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## What Is Intellectual Property, and Why Should I Care?

By Arnold Winter, Esq.

You've heard about intellectual property. You've heard about patents, trademarks, trade secrets, and copyrights. You know this has something to do with protecting things like ideas, inventions, business names and logos, writings and designs.

But if you're like many of the entrepreneurs and business owners I talk to, you're not sure what this means for *your* business. You aren't sure if you need to do anything about intellectual property. Some day you'll look into it—but not just right now. You simply don't have the time and the budget for that. You have a business to grow first.

But wait! **Intellectual property is about growing your business.** It's about creating and protecting the core assets of your business—intangibles.

Most businesses depend in large part on intangible assets. And paying attention to intangible business assets and to intellectual property is not just a good defense, it's a good offense, a way to build a business and to create products and services and long-term business value.

### CAN YOU AFFORD TO IGNORE YOUR MOST IMPORTANT BUSINESS ASSETS?

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As drivers of competitive advantage and business success, intangible assets are much more important than most people realize. According a study by the Brookings Institution, *roughly two-thirds of the true value of a business comes from intangibles*, with the rest coming from what we typically think of as traditional business assets—"bricks and mortar" assets like buildings, factory floors, and offices, and hard assets like equipment, machinery, furniture, and vehicles.

This is a relatively recent phenomenon. Since the Industrial Revolution, business success depended mainly on tangible assets. Intangibles were viewed as an afterthought, sometimes tracked under the "goodwill" default category in traditional accounting. By the late 1970's, according to the Brookings Institution, intangible assets still only accounted for approximately 20% of business value. Today, it's the reverse.

What's responsible for the dramatic increase in the role that intangible business assets now play? The answer: the information age, in which economic success depends much more on knowledge and other intangibles than on bricks and mortar. According to an article in the *Harvard Business Review*, "IP-savvy

business leaders believe that, in a world where battles are increasingly being waged not for control of markets or raw materials but for the rights to new ideas and innovations, the management of intellectual property must become a core competence of the successful enterprise."<sup>1</sup>

And yet, old habits are hard to break. We are still used to thinking that what's really important are hard assets and that intangibles and intellectual property are something that only the lawyers and accountants need to worry about. This may be why many business owners and managers don't pay enough attention to intangible business assets.

Hard assets obviously remain important—we still need machines to make things and desks to sit at. But as drivers of competitive strength, profits, and business success, intangible business assets have become far more important. Intangibles are where the real money is.

### WHAT ARE INTANGIBLE BUSINESS ASSETS?

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**Examples of intangible business assets** include:

- Knowledge, know-how, skills, experience;
- Ideas, information, concepts, inventions;
- Designs, drawings, writings, formulas;
- Plans, policies, methods, procedures;
- Branding, reputation, name recognition.

Some intangibles may be embodied in media such as writings or computer records, while others exist only in the mind. In any event, we're talking brain power and creativity: *What you know, and what you create or invent.*

Along these lines, think about your business operations: *How you get things done in your business and in serving your clients and customers.* Also, consider the impact of intangibles beyond your business operations, such as relationships, brand identity, and reputation: *Whom you know, how you distinguish yourself from your competitors, and how your customers or clients regard you.*

### HOW IS YOUR BUSINESS IMPACTED BY INTANGIBLES?

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First of all, **intangibles are the foundation upon which new businesses are built.**

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<sup>1</sup> Kevin G. Rivette and David Kline, "Discovering New Value in Intellectual Property," *Harvard Business Review* (January-February 2000).

Lacking any track record at the outset, a business start-up usually has nothing more to show in its favor than a bunch of core ideas or inventions, combined with the background, reputation, and personal connections of the founders.

Along these lines, the new business might be based on a unique idea or concept, perhaps an invention or new technology, or an improvement over existing technology, or simply a new or better way of doing things. A new service business might be based on the unique talents, skills, and experience of its founders. On this basis alone, the new business has to do all the things that are necessary to grow, like convincing key people to come on board, or persuading outside investors to provide capital.

**Once the business is up and running, intangibles impact how the business operates internally, how it creates, markets, and delivers its goods or services to clients and customers, and how it distinguishes itself from competitors through its reputation in the market.**

For instance, regardless of industry, businesses appeal to clients or customers through the reputation and name recognition associated with their goods or services. Especially if a product or service is somewhat generic, what makes a buyer choose one vendor or service provider over another is mainly driven by brand recognition. Overall, most businesses are built upon and operate around some combination or another of various key intangibles and rely on information, methods, or processes to gain an edge over competitors and succeed.

Moreover, though we usually associate intangibles with “soft” industries—for instance, software, technology, or entertainment, make no mistake: **intangible business assets impact all industries.**

For example, traditional manufacturers of tangible goods often depend first and foremost on such intangibles as the knowledge, skills, and experience of their employees. Think of the specialized employees who know exactly how certain machinery on the shop floor needs to be tweaked so that the company can make a better product than the competition, and do so faster and cheaper. Think of the sales people who have built a network of key contacts and an excellent reputation among customers.

Consequently, in their *Harvard Business Review* article, Rivette and Kline conclude that “even for manufacturing firms, the bulk of their value now lies in their intellectual assets. Given that fact, it’s appropriate to ask how well these assets are being managed and used. The answer, in most cases, is not very well.”

Most of all, **size doesn’t matter.**

You don’t have to be running a multinational business empire to depend on intangibles. Cultivating know-how and experience, protecting confidential business information, and building a good reputation are just as important to solo practitioners and small businesses as to large companies. Whether you’re competing as a professional services provider or a plumber or landscaper within a local community, or whether you’re running a global consumer products or software company, your success depends in large part on intangibles.

For these reasons, just as it’s important to have legal rights and protections concerning tangible business assets, it’s at least equally important to pay attention to rights and protections concerning intangible assets.

#### **OWNING AND PROTECTING INTANGIBLE BUSINESS ASSETS**

Considering the importance of intangible assets in modern business, intangibles that you actually own are more valuable than intangibles that are just “out there” in the public domain for anyone to use, especially if your ownership rights can make things much more difficult for your business competitors.

**How do you own something you can’t touch?**

It works for intangible property very much the same way it does for tangible property.

Many tangible assets are not owned by anyone in particular. Anyone is free to use the roads, waterways, and public lands and buildings that make up the public infrastructure (though, of course, we still have to pay for this through taxes, tolls, or entrance fees). And we have no trouble recognizing private property when we see it—our homes and personal possessions, and the land, buildings, and machinery owned or leased for business purposes.

Similarly, many intangibles are available to the public. Anyone has the right to access and use knowledge and ideas, literature, language, music and images that are in the public domain. The works of Shakespeare and the mysteries of double-entry bookkeeping can be appropriated and used by anyone.

But what if I’ve developed a new and improved business process or technology that meets a demand in the marketplace or gives me an edge over my competitors? If my competitive advantage derives from the fact that I keep the specifics of my process or technology secret, then I wouldn’t want those specifics to become public knowledge. If it did, then I would lose the foundation on which my business is built. A good example of this kind of intangible asset

is the formula for Coca Cola, which has remained locked away as a trade secret for almost a century.

Likewise, just as ownership of a prime piece of commercial real estate gives me an advantage over someone with property in a less attractive location, so can ownership in an invention that I have protected with a patent give me an advantage over competitors. And if I've built a valuable reputation and brand around my products or services, I have the full force of trademark law to prevent others from trading upon my name and brand without my permission.

So it's not enough just to have a general idea of how intangibles are important in your business. It's also necessary to own and protect them, just as one might with tangible business assets. As Tom Stewart, an editor at Fortune magazine, writes in his book *Intellectual Capital—The New Wealth of Organizations* (1997): "Managing intellectual assets has become the single most important task of business." In the knowledge economy, **identifying and converting intangibles into proprietary assets that can be owned and controlled must be a priority in any business planning efforts.** Doing so is largely a matter of using the tools provided by **intellectual property law.**

## INTELLECTUAL PROPERTY LAW AS A BUSINESS TOOL

**Intellectual property law is the main source of ownership rights and other legal interests in intangibles.**

We don't have to think twice when we say we "own" some particular object like our house or car or clothes, or tangible business assets like our desk and computer. We're generally familiar with the various requirements for different classes of properties: real estate requires a deed, a car a title document, and with most other tangible objects, it's a matter of simple possession in exchange for payment.

Although not as natural to our thinking, the same goes for intangibles. Just as the law recognizes and enforces rights and obligations in physical things, it also recognizes and enforces rights and obligations in intangibles. More specifically, ownership rights and other legal interests in intangibles are created by applying the rules and requirements of intellectual property law.

**Property rights are valuable because they can be enforced.**

Would you let your competitors simply walk into your own place of business and use your facilities and equipment without your permission? Of course not. The law provides penalties against someone who

steals your personal or business property or trespasses on your real property.

Similar legal protections are available for intellectual property. For example:

**Patent law** protects inventions involving products, processes, machines, devices, methods, and similar subject matter and gives the owner of a patent the right to exclude others from using the invention without the owner's permission.

**Copyright law** protects writings and other expressions of ideas fixed in a tangible medium and allows the owner of a copyright to prevent others from copying, adapting, publishing, performing, or displaying the protected work without the owner's permission.

**Trademark law** protects unique letters, words, names, logos, slogans, catch phrases, symbols, designs, or similar devices (including combinations of the foregoing) that indicate and identify a particular source for products or services and distinguish them from the goods and services of others (think COKE versus PEPSI) and lets someone who has built a brand embodied in such a mark stop others from diverting business through the use of a confusingly similar mark.

**Trade secrets law** protects a wide range of confidential business information and lets owners of such information preserve its confidentiality and take legal action against its misappropriation.

But securing intellectual property ownership rights in intangible business assets is not just a defense against competitors and the basis for taking legal action against infringers but also lays the foundation for **converting your intangible assets into dollars.**

**Intellectual property rights create value in your business because they can be commercialized:** they can be sold, leased, licensed, and mortgaged—anything you can also do with tangible property. More fundamentally, securing intellectual property rights in your intangible assets can be critical to creating a viable **business plan**, attracting **investors** and other sourcing of business funding, and making you and your **shareholders** happy by growing the value of the business.

So there are two important reasons for hiring a lawyer experienced with business matters and intellectual property law to advise you on your intellectual property matters: **One**, to secure ownership rights in your intangible assets and use the legal system to stop competitors and infringers from exploiting your intellectual property; **two**, to help commercialize your intangible business assets through deals, business transactions, and other activities.

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## AVOID COSTLY MISTAKES WITH YOUR INTELLECTUAL PROPERTY

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When should you consult a lawyer about your intellectual property needs? **As soon as possible.** Otherwise you may end up making costly mistakes and even jeopardizing your business.

Protecting and commercializing intellectual property is not just about “getting” a patent, a trademark, or a copyright. Instead, it’s about **securing, protecting, and preserving the underlying ownership rights on which the filing is based in the first place.**

The filing of papers with the government doesn’t actually “create” the ownership right but serves to confirm and strengthen whatever rights already exist. Preparing and filing a patent application or filling out the forms for a trademark or copyright registration is often just a follow-up step after other steps have been taken to create the underlying ownership rights.

And this is where people often trip up, because **creating and maintaining ownership rights in intangibles usually requires doing certain things in your business before (and after) any government filings.** The law does not automatically protect the rights you think you have, and it rewards only those who take affirmative steps to preserve their rights. That’s why it’s so important to seek the help of an experienced attorney as early as possible to safeguard your intangible business assets.

Unfortunately, the laws and rules governing intangible property are not as intuitive or familiar as with tangible property. In fact, they are full of **“traps” for the unwary.** Because of these traps, ownership rights in intangibles are often inadvertently weakened—or even lost forever.

As a rule of thumb, **timing can be crucial when it comes to preserving and perfecting intellectual property rights.** Much can depend on steps taken (or not taken) early on, long before any governmental filings are made. Moreover, each area of intellectual property law has its own unique requirements, rules, and potential pitfalls.

Inadvertently losing potentially valuable intellectual property ownership rights, or finding yourself liable for infringing someone else’s right through sheer ignorance of the law, is like forgetting to get insurance on a brand new commercial building before it accidentally burns down to the ground. As in many other areas of law that impact business, here, too, **an ounce of prevention can be many times more valuable than a pound of cure**—and more often that not, it might be very expensive, if not too late, to fix the problem after the fact than it would have been to prevent it in the first place.

So in dealing with intangibles of potentially significant commercial and business value, **getting proper advice early in the game is simply a sound business measure.** In contrast, fixing intellectual property problems down the road after they have already occurred can be costly, if not impossible. Therefore, by helping you secure your intellectual property rights early on and avoid costly problems from occurring at all, an intellectual property lawyer can create value for your business.

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## HOW INTELLECTUAL PROPERTY CAN CREATE BUSINESS VALUE: A QUICK EXAMPLE

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Different areas of intellectual property law apply to different types of intangibles. To know what rules apply, we must first know the nature of the intangibles we’re dealing with in a given situation.

As a general proposition, any given business usually has a variety of intangibles and, consequently, a variety of unique intellectual property concerns. In fact, a single product, technology, or business concept can involve more than just one type of intellectual property and generate more than one potentially valuable ownership right, possibly resulting in multiple revenue opportunities.

**Here’s a quick illustration:** Imagine you’ve developed a new espresso machine. Anyone can see the tangible asset—a stylish gadget that makes super-strong espresso. But can you also see all the potentially valuable intangible assets and possible revenue opportunities? What are all the intellectual property rights that could be owned, controlled, and protected so that you can compete with all the other espresso machines out there?

Well, let’s take a quick look. Protecting your espresso machine might include developing and securing intellectual property rights such as the following:

One or more **patents** (covering, for example, functional features of the espresso machine, its electrical circuitry, or its unique design);

One or more **copyrights** (covering, for example, original design drawings of the espresso machine, instruction manuals, advertising copy, or software that might be part of the machine);

One or more **trademarks** (protecting, for example, a distinctive word, slogan, logo, or design denoting the brand of the espresso machine on a label, tag or package or otherwise used in marketing the machine), and

One or more **trade secrets** (protecting, for example, the method of making the espresso machine,

*the recipe for special blends of coffee, or the identities of vendors and suppliers).*

Taken together, these various intellectual properties represent a bundle of valuable assets on which your espresso machine business is built. Some of these rights might be used to protect your own internal business and manufacturing operations, while others might be licensed out in exchange for royalty and other payments or for other business benefits.

For example, your trademark might not only be associated with your original coffee machine (and unique blends of coffee that you might offer along with it) but also become the basis of a whole chain of stores or coffee shops or the basis of other kinds of business deals. But you really wouldn't want to go down that road only to discover that the trademark was already owned by someone else, a problem that could have been avoided through a proper trademark search early on.

In sum, intellectual property issues come up in any business setting. Depending on how you deal with them, they can either be a source of major headaches or a driver of business success.

#### WORKING WITH AN ATTORNEY

In view of the importance of intangible assets in business today, what can an experienced intellectual property and business lawyer do to help you identify, protect, and commercialize your intangibles?

First, the lawyer might propose a review of your business to *identify relevant intangible business*

*assets*. Knowing what potentially valuable intangibles you have is the first step in determining your potential intellectual property assets.

Based on that, and taking your particular business objectives and strategies into account, the lawyer will ***recommend how any inherent intellectual property rights can be secured and help take all the necessary steps***. Not everything may have to be done right away, and your lawyer can help you set priorities in line with your business plan and budget.

Last but not least, the lawyer can ***help with any resulting business and employment relationships, contracts, and business deals that you undertake to commercialize your intellectual property and turn them into products or services that generate a profit***. After all, many people have patented better mouse traps, but making money off an idea or invention requires meeting an existing demand in the marketplace and taking steps to meet that demand.

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Overall, as an entrepreneur or business owner, ***avoid the potentially costly—and even catastrophic—pitfalls of ignoring intellectual property issues***. Pay attention to your intangible business assets now, and you're likely to be rewarded many times over as your business develops.

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*To discuss any specific questions you might have about the topic of this article or related matters, please call **Arnold Winter** at (610) 891-6910. For more information about our legal services, please visit [www.LawWinter.com](http://www.LawWinter.com).*

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