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## **SAFEGUARDING THE INTELLECTUAL PROPERTY OF AN ORGANISATION: A CRITICAL GOVERNANCE MATTER!**

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When boards of directors gather to discuss the top risks of an organisation, it may entail matters such as structurally high unemployment, labour unrest, exchange rate volatility, political uncertainty, unmanageable fraud and corruption, threats of new market entrants or even product stagnation. Whilst there are indeed many more topical risks that may be relevant to the nature of the organisation's business and immediate environment, it is not common for a board to include the threat of their innovation and intellectual property ('IP') being marginalised or lost. Bearing in mind the critical importance of protecting the organisation's IP, which is the organisation's *raison d'être*, it's quite likely this vital business component has fallen within the board's blind spot.

### **Recognising the IP types**

There are several types of IP found within an organisation, including the organisation's trademarks, slogans and brands, works eligible for copyright protection, patentable inventions, registerable designs, trade secrets and confidential information. Expectedly, if an organisation is careless about the registering and protection of its IP, the exclusive right to the IP is often lost or donated to the public, free of charge. The organisation may well find itself facing off its competition, where their own original ideas are used against them by competitors. Indeed, this indefensible situation even extends to an individual level, where for example an individual has a novel idea, which has the potential of earning vast sums of money, and someone else claims the idea for themselves or takes credit for it. Once a patentable invention has been disclosed to the public prior to the filing of a provisional patent application, the invention becomes public property. It is not often realised that, even though a company pays for the development of software, it will not necessarily own the copyright therein and that the copyright will have to be assigned in writing before the copyright will vest in the commissioning party.

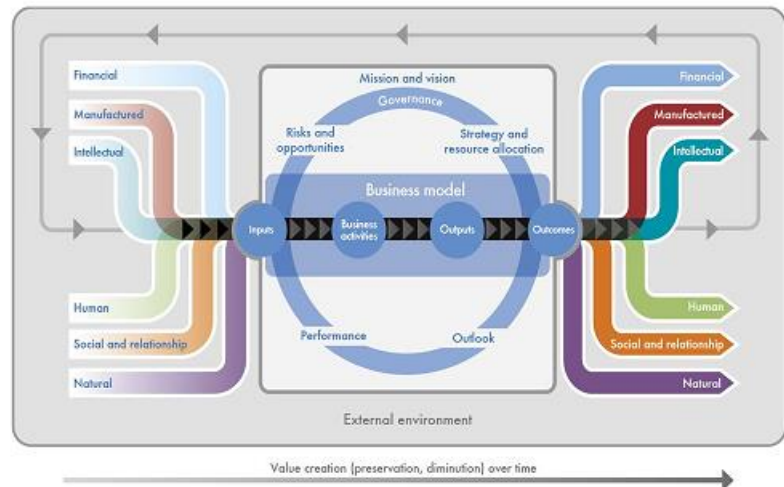
In respect of the board's duties to protect the organisation, clearly this involves the protection of the organisation's IP and it is crucial that the organisation -- and indeed the board itself -- familiarise themselves with the relevant legislation that protects IP. In doing so, the moral and economic rights of the creators of such IP is legally recognised and protected, including to ensure that a standard of fairness prevails where creators are encouraged to meaningfully contribute toward the organisation's, and indeed the country's economic and social development.

The need of protecting an organisation's (or individual's) IP has been established across the world over many decades. To this end, the World Intellectual Property Organisation (WIPO) was formed in 1967 at Stockholm and entered into force in 1970, to regulate various matters concerning intellectual property on a worldwide basis. WIPO's origins however backdate to 1883 and 1886 with the adoption of the Paris and Berne Convention respectively, where the establishment of international secretariats were formed under the Swiss Federal government. South Africa is a member of WIPO, which comprises approximately 191 member states,

and similar to all members, South Africa is bound by its international cooperation provisions which among other functions promote the creation, dissemination, use and protection of IP.

### Strategic value

Since there is great strategic value that underpins the use and protection of IP, it is essential that organisations conduct a regular IP audit in order to understand what intellectual property or IP assets they own. When making reference to IP 'assets', it's important to understand that these are often intangible -- including a person's knowledge and know-how -- and therefore it often becomes very difficult to accurately quantify these assets, including their true value. Conversely, quantifying intellectual property that can physically located or measured in a tangible way, for example a new software application or patented product, is clearly far easier to audit. With the advent of the Fourth Industrial Revolution, trying to measure and audit an organisation's IP is becoming a lot trickier and more complex in a highly competitive and electronically connected business environment. Since IP of an intangible nature is on a massive growth curve, it is clear that organisations will need to rapidly apply their attention to this growing problem which poses massive risk to the sustainability of organisations.



Importantly, as one of the foremost runners of governance codes, the King IV™ Report on Corporate Governance for South Africa for 2016 (King IV™) makes significant reference to the organisation's six capitals, wherein intellectual capital -- IP -- features amongst the other five capitals, namely; financial, manufactured, human, social and relationship, and natural capital. These six capitals are 'stocks of value' which are affected or transformed by the manner in which the organisation, through the board of directors, gives them meaning and value over time. Where the organisation is able to 'strategically exploit' their six capitals, stakeholders -- but more especially financial capital holders -- will be better informed regarding the quantitative and qualitative manner in which the organisation has created value, not least also remaining relevant in a turbulent global economy. King IV™ further recommends that the organisation produce an annual integrated report to explain how the organisation has made use of their six capitals, moreover contextualising them within the outputs of their business.

*"This [Vodacom] case hinges entirely on intellectual property law - on who owns the creation and who has the right to compensation... The inventor is "whoever publicly discloses first", and rights are conferred upon whoever files for protection under the sovereignty of IPR law."*

**Article: Vodacom Please Call Me  
- The truth  
17 January 2019 (Staff Writer)**

### Risk of not protecting IP

There have been many cases of organisations across the world, or individual creators of IP finding themselves on the short end of the stick. A recent multi-billion rand case in South Africa involves the Vodacom “*Please Call Me*” matter, where a massive legal battle is still on the go up to the Constitutional Court level between Vodacom and one of its employees, Kenneth Makate. Essentially it is claimed that the “*Please Call Me*” idea (invention) was the brainchild of the employee, however the company claims the invention happened by chance. To add further confusion, a R&D consultant -- Ari Khanat -- who worked for a competitor company, namely MTN, claims *he* is the true inventor of the “Call Me” technology which he designed in the year 2000 and had registered with the SA Patent office on 22 January 2001. Needless to say, as per a Constitutional Court order, Vodacom agreed to settle and compensate Makate with ‘reasonable compensation’.

In another recent IP case in the United States of America, the second largest maker of smartphones, Huawei, is also being investigated for allegedly stealing trade secrets from US partner companies. The Chinese company has been accused of allegedly stealing T-Mobile’s robotic technology and it is reported, due to the associated national and international risks, that a Huawei employee was arrested in Poland.

In concluding, an organisation must first and foremost ensure it has sufficient legal protection and policies in place to protect the organisation and its interests against any, and all risks that may harm the organisation. Indeed, an organisation must also, in fulfilling its own obligations of acting reasonably, and fairly (ethically) toward its employees and other stakeholders, ensure there are clear guidelines in place to observe and reward, as the case may be, any person(s) that invent new products which fall outside the scope of their contractual duties owed to the organisation. Depending on the side one may take in respect of who is right and who is wrong, the fact that many organisations may not have clear guidelines in place, neither that they pay proper attention to protecting the organisation’s IP (or its creators), suggests that the topic of safeguarding intellectual capital may indeed be much lower on an organisation’s radar and risk register.

Each company should have an IP policy and protection protocol in place and which should be communicated internally. These have to address the identification, reporting, evaluation and protection of IP. In the midst of developing and launching new and competitive business initiatives, the protection of IP is often left by the wayside, opening the door to competitors to counter with competing products and services. Launching a marketing campaign of an innovative product at a trade show before the patent is filed could deprive the innovator from the opportunity to protect the invention, thus being deprived of the competitive edge.

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