# BARRIERS TO ENTRY: SHORING UP FRAGILE DEFENCES WITH INTELLECTUAL PROPERTY

Often a client can be complacent about the perceived strength of barriers to entry to their competitors in a market. A good advisor challenges their clients' assumptions so that they make decisions with a full knowledge of risks and costs.

Typical barriers to entry are explored below with a view to how IP tactics can address any weaknesses identified.

### Personnel

Client: *"We have the best researcher in this area!"*

Advisor: *"Excellent. But what if they leave or get hit by a bus?"*

Usually clients have good employment contracts that restrict employees from taking away proprietary intellectual property. However that does not address the hole the star employee leaves behind.

Ensure that your client considers the following.

- Documentation protocols which compels the researcher to keep an up to date record that others can follow once he/she has left.
- Succession planning so someone in-house can easily step into the shoes of the researcher.
- "Key person" insurance to give financial compensation to your client if illness/accidents happen.

### Niche Market

Client: *"It is a niche market in which there is no room for our competitors."*

Advisor: *"Great, but have you considered other opportunities?"*

If a business flourishes in a niche market, then often that market grows as a consequence – thereby allowing entry by others.

Also, IP advisors are often in a position to recognise that the innovative attributes a client applies to a niche market, can often be applied to other markets by them or potential licencees.

Explore with your client other opportunities and see whether it is worthwhile applying for IP protection to

1. keep competitors out of a growing niche market, or
2. to licence the IP in alternate markets.

### Supply

Client: *"I have an exclusive supply of the key ingredient."*

Advisor: *"How do you know?"*

An exclusive supply is often not guaranteed unless the supplier has their own intellectual property protection ensuring that others cannot compete.

For example, the exclusive supply may be a natural resource. However it may be possible for others to farm that resource elsewhere. It is also possible for others to recognise the functional attributes of that resource and look at ways to synthesise it.

It is definitely worthwhile for your client to consider obtaining IP protection for the use of the functional aspect of the ingredient, no matter whether it is synthesised or supplied from elsewhere.

Further, you should examine the agreements that your client has with its supplier to determine the circumstances under which they could lose access to that resource.

## Regulatory Approval

Client: *"We have FDA approval and it will cost too much or take too much time for competitors to run equivalent trials."*

Advisor: *"Don't they need to conduct the trials if they can show they have the identical product to you?"*

There are numerous regulatory approval hurdles that exporters have to overcome to be able to market a product in a country, not just FDA. The R&D required to produce a product which falls within a country's regulations, and then the subsequent trials proving safety and reliability are incredibly expensive.

However, it is possible for competitors to by-pass the expense of R&D and the majority of the trials if they can show their product the same as an approved product.

In this instance, it can worthwhile obtaining very narrow IP protection (perhaps in the form of a selection invention patent) for a product. To avoid patent infringement competitors would have to design outside of the patented product. Therefore to compete they will have to go through the same expensive hurdles your client had to to gain approval for their non-infringing product.

## First to Market

Client: *"We are going to be first to market which will give us an advantage over everyone else."*

Advisor: *"Really?"*

First to market only works if the market is small or short term and you can dominate it quickly (see niche market above). Only occasionally does a business have sufficient marketing firepower to establish themselves quickly as the only purveyor of the goods or services.

As soon as other players see another's success, it is very easy to come into the market as a cheaper or more profitable alternative. This is because if the market "leader" has no IP protection, other players can copy the original product without having to recover R&D costs in their pricing model.

In this situation, timing is critical and therefore a tactic is to put in some IP protection – even if the intention is merely to use it as a deterrent for a period of time. The semblance of IP protection can give a competitor "cause to pause". And any time that a client has to gain more traction in the market is usually worth the initial expense of applying for IP protection.

It should be noted that IP protection does not need to be continued with if the desired effect has been achieved, such as market dominance.

## Disorganised Competition

Client: *"Our competitors don't have their act together."*

Advisor: *"So how long is that going to last?"*

Most established companies can be complacent, particularly when their competitors are smaller and/or more disorganised. However, history shows that "new kids on the block" can readily arise, or existing competitors can cooperate together to provide formidable counterparts.

Formal IP protection may not be necessary if the company has analysed that the life of a product is likely to be less than the time that they consider their competitors could become significant. However, if a product does have a medium to long term life, then a client cannot afford to be complacent about the ability of competitors to arise or reorganise.

This is where IP protection can be useful.

## Summary

I am not advocating IP protection is the solution for everything.  However I do advocate challenging clients' assumptions so that they can make an informed choice as to whether to rely on alternate barriers to entry or invest in IP strategies which can strengthen those barriers.

*By Kate Wilson, Partner*