



PROTECTING YOUR COMPETITIVE ADVANTAGE

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Protecting your competitive advantage in challenging times

Intellectual property remains underleveraged by many businesses, yet it's one of the most valuable tools they have in their arsenal for long-term success.

Carrick Robinson of James & Wells explains to *NZ Lawyer* why protecting your IP can be crucial during challenging times



THE COVID-19 PANDEMIC has highlighted for many companies around the world that tough times will lead to tough business decisions. Though it's been business as usual for some, there are many others that are looking for ways to survive the current set of challenges – reassessing their priorities, investing in new areas, or entirely pivoting their business models.

As part of this process, more businesses are looking closely at their intellectual property (IP) and questioning how they can more effectively leverage it. It's something that Carrick Robinson, partner at James & Wells, sees as a positive.

Too often, Robinson says, businesses come to view IP protection reluctantly; not as a necessity but as something they “just have to do”. But businesses that take a proactive approach towards IP protection will always make the best of their intangible assets, in good times and in bad. Working with an IP specialist, Robinson explains, will help with not only leveraging and protecting a company's IP but with identifying it in the first place. Many businesses don't have a

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proper understanding of their intangible assets or the value these contribute.

“Obviously an IP specialist can help at any stage of the process, but best results are always achieved if we are involved as early on as possible,” Robinson says. “Why? Because often businesses spend a lot of time and money developing what they think is the next best thing, only to find out at the last minute that they can’t do what they wanted to. So it’s back to the drawing board, requiring more money and more time.”

Robinson points to the various ways that historical recessions have spurred innovation as both existing and new businesses look for new means of generating revenue and maintaining industry relevance.

“There’s a lot of innovation happening among New Zealand businesses at the moment, and new opportunities being driven by the pandemic,” he says. “Some of that is going to be very situation-specific, but in other cases we’ll see long-term opportunities and solutions emerging.”

Adopting new products or services, as well as new methods and processes for manufacturing or distribution, can enable businesses to become more resilient to future events of a similar nature.

“Right now, we’ve seen healthcare providers and suppliers making big strides,”

says Robinson. “Workplace suppliers of tools like remote communication have also had a real boost. We’ll no doubt see more as businesses adjust to a post-pandemic world, whatever that might look like.”

However, Robinson cautions that these shifts still need to be carefully considered by businesses. IP protection, he notes, should continue to be aligned with wider business strategy to ensure that any investment in new IP is sustainable, and that there will

some other way to enhance revenue, cut costs, or build new partnerships.”

Conversely – given that the COVID-19 pandemic has caused its share of economic turmoil – Robinson suspects it’s likely that many companies will become far more protective of their market share and their valuable IP. If a business has a trusted brand with a loyal customer base, he says, it’s more important than ever to protect and police it.

“A business’s competitive advantage is



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be a return on that investment. That return could be monetary, strategic, or both.

“Does the business’s existing IP protect these new initiatives?” says Robinson. “For example, trade marks are registered under different classes, determined by the nature of the goods or services in question. A brewery that’s pivoted to making hand sanitiser during the pandemic might have their brand registered in the relevant beverage category, but not in the hand sanitiser category.”

With considerations like this in mind, Robinson suggests that businesses should conduct an IP audit to determine what IP they have, how it’s being used, and how this fits in, if at all, with any new plans the business has.

“A business that can identify which IP is central to its competitive advantage will have a far better chance of surviving, and perhaps even thriving, during a crisis such as COVID-19,” Robinson explains. “An audit can also identify unused or underused IP that could be sold, licensed or leveraged in

often heavily reliant on its IP, and we’ve seen some brands doing a brilliant job of building customer trust over the last few months,” says Robinson. “A strong reputation is worth a lot, but you need to own the rights to the underlying IP to leverage it and protect it.”

With factors like this in mind, businesses must get wiser to how IP fits in with their wider strategy, Robinson notes.

“In previous economic downturns, we’ve seen an uptick in businesses approaching us wanting to take legal action against their competitors and new entrants to their market,” Robinson says. “Previously, these things might have otherwise gone unnoticed or had a blind eye turned to them. Certainly in tough times businesses get more protective of their patch.”

The shield and sword against competition

Having said all this, Robinson is conscious that this is a time of cutbacks for many businesses. Investment in or maintenance

ABOUT JAMES & WELLS

James & Wells is a privately owned firm of patent and trade mark attorneys and litigation lawyers. They provide a full suite of intellectual property services to help businesses own, control and leverage their innovations and brands both locally and globally. With offices in Australia and New Zealand, their experienced and approachable team provide a strategic approach with business needs and commercial outcomes in mind.

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of IP can sometimes be seen as secondary to core business expenditure and can fall victim to in-office austerity measures.

“We tend to find that IP can be perceived as nebulous. As it’s not a physical object, businesses don’t always see the immediate

“A business needs to do what it can to remain sustainable. But cutting costs on IP can be a short-sighted approach,” says Robinson. “What’s the long-term cost of dropping that IP protection, versus the benefit of paying now to retain it?”

“Businesses shouldn’t willingly lower the bar for entry for their competitors”

Carrick Robinson, partner, James & Wells

connection between holding and maintaining that IP and generating income,” Robinson says. “Businesses look at it in comparison to more tangible assets like plant and machinery, and immediate costs like payroll, and might decide to make cuts accordingly.”

If the company plans to return with full force further down the track, then letting its IP lapse can be problematic. IP, after all, is all that distinguishes many businesses from their competitors, particularly where generic goods and services are on offer.

Accordingly, Robinson believes, there need to be crucial conversations happening around IP protection, particularly within small to medium-sized businesses. Larger corporations, he notes, may have entire departments dedicated to the protection and maintenance of their IP; they’re keenly aware of its importance and value.

“Businesses shouldn’t willingly lower the bar for entry for their competitors,” says Robinson. “After all, their competitors will be looking for opportunities too – if they see an

easy opening, then they’re going to take it.”

Of course, context will vary from business to business, and Robinson points out that it’s entirely possible there may be savings to be had that are not at the expense of a business’s competitive advantage.

Breeding innovation for New Zealand’s future

Robinson does concede that much of the discussion around whether or not a company makes the right call about its IP in the current circumstances will only be able to be properly assessed in hindsight.

“No one’s got a crystal ball,” he says. “We just have to make the best choices we can under the circumstances, with the best advice.”

Nonetheless, he believes that adversity can and does stimulate innovation, and he hopes more New Zealand businesses will focus on innovation into the future, both at a local and global level. Generating new and leverageable IP will continue to be a pathway to the country’s greater presence on the world stage.

“From speaking to our clients over the last few months, many companies have really had to reassess their business model and the sustainability of this, both in the short and long term,” says Robinson.

In some cases, a business’s product or service just isn’t relevant at the moment, but probably will be post-pandemic. Others will find themselves back at square one. However, Robinson notes that James & Wells is seeing some companies take creative approaches to innovation and reshaping their businesses.

“The companies that emerge will likely be more resilient, and more aware of the risks that can arise during crises,” he explains.

“It’s our role to be a sounding board and to guide them through these times where we can, and to be ready to support them into the future too. It’s never been a better time to remind businesses about the importance and value of their IP.” **NZL**