COMMERCIAL GOOD PRACTICE PART I – YOU HAVE AN INVENTION, BUT WHAT NEXT?

Written
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Once you have created an invention or innovation, you must consider the next step if you wish to commercialise that invention/innovation, writes Dr Rosanna Cooper. You would need to set up a business to exploit your invention/innovation, and in doing so will be faced with commercial and legal issues such as, which legal structure to adopt for your mode of business; choosing a name for the business and/or product; drafting a business plan; registering the name(s) as a trade mark; filing patent applications to protect any subsisting technology; protecting any intellectual property rights (IPR's); marketing your products or services and obtaining the highest quality legal advice. You should consider the legal, commercial and tax implications of the entity you are going to adopt.

There are several ways of establishing a business whether as a sole trader, a partnership, a limited liability partnership, a limited company or a joint venture. The various modes of business are explored further in this article.

Sole Trader

A person can establish a business as a sole trader if he intends to trade as an individual. The main advantage with this kind of business formation is the lack of formality required. You would not be required to register for VAT until your annual turnover exceeds £58,000.00. The major disadvantage with this type of business is that your liability is unlimited in the event of any claim or proceedings against your business. There is a risk that your personal possessions could be taken into account to meet the value of any damages or claims awarded against you. Pay As You Earn income tax (PAYE) will be payable to the Inland Revenue.

Partnership

A partnership can be set up provided there are two or more partners and there is a business that is carried on with a view to profit. Almost any kind of business can be carried out as a partnership, though it is more common for service businesses. A partnership enjoys much the same flexibility and informal nature as a sole trader. It is advisable to have a partnership agreement drafted to govern the management and activities of the partnership and which all the partners of the business have a duty to uphold. You would agree at the outset with your fellow partners the terms of the partnership agreement. The main disadvantage of a partnership is that the partners are jointly and severally liable – meaning that any successful action against the business can be enforced against any or all of the partners, in the same way as against a sole trader. The importance of the integrity of all partners cannot be over-emphasised.

Limited Liability Partnerships

You can with two or more partners establish a Limited Liability Partnership, which is more commonly known as an LLP. An LLP may be advantageous to Small to Medium Sized Enterprises ("SME's") wanting to have the benefits of a limited company whilst maintaining some of the simplicities of a partnership. The members of an LLP will still retain the tax advantages of a partnership, however, members will still be responsible to third parties if they act negligently. There are some formalities associated with a partnership such as filing annual returns and accounts for the LLP with Companies House. With an LLP your liability is limited to that of the partnership's assets, meaning any claim against the business would not normally extend to the personal assets of the members.

Joint Venture

A joint venture (JV) can be entered into by two or more parties with a view to sharing the profits of the company being created or by wishing to merge their operations in a particular territory. JV's should always be governed and managed by contractual arrangements. There are a number of entities through which a JV can be effected, including those in this article.

It is common for two companies joining forces to achieve a common goal to do so via a JV. There are issues associated with a joint venture such as ownership of intellectual property rights (IPR's) of the respective parties and ownership of the JV. There are certain tax implications associated with a JV.

Limited Company

A limited company has a separate legal personality, and as such is separate from the owners and directors of the company. When setting up a limited company you must check the availability of the name with Companies House. You must adopt your articles of association (which governs the business) and your memorandum of association. The company would need to be incorporated by completing the requisite forms, at least one director and a company secretary would have to be appointed. Like a LLP, once the company is incorporated, you will be required within a prescribed period to file your annual returns, accounts and other documents. The company would also be required to hold board meetings and annual general meetings, at which the company secretary would record minutes of the meeting. It should be noted that a limited company could be set up with one director and a company secretary. The shareholding of the company should also be determined.

In most companies, their main assets would be their IPR's. If you are seeking investment it is advisable to [1]assign the IPR's to the company. This is achievable by a simple transfer document of the rights from you to the company. The company will then own the IPR's and as such any deals or investment would be made between a third party and the company. You

[1] See our January article entitled "IPR: Assign or Licence?" (Issue 38)

would remain a director and founder shareholder of the business. The company would allocate shares to members of the company such as investors to raise capital (see next month's article for greater detail). However, shareholders should always enter into a shareholders agreement in case of any dispute later on.

The main advantage of a limited company is that if a third party were to successfully bring an action against your company, your personal assets would not be called into question in meeting the value of any damages awarded, save in a few extreme circumstances. The liability of the shareholders of the company would be limited to their capital contributions.

Conclusion

The entity you choose will have a bearing on your business. In the September and October issues of Inventique, we will be looking at preparing your business for funding and investment.

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