

# Protecting your Intellectual Property assets from theft

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## Protecting your Intellectual Property assets from theft

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### 1. INTELLECTUAL PROPERTY RIGHTS

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Intellectual Property rights are those intangible assets that include patents, registered trademarks and designs, plant variety rights and copyright.

The owner of an Intellectual Property right has the exclusive right to exploit the tangible and intangible assets that are attached to that right.

It includes the right to exclude others from using that property right and the right to sue those who steal and use that property right without a licence to do so.

### 2. INTELLECTUAL PROPERTY RIGHTS INSURANCE

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Intellectual Property Rights Insurance provides funding to pay for the legal costs associated with enforcing intellectual property rights and in some cases providing the funding to pay for the defence of an alleged infringement of another party's intellectual property rights.

### 3. THE DILEMMAS THAT INVENTORS FACE

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Developed economies are based around the ownership of property and the ability to trade freely. Those that develop innovative new products, processes or services who take out a formal intellectual property right, do so in order to extract the maximum value from the intellectual property and recover the costs of bringing that property right to the market.

Theft of intellectual property rights either during the development or marketing phase, stifles the process of innovation.

The owner of the property rights has to then raise the funds to enforce their rights or if they are unable to do so, allow the thief to capitalise unhindered on those rights.

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#### 4. THE WORLDWIDE PROBLEM OF INTELLECTUAL PROPERTY THEFT

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Theft of intellectual property rights is a major worldwide problem. Henrik Dahl Sørensen, Deputy Director General of the Danish Patent and Trademark Office<sup>1</sup> reported that:

Few thieves get away with stealing in broad daylight and then publicly reap the rewards from their ill-gotten gains. However, in cases of theft of good ideas, this grotesque scenario is by no means rare. Entrepreneurs and inventors, who need much time and much money to create a new product, can never feel secure, even though they have patent protection in all of the EU.

The problem is that even though the inventor holds a patent that is supposed to protect him from blatant theft of the idea, it is in many cases extremely difficult and costly to prosecute the enterprise that violates the patent. This keeps many small and medium-sized enterprises from pursuing their case, and therefore they do not reap the full benefit of their investment in innovation.

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#### 5. WHY INTELLECTUAL PROPERTY IS STOLEN

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Theft of intellectual property takes place because it is generally prohibitive for the holder of a property right to take the infringer to Court to recover what belongs to them. It is different for larger businesses who hold intellectual property rights for they may have the funds to enforce their property rights.

Mandy Haberman, the inventor of the Anywayup non spill drinking cup for infants wrote that:

"..... industry is loath to invest in new ideas until competition forces its hand. Generally, it is quicker and cheaper for them to spot successful new products in the marketplace, than it is to research and develop their own products from scratch. It could be said that the current system encourages them to do this, because the cost of litigation is prohibitive for most independent inventors or fledgling companies"<sup>2</sup>.

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<sup>1</sup> Taken from an address given by Henrik Dahl Sørensen to the European Conference on Patent Insurance held on the 28<sup>th</sup> of October 2002, for more information go to page 18,

<http://abmankara.gov.tr/english/services/onlineissues/cordis/Docs/208en.pdf>

<sup>2</sup> [http://mandyhaberman.com/Mandy\\_Haberman\\_Case\\_Study.php](http://mandyhaberman.com/Mandy_Haberman_Case_Study.php)

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## 6. THE PROBLEMS NEW ZEALAND INVENTORS FACE SELLING THEIR INVENTIONS IN THE WORLD MARKET

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It costs a lot of money and it takes a great deal of time and effort to develop a new idea and get it into the international market.

Few New Zealand businesses have the cash resources or the international marketing networks that can be used to launch new products internationally. Most owners of an intellectual property right know that they can use that right as security.

Many seek venture capital providers to provide the financial support to assist with this process. Most international venture capital providers are unwilling to provide financial support unless the owner has the ability to enforce that right.

It is common for New Zealand businesses to search for and find partners overseas who can act as their distributors. Many international distributors are unwilling to enter into a distribution agreement unless they can be assured that in developing the market, that the goods and services which incorporate an intellectual property right, will not be copied by others. The distributor expects the owner of the property right to be able to enforce that right when it becomes necessary to do so.

**An intellectual property right that cannot be enforced has little or no commercial value.**

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## 7. EXAMPLES OF INSURED PATENTS THAT WERE ENFORCED SUCCESSFULLY.

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Gripple, a company based in Sheffield in the United Kingdom, manufactures a range of wire joining and tensioning devices. Ten years after they commenced production an American company started selling a copy of their wire joiner. Insurance provided the funds that led to a permanent injunction being granted against the American company that halted the production and sales of the copy.

Mandy Haberman developed the Anywayup cup, a non spill drinking cup for infants in the early 1990's. In 1996 she launched the Anywayup cup onto the UK market and close to 1 million cups were sold in the first year of production. Two years later just as Mandy and her United Kingdom distributor were starting to achieve market share, one of the major nursery supply companies that she had approached earlier during the development phase brought out a copy of her product. Sales plummeted as this brand leader encroached on her market using her patented technology.

Mandy and her UK distributor took the company that was infringing her patent to Court. The Court ruled that her patent was both valid and had been infringed. The infringing product was removed from the market. Sales have now passed 25 million units.

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## 8. OVERSEAS TRENDS IN INSURANCE

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Insuring intellectual property rights is becoming more common in Europe and North America. There, capital providers recognise that intellectual property rights that cannot be enforced, have no commercial value. Capital providers will not generally make funds available if there is a chance that the intellectual property right in which they have invested will be stolen and copied and that some of the funds that they have provided might be used to enforce that right.

There is concern in some parts of Europe that attempts by small and medium sized enterprises to become more innovative are being stifled. Those small and medium sized enterprises know that if they create something that is successful then it is likely to be stolen and copied.

A report was commissioned by the European Commission<sup>3</sup> and published in June 2006 which recommended that Patent Litigation Insurance, Intellectual Property Rights Insurance, should be made compulsory for all holders of intellectual property rights in Europe.

This would encourage more small and medium sized enterprises to take out formal intellectual property rights knowing that there is funding available to enforce those rights. It should also act as a deterrent to stop others from stealing those (insured) rights.

The Government of Denmark<sup>4</sup>, recognising that a European solution to the problem of theft may not be obtained for some time yet, is currently seeking to establish an insurance scheme on a smaller scale. Denmark is prepared to join with other interested countries to create a scheme that will support the process of innovation within small and medium sized enterprises.

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## 9. THE COST OF INSURANCE

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The cost of insurance for intellectual property rights is affected by a number of factors which include:

- Whether cover is required in New Zealand, or in New Zealand and Australia, or on a world wide basis that either excludes or includes North America.
- The value of the intellectual property to be insured. The value is determined by looking at the sales turnover created by the products or services which incorporate the intellectual property rights.
- The level of indemnity that will be required.
- How much of the risk the insured intellectual property holder is prepared to share with the insurer.

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<sup>3</sup> [http://ec.europa.eu/internal\\_market/indprop/docs/patent/studies/pli\\_report\\_en.pdf](http://ec.europa.eu/internal_market/indprop/docs/patent/studies/pli_report_en.pdf)

<sup>4</sup> <http://int.dkpto.dk/ip-policy/selected-policy-areas/patent-litigation-insurance.aspx>

## **10. THE LLOYDS REGISTER OF INSURED INTELLECTUAL PROPERTY RIGHTS**

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Lloyds maintains a register of insured intellectual property. Insured holders of intellectual property rights have the option of having their details added to the Register of Insured Intellectual Property that is maintained by the Intellectual Property Policy Registry Ltd<sup>5</sup>.

All insured property holders are urged to make it clear on all their documentation, and where it is possible to do so, on their products, that their intellectual property rights are insured, for this acts as a deterrent to those who might be tempted to infringe upon the insured right.

## **11. PROVIDERS OF INTELLECTUAL PROPERTY RIGHTS INSURANCE**

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Most of the international insurance broking businesses can arrange intellectual property rights insurance.

SMEi Services Ltd offers to arrange to insure all New Zealand holders of Intellectual Property rights. This insurance is underwritten by Lloyd's of London.

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<sup>5</sup> <http://www.ipprltd.co.uk/>