Intellectual Property Ontario

Why IP?

Intellectual property (IP) has recently been called upon as a tool to solve Canada's productivity crisis. There is a solid argument here -- when leveraged strategically, IP can be a powerful value multiplier for companies. Companies with IP are 3.6x more likely to scale. And the big players prove this: 91% of S&P 500 companies' value is in intangibles. For startups and entrepreneurs, IP can make or break your opportunity to compete in your target market, but the key is in commercialization of that IP. And successful commercialization requires an IP strategy.

What is IP?

Simply put, IP is something you, your employees, or contractors create, that happens to be intangible. It must be created by a human being (for now), and is usually something inventive, new, or valuable to your business. Beyond that, the possibilities are vast.

IP is often confused with IP rights – but the distinction between the two is important.

IP rights are legal protections you can acquire to secure ownership over your IP. The IP itself is not the right. For example, if you patent an invention, your IP is the invention, not the patent. The patent is kind of like your ownership certificate. The reason this is important is that not all IP needs protecting with IP rights.

Common IP rights include:

- Patents
- Trademarks
- Copyrights
- Industrial designs
- Trade secrets/confidential information

Each of these rights has distinct criteria, but it is possible and often recommended to layer them. A single invention could have many components, and each component could be eligible for multiple layers of protection.

How does IP drive value?

The answer to this question lies in your company's business strategy. What is your business, and what do you do? What are your objectives? IP is a business tool that can help you achieve objectives in the short, medium, and long term.

- **Seeking Investment:** Investors like innovative, value-rich companies with value multipliers. IP rights can be an indicator that a company has innovative practices, and an IP strategy multiplies that indicator by demonstrating that the company has been strategic in filing IP in order to support their value proposition and deliver a return on investment.

- **Use as leverage:** IP rights can appear on a balance sheet, like any other business asset. They can be used as collateral in a financing deal, or as a bargaining chip in securing something you need. They are quite commonly used in licensing or cross-licensing deals, with all kinds of objectives. In many cases, potential litigation from infringement on another company's IP rights ends up in a licensing deal.

- **Freedom to Operate (FTO):** FTO is a buzzword, certainly, but the idea behind it is important. The concept here is that your company wants the ability to sell your product or service where you

want, without fear of encroaching on other companies' legal rights. Sounds simple, but considering our global supply chains, this requires some planning to achieve. IP rights can be filed strategically to block competitors, as well as secure your own company's rights in key jurisdictions.

What is an IP strategy and why is it a critical business plan?

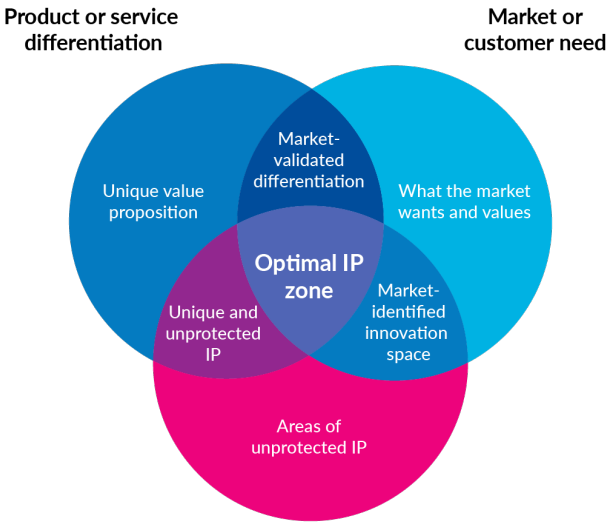
An IP strategy is a plan that considers IP as assets that can support a business strategy. Commercializing valuable IP can provide new revenue streams or shore up existing business operations. By creating a strategy around identifying, protecting, and leveraging IP, you can ensure the budget you spend on these activities will drive the highest return on investment. Consider an IP strategy as an exercise in prioritization; a set of reflective questions that allows you to connect IP back to business objectives, and determine which assets are the most important.

Most IP experts agree that IP strategies consider three key things:

1. **Differentiation**: how is your business different from competitors? What sets you apart? What is your technological advancement, and how does that give you a competitive edge?

2. **Market need**: what problem are you solving? What customer needs are you addressing? What are your business objectives?

3. **IP whitespace**: what is your competitive landscape, and how crowded is the market? Critically, are your competitors securing IP rights? If you can identify IP whitespace, or a niche for your company, this is your path to obtain the freedom to operate.



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In the early stages of your business, when you are likely the most resource constrained, you're going to want to take extra care when deciding what IP to protect. Targeting the intersection of the three above components can help you do just that. Ideally, the IP that supports the core of your business will all fit into this category, giving you a good indication of what will drive the most value in the years to come.

So what are you working with? How do you identify IP in your company?

You'll need to perform a strategic audit. How does the company already protect core innovations? Are the inner workings kept a secret? Has the company developed a brand? Does the company already have a patent or trademark? When developing your IP strategy, first identify the core innovations that are required for the success of each product or service. How do these innovations drive your competitive advantage? What market need do they serve?

Perhaps the product the company makes is generic enough (e.g., athletic wear) but the *difference* from competitors lies in something only conceived by the company (e.g., sweat-wicking textile weave, environmentally friendly materials, attractive branding, recycled packaging, etc.). So what the company ends up protecting isn't the leggings themselves, but perhaps the textile blend and weave, the packaging, the branding. And those pieces could be commercialized by licensing them out to other leggings manufacturers.

Value lies in what sets you apart—that's where the valuable IP is found. Innovators must connect whatever the company is considering for IP protection back to the business strategy/goals, in order for the spend on IP to reflect a return on investment.

Ok, I've identified some key differentiators. How do I protect them?

Different products and services will benefit from or require one or more different forms of IP protection - often in a layered approach for best results. As described above, it's best to consider what the company objectives are before deciding what IP right is the best fit and investment.

Here are some examples:

- **Trade secrets** may be appropriate for innovations that cannot be reverse engineered or easily discovered from use of the product/service which embodies the protected innovation.
- **Patents** may be more appropriate for new, useful, and non-obvious innovations that could be independently discovered by a competitor, thereby defeating the exclusivity of trade secret protection. Patents are often leveraged as assets on the bottom line too – creating wealth and demonstrating an innovative culture to the world.
- **Trademarks** can support the brand of your company, product, or service, creating a recognizable presence in the market for customers to choose.
- **Copyright**ed code, images, writing, and marketing collateral allows development of a company voice that can be protected from others. Plus, a copyright symbol is an easy way to demonstrate that the company is prioritizing IP.

All of these approaches may be applied to innovations, either simultaneously or at different times in the product/service lifecycle.

Note: not all IP comes from the R&D department. **Everyone generates IP – it's up to the company to capture it, determine its value, and protect it accordingly.** Take employee know-how as an example**:** it is difficult to quantify, impossible to hold, yet extremely difficult to replace if it walks out the door.

What are some other considerations when prioritizing IP spend?

There are many factors that a founder should consider when reviewing their IP portfolios, and each factor may be afforded a different weight based on the business and IP strategy of the company. These factors should be weighed both during the analysis of both existing IP portfolios and when determining gaps where resources should be devoted to developing or acquiring IP.

Consider the following:

- Available resources, i.e.
  - Budget
  - Talent
  - Time
- Relevance of existing or potential IP to the business strategy and current product/service portfolio and any future innovation(s)
- Applicability and coverage of patent claims in relation to current products/services, and remaining term of protection
- Ability to defend or enforce IP against known competitors
- How IP is treated in certain jurisdictions and what benefit the company gains from having IP in that country. Protect your IP in accordance with the following:
  - Principal place of business
  - Current market(s)
  - Manufacturing location(s)
  - Potential or future market(s)
  - Competitor(s)' market(s) & location(s)
  - Collaborator(s)'s market(s) & location(s)
- Follow-on or associated costs (examination, issue, maintenance/annuity, translations, foreign/domestic agents, etc.)
- Licensing potential for existing or future IP

Who can help?

While much of the forethought and business strategic planning can be done in-house, founders should involve qualified counsel whenever possible in developing their IP strategy, so that important details and opportunities are not missed, which could lead to expensive or catastrophic shortcomings later.

When it comes to implementation of the IP strategy – filing patents, registering trademarks, writing agreements, licensing assets, etc. – companies should always work with an IP service provider who understands what the business is trying to accomplish and is suited for the task at hand. IP service providers should have an educational background in fields related to what the company does, as working with those people may fast-track some of the explaining otherwise required in getting someone else up to speed.

There are many resources to help business leaders learn about, pay for, and protect IP, like this IP Tool Kit or other resources made available by Intellectual Property Ontario (IPON) and ElevateIP for Ontario-based businesses. Find out which resources are available to you by researching IP support in your area and connecting with your local innovation hub for guidance.

Develop an IP strategy that aligns with and supports the business strategy/goals of the company. It is imperative when mapping out the IP strategy to properly consider the innovations that will drive success of the company.