

Insights

Intellectual Property Awareness: Critical Element of Business Planning

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I attended law school to become a patent attorney. I didn't know at the time what that really meant, or even that patents are but one type of intellectual property (IP). I did know that an engineering career was not for me, but patent law could be a way to leverage my engineering background into an interesting legal career. And, law school wouldn't require more math. Not until I enrolled in as many IP courses and seminars as my law school offered did I realize how far reaching the full gamut of IP could be. IP provides a critical component for any business, and the more it is taken seriously and broadly incorporated into business planning and employee education and training requirements, the higher the likelihood for commercial success as well as avoidance of many legal risks.

IP touches on all aspects of business. Any enterprise having marketing, sales, product management, customer-experience managers, HR, internal and external communications teams, and, of course, R&D will do well to be deliberate and diligent when it comes to identifying and protecting its IP. This includes at least a basic understanding of the differences between patents, trademarks, copyrights, trade secrets, and restrictive covenants such as non-disclosure and non-use obligations. Training and education on these topics for employees at all levels should be a requirement that permeates the company culture, instilling an IP-aware mindset throughout the organization. Each business should keep the following few IP touch points in mind.

For a company built on and/or sustained by its product or service innovations, inventions created by its employee inventors or collaborators need adequate protection either by obtaining patents for them or by keeping them as trade secrets. Such companies must be savvy about identifying when inventions arise and deciding between patent or trade secret protection. Patents provide exclusive rights to exploit the invention for limited times (about 20 years), in exchange for sharing the details of the invention with the public. Trade secrets, however, are protected indefinitely against misappropriation so long as reasonable measures are put in place to maintain the secret; but as soon as the secret gets out, that protection is gone. A good assumption is that anything that can be reverse engineered will be, so a patent would be the better choice. But if details of an invention are not discoverable by legal means, or if the nature of the invention would make detecting infringement difficult or impossible, then maintaining it as a trade secret is a reasonable option.

Trademarks help build a company's reputation around its branded products and services. Marketing and communications teams must understand the spectrum of trademark distinctiveness and its significance in

selecting a strong and legally protectible brand. Brand selection should also include consideration of competitors' brands to avoid confusing similarity that could lead to allegations of trademark infringement. Moreover, while alluding to competitor brands in comparative promotions might seem clever, IP-savvy marketing teams will understand the strict limitations around doing so, thereby avoiding potential legal claims for unfair business practices.

While many think copyrights relate mainly to books, music and movies, copyrights cover much more. These rights can extend to software applications, white papers, promotional brochures, user manuals, presentations, commercials, print ads and jingles, product images, company logos, app icons, etc., essentially any creative assets generated by a company that comprise an 'original work of authorship' set in a tangible form, whether analog or digital. A user manual might not crack a best-seller list, and a jingle might not hit the top-40, but copyrights in these keep competitors from simply copying and benefitting from your company's creative investments.

Besides maintaining its own copyright assets, an IP-aware company will also be careful to avoid the pitfalls relating to the copyrights of others in things like journal publications, online images and videos, and streaming music and motion pictures. Obtaining appropriate licenses will allow sharing third party publications internally or with customers, playing music over public speakers, and showing movies or TV shows in the workplace. Furthermore, knowing the difference between linking to content of a website versus copying that content can avoid potential infringement. And just because something like an image or video can be easily copied from the internet does not mean doing so is allowed – any copying requires permission of the owner of that image or video. The bundle of rights offered by copyrights can be leveraged in many ways and they often are when it comes to publications, images, music and movies.

Non-compete agreements have recently become increasingly subject to scrutiny for use in many industries and are or soon could be limited. These limitations in conjunction with increased employee mobility endanger trade secrets. Thus, HR departments need robust and consistently implemented employee policies covering confidentiality, non-disclosure, and non-use, as well as training programs pertaining to all confidential information of the company, not just trade secrets. All employees should execute nondisclosure/confidentiality agreements for the duration of employment as well as an appropriate duration post-employment. Employee training should also include best practices to ensure trade secrets stay within the smallest circle of people who "need to know." And conducting exit interviews with departing employees can emphasize an employer's expectations about confidential information (including trade secrets) and the obligation of the departing employee NOT to share that with a new employer.

I have offered merely a sample of the different ways building an IP-aware culture can benefit any business. Policies and guidelines pertaining to these topics and more are highly recommended, as is providing IP training throughout the organization. For any IP situation or risk, you should seek counsel from your friendly neighborhood IP attorney who can help answer questions, secure appropriate IP rights, enforce IP rights against infringers, draft useful policies and guidelines, and advise how to avoid risks not just of losing own-IP assets but also of infringing the IP rights of others.

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