

Intellectual property: How food businesses can maximise the commercial value of innovation

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Introduction

This is a challenging time for innovators in the food sector, who are facing mounting pressure to take food production from the field to the future by adopting new sources of food, ingredients, farming methods and machinery. This has made it even more difficult to turn new ideas into market-ready products, a feat the highly complex regulatory environment is making even more difficult for the food sector. However, this in no way alleviates the demand for more scientifically sophisticated foods and drinks. If we are to combat the effects of the current food and financial crises, and meet the increasing demand for more health-conscious and sustainable options, the food sector must continue to innovate and push the boundaries of what is possible ever wider. But turning a great idea into a success requires work, including the protection and commercialisation of the intellectual property (IP) at the heart of a business.

What is meant by IP?

The different types of IP that you will need, and the way you will use them to build your business and maximise its value, will depend on the nature of the business and on what you want to achieve. The primary IP rights are:



Patents prevent anyone else from manufacturing or marketing your products or foodstuffs, or using your processes, for the next 20 years. Once you have a patent, you can license your products and processes to others to create an additional revenue stream.



Trademarks protect names, phrases, sounds or symbols used in association with products vital to building a brand and reputation within a market for 10 years. Protection lasts for 10 years but can be renewed in perpetuity.



Design rights protect the appearance of a product in terms of its lines, contours, colours, shape, texture or materials which make them an extremely important IP right for the food industry, given the unique and often brand-defining packaging and presentation of many foods and drinks.



Copyright protects the written or artistic expressions fixed in, for example: media, novels, poems, songs or movies.



Trade Secrets are sometimes forgotten, however they are very important and are, for example, used by leading quick service restaurants and beverage manufacturers. They can cover a formula, recipe, process or combinations, in fact anything that gives an advantage over competitors can be recorded as such. If you have something you need to keep secret, you will need to prove it adds value to the business and that you have taken appropriate measures to maintain it a secret.

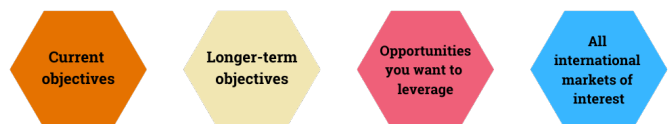
When should you start thinking about IP?

You should really consider IP at the inception of an idea, as it will play an integral part of your commercial development, as well as protecting your most valuable assets as you begin your journey to market.

We would always suggest you seek advice from a qualified and experienced IP professional as soon as you have developed the idea. Proactivity prevents ambiguity. This will save you from having to expend significant time and fees to put things right further down the line. It could also prevent you from costly delays in terms of bringing your products safely to market.

Choosing the right IP direction

Depends on which rights provide the best protection for:



As your business develops, the way you use IP will also and you will need to change with it. As you start out, you will want it to:

1. Make yourself attractive to potential investors, by giving them confidence that they will get a return on investment
2. Support the valuation of your company, which again will make your business more attractive to investors and possible partners/retailers/distributors
3. Make it harder for competitors to enter the market, which in turn protects your market share and position
4. Derive higher profit margins and additional revenue streams
5. Strengthen your brand and reputation, and showcase your company and products in the best possible light.

Establishing IP ownership

Once you have identified the IP you have, you should create an IP register and keep it up to date, then establish the IP ownership, as it is often raised by potential investors. It can be useful to engage with an IP attorney to help conduct an innovation capture session.

Key areas to address:

1. Who owns the existing IP.
2. Who will own any new IP created.
3. How ownership will change as you create new IP.

If unclear, an investor may walk away rather than risk investing funds into an unknown. To avoid this, you need to determine who is entitled to claim IP ownership. Generally speaking this will be the IP creator, although there may be an automatic transfer of entitlement arising from employment or contractual obligations. If there are co-creators of the IP, multiple parties may be jointly entitled to IP ownership. It is more complicated if foods or drinks are developed in collaboration with a partner in an inventive or creative capacity, as that will impact who owns the IP, so you will need to consider their status in addition to your own. It is advisable to maintain an open dialogue on this matter and keep clear records of potential inventions and inventorship.



Setting and steering an effective IP strategy

An IP strategy is your plan to develop, grow, leverage, and monetise your IP. Not only is it a road map, but what will construct and hold your competitive advantage which in turn drives market share, revenue and profitability, as well as making you a more attractive investment proposition. Setting the right strategy is particularly important for food businesses given the level of competition and fortunately it does not have to be complicated. The first iteration could be a one-page overview of your IP and how you intend to grow and leverage a portfolio over time. However, it is essential to remember a business plan must dictate how your strategy is formulated, so it must be regularly checked to ensure it continues to map directly to the business plan and commercial objectives. Without commercial input, one could easily end up with an IP portfolio that is inefficient, or worse not fit for purpose. The IP strategy should also address how the IP will help create revenue. Are you planning to sell your products directly or do you want to license your products for other manufacturers to use? These are business critical decisions. The strategy should protect revenue streams from competitors and calculate whether third-party IP rights might impinge on

your ability to make use of this. Timing and confidentiality are also crucial elements; knowing when to act is vital.



You do not want to file too early and risk disclosing your most valuable secrets to your competitors. You also need to be sure who needs to know about your most valuable ideas. Talking through your ideas with a sympathetic sounding board could look like an inviting opportunity but what if their intentions are less than honourable? What happens if they take what you tell them to use for their own gain? Knowing which steps to take and what to disclose to whom, and when, will have a critical impact on the strength of your IP position. It is important to ensure you keep all the details of what you are planning to protect confidential before filing a patent application. This means not telling a third party what you have, how you use it and what you are planning to do with it. It also means ensuring other parties you are working with (such as a manufacturing or marketing partner) know they must keep it confidential too. The need to maintain confidentiality is particularly important if you are pitching for funding prior to filing. If details were to leak and competitors begin to use your intellectual property for their own commercial gain, the investor(s) will immediately withdraw, recognising their likely returns will be much lower once you lose your unique advantage. Potter Clarkson; IFST member), in conjunction with IFST Food Innovation (Product and Packaging) Special Interest Group During the early stages, your focus will probably be on protecting the core innovation you have developed, so that you can secure funding and grow your business whilst keeping a close control on your IP spend. However, looking to the future, as your business enters its 'adolescence' you may want to expand your IP portfolio through creation or acquisition. Additionally, you might want to put more internal IP procedures in place, look harder at commercialisation opportunities and tackle any possible Freedom To Operate (FTO) concerns. As your business matures, your IP strategy will need to adopt a more multi-layered approach to managing progress, research and development (R&D), diversification, investment and even exit. It will keep evolving as you move through each new stage.

Reference

Intellectual property: detailed information - GOV.UK (www.gov.uk)

Credits

Dr Charlotte Crowhurst (Partner and Patent Attorney, Potter Clarkson; IFST member), in conjunction with IFST Food Innovation (Product and Packaging) Special Interest Group.