprise generally in the management of IP.

IP has been recognised as an element of a firm's IC. Virtually all enterprises own or use some type of IP such as logos, brand names, manuals and contracts, training materials, software, databases, sound or visual recordings, designs and even unique attributes such as sounds and colour schemes. IP is generally regarded as 'creations of the mind'[1] and includes inventions, literary and artistic works, symbols, logos and images, names

[1]World Intellectual Property Organization, *What is Intellectual Property*? (2016) WIPO <http://www.wipo.int/about-ip/en/>.

and brand names, designs and industrial designs, and software and sound or visual recordings. In the context of this book and research study, a high-level approach is favoured, founded on practice-based considerations, and the focus is on providing insight into sustainable IP management strategies that can be applied by stakeholders.

Some notably relevant categories of IP referred to are copyright in written materials (such as training manuals or contracts), computer software and website content, images, sound and visual recordings, trademarks (such as symbols, logos and images or business names, domain names and brand names), patents in goods, products or processes, and confidential information (including trade secrets and know-how).

From a legal perspective IP rights allow the originating creator or 'owner' to maintain control of a creation, and the enforcement of IP rights can prevent attempts to adapt or misuse the original creation for another purpose. Thus, the owner of IP may have rights to exclude others from its use, reproduction and distribution. It is important to recognise that there is no IP in an idea until such time as it's written down or made tangible. If it is only an idea, then it has no protection under the law. In the third sector context, relevant IP may typically include trademarks, patents and copyright.[2]

The three main types of IP rights that impact SMEs are examined in detail in Chapter 5. However, by way of introduction it is necessary to briefly distinguish the various concepts.

Copyright

Copyright is a statutory right which gives the owner exclusive rights over a body of work for a limited or fixed period of time dependent on the medium. It is essentially a legal right that grants the creator of an original work exclusive rights for its use and distribution. These rights are not absolute but limited by exceptions under the copyright laws of different countries and states, including the right of 'fair use'.

[2]In Australia, the *Trade Marks Act 1995* (Cth), *Copyright Act 1968* (Cth) and *Patents Act* 1990 (Cth) primarily regulate intellectual property. In, New Zealand the equivalent legislation is the *Trade Marks Act 2002* (NZ), *Patents Act 2013* (NZ) and *Copyright Act 1994* (NZ).

Trademark

A trademark has been defined as 'a sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by any other person'.[3] A trademark may be an unregistered common law mark or a mark registered under the trademark laws of different countries. Registration gives the owner of the mark the exclusive rights listed under the legislation. Registered trademarks are the personal property of the registered owner.

Patent

Described as a set of exclusive rights granted by a country or state to an inventor for a limited period of time, patents are subject to requirements of detailed public disclosure of an invention. The invention is a solution to a specific technological problem and may consist of a product or a process of manufacture. A patent may be classified as a standard patent, innovation patent, or petty patent. Patent rights—like other IP rights—are personal property, and may be assigned, willed, sold, licensed, or otherwise dealt with by the patentee. The patented product enters the public domain after a maximum of 20 years for a normal patent; if it is an innovation patent it usually enters the public domain after eight years.

Related to these IP rights are trade secrets, which may also be protectable under the law.

Trade Secret

Trade secrets can include any formula, pattern, device, or compilation of information that is used in a person's business and that gives that person an opportunity to derive an advantage over other persons who do not know or use it. Trade secrets are a form of property and may be sold. They may also be protected against competition without infringing the general prohibition against contracts in restraint of trade. An employee is usually

[3] *Trade Marks Act* 1995 (Cth) s 17.

required to maintain the confidentiality of trade secrets learnt during employment, even after leaving that employment. In environmental law, for example, persons who gain knowledge of trade secrets in the course of considering applications for permits to emit pollution, or otherwise in the course of administering legislation, may commit an offence if details are improperly disclosed.

IP Protection and Management: General Considerations

As with other types of property rights, an owner of IP has certain rights to exclude others from its use—IP rights have value and can create new value both financially and in terms of social welfare benefits, during operation and expansion as well as upon disposition.[4] For these reasons organisations have an interest in ensuring that IP is managed effectively; a firm 'must use IP rights in combination with other strategies, while being fully cognisant of the strengths and weaknesses of the various IP regimes'.[5]

Due to the importance and value of IP, commercial success in the information age is inextricably linked to the effective management of IP.[6] Philips Electronics, for example, reportedly employs over 300 IP staff, while Toshiba has a dedicated IP group that handles all the activities surrounding filing and enforcing IP rights; it also hosts an information centre dedicated to supporting IP management. Case studies of blue chip corporations

[4]Gollin argues that copyright balance is the free global flow of creative expression with incentive to express new ideas; patent systems balance access to existing inventions with incentives to invent new ones; trade secret balances benefits of sharing personal knowledge publicly with the possibility of keeping the secrets safe within a limited group; trademarks systems balance the benefits of merchant creativity in marketing goods and services and consumers' need to know the source of goods. See Michael A. Gollin, *Driving Innovation: Intellectual Property Strategies for a Dynamic World* (Cambridge University Press, 2008) 51–52, 59.

[5]William van Caenegem, 'Intellectual Property and Intellectual Capital' (2002) *Intellectual Property Forum* 10.

[6]Wuryan Andayani et al, 'Corporate Social Responsibility, Good Corporate Governance and the Intellectual Property: An External Strategy of the Management to Increase the Company's Value' (Paper presented at National Conference on Management Research, Makassar, 27 November 2008). The authors conclude that 'intellectual property had important role towards the values of the company. The intellectual property could improve the values of the company and investors considered the variable of intellectual property as an important thing'. See also Although it has been recognized that economic wealth comes from knowledge assets-intellectual capital- and its useful application, replacing or perhaps supplementing land, labour, and capital (Dean and Kretschmer, 2007).

have documented a range of IP management strategies.[7] Indeed it is not hard to think of the current era in the progression of capitalist economic systems as an era of 'intellectual capitalism,' in which building effective strategies around IP provides a major, sustainable advantage.[8]

What is clear is that, in order to manage them, IP assets must first be identified; second, the value of trademarks, patents, copyright and trade secrets held by the organisation must be quantified; and third, the level of risk associated with IP rights protection, or failure to protect, must be assessed. These processes should incorporate planning and strategies for protecting against threats and vulnerability, and establishing controls with both offensive and defensive efforts.[9]

IP rights are viewed as a valuable asset to any organisation, including third sector organisations. IP is considered by many to be instrumental in the ongoing viability and innovative capacity of an organisation, namely 'the invisible infrastructure of innovation'.[10] The value of IP rights is increasingly recognised in commercial dealings.[11] Organisations are more frequently offering intangible property as collateral, and creditors are more readily accepting such assets as security for loans.[12] In this way commercial organisations have been increasing their ability to obtain funding by offering intangible property, for example copyright in a film or in musical works,[13] as collateral. It has been said that the importance of tangible property such as real estate, machinery, and inventory has reduced, and intangible property has gained greater significance,[14] causing a 'paradigm shift'.[15] Moreover, the inclusion of IP rights is often incidental

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[7]Scott Wilson, 'Value, Protect, Exploit: How Managing Intellectual Property Can Build and Sustain Competitive Advantage' (Research Study, Deloitte Research, Deloitte Services LP, 2007) <http://www.deloitte.com/assets/Dcom-Bulgaria/Local%20Assets/Documents/BG_tmt_ManagingIP_160807.pdf>.

[8]Ove Granstrand, *The Economics and Management of Intellectual Property* (Edward Elgar, 1999).

[9]Ibid.

[10]Gollin, above n 4, 51–59; see also Francina Cantatore and Elizabeth Crawford-Spencer, 'Yours, Mine, and Ours: The Development, Management and Protection of Intellectual Property in Third Sector Enterprise' (2014) 3 *Intellectual Property Quarterly* 210, 210–226.

[11]Francina Cantatore 'Intellectual Property Rights and the PPSA: Challenges for Interest holders, Creditors and Practitioners' (2015) 25(3) *Australian Intellectual Property Journal* 141.

[12]Andrea Tosato, 'Security Interests Over Intellectual Property' (2011) 6(2) *Journal of Intellectual Property Law & Practice* 93, 93.

[13]Judy Lam, 'Banking on a Dream: Perfecting Security Interests in Copyright—An International Survey' (1993) 13 *Loyola of Los Angeles Entertainment Law Journal* 319.

[14]Tosato, above n 12, 93.

[15]Gordon V. Smith and Russell L. Parr, *Valuation of Intellectual Property and Intangible Assets* (Wiley, 3rd ed, 2000) 1.

in transactions where security is taken over the assets of an organisation obtaining funding.[16]

The ability of any enterprise to manage its IP effectively is seen by IP protection advocates as a significant factor in achieving goals and maximising the benefits of assets. IP management is important to any business structure that creates, innovates, expands or advances pre-existing ideas. As IP owners have certain rights to exclude others from its use, reproduction and/or distribution,[17] organisations have an interest in ensuring that IP is managed effectively. A firm 'must use IP rights in combination with other strategies, while being fully cognisant of the strengths and weaknesses of the various IP regimes'.[18]

Thus, engaging effectively with IP rights allows creators to maintain control over the use of their ideas, developments or innovations which then protect the organisation's core values and social causes from misuse by others. By protecting its core values, the organisation will maintain accountability to stakeholders, its target audience and the general public.[19] Consequently, the failure to adequately manage IP is thought to have adverse consequences for organisations in relation to economic sustainability, growth and public image.

Of course, the benefits of protecting IP are regarded as more than just economic:[20]

> social welfare should not be assessed by reference only to the price of access to copyright material, but also by reference to non-economic benefits such as being part of a community in which creative activity is encouraged and fostered.[21]

There is, of course, a healthy debate surrounding the underlying values of IP ownership and protection. The politics of IP can be polarising.

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[16]Tosato, above n 12, 93.

[17]World Intellectual Property Organization, above n 1.

[18]Nick Bontis, 'Managing Organisational Knowledge by Diagnosing Intellectual Capital: Framing and Advancing the State of the Field' in Chun Wei Choo and Nick Bontis (eds) *The Strategic Management of Intellectual Capital and Organisational Knowledge* (Oxford University Press, 2002) 621, 642.

[19]Francina Cantatore and Elizabeth Crawford-Spencer 'Intellectual Property Rights Management in Small and Medium Size Social Enterprise in Australia' (2015) 4 *Intellectual Property Quarterly* 328, 331.

[20]Cantatore and Crawford-Spencer, above n 10, 210.

[21]Australian Copyright Council, Submission to the Intellectual Property & Competition Review Committee (IPCRC), *Effects On Competition Of Australia's Intellectual Property Laws*, 17 December 1999, 3.

Proponents espouse a range of benefits of IP management and protective measures, while critics advocate abolishing them. Advocates of IP rights emphasise their value and potential to create new value, both financially and in terms of social welfare, during operation and expansion of an organisation as well as upon its disposition. It is claimed that the active management and protection of IP rights aids organisations to compete on the basis of reputation associated with a product rather than price alone. For this reason, SMSEs have an interest in ensuring that IP is managed effectively, including measures for protection of IP. Advocates of IP legal regimes argue that IP laws provide incentives for people to be creative, promote public disclosure of new information, facilitate the transfer of (and investment in) innovation, and implement industrial policy.[22] They credit IP rights with driving innovation, which in turn improves standards of living.[23] For them the key to progress is balance; 'the right combination of access and exclusivity can drive the innovation cycle.'[24]

Critics, however, argue that IP regimes facilitate the withholding or restricting of information from others. They suggest that IP protection keeps innovations out of the public domain; increases the cost of technology; creates monopolies; concentrates industry on what can be protected, not what is best; is expensive to obtain and maintain; and requires burdensome and costly legal and regulatory institutions.[25] They say there is no conclusive evidence that IP regimes create value, and there is also uncertainty with respect to valuation of IP rights. Critics also point out that accounting standards and methods vary, and that there is generally little co-ordination among diverse professionals dealing with an organisation's IP rights.[26] The nature of IP is constantly changing in response to technology, which means that it can be difficult to maintain consistent and fair rules around IP.

While protection of IP may benefit an organisation, there are risks. Every enterprise needs to find the balance and approach that is appropriate,

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[22]Gollin, above n 4, 51–59. Gollin further argues that IP is a means of balancing public access and private exclusivity and that exclusivity and access are part of a dynamic system of creativity, '[s]uccessful IP management involves finding the right balance of exclusivity and access in any given situation'.

[23]Ibid 104–109.

[24]Ibid 299.

[25]Cantatore and Crawford-Spencer, above n 10, 225.

[26]Jason Sacha, 'Virtual Advantages for Charities' (2012) 25(1) *Intellectual Property Journal* 75, 75–95.

'the right combination of access and exclusivity can drive the innovation cycle.'[27] The underlying question of whether the cost-benefit considerations of commercial organisations translate to the SMSEs context (where the emphasis is on collaboration rather than competition) is further explored and discussed in a future chapter.

While it is true that an organisation without an IP strategy can save short-term costs and the effort involved in reporting, tracking and protecting their trade secrets, inventions, copyright, and trademark risks, such an organisation may also miss opportunities to build assets, may be more vulnerable to competitors' activities, and can incur liability for infringement.[28] An organisation without an IP strategy is likely to fail to acknowledge the return on its investments in innovation (even though it may have a duty to shareholders) and is likely to miss opportunities to use IP tools to help fulfill its mission.[29] Furthermore, if an organisation permits others to use its IP—such as logos, name or copyrighted works—the terms and conditions of use should be contained in a written licensing agreement, to prevent trademark infringement and damage to the organisation's reputation and goodwill.[30]

While copyright in work undertaken by employees within the scope of their employment will generally be owned by the organisation,[31] written

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[27]Gollin, above n 4, 29–40.

[28]Ibid 132. Gollin describes the risks for an organization with 'nonstrategy': It may lose technical information, control over processes, specifications and other operations information. Software and graphic designs in reports, packaging, and webpages are at risk and the value of copyrights can be lost or diminished due to non-marking of works and nonregistration. And a zero level organization is likely to violate software user licenses. There may be also issues with respect to patent protection and exposure to damages for infringement.

[29]Though in many cases the common law will confirm rights to trademarks in use by an organization, employees and consultants may be free to register and use trademarks in foreign jurisdictions. Independent contractors and consultants who create logos and marketing copy may secure copyrights, and trade secrets such as formulas, contact lists, organizational policies may be appropriated by employees and others. It depends on insurance coverage in case of liability for mismanagement of IP, permits competitors to use its IP without sharing of benefits, and ignores legal avenues available to expand its IP portfolio. Such an organization allows others to use its IP without any charge, recognition, or obligation and may similarly fail to respect IP rights of others, and therefore faces exposure to liability for infringement. For these and other reasons Gollin suggests that 'nonstrategy' is the worst alternative for most organizations. See ibid 361–363.

[30]Jeffrey S. Tenenbaum, *Licensing your Association's Logo to Others*, Venables News and Insights <http://www.venable.com/licensing-your-associations-logo-to-others-01-01-1999/>.

[31]Jeffrey S. Tenenbaum, *Does Your Association Own the Work Product of Your Contractors, Authors, Speakers, Officers, Directors and Committee Members?* Venables News and Insights <http://www.venable.com/does-your-association-own-the-work-product-of-your-contractors-authors-speakers-officers-directors-and-committee-members-03-01-2002/>.

copyright assignments should be obtained for work done by external contractors including work such as written copy, graphics or videos. Computer programs commissioned by a firm are also not protected unless covered by a written assignment.[32] Under Australian law, inventions will be owned by the employing organisation only if they were invented in the course and scope of an employee's duties.[33] Using an employer's resources will not automatically entitle the organisation to the assignment of an invention,[34] thus a written contract should be concluded to protect both parties' interests.

Licensing of IP can play an important role in creating functional structures within an organisation or entity. For organisations reliant on the use of patents, the concept of patent pools has become a relevant consideration. Evidence suggests that companies are acknowledging the benefits of participating in IP collaborations. In 2001, for example, sales of devices in the US based in whole or in part on pooled patents were estimated to be at least US$100 billion.[35] Patent pools provide collaborative advantages such as cost sharing and obtaining the benefit of others' experience,[36] as well as opportunities to obtain IP rights at a reasonable cost 'without having to negotiate at their own expense for months or years.'[37]

These types of arrangements have been a viable option for large corporations holding patents to consumer electronics such as Dell and Apple over recent years.[38] The biomedical research community has also embraced development of patent pools for cancer, HIV/AIDS, severe acute respiratory syndrome (SARS), and agricultural biotechnologies research.[39] Patent pool arrangements do, however, raise some concerns, such as the potential for anti-competitive behaviour and the difficulties associated with

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[32]Michael L. Gollin and Ronald W. Taylor, *Protecting Your Company's Intellectual Property*, Venables News and Insights <http://www.venable.com/protecting-your-companys-intellectual-property-04-01-1999/> 8.

[33]William van Caenegem, *Intellectual Property Law and Innovation* (Cambridge University Press, 2007), 97.

[34]Ibid; *Victoria University of Technology v Wilson* [2004] VSC 33.

[35]Josh Lerner and Eric Lin, 'Collaboration in Intellectual Property: An Overview', *WIPO Magazine* (online), November 2012 <http://www.wipo.int/wipo_magazine/en/2012/06/article_0008.html>.

[36]Ibid.

[37]Cameron Gray, 'A New Era in IP licensing: The Unit Licence Right™ Program' (2008) 28(10) *The Licensing Journal* 5.

[38]Ibid.

[39]Lerner and Lin, above n 35.

monitoring a partner's actions.[40] For larger third sector organisations patent pools may provide long term IP solutions, as the sharing of inventions and innovative research also provides the opportunity for the development of strategic and collaborative relationships.

The issue of trade secrets merits consideration as organisations may rely on confidential information or trade secrets in their activities, which should be protected. The form of protection will differ depending on where the organisation is situated. For example, Japan and some US states provide statutory protection for trade secrets,[41] but Australia relies on its common law and remedies for the unauthorised use of trade secrets or confidential information are limited to contract or equity.[42] While trade secrets do not require registration in order to be protected, adequate security measures should be in place to demonstrate that reasonable measures have been taken to maintain the secrecy of the information.[43] Gollin and Taylor suggest that confidential information should be provided to employees on a 'need-to-know' basis only, and that passwords should be used for computer files and email. Furthermore, they propose that confidentiality clauses should be inserted into all employment agreements.[44] In theory, these steps are basic protection standards that should be applied in all organisations, and need not be costly.

In practice, protection measures may impact upon the organisation's IC, as discussed in greater detail in Chapter 2. For example, they may impact upon flexibility to work collaboratively with others and to effectively harness human capital. Employees and stakeholders in the organisation comprise the human capital of the organisation, including their competences, skills and innovative talents.[45] It may be difficult to impose stringent protection strategies where such individuals are closely involved with the organisation's day-to-day operations. In Australia an action for breach of confidence requires the information to be 'secret'.[46] Although absolute

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[40]Ibid. The authors provide an example of the recent lawsuits between Apple and Samsung, a key supplier of Apple's processor chips, which 'provide a cautionary tale about the pitfalls of contractual joint collaborations and the disputes that can arise between market rivals operating within a complex strategic context.'

[41]For example, *The Uniform Trade Secrets Act* (UTSA) applies in Maryland, Virginia and the District of Columbia. See also Gollin and Taylor, above n 36, 6.

[42]William Van Caenegem, Intellectual Property in Australia, (Wolters Kluwer 2010), p. 184.

[43]Gollin and Taylor, above n 36, 5.

[44]Gollin and Taylor, above n 36, 5–6.

[45]Bontis, above n 18.

[46]*Coco v AN Clark (Engineers) Ltd* (1986) 1A IPR 587, 590.

secrecy is not required, the information must not be available in the public domain or known to those 'amongst whom such information normally circulates.'[47] This requires careful monitoring on the part of management and is a consideration in deciding whether or not to register an innovation or share knowledge with collaborators. IP protection may also impact upon relational capital, including relationships with customers, suppliers and other partners and to the public, as well as strategic alliances, licenses and agreements.[48] Implementing adequate protection measures for confidential information and trade secrets, while maintaining strategic alliances and collaboration, can present significant challenges.

Achieving Balance Between Reward for Work and Innovation

IP can serve as an instrument for innovation if there is a balance between exclusion and access to ideas. The International Commission on Intellectual Property Rights has stated that the crucial issue is to reconcile the public interest in accessing new knowledge and the products of new knowledge and products on which material and cultural progress may depend.

People who wish to cite and learn from others' patented ideas can search the public domain, which contains publicly accessible published and recorded information. There should be a balance between protecting the rights and interests of the IP rights owners (rewarding them for their efforts) and opportunities for the public to innovate and develop new ideas.

This balance of interests in IP protection can be characterised according to the four basic categories of IP: (1) Copyright, balances the free global flow of creative expression with incentive to express new ideas; (2) Patents, balances access to existing inventions with incentives to invent new ones; (3) Trade secrets, balances the benefits of sharing personal knowledge publicly with the possibility of keeping the secret safe within a limited group; and (4) Trademarks, balances the benefits of merchant creativity in marketing goods and services through commercial channels of trade with the consumer's need to know the source of goods.

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[47]William Van Caenegem, *Intellectual Property in Australia* (Wolters Kluwer 2010), 186. For example, in the case of *Franchi v Franchi* [1967] RPC 149 an invention which was made public in a patent application in Belgium, was held not to be sufficiently secret in the United Kingdom as patent agents could be expected to monitor such publications.

[48]Bontis, above n 18.