

# CONTROLLING YOUR INTELLECTUAL PROPERTY BY KNOWING HOW TO STRUCTURE AN EFFECTIVE LICENSING CONTRACT

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## 1. INTRODUCTION

1.1 In this paper we will examine a number of matters relating to your licensing contracts which will assist you in controlling your intellectual property once it is in the hands of another.

1.2 These mechanisms include:

- (a) being very specific as to the rights you are licensing;
- (b) being clear as to who owns the intellectual property rights licensed and subsequently modified;
- (c) being clear about all of the obligations with which your licensee must comply;
- (d) effectively limiting your liability and obtaining appropriate indemnities from your licensee;
- (e) working within the bounds of statutory obligations which cannot be excluded in your contract;
- (f) dealing effectively with termination and the return of your intellectual property;
- (g) understanding the options provided by escrow arrangements; and
- (h) effectively dealing with disputes.

## 2. PRESUMPTIONS

2.1 For the purpose of the illustrations in this paper, we have presumed that:

- (a) you are the owner of source and object code in a piece of software and other documentation related to it (together the “**Copyright Material**”), an associated logo which has been registered with IP Australia as a trade mark in Australia (“**Trade Mark Material**”), and some other information which is confidential and which relates to the Copyright Material and the Trade Mark Material (“**Confidential Material**”);

- (b) you wish to provide a non-exclusive license to a third party (“**Distributor**”) to exploit the intellectual property referred to in paragraph 2.1(a) above in the Australian market in return for a royalty payment to you;
- (c) the Distributor will wish to modify some of the Copyright Material and then integrate it with other software and to license same to end users in Australia under its own registered trade mark.

### **3. WHY ENTER INTO A CONTRACT?**

- 3.1 Particularly in circumstances where you are new to business, or you are attempting to commercialize your particular intellectual property for the first time, there may be a reluctance to enter into a formal contract with your customer, in this case the Distributor. This may arise as a result of a perceived need to minimize cash outflow (legal fees) and, quite commonly, a perceived need “not to antagonize” the Distributor at a time when you are endeavouring to maximize its interest in, and enthusiasm for, your intellectual property.
- 3.2 Experience shows however that the warm inner glow often shared by parties at the beginning of the transaction can quickly subside as the transaction progresses.
- 3.3 In many ways, a formal written contract deals with the potential bad news part of the transaction - what happens when things go wrong. When things do go wrong, as they often will, the investment in contract negotiations at the outset will be well worth it.
- 3.4 However, it is not only when things go wrong that a contract is required. It is essential that both you and your Distributor know exactly what each party’s legal obligations and rights are.
- 3.5 Even in the absence of a formal written agreement, a contract will at law most certainly exist in any event, albeit that it will need to be implied from a number of different sources, from a course of dealing, or implied by law to give the contract business efficacy.
- 3.6 As the owner of intellectual property, the custom is that you will be responsible for generating the initial contract for discussion with the Distributor. Increasingly however, that presumption is reversed with governments and large corporations in particular being

particularly fond of the “*we only contract on our standard terms*” line. While this may well be the policy within those organizations, you will need to be cognizant of your bargaining power in the particular circumstance to determine whether it is fruitful to insist on the use of your contract. In the event that you are forced to use your Distributor’s contract, you should as a minimum negotiate, with the assistance of a lawyer, many of the variations that may be necessary and highlighted in the discussion below.

3.7 When dealing with intellectual property rights, it is particularly important to have clarity in relation to the rights and obligations of the parties and to do so in the written agreement. There needs to be absolute certainty that you are not selling your rights, or otherwise parting with possession, other than granting a contractual licence to some other person to use those rights, and then only in a very specific way. A particular nuance discussed below is the fact that those licenced rights may be modified by the Distributor or someone on behalf of the Distributor which creates an extra layer of complication when it comes to protecting your ownership rights in the original material and clarifying the extent to which you have rights in relation to the modified material. Your contract will need to expressly deal with the following in relation to the intellectual property rights:

- (a) the rights of the Distributor to use your intellectual property rights;
- (b) the right the Distributor has to modify the intellectual property rights;
- (c) the right to assign, sublicense or otherwise deal with that intellectual property;
- (d) the right to supply goods or services using that intellectual property; and
- (e) your obligations to support that intellectual property.

3.8 Overlaying all of the express provisions of your contract are a number of statutory provisions which cannot be excluded by the terms of the contract. Understanding those obligations, as discussed below, is also crucial when beginning the process of commercializing your intellectual property and structuring an effective licensing contract.

#### **4. RETENTION OF OWNERSHIP**

4.1 The general rule in relation to intellectual property is that the person who creates it is the owner of it. In the case of a company however, if its employees develop the intellectual property, that will be owned by the company (“**Company Rule**”). There are some exemptions to this Company Rule. For example, an employee will own a patentable

invention invented during the course of employment. An employee will also retain their moral rights. Also, technology development for a government will be owned by the government in many circumstances. The key exception to the Company Rule though is that intellectual property developed for you by a contractor will remain the property of the contractor even if you have paid for it (subject to a handful of exemptions). It can only be assigned to you in writing.

4.2 While not the subject of this paper, this means that you should ensure that any contractor working for you is the subject of a clearly documented contractor agreement pursuant to which they assign to you all present and future intellectual property rights created by them for the purposes of that contract, and also warrant to you that those intellectual property rights so created do not breach the intellectual property rights of other people.

4.3 As your Distributor's "contractor", it also means that you should ensure there is clarity in your agreement with the Distributor in two ways:

- (a) you must insert a clause pursuant to which you clarify that the agreement does not constitute an assignment by you to the Distributor of any of the Copyright Material, Trade Mark Material or the Confidential Material, or any modifications of same which may be undertaken by you; and
- (b) to the extent that you are licensing your intellectual property rights, you must state that:
  - (i) you are providing a licence only;
  - (ii) it is a non-exclusive licence;
  - (iii) it is a non-transferable licence;
  - (iv) it is for use for a particular purpose;
  - (v) it is for use for a particular time;
  - (vi) it is for use in a particular territory.

4.3 It is strongly recommended that co-ownership of intellectual property be avoided. Particularly in the case of intellectual property rights which may be heavily modified for the Distributor's purposes, it will often be the case that the Distributor will propose that a good compromise is co-ownership of the base intellectual property or even the modification. The hidden difficulties of co-ownership include:

- (a) On what basis do you each own the intellectual property, is it as joint tenants or as tenants in common?
  - (b) While use of the intellectual property for the project at hand may be obvious, how will decisions be made in the future regarding that use, often when the individuals involved in the original transaction have moved on to greener pastures?
  - (c) How do you anticipate and regulate bad faith restrictions by one party on the other in relation to use of that intellectual property?
- 4.4 Where the licence relates to the Copyright Material, the licence provisions should also deal with further matters, such as the extent to which access is given to source code in addition to the object code.
- 4.5 In the event that access is required to the source code, then escrow arrangements may be required as referred to below.
- 4.6 In the circumstances presumed in Section 2 above, in granting the licence it is important to avoid the words (or words like these words):
- (a) “perpetual”, which means the licence will last forever;
  - (b) “royalty free”, as you will in fact be requiring the payment of an ongoing licence fee for the right to use the intellectual property; and
  - (c) “irrevocable”, as no doubt there will be provisions in the agreement pursuant to which you can revoke or terminate the licence;
- 4.7 While some of these words may be appropriate in other circumstances, you should not presume they are boiler plate if, as indicated above, larger customers or governments require you to enter into their licence documents. The inclusion of these words in the licence clause may at worst completely change the scope of the licence you are purporting to grant, and at best, when weighed against the other terms of the licence, create significant ambiguity which could be use by the Distributor to its benefit.

## 5. RIGHTS BEYOND THE LICENCE

5.1 Based on the presumptions in Section 2 above, you have decided to appoint a Distributor, in a particular territory and for a particular term, to exploit your intellectual property.

5.2 This requires provisions to be included in your contract to ensure that there is clarity of roles as between you and the Distributor.

5.3 Alternatives to the “distribution” model are:

- (a) The appointment of the relevant person in the territory as your agent. As a general rule, agency should be avoided (as should partnership, and even the mere use of the term “partner”). An agent effectively is you in the territory and can in many circumstances bind you to obligations even if you are not first aware of those obligations. Agency agreements require careful consideration to make it clear what the scope of an agent’s authority is and how you can put the world on notice of that scope. This is beyond the scope of this paper; and
- (b) The appointment of the relevant person as a mere “facilitator”. A facilitator is a person who simply identifies opportunities for you in a particular market and then introduces the customer to you so that you may contract directly with the end customer.

### *Key Obligations*

5.4 By contrast, our Distributor in the current example licenses the intellectual property from you and then deals directly with the customer in its own right in relation to those intellectual property rights. As a result, the clause appointing the person as a distributor should:

- (a) expressly confirm that they are neither agent nor partner nor employee, but merely a contracting Distributor;

- (b) state that the Distributor is appointed on a non exclusive basis for a particular term and in a particular territory to distribute the intellectual property (and in this regard many of the provisions will mirror the licence referred to in Section 3 above);
- (c) in consideration for being appointed the Distributor, state that the Distributor will pay to you a Distributor Fee, which may be in addition to the fee that applies to the intellectual property licence;
- (d) expressly acknowledge that you may appoint other distributors in the territory, or otherwise yourself deal with the intellectual property rights in the territory during the term.

5.5 It needs to be remembered that if an exclusive licence is granted, that exclusivity may also apply as against you. That is, you also may not be able to exercise any of the licenced rights in the territory for the term. While in some circumstances this may be appropriate, it will certainly require greater attention to be given to the key performance indicators (referred to below) which the Distributor must meet in order to retain its exclusivity.

#### *Ancillary Obligations*

5.6 Examples of ancillary obligations which should be expressly imposed on a Distributor include the obligations to:

- (a) use its best endeavours to promote, market and sell the products and services incorporating the intellectual property rights in the territory;
- (b) be confident and knowledgeable in, and conversant with, all aspects of the intellectual property;
- (c) preserve the confidential nature and secrecy of your confidential information;
- (d) provide information to you on a consistent basis in relation to sales and prospects and to enable you to audit those as required;

- (e) create a specific contact person within the Distributor's organization, informing you of any matters which you may require;
- (f) at all times, act in good faith towards you and to provide assistance and cooperation as soon as practicable upon request by you;
- (g) not compete with you (the details of which must be quite specific), and not to solicit your key employees etc.

5.7 In addition to these obligations stated in the contract, protection of your intellectual property will also be enhanced by undertaking some due diligence on the Distributor before entering into the contract. Issues that you should consider include:

- (a) Is the proposed Distributor a company of substance or a \$2 company formed solely for this project?
- (b) What is the trading history of the Distributor? In this regard, a review of the Distributor's accounts and the provision of referees will assist.
- (c) Undertake with appropriate courts a search to determine whether your proposed Distributor has been involved in litigation and if so, with whom and in relation to what. (Be aware that some courts do not offer this facility).
- (d) Consider undertaking a credit reference check with organizations like BayCorp.
- (e) Undertake a search with the Australian Securities and Investments Commission which may indicate:
  - (i) whether the company has ever been in financial distress;
  - (ii) who the directors are;
  - (iii) who the ultimate shareholders are;
  - (iv) whether the Distributor has been diligent in complying with its obligations under the *Corporations Act* in relation to lodging documents etc.
- (f) seek present guarantees from directors, or bank guarantees.

***Key Performance Indicators***

- 5.8 Given that a considerable amount of responsibility will be given to the Distributor to create revenue to reimburse your costs of developing the intellectual property, it is essential that some key performance indicators be imposed on that Distributor even if the Distributor has non-exclusive rights.
- 5.9 Examples of such key performance indicators may included:
- (a) obligations to advertise the products utilising the intellectual property at certain times, in certain journals and in a particular way (for example, the Distributor may be required to always include your Trade Mark Material in the promotional material even if the product represents a heavy modification of your Copyright Material);
  - (b) participating in appropriate road shows and fairs;
  - (c) complying with your other specifications in relation to promotion activity;
  - (d) distributing a minimum number of products per annum which utilise your intellectual property rights, including a mechanism for changing that quota during the term of the agreement;
  - (e) keeping particular records in accordance with your specifications and providing those to you at regular intervals;
  - (f) only modifying intellectual property rights in accordance with strict specification and notification requirements; and
  - (g) meeting certain requirements in relation to the protection of the confidentiality of your intellectual property rights, and being audited by you in relation to same.

## **6. MODIFICATIONS TO THE INTELLECTUAL PROPERTY RIGHTS**

6.1 One of the issues which is the most difficult to manage when dealing with contracts involving intellectual property rights is the right of the Distributor to modify the intellectual property rights, to then incorporate them into the end user products, and the implications of such modification for your ownership of your base intellectual property rights.

6.2 Clearly, the ideal starting point is to ensure that you retain ownership of all intellectual property rights, including those in any modification. In return, you may need to grant to the Distributor an irrevocable perpetual and royalty free licence to use those modifications (although not the base intellectual property). Your Distributor will no doubt resist, however it should be reminded that it will cease to have the ability to use and market the modifications in any event on termination of its licence to use your base intellectual property rights.

6.3 Courts frequently needs to deal with circumstances where base intellectual property rights have been modified to such an extent that a Distributor argues that they are in fact different intellectual property rights and therefore not the subject of the licenced terms and conditions. The general position adopted by the courts is that, unless the modification is substantial, no adaptation or new work will be created and the modifier will not own anything. The modifier will, however, be liable for infringement if it has copied the first work in the process of modification and its licence to do so has terminated. If the modifications are substantial, they may be deemed to have created a new work which is owned by the modifier outright, although the modifier will still be liable for any copyright infringement of your work.

6.4 Another alternative may be for you to insist on undertaking the modifications yourself, with the modifications then being clearly owned by you and the subject of your licence to the Distributor.

## **7. LIMITING LIABILITY**

7.1 As the owner and developer of intellectual property rights, a key concern in any contract must be to limit your liability, not only to the Distributor but also to its end users. The latter can be a difficult exercise given that you are not party to a contract specifically with those

end users. There are some devices however which may be used in order to limit your liability even in those cases.

### *Liability to the Distributor*

7.2 As a general observation, Australian law will allow you to limit your liability in your contract with the Distributor except in certain circumstances, examples of which are:

- (a) where a specific statute prohibits you from doing so (and these are discussed further below); and
- (b) if by limiting your liability you are essentially denying the Distributor the benefit of the contract.

7.3 In the absence of these two situations, there are usually three components to the limitation of liability regime. These are:

- (a) disclaiming obligations to comply with implied warranties not expressly stated in the agreement;
- (b) seeking indemnities from the Distributor in relation to its conduct; and
- (c) setting limits on your liability for various matters.

7.4 As further discussed below, both statutes and common law in Australia will imply into any relationship various warranties regarding your conduct and the intellectual property you are providing. To the extent permitted by law, you should expressly seek to remove those implied warranties and provide that the Distributor should rely only on the express warranties stated and negotiated into the contract. As noted below, this needs to be carefully crafted so that you do not inadvertently exclude in prior warranties which may not, as a matter of statute, be excluded. If the exclusion of implied warranties is overstated, you run the risk of the exclusion clause being considered void.

7.5 In relation to indemnities, typically each party indemnifies the other against expenses, losses, damages and costs the other may incur arising out:

- (a) the first party's breach of the agreement;
- (b) the first party's false, misleading or deceptive conduct; or
- (c) the first party's negligence.

7.6 The limitation of liability clause then sets about placing limits on the scope of that indemnity and the liability for other breaches of the agreement. Again this needs to be carefully crafted so that it deals with all of the following in a logical order:

- (a) excluding all liability to the extent that it was caused by a breach of the agreement by, or the negligence of, the party seeking the benefit of the indemnity;
- (b) except in the circumstances referred to in paragraph 7.7 below, excluding all liability for consequential or indirect loss. This is because such loss is difficult to quantify (and therefore difficult to manage) and also because many of your insurance policies will insist that this exclusion be included; and
- (c) in relation to direct loss, but for the items referred to in paragraph 7.7 below, this are usually limited to a stated amount in scale with the agreement. A common tactic is to limit the amount of exposure for this direct liability to the amount a party receives under the agreement. This may not of course reflect a reasonable amount of compensation which would be paid by one party to the other for a breach of the agreement or negligence. While it may restore the breaching party to the position it was in prior to the deal commencing (i.e. it receives no financial benefit), it does not necessarily compensate the other party for all of the exposure they may have as a result of that breach or negligence.

7.7 There are some matters, however, which should not be the subject of the limitation of liability clause because to limit that liability would remove the whole benefit of having those clauses in the contract at all. Examples are as follows:

- (a) There should be no limit on liability as a result of a party breaching its confidential information obligations, as to do so will effectively deny the person whose confidential information is being protected the whole benefit of that clause.

- (b) Traditionally, no liability caps are placed on liability for death or injury to people (and sometimes damage to property, although increasingly same is the subject of liability caps).
- (c) Importantly, a breach of an obligation in relation to intellectual property rights is not the subject of any cap. Such obligations may include warranties provided by one party to the other that the intellectual property rights it is contributing into the arrangement do not breach the intellectual property rights of third parties. This is because, as the innocent user of those intellectual property rights, you may still be expose to an action from the actual intellectual property right owner.

7.8 In addition to the limitation of liability clauses above, a key risk management tool is to ensure that your risks, and the exposure of the other party, are adequately insured by the respective parties. As a minimum, workers compensation insurance and public liability insurance should be obtained, but consideration should also be given to more expensive product liability insurance and professional indemnity insurance. The interest of the non insured party should, in many circumstances, be “noted” on the insurance policy of the other. While noting your interest on the insurance policy of the other puts the other’s insurance provider on notice of a potential claim, it is not the same as being “named” on their insurance policy, in which circumstances you would have the right to make a claim of that insurance policy yourself rather than requiring the insured to make the claim.

#### *Liability to the End User*

7.9 While you may not have a contract with the Distributor’s end users who will be using products which incorporates your intellectual property rights, the two most common devices for limiting your liability to those end users are as follows:

- (a) obtaining a full indemnity from your Distributor in relation to any end user claims; and
- (b) requiring the Distributor to include in its end user contract the relevant limitations and exclusions of liability, stating that they are also for your benefit. In this regard, while you are not a party to that end user contract, if the end user has agreed to

those exclusions, in certain circumstances you may be able to obtain the benefit of that contract in any event.

## 8. STATUTORY OBLIGATIONS

8.1 As mentioned above, in Australia there is some liability imposed by statute which cannot be excluded and you should not seek for it to be excluded. As a result, in relation to some of the limitation of liability clauses referred to above, the expression “*to the extent permitted by law*” should be included.

8.2 Examples of statutory liability which should not be excluded include:

- (a) provisions of the *Trade Practices Act* which require goods and services manufactured or supplied in Australia meet certain minimum quality standards (discussed further below);
- (b) prohibitions on certain unfair trading practices, such as misleading and deceptive conduct (see sections 52, 53, 51AA, 51AB and 51AC of the *Trade Practices Act*);
- (c) obligations on manufacturers and suppliers of goods for personal injury or death, or damages to personal property, caused by the manufacture or supply of unsafe goods (see Part VA of the *Trade Practices Act*).

8.3 While we will not deal with each of these issues in detail in this paper, it is worth noting, in relation to the liability referred to at paragraph 8.2(a), the provisions of sections 68 and following of the *Trade Practices Act*. Division 2 of Part V of the *Trade Practices Act* deals with conditions and warranties which are implied by the *Trade Practices Act* into the consumer transactions. The Division only applies in relation to contracts for the supply of goods or services to a “consumer” (as defined in the *Trade Practices Act*), so may not be directly relevant to you if you are dealing with a Distributor or dealing with people who are not otherwise considered “consumers”. If the Division does apply, examples of the non-excludable warranties and conditions include:

- (a) warranty as to title (Section 69(1)(a));
- (b) warranty as to quiet enjoyment (Section 69(1)(b));

- (c) that services will be rendered with due care and skill (Section 74(1));
- (d) a warranty that any goods supplied with the services will be fit for their purpose (section 74(1) etc).

8.4 The Division allows suppliers (subject to an overriding fairness test) to limit their liability in relation to goods (even for these implied warranties) except where the goods are ordinarily acquired for domestic, personal or household use. If the goods are for those purposes, it is not possible to claim limitation of liability. If this is not the case, you can attempt to exclude, restrict or modify your liability for the implied provisions in the Division in such a way that it will not be void (as will usually be the case) if the terms of the limits of liability are restricted to:

- (a) in the case of goods, any one or more of the following:
  - (i) the replacement of the goods or the supply of equivalent goods;
  - (ii) the repair of the goods;
  - (iii) the payment of the cost of replacing the goods or acquiring equivalent goods;
  - (iv) the payment of the cost of having the goods repaired; or
- (b) in the case of services:
  - (i) the supply of the services again; or
  - (ii) the payment of the cost of having the services supplied again.

## 9. TERMINATION ISSUES

9.1 Your agreement should expressly state the conditions under which you can terminate the agreement during the term. This may include:

- (a) if the Distributor has breached the agreement and has failed to remedy the breach (if it is capable or remedy) within a stated period;
- (b) the Distributor has committed some negligence or other unlawful act; or
- (c) the Distributor becomes insolvent or is otherwise unable to pay its debts as and when they fall due;

9.2 The issue then arises as to how the relationship between you can be effectively undone. It is important to make clear in the termination provision that:

- (a) on termination, the right to use all the intellectual property rights stops;
- (b) the Distributor must return the intellectual property rights, and all materials relating to same, to you or destroy it at your option;
- (c) the Distributor must return to you all of your Confidential Material;
- (d) the Distributor must cease distributing products which incorporate any component of your intellectual property rights;
- (e) in some cases, it would be appropriate to require the Distributor to hand over its customer lists in relation to customers of products which incorporate your intellectual property rights;
- (f) you may wish to have a handover provision which requires the Distributor to undertake an orderly handover to the next Distributor during a stated period;
- (g) there should be an express provision requiring the Distributor to stop representing that it is your distributor; and
- (h) the Distributor must pay you all amounts due and owed within a specific period of time.

## **10. ESCROW**

10.1 As noted above, a common protection technique when dealing with intellectual property is to invoke escrow provisions. Essentially, if your intellectual property involves such things as software or manufacturing knowhow, it is possible to provide the source code for the software, or the information regarding the knowhow, to a neutral third party, often a commercial escrow agent or bank. That person will do nothing with the materials except for holding them and, subject to a tripartite escrow agreement, to release them in certain circumstances. The escrow agent will take it upon itself to determine whether it should or should not release the material, rather it will simply rely on the direction of one of the parties. The party requesting the information however will be exposed to a claim for breach of contract under the main agreement, which of course will deal with the terms and conditions under which the information held in escrow can be called.

- 10.2 Examples of the events under which the information can be called from escrow include:
- (a) if you breach your obligations to the Distributor and it is not remedied;
  - (b) if you go out of business;
  - (c) other stated circumstances.
- 10.3 The benefit for you of course is that your Distributor may be satisfied not to receive the source code and that key information upfront. There may be circumstances where you do not wish to provide that information, rather provide services during the term in relation to your intellectual property rights to support the Distributor. The Distributor's concerns can be alleviated knowing that if you are not able, or refuse, to provide that key support it can still access the relevant information from the escrow agent so it can continue to exploit its rights under your distribution agreement.
- 10.4 The separate escrow agreement should provide that the materials are returned at the completion of the term of the distribution agreement.
- 10.5 A simpler arrangement of course is to provide the materials to the Distributor under the undertaking of the Distributor that it will not access those materials except in certain circumstances, such as a breach of contract by you. While this is a simpler arrangement than entering into a tripartite escrow arrangement in addition to the distribution agreement, the risks are obvious.

## **11. DISPUTES**

- 11.1 As the owner of the intellectual property rights, you should use a dispute resolution mechanism that is most convenient to you. For example:
- (a) In order to minimise unnecessary costs, you may wish to provide that, if a dispute arises, then within 30 days of first written notification from one party to the other of the dispute, the parties must meet in good faith in an endeavour to settle the dispute, including holding meetings between persons at a higher level in the organisation than those dealing with operations.

- (b) Thereafter, you may wish to have the dispute referred for mediation, arbitration, conciliation or simply have the right to litigate. In our experience, moving straight to litigation is always a more satisfactory arrangement given that it is less open to abuse by parties to string out disputes before a resolution is obtained.
  
- (c) Finally, you should have the parties submit to the most convenient jurisdiction and law to you. For instance, if you are in New South Wales, the parties should submit to the jurisdiction of New South Wales courts and New South Wales law.

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