Freedom to Operate

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Freedom to operate is the process of ensuring that you are not infringing on intellectual property rights belonging to others. Where commercialisation is a goal, it consists of confirming that you will be able to sell your product or service without the possibility of another party making a legal claim against you.

Why is it relevant?

It's important that freedom to operate is checked early in the innovation process. If intellectual property (IP) infringement is proven against you, you will need to pay an 'account of profits' to the IP owner – a share of the profits that you have made. If an invention has been in the market for many years, this could be a substantial sum of money. An IP infringement claim might also require you to rebrand your business. Uncertainty in IP ownership may also be treated as a liability by potential business partners and investors.

It is worth emphasising that IP rights are specific to each country. That means that you will need to check your freedom to operate for each country that you are intending to trade in.

Practical Steps

1. *Freedom to Operate: Copyright*.Because copyright infringement requires direct copying, avoiding copyright infringement just means not copying the direct expressions of your competitors. As long as you have not directly copied a work (including text, images, photographs, as so on), copyright will not interfere with your freedom to operate. Innocent infringement is a defence to a copyright infringement claim: as long as you can prove you created something yourself, accidental similarities to pre-existing works are not a problem. To avoid copyright infringement claims, avoid using works that you did not create yourself, unless you have permission from the original creator. As the copyright status of AI-

generated works is legally uncertain at present, it is best to not use AI for important elements of your business.

2. *Freedom to Operate: Trade Marks*.Innocent infringement is not a defence for trademark infringement. That means that even if you didn't know a trade mark existed, you can still be found to have infringed that trade mark. To help avoid this happening, it is best practice to perform a trade mark search using IP Australia's free search tools. IP Australia offers two kinds of free trade mark search. The Quick Search tool allows searching for words in the trade mark, the name of the owner, the trade mark number, or for an image. [1] Note than only exact matches will be returned. The Advanced Search provides a much more powerful search tool. [2] Searches can include multiple words and images, phrases, trade mark classes, trade mark status, dates, owners, trade mark number, and various other fields. The Advanced Search also provides search features including phonetic similarity, partial match, and fuzzy (approximate) match. IP Australia also provides a Trade Marks Classification Search tool, which is useful for identifying the classification of your trade mark to narrow down your search results. [3] Even if you are not intending to obtain a trade mark yourself, you should do a trade mark search for key elements of your business. Your most comprehensive searches should be around your business name, product name, and logos. It can also be worth searching in your commercial categories for things like logos, packaging, colours, and fonts, although the risk of accidentally infringing these is much lower than names. Filing for your own trade mark can be an effective defensive move against trade mark infringement. This is because trade mark searches and determinations are made during the application process. Once this is registered, the owner's rights in the trade mark are legally protected. Alternatively, if the trade mark is rejected, at least the cost of rebranding a business is averted.

3. *Freedom to Operate: Patents*.For patents, unlike copyright, innocent infringement (independent creation) is not a defence. There are a number of useful websites for patent searching. Lens.org allows quick searching by keyword or patent field, [4] and structured searching by a large number of fields, including jurisdiction, key dates, inventor, classification, and various text searches. [5] Searching keywords and synonyms relating to your possible new product or technology can be extremely valuable for saving time that may have been spent developing something which already exists. Patent searching can also be useful for identifying elements of a competitor's business which you may be free to copy. Patent searching can also be useful for staying up to date on developments in your industry, for keeping up with the state of the technological art, and for generating ideas about your own innovative products and technologies. It is worth searching for any key innovations in your business

processes or products. Because of the large number of ways that an invention can be described, it is worth engaging a lawyer if you are concerned that you may be infringing a patent.

References

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