Foreword

Intellectual Property (IP) plays a pivotal role in the success of any business looking to derive economic returns from their innovations. Beyond the exclusivity conferred to protecting market positions, businesses with a deliberate IP strategy are better positioned to seize new opportunities in their respective sectors, as well as adjacent sectors. Hence, it is crucial for businesses to develop an understanding of IP and how to leverage it for growth, so as to maximize the potential benefits they can reap from their investments in innovation.

This is especially pertinent today as the global COVID-19 pandemic continues to overturn prevailing assumptions and disrupt business models that were successful in a pre-COVID era. Even as our local business owners concern themselves with daily operational issues surrounding cashflow and credit, it is equally important that they continue strategizing about how to unlock future value for their businesses.

Many business owners, particularly owners of Small and Medium Enterprises (SMEs), may be unfamiliar with the concept of IP, much less have an active strategy for managing their IP assets. This briefing by the Licensing Executives Society (LES) thus serves as a useful resource for business owners wishing to understand the different forms of IP and principles to developing their own IP strategy. The briefing distills the key concepts surrounding effective IP management and presents them in a concise and clearly written manner. I encourage our business owners, in particular SME owners, to use this as a guide when thinking through their own IP management strategies and processes to unlock greater value for their businesses.

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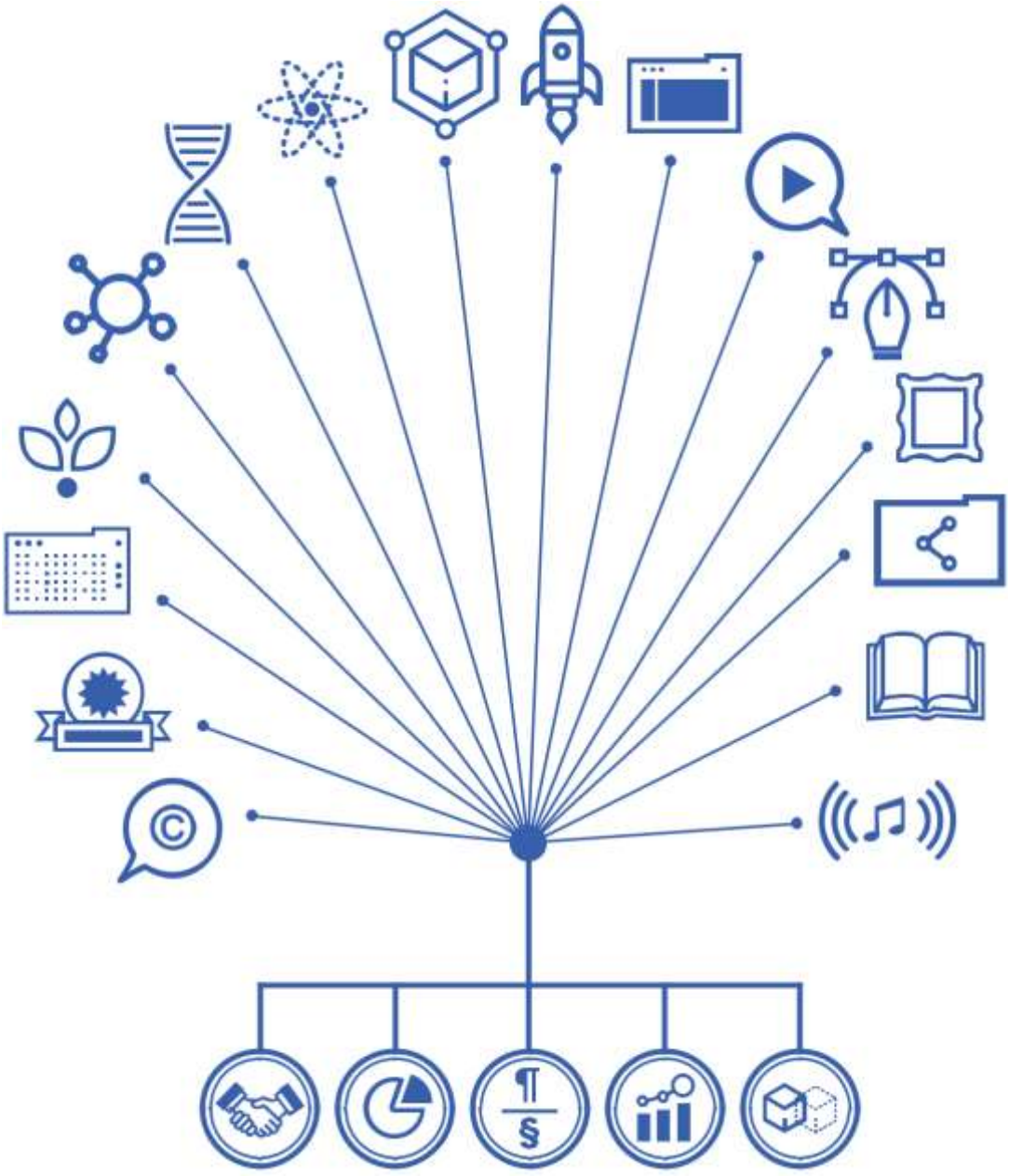
Enterprise Singapore
November 2020



You understand and appreciate the value of your intellectual property and intangible assets. But what is the optimal way of making these prime assets work in your business setting?

MANAGING YOUR INTELLECTUAL PROPERTY (IP)

INTELLECTUAL PROPERTY IS AT THE HEART OF ALMOST EVERY BUSINESS

Intellectual Property (IP) is core to the commercial success of any organization as it enables the conversion of innovative ideas, innovation results and other intangible assets into tangible business assets which can be used to improve the organization's market position. As companies shift their focus from product manufacturing to information based services, the composition of their assets is also changing.

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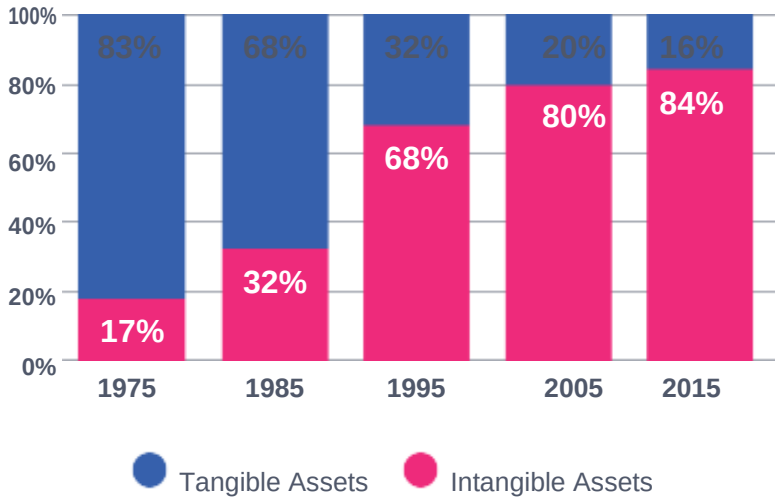
Components of S&P 500 Market Value



Source: OCEAN TOMO, LLC – January 1, 2015

Recent studies[1] have shown that businesses owning Intellectual Property Rights (IPRs) perform better in the long-term.

This is especially true for Small and Medium Enterprises (SMEs) where IPRs play a pivotal role in their success. SMEs can leverage their IPRs to protect and expand their market position and create new revenue streams through the sale or licensing of core IP assets.

For example, an SME focusing on the European market may license the rights to their US patents to a US-based distributor for the distribution of their products to the US market, thus allowing the SME to expand their global market reach and create an additional revenue stream.

Similarly, SMEs may use the exclusivity conferred by their IPRs to prevent competitors from bringing comparable products to the market, as well as to create partnerships.

There are several successful examples of companies worldwide that showcase the commercial value of IP.

An SME focusing on the European market may license the rights to their US patents to a US based distributor for the distribution of their products to the US market, thus allowing the SME to expand their global market reach and create an additional revenue stream.

For example, companies such as Philips®, Qualcomm®, and IBM® have created robust IP licensing platforms which, in addition to protecting the market share of their core business segments, generate a considerable segment of their annual revenues.

Similarly, SME companies can leverage the power of IP to achieve business success, as indicated in an SME case study report that has recently been published by the European Patent Office (EPO)[2].

1 High-growth firms and intellectual property rights: the IPR profile of high-potential SMEs in Europe – A joint study by the EPO and EUIPO, 2019

2 EPO SME case studies - https://www.epo.org/learning-events/materials/sme-case-studies.html

WHAT DO WE MEAN BY INTELLECTUAL PROPERTY RIGHTS?

IPRs are a collection of legally enforceable IP rights, which provide to their owners exclusive rights on the exploitation of their innovations for limited periods.:

INTELLECTUAL PROPERTY RIGHTS IN SINGAPORE

The Intellectual Property Office of Singapore (IPOS) oversees and applies IPRs. IPs are registered with IPOS, who then directs companies to IP service providers. IPOS also provides hearing and mediation services for resolving disputes about registration. These IPRs include:

Patents

Exclusive rights protecting inventions in any technical field for a limited time. The exclusivity relates to the manufacturing, selling, or offering for sale of the patented product in the jurisdiction for which the granted patents have been issued. Patent owners may also license patents to a third party by applying for a license of right in the Patents Register.

Application

In Singapore, a patent application needs to be filed with IPOS and is subject to stringent requirements. The invention must be new, involve an inventive step and be capable of industrial application. Protections last for 20 years from the date of filing the application and are subject to the payment of annual renewal fees.

Example

NUH contested Cicada Cube's ownership of a patent for a procedure collecting laboratory specimens. The patent was found to cover two inventive concepts, one contributed by each party and the parties were appointed as joint inventors.[1]

Remedies for Infringement

The patent owner is entitled to take legal action against the infringing party, including applying for an injunction to stop the action, demanding for profits gained or seeking damages for the loss.

Trademarks

Rights that protect the brand identity of an organization. It usually consists of a recognizable sign, design, or expression that distinguishes the products and services of an organization from those of its competitors.

Application

A trademark has an indefinite lifetime, as long as they are in use and renewal fees are paid. While recommended, registration is not compulsory as the doctrine of 'passing off' prevents one from misrepresenting their goods as that of another.

Remedies for Infringement

Available remedies include an injunction, monetary damages calculated based on profits gained or loss caused, as well as an order for the disposal of the infringing goods.

The IPOS evaluates infringement of trademarks based on the likelihood of confusion between them. Some considerations include visual, aural and conceptual characteristics of the trademarks.

Example

Rolex opposed FMTM's registration of the mark 'MARINER' based on their earlier trademark 'SUBMARINER'. The names were differentiated by the syllable "Sub" and conveyed similar ideas. Additionally, as the goods were similar, it was held that there was a likelihood of confusion[2]

In comparison, Apple contested Swatch's campaign 'Tick Different' with their trademark of 'Think Different'. Although both marks were visually and aurally similar, however it was held that they were conceptually different and operated in different markets. Hence, was no likelihood of confusion.[3]

3 (2018) SGCA 52

4 (2020) SGIPOS 6

5 (2018) SGIPOS 15

Industrial Designs and Design Patents

The Registered Designs Act protects the external appearance of a product, such as visual aspects including the shape, configuration, contours or texture. Furthermore, industrial designs can be used to protect graphical symbols on a Graphical

User Interface (GUI). The lifetime of the Industrial Design right in Singapore is 5 years from the date of filing the application, which can be renewed every 5 years.

Application

The design is registerable with the IPOS if it is novel and differentiated by a material detail. The design cannot be determined by its function or by features enabling it to perform its function, nor dependent on the appearance of another article or non-physical product.

Copyright

Refers to the rights granted to the creators (authors) of literary and artistic works. A variety of works can be protected under copyrights ranging from books, music, paintings, sculptures and films, to computer programs, databases, advertisements, maps and technical drawings. The lifetime of the copyright usually extends beyond the lifetime of the author by a certain period, which depends on national law.

For a copyright to exist, the creator must have expended sufficient skill, intellectual creativity or judgement in its creation. Infringement is evaluated based on if the infringer has substantially copied the work.

Example

ProperyGuru's suit against 99.co's use of their watermarked photos on 99.co's website failed as the editing of the photos did not substantially change the original work and hence did not warrant copyright protection.

Application

It is an automatic right granted to the creator and, in most cases, does not require formal registration. The duration of copyright is dependent on the types of works, of which a list can be found in the Copyright Act.

Trade secrets

The protection of confidential information within an organization. A trade secret is generally considered as any confidential information of commercial value, that is known to a small group of people, and which is subject to a strict procedure for maintaining the confidential information a secret. A trade secret can be a powerful way of protecting critical information that gives the business a competitive edge.

Some famous examples of trade secrets include the Google® search algorithm, the WD40® formula, and the Coca-Cola® recipe.

Application

Trade secrets have an indefinite lifetime as long as the trade secret is kept. No application is required.

Remedies for Infringement

Although not necessary, a confidentiality clause in employment contracts or non-disclosure agreements would be helpful in establishing what information is confidential and their scope and obligations. This is helpful for seeking an injunction and damages provides the alternative pathway of a breach of contract.

Example

The Asia Business Forum brought a claim against ex-employee Long Ai Sin for disclosing information about a training manual and conference production. It was unsuccessful as the general management of a business without exceptional sensitivity did not warrant the protection of a trade secret. Other factors considered include restriction of circulation and the employee's awareness of confidentiality.

A trade secret can be a powerful way of protecting critical information and processes that cannot be obtained or deduced by a competitor through reverse engineering of a product or process.

Database rights

Data is a new frontier of IP. Data has driven the explosive growth of Facebook®, Google®, Amazon®, Pandora® and other companies, quickly turning SMEs into technology giants. Companies need to develop a 'digital' strategy to

properly obtain data that is relevant to drive its business, the permission to use it to do so and most importantly to protect it. A company needs to understand new laws that protect individual privacy, such as Europe's recently enacted GDPR and Singapore's PDPA, and work within those frameworks to accomplish its goals.

YOU NEED TO SET OUT A BUSINESS STRATEGY FOR YOUR IP

Your organization should have a discrete strategy for your IP — and you should follow it. This will allow you to maximize your investment in IP. Obtaining patents, trademarking products and keeping trade secrets can be expensive, so you need to be coordinated to create an efficient and effective IP portfolio. You should dispose of any IP which you have developed that is not part of your strategy. This is not to say that inventive ideas should be dismissed if they are not core to the IP strategy but, rather, they should be recognized and a clear path agreed to dispose of the assets to deliver value for the company.

Many companies set goals such as the number of patents to be awarded and/or filed in a specific time period. While this has the advantage of rewarding company innovation, it might create the wrong behaviours. For example, some companies may review a product to see what is patentable without considering whether it can be effectively enforced or whether a competitor can design around it easily. A better approach is to look at a new product as a whole and determine what combination of patents would provide the greatest protection, whilst taking into consideration design around options and enforcement opportunities. This means considering what can be held as a trade secret and how a trademark may be used to protect the product.

> *Inventive ideas should not be dismissed if they are not core to the IP strategy but rather, they should be recognized and have a path to leave the company preferably for value.'*

Another factor to consider when developing an IP strategy is how commercial agreements can enhance it. For example, a semi-conductor company may set as a requirement that its customers cannot sue them or their customers based upon technology that relates to the semi-conductor. Linking rules about patent enforcement to commercial agreements is a somewhat new and growing phenomenon, and one that may be looked at by anti trust bodies in the future.

Your IP strategy requires proper management

Active IP management must be at the core of your IP strategy with an outlook to enable your organization to efficiently manage its IP assets to maximise value and mitigate business risks. IP management consists of a set of processes that detail the steps to be taken to achieve specific IP driven results that are unique for each organization.

Like any other business processes, IP management processes should be implemented across the entire organization to ensure effectiveness, with particular focus on the business units that generate innovative ideas. It is important to note that different organizations have different needs.

Therefore, it is important, especially for SME companies, that they carefully assess the business needs of the organization and plan, with the help of a qualified practitioner, a bespoke IP management process that would align with their business objectives.

THREE BASICS STEPS TO SETTING UP YOUR IP MANAGEMENT STRATEGY

Identify your IP …

Within any organization, a key element to effective IP management is implementing a structure to identify the intellectual property emanating from employee work product. This should include a formalized process for documenting innovation, disclosing inventions, and making decisions for directing what to protect and how (e.g. trade secrets versus patents).

… evaluate your IP …

Organizations should formalize the process around periodic evaluation of its IP based on its business objectives. The business model and product roadmap of any successful organization is set to change over time to maintain its competitive edge.

Therefore, it is essential to periodically evaluate how these changes affect the positioning of the IP covering relevant products. This assessment can include an updated product to IP mapping, assessment of the IP portfolio in view of the future product roadmap, valuation of the assets and re-characterization of how best to derive value from unused IP.

… and then protect it

In order to efficiently protect the IP generated in the course of an innovative activity, companies need to realise that they have a range of IP mechanisms at their disposal.

The main IP mechanisms considered in this section and elaborated in more details below, are: IPRs, contracts, and IP protection processes and policies.

> Depending on the nature of the organization, its size and business model, these IP mechanisms can be used independently or collectively to best serve the interests of the organization.
>
> Specifically, for SME companies that lack the size and resources of large corporate entities, the use of these IP mechanisms can prove an essential tool for attracting investment, protecting core businesses, and safeguarding the future technology roadmap of the organization to ensure continuity.

YOUR IP CONTRACTS: GET THEM AGREED, SIGNED AND SEALED

Contracts are one of the core legal mechanisms that can be used in business transactions to protect the rights of the parties involved.

In essence, a contract is a legally binding agreement between at least two parties that recognizes the rights and obligations of each party within the scope of the agreement which usually involves the exchange of goods, services, money, or promises, or any other exchangeable commodity.

In order for the contract to be legally binding, it needs to meet the requirements of the applicable law, otherwise there is a risk of invalidation.

Contracts can take different forms to cover different types of transactions. However, in business transactions that involve any form of IPR, it is essential that the contract contains specific clauses on how the IP involved is to be treated by each party and, if applicable, establishing the ownership of the IP generated during the term of the agreement.

> *It is of paramount importance that each contract is prepared by a qualified practitioner, and thoroughly reviewed to ensure that it protects the current and future business interests of the organization and minimizes business risks.*

As such it is of paramount importance that each contract is prepared by a qualified practitioner, and thoroughly reviewed to ensure that it protects the current and future business interests of the organization and minimizes business risks. Examples of contract types commonly used in business transactions between high growth innovative organizations are:

Non-Disclosure Agreements (NDAs), used to ensure that information exchanged between parties remains confidential irrespective of the outcome of the transaction. NDAs are common, and highly recommended, during initial discussions between two parties that require confidential information to be made available. Under an NDA it is good practice to always mark documents as ‘confidential’ and keep detailed minutes of what was discussed at the meeting(s).

Business Partnership Agreements, which detail the intentions of the parties to enter into a partnership for the development and delivery of goods and services. In the context of IP, a partnership agreement should specify the rights of each party to the ownership of the IP provided (background) and generated (foreground) during the agreement, how the revenues and risks should be shared, and how each party can use the IP covered by the agreement.

Outsourcing Agreements, usually used when a specific task is outsourced by a client company to an external provider. In an outsourcing agreement, there needs to be a clear understanding of who owns the IP generated, and how the IP generated by the external provider is transferred to the client company.

Employment contracts, which detail the contractual relationship between an employee and an employer. In the context of IP, employment contracts should clearly specify how the rights to the IP generated by an employee during the term of the contract are transferred to the employer, and the obligations of the employee as regards to keeping information confidential even after the term of the contract.

NEXT STEPS: MAKE SURE YOU HAVE IP PROCESSES AND POLICIES

A company should also develop a policy for using open source software. Improper use of open source software can create requirements that a company make public its proprietary software if it is improperly linked to the open source software. This is referred to as the open source software being 'viral'.

Furthermore, an organization dealing with know-how and trade secrets should develop processes to protect these unique assets. In particular, for trade secrets a process needs to be developed for collecting, describing and securely storing the confidential information.

This is important because for confidential information to be classified as a trade secret in the EU, the EU requires that there are procedures in place to satisfy the guidelines established by the current legislation, e.g. the EU Trade Secrets Directive[1], or the US Defend Trade Secrets Act of 2016[2]. Other jurisdictions may have similar procedural requirements.

1 Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know how and business information (trade secrets) against their unlawful acquisition, use and disclosure (Text with EEA relevance) OJ L 157, 15.6.2016, p. 1–18

2 Defend Trade Secrets Act 2016, Public Law 114–153, May 11, 2016

SO HOW DO YOU EXPLOIT YOUR IPR?

Defend

Many companies holding a portfolio of IPRs begin and end the value proposition of IP with defense. IPRs provide their owners the freedom to derive revenue from innovative products and services driving the commercial value of the enterprise. The legal rights confer supply companies with confidence that the effort and expense to innovate is justified through the ability to defend the market position to achieve fruits of that innovation.

Assert

IPRs are, however, only valuable to the extent that a rights holder is willing to enforce their rights against an infringing party. The extent to which an IPR holder is more proactive or reactionary in asserting their rights is a function of a business's overall strategy. Operating companies may take care to only assert IPRs against entities outside of their core business area or those significantly encroaching on its market position for fear of industry reprisal while non-practising entities (NPEs)/patent assertion entities (PAEs) may distinguish potential infringers only by the strength of a claim.

For those proactive businesses seeking to maximize IPR value through assertion, an analysis of the economic and legal strength of claims against potentially infringing products, brands, works and/ or designs should be undertaken to prioritize assertion campaigns. With the rise of global litigation finance in recent years, additional liquidity is available to smaller entities holding strong claims against deeper pocketed adversaries.

License

Licensing of IPRs may provide the rights holder a steady stream of royalty revenue. Although not all licensing agreements are structured in this manner, those that are allow the licensor to share in the upside of the licensee's commercial success. The aforementioned examples show how successful licensing platforms can be integrated into operating companies. For those entities such as individual inventors, universities, R&D businesses and other NPEs lacking scaled operations to commercialize the underlying innovation covered by their IPRs, licensing is an effective method to both derive IP value and reward innovation.

WHAT YOUR MANAGEMENT NEEDS TO CONSIDER REGULARLY

IP risk mitigation

Managing IP risk is a vital component of an IP strategy. At a high level, the goal is to make sure that the organization has clear rights to all IP embodied in a product. It also means that the company's products are protected to reduce the risk of new competitors easily reverse engineering the product. While this may seem simple, it can be very complex. The following are some techniques to reduce IP risk.

Agreements

Today's economy is IP based. Thus, most agreements include clauses that address IP. For example, if you decide to contract some of the development effort, you need to make sure that the agreement governing the work properly allocates the IP so that you get what you need. For software agreements, it may be necessary to have access to source code under certain circumstances, for example, if the company that supplied the source code is purchased by a competitor of yours. Escrowing the source code can be used for this purpose.

You also need to make sure that your company's rights are not compromised by non-IP agreements.

You need to know what resources would be necessary to be able to develop with the source code.

You also need to make sure that your company's rights are not compromised by non-IP agreements. For example, a distributor might set a condition that you cannot sue them for patent infringement, later to find out that they are selling infringing products, or a supplier may include the same type of non-assertion clause that prevents you from suing them or any of their customers for patent infringement.

Agreements must contain the trademark and copyright rights necessary for your business. For example, you may need the rights to copy licensed specifications, to redistribute music or to use the trademark of another company for your advertisements. These rights must be clearly granted as part of any agreement that governs the IP.

Agreements that include personal identifiable information need to include clauses that clearly state who owns the data, who controls the data, who processes the data and the expected privacy policies that each party of the agreement will present to their customers.

IT IS VITAL TO MONITOR AND ASSESS IP ACTIVITY

Registering one's IP, conducting IP searches and developing patent landscapes can require significant resources from an organization.

For companies in the early stages of developing an IP strategy, the first step may be to simply document the stage, format and status of one's IP via an asset register.

For companies further along, understanding the IP activity around a technology segment is worthwhile. Patent searches and landscapes are essential for effective internal assessment, competitive positioning, cost management and acquisition/divestiture decision making.

> *Investors would be very unhappy if they fund the development and introduction of a new toaster only to find out that the design has been patented by somebody else.*

Beyond IP managers, research teams and C-suite professionals should have at their fingertips an evolving understanding of the patent landscapes relevant to their organization's products and technologies given the increasing emphasis and importance of intangible assets as value drivers in today's knowledge economy.

Before embarking on a new product, a company should understand the IP landscape in regard to the new product.

For example, if the company has developed a new way to toast bread, it needs to understand the patents that others have for toasting bread. Investors would be very unhappy if they funded the development and introduction of a new toaster only to find out that the design has been patented by somebody else.

Of course, you also need to determine what inventions your company can protect through patents to protect the new approach against competition.

There are many ways to research an IP landscape. The simplest is to search for patents related to your new product on the patent websites of the countries that you plan to make, sell or where the device will be used.

More complicated approaches use proprietary algorithms to search through the patent databases to find relevant patents. There are many companies that have developed software to do this.

Some license the software while others may provide full searching services. For a more mature company, these same tools can be used to find other companies that may be infringing one of the company's patents or to find licensing opportunities as previously discussed.

Once these landscapes inform an IP owner that they are underweight or overweight — rather than optimally positioned — in a technology segment, software solutions may also assist in the execution phase.

When a portfolio is underweight, IP managers can either organically bolster the portfolio through patent prosecution, acquire patents on the secondary market, or a combination of both. Based on patent coverage over time understood from the landscape as well as via secondary market pricing, the most effective option to reduce risk may be through acquisition rather than through lengthy prosecution.

Marketplace software analytics tools enable a user to search patent databases to filter and identify targets for acquisition. With the integration of artificial intelligence and natural language processing techniques, these tools are becoming increasingly effective at delivering an exhaustive set of targeted results.

If an IP owner's portfolio is overweight, the option is to either abandon assets when annuity payments become due, divest through a patent sale, or a combination of the two.

Rather than abandoning assets by default and relinquishing a revenue opportunity, managers of overweight portfolios should consider attempting to monetize all or most of the patents deemed to be surplus to requirements.

Based on factors such as citation activity, forward rejection data, strength, and others, IP analytics tools can quickly highlight those patents that are likely to be the most marketable.

These same tools can also highlight whom the likeliest buyers of the assets might be based upon similar patenting activity as well as identifying underweight entities holding patents in the same product or technology segment.

ESTABLISH YOUR OWN GUIDING PRINCIPLES

Companies should integrate procedural elements and the ensuing execution phase into a broader strategic process plan for managing IP, leveraging a set of guiding principles.

These principles should enumerate the salient tenets of an IP strategy to be integrated into the business, culture and overall strategy of an organization.

Organizations instituting this process plan ensure that downstream decision-making will always reflect the established principles for effective IP management particular to its unique business.

Example illustrative guiding principles include:

Centralized IP management;

Treat IP as a profit center;

Assess IP portfolio on regular basis to evaluate its effectiveness on the basis of the organization business model and future product roadmap;

Consider strategic IP partnerships e.g. joint developments, IP acquisition; Post

and solicit technologies of interest (open innovation);

Protect core innovations first with an eye on the protection of future developments;

Publish non-core incremental innovation;

Actively map IP to products and mark products with the IPRs that cover them.

ABOUT THIS LESI BRIEFING

We hope you have enjoyed reading Managing Your Intellectual Property (IP) and that it has provided you with some useful information on the topic. This guide is one of a series for businesses on IP related topics. The other titles include ***The Value of Intangible Assets*** and ***License Your Valuable Assets***.

This Business Briefing has been written by experts from all over the world who are members of the Licensing Executives Society (**lesi.org**) and adapted for use in Singapore by the Licensing Executives Society (Singapore) (les-singapore.com)

As a member of LES you will be welcome to participate in our educational programs, receive our highly rated quarterly journal 'Les Nouvelles', access our membership database and participate in local and international meetings – see **lesi.org** and les-singapore.com for our meeting calendar.

LES Singapore would be pleased to provide more information on the topic of this guide and put you in touch with LES members who may be able to advise in more depth on this topic if required.

Many thanks to the authors of this guide namely:

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This guide was adapted for use in Singapore by LES Singapore

→ Information about LES Singapore can be found on our website at les-singapore.com
Consider signing up for LES Singapore's Basic and Intermediate Licensing course to learn more about protecting your IPR

MANAGING YOUR INTELLECTUAL PROPERTY (IP)

IP Management Business Briefing

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