

Protecting your Intellectual Property

The fitness industry plays an important role in improving the health of all Australians. Yet is the professional approach to the services the industry provides, reflected also in the health of their businesses? Have they properly protected assets vital to the conduct of their operations – their intellectual property.

What is intellectual property?

It is a collection of rights which are recognised as a result of some creative effort. The most common of these rights are copyright, trade marks, patents or inventions and designs. These rights are 'property' and even though you can't touch them, they exist and can be enforced and even appear on a balance sheet. In 2006, the Forster's trade mark in Europe was sold for \$750m.

What is my intellectual property?

In the fast growing fitness industry, two areas emerge as the most applicable - trade marks and copyright.

A trade mark is a sign you use to distinguish your goods or services from another trader in similar goods or services. Descriptive marks are generally not able to be registered because they don't distinguish e.g. 'Hot Roast Chicken' cannot be registered as it does not distinguish one hot chicken seller from another.

You may ask 'How does that apply to 'Fitness Australia' – is it descriptive of fitness in Australia?'



This mark is registered as trade mark 1248131. Its registration is not only for the words but also the graphic appearing with the words and this combination distinguishes it.

The other apparent area relevant to the fitness industry is copyright. Training manuals, exercise programs, recommended food programs and diagrams are protected by copyright as literary or artistic works. To be a 'literary work' the work does not have to be a literary masterpiece or innovative. A table or a chart which contains information may be the subject of copyright.

In Australia, there is no system of registration for copyright. It is copyright if it is an original (not copied) literary, artistic or musical work or it is subject matter like a film.

Why should I protect it?

A trade mark identifies you and your business. It represents your reputation, quality and integrity. Someone else using your mark or a mark deceptively similar may attract customers looking for you and might even dilute or diminish the value of your mark by providing inferior services to the original brand owner.

Successful businesses need protection as there are always people who seek to fast track the growth of their business by using a mark similar to a known brand.



Some years ago, I advised a group of physiotherapists who had a company name registration but not a registered trade mark. For 7 years they traded, advertised in newspapers and had even sponsored touch football teams using the brand. In the course of their business, they interviewed an applicant for a position, who was ultimately unsuccessful. The unsuccessful applicant applied for a trade mark in respect of the name and threatened the physiotherapists with proceedings based on the application. The physiotherapists ultimately succeeded, but could have avoided the episode by registering their mark.

Registration through IP Australia puts the mark on a national register and gives you ownership of the mark. Many people assume that registering a business name or company name gives you the sole right to the name. Neither does. It may not be good evidence of use as a person might have registration of the business name but not use it. The Office of Fair Trading and ASIC which administer business names and incorporations, do not cross check applications with IP Australia.

Another pitfall is thinking you own copyright when you contract to get something done such as a graphic, a web page or a software program. Unless you agree otherwise, anyone who you retain to create that graphic or logo or write that program owns the copyright.

What you get when you pay for that service is a license to use the program or graphic in your business, for the purpose it was created.

How can I go about protecting it?

The trade mark system is a registration system.

An application is lodged with IP Australia. It is then examined and advertised as being accepted if it does not raise issues on examination, for example it might be similar to a registered mark. A period of 3 months is given to oppose the registration after its acceptance.

If accepted and unopposed it will be registered for 10 years and then renewable.

As copyright does not require registration provision for its protection should be made in employment or service contracts.

Advice in these areas should be obtained from experienced intellectual property professionals.

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