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Protect intellectual property : it's the thought that counts!

All businesses are built around ideas. Those ideas, inventions, thoughts, designs or whatever provide the cornerstone of their commercial position. In a free market environment, the protection of this "intellectual property" enables protection of the profitability of an enterprise by preventing those who want to copy a successful formula, from setting up in competition and eroding their competitor's position. I used to work in ICI Agrochemicals which spent vast amounts of money developing new molecules, and then protecting them with patents.

I now work in a small business which depends on thoughts and ideas in the supply chain arena, and turning these into Powerpoint slides, white papers, case studies, assessments, and presentations to provide supporting documentation in spreading "best practice" in business leadership – particularly in the market for manufacturing companies.

Recently I had a partner leave to set up a competitive company. They copied a number of "white papers" and "case studies", and published them on their website. I knew that the potential cost of pursuing this through the courts could be incredibly high. But I discovered that the UK has an extraordinarily useful "Intellectual Property Enterprise Court" and within that there is a "Small Claims Track" to help Small to Medium size companies. I decided to act as a "Litigant in Person".

It was a stressful experience, but at the end of the day rewarding, as the High Court found that our copyright had been infringed, and placed an injunction on the infringing ex-partner's company. We won! So, I thought I would share a few "lessons learned", just in case it might be a help to anyone else, who feels they want to do the same!

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Why did we need to protect “Intellectual property”?

Being in the “Education” business, working with small to large European companies in many different industries, we have developed a number of materials including PowerPoint Slides, to support presentations/workshops/classes, White Papers to illustrate “Thought Leadership”, and Case Studies to illustrate successes that we have had. The business depends on transferring knowledge and experience to clients – from which they hopefully benefit – and supporting this with marketing collateral to help persuade new clients to come and do business with us. Thoughts and ideas are core.

Here is a copy of a slide which illustrates our “Integrated Business model”, which I can talk about for at least a quarter of an hour!

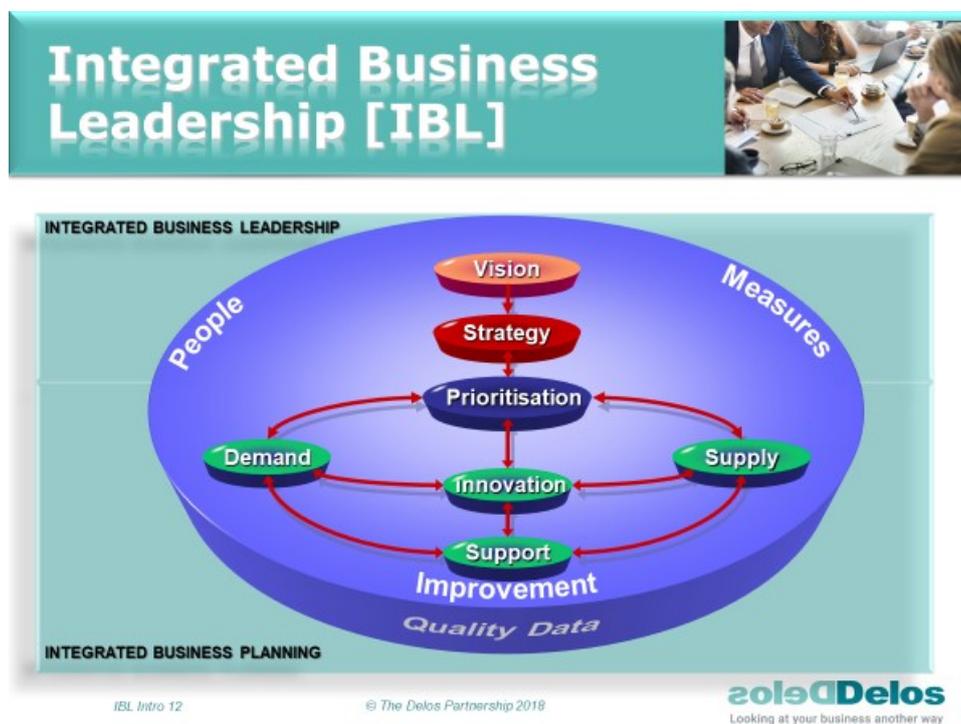


Figure 1 - IBL Slide

A fundamental principle behind the protection of Intellectual Property is that you cannot protect ideas, but you can protect the expression of these ideas – in some form like a script, music, or a published article. You may note also that there is a little phrase at the bottom of this slide which says “© The Delos Partnership Limited 2018”. You don’t have to put that there – the law provides protection the moment this slide (for instance) is created. You will also see the same at the bottom of this page!

I have spent many hours creating slides, creating pictures, and adding words to them. I have devoted much time and thought to writing books, articles, white papers and so on. I am mad like that! But having done all that, it is relatively easy for someone to then set themselves up in their own business as a competitor (the barriers to entry are not great – you just need to be able to stand up in front of a group of people and share knowledge and experience!). So, without some protection of the intellectual property, you are at risk of quickly losing business

to your competitor – subject to the usual considerations of identifying customers and “making them an offer they cannot refuse” as someone famously said.

How do I protect my intellectual property?

As a “Small to Medium size” company I wanted to avoid the costs of litigation, which can be incredibly high. I understood many of the basics of Intellectual Property, but I am clearly no expert. I once nearly took up law at London University, but did not.

My great uncle, though, at the age of 26 became professor of law at Aberystwyth university, despite the advice of a Professor of English Law at Oxford, A. V. Dicey, that he should not throw away his brilliant gifts in such a remote and insignificant place!! He was concerned to improve the standing of the university and, in particular, to ensure that university teaching of law was more than *‘breeding pettifogging solicitors to work up vexatious litigation’*. The Department had a *‘duty to teach students the principles of public service, to train them to take part in communal life and inspire them with a high ideal of citizenship’*. Perhaps his enthusiasm for teaching provided some of the genes inside me – but I did not get his extensive understanding of the law.

So, I had to do some research around the subject.

One of the best books that I came across – which is easy to read, and superb at covering the whole subject - is “Enforcing Intellectual Property Rights: A Concise Guide for Businesses, Innovative and Creative Individuals” by Jane Lambert. It is available from Amazon in kindle form, or as a hardback book.

It starts with a great tale of a discussion with a potential client who wants to take immediate action against a departing competitor (Mr. Aardvaark who makes distelfinks, accompanied by his solicitor Mr. Pepys) which amusingly but seriously points out all the issues with protecting Intellectual Property. It should all start with an audit of intellectual property, and then there needs to be a good agreement in place which prevents theft of copyright, and then a comprehensive process for ensuring that all intellectual property of what ever sort (Trade Marks, Designs, Words, music) are properly protected under law through the various treaties that exist (Paris, Bern) in the various countries. In the UK the Intellectual Property Enterprise Court resides at the Thomas More building in the Royal Courts of Justice, but cases can be heard in the provinces. Jane Lambert also has a great blog where you can get a lot of information - <http://nipclaw.blogspot.com/> - around Intellectual property.

Fortunately, I had a reasonable agreement in place, signed by my ex-partner which had a specific set of clauses to deal with Intellectual Property. That is essential. Operating without an agreement is fine until you have to get legal. Trust is fine until it no longer exists!. Section 90 (3) of the Copyright, Patents and Designs Act 1988 says you need to have a signed agreement to assign copyright for instance!.

One of the rules that Jane Lambert emphasises in her book is do not go to court lightly; and rule 2 is that if you have not followed Rule 1 then go back and do not go to court lightly. Very good idea.

In the UK system there is a brilliant opportunity to mediate using a free (yes there is such a thing) mediation service for an hour. This requires compromise on both sides, which is great unless you find that the other side is unlikely to compromise!

What if I have the feeling of the need to go to court?

The wonderful fact about the law in England Wales is that the whole process is well-defined in rules and regulations (the sort of thing that I often find is completely missing in many organisations, who manage to operate in highly informal ways, by the “seat of their pants”). There are the Civil Procedure Rules (CPR) to be followed, and within that there are the Practise Directions, to make sure that you provide the right documentation at the right time. See, for instance, <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part63>.

With Intellectual Property you have to be particularly careful, as even a threat to take legal action can have adverse consequences. You need also to follow carefully “Pre-Action protocol” – basically to make sure that you have given the potential defendant clear notice of intention to pursue a claim, and reason for the claim.

If you then feel that you really want to go to court, then the key stages in the process are to lodge a claim against the offending party (Particulars of Claim) using a standard claim form, wait for a “Defence”, create a “Reply to Defence”, and then finally create your witness statements and then your skeleton argument.

With intellectual property there is a great government website – which starts with:

<https://www.gov.uk/government/organisations/intellectual-property-office> .

You can also find out all you need to know at <https://www.gov.uk/courts-tribunals/intellectual-property-enterprise-court> about the Intellectual Property Enterprise Court and there are some excellent publications there that people can access – particularly if you want to be as enterprising as I was I was and be a “Litigant in Person”.

The original claim can be filled out easily online, and if – like me – you want to make a Small claim (defined as less than £ 10,000) you do so at relatively small cost, which can be recovered if you are successful.

My point here is that UK law is open to everyone, and is brilliant. In this area. Though your “local” solicitor, whom you normally use, may not be expert in UK IP law, and it is essential to get the services of someone who understands Intellectual Property Law. In fact, you can get some IP law for free from the IP pro bono group at the following website <http://www.ipprobono.org.uk/>

But of course, you must seriously consider using the help of a solicitor and barrister, if the sums involved are much more significant and you are not confident in handling the case yourself.

I had a great solicitor to support me at early stages, who encouraged me to try and use the Small Claims Court. The reason for this was that the costs in this route are limited (you do not get slapped with great costs at the end if you lose), and the sums involved in this case were relatively small. Justice can be done. I believe that law is a right and not a luxury, and hence should not just be the province of those who can afford to enforce the law.

The key lesson to take away behind all of this is that “Fortune favours a prepared mind”, and hence the key is to make sure you have the evidence to support your case – which will include the original documentation, which was “copyright”, any agreements which support protection of copyright, examples of the infringement, and any correspondence which relates to all of that.

It can take a lot of work to prepare the required information, but at the end of the day the brilliant thing about the English and Welsh system is that that it enables everyone to benefit from the law whether you are a “Litigant in Person”, or supported by a fully qualified solicitor and barrister (s)

What is it like in court ?

I used to spend hours watching Perry Mason in court with all the drama of the court case of prosecution and defence. I used to love the books and TV dramas of Rumpole of the Bailey, played out by Leo McKern, and references to the Penge Bungalow Murders, fine claret for lunch, and “she who must be obeyed”. When I lived in London just before university, I actually went in and sat at the back of the court, and struggled to find out what was going on.

So, I had my impressions of going to court, formed by dramatic courtroom dramas and all the rest. But in the actual event, it is all fairly simple and relatively relaxed. Of course, there are the inevitable tensions, but the judge was very good at relaxing myself as claimant, and then he invited presentation on both sides to state the case, and then state the defence, which all followed a very logical process.

Part way through and at the end the judge provided his interim findings, referring to a key case - *Martin and Another v Kogan* [2017] EWHC 2927 (IPEC) (22 Nov 2017), which helps to determine the ownership, in this case, of intellectual property.

At the end of the day the judge concluded that there had been an infringement of copyright, and all the effort of going to court was worthwhile.

Lunch was a coffee and a sandwich in the coffee-shop in the courts building - no St. Emilion 2009. So it was not like Rumpole of the Bailey at all. Far from it.

It was extraordinarily easy to go through the day.

I had spent fair amount of time before hand trying to find out what to expect, and found nothing (in hindsight it would probably have been better to be a fly on the wall at another hearing).

But the amazing thing about the legal system that I experienced was that it does not matter how small you are, the courts are open to proving that the law is indeed a right and not a luxury, and you can (and should) use solicitors and all of the legal profession if needed. But, even if you do act as a “Litigant in Person”, then the law can be enforced if needed, and your intellectual property protected.

Intellectual Property is at the heart of what all companies do. Without an idea to solve someone’s problem, then it is unlikely that there is a commercial opportunity. But copying someone else’s ideas because you are bereft of originality, is even cheaper, and if enterprise is to be encouraged, then it is essential that we do whatever is necessary to prevent the theft of valuable property.

Fortunately, the use of the law is not a barrier to justice being done, and being seen to be done.