



The INTELLECTUAL PROPERTY ladder

It is seen by many as one of the next great commercial battlegrounds, but your Intellectual Property can as soon have you climbing the walls as climbing the business food chain, writes Tracey Caldwell.

Intellectual Property. As a phrase, it really could mean anything from a des res semi (in Braintree perhaps?) to Stephen Fry's bachelor pad. So, unless you happen to be a big noise in corporate law, you can probably be forgiven for not realising that recent years have seen it quickly but quietly emerging as one of the biggest, most important issues for businesses in the Internet age. Honestly, who would have thought such an apparently niche commercial backwater would become such a big deal?

Big deal it is though, and the first step in understanding why is to remind oneself that – crazy as it may sound – we now live in a world in which the name of a business, its logo, even the font it's written in, can be worth more than the very products and services that the company provides. Shapes, colours, words – you can even trademark sounds these days.

As such, while Intellectual Property might not appear on the average balance sheet, it can very often be a business's single biggest asset. OK, but why all the fuss now all of a sudden? It's been possible to ring-fence company names and logos and so on since the year dot hasn't it?

Well, in essence, yes. Intellectual Property is currently protected by something called Intellectual Property Rights (IPR) – which in fact is simply a catch-all term used to describe the various mechanisms for safeguarding a person or organisation's rights over their ideas, products, information and so on. Some, such as copyright, simply exist and can be invoked without formal registration. Others, like patents and trademarks, must be paid for.

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The problem is however, that it is now the year dot.com, and the web is just one of any number of technological factors that are redefining what does and doesn't constitute Intellectual Property – and therefore the legislation that governs it.

"Most businesses interact with the Internet, and its fast-changing nature is leading to IPR issues", notes Business Link Innovation adviser Mark Barber. As an example, he says, he recently came across a company that, having "grown out" of its relationship with one web developer, decided to look elsewhere. Come crunch time however, they discovered that their existing web pages were owned not by themselves, but by the developer.

IP rights are also much more complex in open, collaborative environments such as that associated with Web 2.0. Paul Gershlick is an associate with lawyers Matthew Arnold & Baldwin and the editor of legal market news service upload-it.com. He points out that, with Web 2.0, several people may contribute to the development of an idea, and it can be unclear whether contributions have been made in a personal capacity or in the course of their employment.

Attitudes on this issue vary from culture to culture, says Barber. Some large companies take the view that anything an employee thinks up – inside or outside working hours – belongs to the firm. Others are less hard line. And whereas UK companies often feel the need to protect against people leaving and taking their ideas with them, in Central Europe employees are often permitted to file patents themselves.

Increasing numbers of end users are contributing to product and service development too, particularly via collaboration models like open source – so even customers can impact who owns your IP. And worryingly – with many firms loosening their grips on architecture and code in order to benefit from user-driven innovations – even the experts have little real idea as to what rights they might have.

Things are further complicated by two more factors; the fact that IPR legislation overlaps with laws governing several other areas of the business (with competition and contract law both having a great deal to say regarding IPR) and the fact that IPR law is struggling to keep pace with the technology that impacts it. Until recently, for instance, ↪

It seems that even the government has seen the potential impact of the changes taking place in the IPR landscape.

Such was the Treasury's concern about the part IPR could have to play in protecting the country's creativity (one of the few areas in which it believes the UK can claim to remain unquestionably world-class), that it commissioned Gowers to conduct an independent review that eventually recommended changes in copyright rules. Where copyright law used to be controlled by the government's own IPR Office, the old Patent Office has been given a wider remit and become the UK Intellectual Property Office (UK IPO). Its white paper "Innovation Nation" highlighted the changing nature of innovation as new technologies emerge and users become increasingly inventive. It even questioned the UK IPO's own *raison d'être*: "We have assumed that IPRs directly promote economic development and have never sought to prove this assumption."

The government rebuking itself? IPR really must be important.

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intellectual property

it was nigh on impossible to patent business methods or even software developments.

Thankfully, change is afoot. Towards the end of last year the Court of Appeal granted a patent on a particular variety of performance boosting software, paving the way for further UK software patent applications, and while most IPR laws are national laws, cross border issues are now being settled in case law. Other recent legislative changes have made it easier to register patents and trademarks UK-, Europe-, and even world-wide.

Here too, a recent agreement on European patents (removing the need to translate patents for every country at a cost of around £5,000) should halve costs for UK businesses seeking to protect their rights across Europe.

It hasn't all been one-way traffic however. Some of the latest legislative change could complicate rather than simplify matters. One little-known shift in UK trademark law, for instance, means that applications that conflict with existing registrations are no longer automatically rejected, points out Gershlick.

For the foreseeable future then, legality is likely to remain an IPR minefield upon which businesses will need to keep a wary eye. But where to start?

The first rung on the IPR ladder is the Non-Disclosure Agreement or NDA. This is very often as far as many firms will have climbed, says Barber, but it is important to savvy up on patent, copyright, and trademark law too.

The next key step up is to review your IP protection strategy starting with a full intellectual property audit which, given the potential value of the organisation's IP, is every bit as essential as a hardware and software audit.

It is also important to employ pro-active watching tools and services. The business needs to pay particular attention not just to what it is using, but who created it. If freelancers or suppliers have contributed to code or content, what respective rights do they and the business have over it? Is something new being created or are you simply adapting existing material?

And if it is the latter, to whom does this code or content belong? Could you be breaching someone else's IPR?

It's possible to get around such uncertainty by ensuring that documents such as terms of website use and employment contracts properly respect and reflect IPR strategy. But while such concerns are keeping an increasing number of lawyers in clover, there is also a growing pragmatism that although rights can be registered, making them stick is something else entirely.

"Being the rights holder doesn't mean you can stop infringements going on", warns Barber. "People assume that the process of gaining rights is going to be expensive, but they don't realise that if these rights are infringed, especially by a large multinational, that they may not be able to afford to defend themselves, even with IP insurance."



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You can end up paying some pretty high premiums here, but it's vital to look at the small print of what is and isn't covered, he says. Realising this and the multitude of other impracticalities of trying to police every inch of their IPR perimeters, more and more organisations, especially larger concerns, are instead becoming more focused on open innovation.

Steve van Dulken, researcher at the British Library's Business and IP Centre (BIPC) isn't surprised. He suggests that in cases where early user advantage is important, it is often best not to worry too much about Intellectual Property other than automatic rights such as copyright and design right. He also notes that while registering a trademark is generally worthwhile, especially in the EU, rights registration sometimes costs more than it is worth.

If it is too late and you think your IPR has already been infringed, action is usually taken under civil law, though trying to negotiate a solution with the infringer is often preferable, with legal action a last resort.

If all this sounds suspiciously like legal advice, it isn't supposed to. However, much as it might stick in one's craw, a legal stitch in your IPR strategy now could save nine (and maybe a lot more) in the long run. ■