

Protection of Intellectual Property for Small Business



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What is the pudding here for?



What is “Intellectual Property” ?

- ▶ Type of property right that covers intangible creations of the human intellect, as opposed to things like land or goods.
- ▶ String of different laws and rules – mostly limited territorially in effect – makes overseas protection expensive – WIPO
- ▶ Best initially explained by some examples to be touched upon today:-
 - ▶ Copyright
 - ▶ Trademark
 - ▶ Patent
 - ▶ Registered Design
 - ▶ Trade Secrets
 - ▶ Confidentiality obligations

What “Intellectual Property” Laws don’t do.

- ▶ An “idea” is not protectable “at law” as intellectual property
- ▶ Protecting an idea is problematic but not impossible
- ▶ Often need action / registration
- ▶ Our laws only apply onshore, overseas local law (with some exceptions)
- ▶ No guarantee of making money from IP



Common Law v Statutory .

- ▶ Protecting an idea is problematic
 - ▶ We don't have an equivalent of the USA's Defend Trade Secrets Act of 2016
 - ▶ Statutory protections quicker and easier to enforce than general law things like passing off or deceptive and misleading conduct

Account of profits available for breach of some statutory IP rights

Problems with Common Law Protections

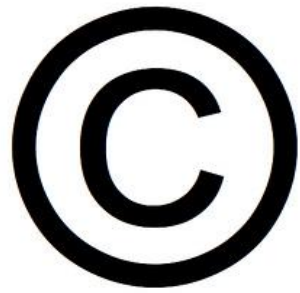
- ▶ **Protecting an idea is problematic**
 - ▶ **Contracts**
 - ▶ **Types of action to enforce / defend**
 - ▶ **Cadbury Schweppes v Pub Squash**
- ▶ **Unlike some forms of statutory IP right, no worldwide enforcement system**

Benefits of Statutory Protection for some types of Intellectual Property



Overseas registration can be of help but it costs

Formal “account for profit” remedies for patent and trademark infringement



copyright

➤ **Nature**

- Literary, artistic, music and dramatic works
- Also photographs, cinematograph films, sound recordings, performances and broadcasts
- Copyright Act
- Computer code
- Protects an expression not an idea

Length of copyright

- “Mickey Mouse” Amendments following signing of US Free Trade Agreement – 80 years from creation
- Came into effect 1 January 2005
- Extends length of copyright in works still in copyright

Moral Rights

- Separate to Copyright
- Three types of moral rights
 - Right to be attributed as author
 - Right not to be falsely attributed as authority
 - Right of integrity
 - Art Gallery Canberra
- Original author retains moral rights even if employee
- Cannot be assigned or waived – must obtain specific consent

TRADEMARK

Common law and statutory

Can't own common, location or mere descriptive words

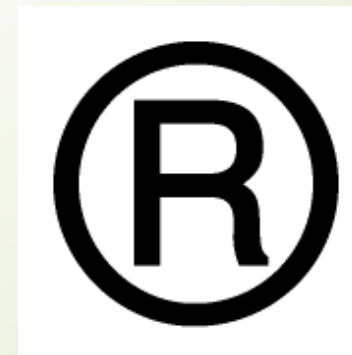
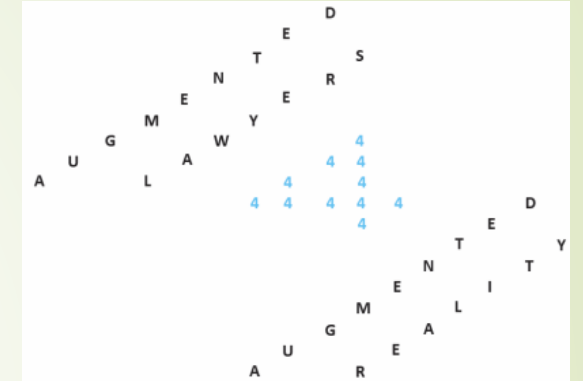
Statutory much better protection

Local Registration but can apply to extend overseas (for a cost)

Word, style of word (font), logo,

Attaches to a business of some sort and protection relates to classes of goods and or services

The symbols to the right are more American than Australian but can demonstrate a claim



Patents and Registered Designs



Patents are granted to protect any device, substance, method or process that is new, inventive and useful

Innovation (formerly petty) patents – granted up to 8 years

Very complex area

Standard patents – granted up to 20 years

Registered design protect the unique visual appearance of a product.

Confidentiality (Non-Disclosure) Agreements

- Best way to protect trade secrets – know how-
 - Restaurant client examples
 - Recipes - KFC - Coca Cola



- Business negotiations
- Franchises – operations manuals



TRADE[®]
SECRETS

Employees and Contractors

Who owns what?

Employees

If work produced in pursuance of employment contract, then employer usually owns copyright
Examples – lecture notes in universities

Students

Generally own what they create
Cannot use their work or reproduce it without written assignment or permission
Encouragement to attribute quotes etc

Contractors

Deal with it in the contract

Internet pitfalls – Copyright Especially

Need to educate people about

- Cutting and pasting from works from internet
- Attributing works to authors
- Illegal downloads especially music/video files
- Need to attribute when using extracts

Who, what, when, where and why [e.g. in contracts]

Who owns what IP-wise?

Who owns the product?

Identify all property involved – consider a schedule or register

IP – Copyright- processes- confidentiality – staff versus contractor impact on ownership

Can Contractor use it? License it? Royalties?

Moral rights – the issue of consent – changes

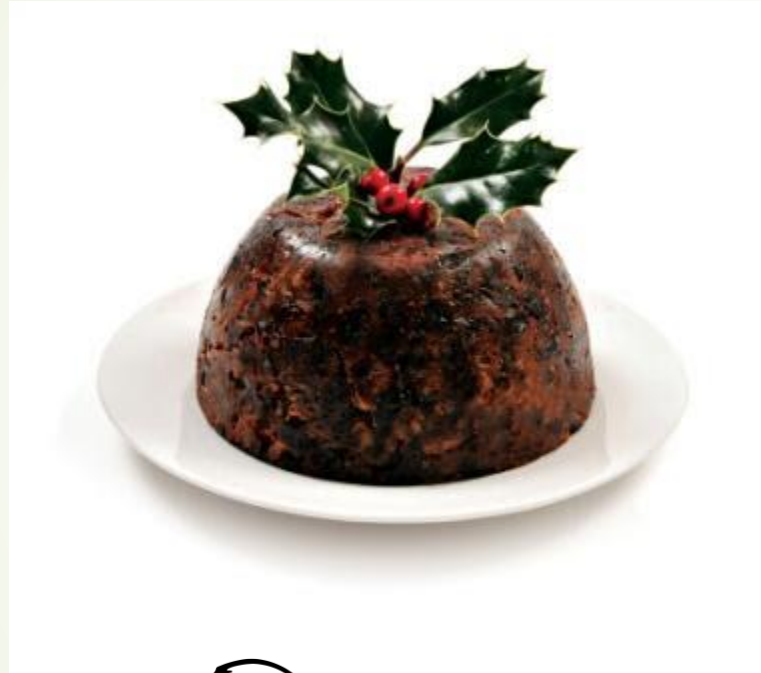
Foreground and Background IP

Reflect your policy in contracts

Tips & Questions

- ▶ In a business, do an inventory of the types of Intellectual Property used, what is owned and what is licensed;
- ▶ Decide what need protection (and where)
- ▶ Have apt T&Cs to protect IP when dealing with customers and contractors;
- ▶ Where necessary deal with IP in employment contracts

To Conclude The Pudding Story



Unlike



which has over 1100

*“Our aim is to achieve successful outcomes
for our clients”*

TIMOTHY EAKIN
PARTNER

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