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COMMERCIALISATION STRATEGIES IN SOUTH AFRICA: THE DOS AND DON'TS





Introduction to IP Commercialisation Strategy

Developing the perfect IP commercialisation strategy in South Africa is complex and depends on numerous factors for its success. Moreover, with various IP commercialisation strategies available, selecting the most suitable strategy can be challenging for SMEs looking to expand into its markets.

This IP guide, therefore, aims to provide a comprehensive framework for businesses and SMEs to effectively monetize their intellectual properties in South Africa.

The Importance of IP Commercialisation Strategy

South Africa is a business hot spot, boasting the [third largest GDP in Africa](#) and robust financial markets. A [report by Startup Genome](#) ranks Cape Town and Johannesburg among the top five entrepreneurial hubs in Africa.

It is projected that by 2025, South Africa's economic sectors will experience significant expansion, leading to an influx of both domestic and international players especially in the Fintech sector. This presents unprecedented opportunities for SMEs to thrive. However, startups and companies must develop adept commercialisation strategies for their IP in order to succeed in South Africa's competitive business sector for the following reasons:

- a. **Competitive Advantage:** IP serves as a significant competitive differentiator in the marketplace. By protecting innovations, brands, and proprietary processes, businesses can gain a unique edge over competitors. A robust IP commercialisation strategy ensures that these IP assets are not only protected but also effectively leveraged to distinguish the business from its competitors, making it difficult for others to replicate or surpass their offerings.
- b. **Revenue Generation:** A well-executed IP commercialisation strategy opens various revenue streams for your company. Whether through licensing agreements, franchising models, or direct IP sales, you can monetize your intellectual assets to generate significant income. This not only provides an additional revenue source but it also maximizes the returns on investments made in developing these IP assets.



- c. **Market Expansion:** IP commercialisation can facilitate market entry and expansion, both locally and internationally. By licensing technology or brand rights to local partners, businesses can efficiently penetrate new markets without the need for substantial capital outlay. This approach can be especially beneficial in South Africa's diverse market, allowing companies to tap into different consumer segments and regional opportunities.
- d. **Investment and Valuation:** Strong IP assets enhance your company's overall value and attractiveness to investors. An effective IP commercialisation strategy demonstrates to potential investors that your business is capable of not only creating but also monetizing its intellectual assets. This can lead to higher business valuation, greater investment opportunities, and increased financial stability.

Strategies for IP Commercialisation

The IP commercialisation strategies that can be adopted include:

1. **Licensing:** A license is an agreement in which the owner of an intellectual property (licensor) authorizes another party (licensee) to use the intellectual property under the terms and conditions specified in the contract. Licenses may be classified into exclusive and non-exclusive licenses.

Exclusive License grants the licensee sole rights to use the IP, even excluding the licensor from using it. This type is often used when the licensee plans to make significant investments in developing the licensed IP.

Non-Exclusive License on the other hand allows multiple licensees to use the IP simultaneously while the licensor retains usage rights. This type of license is suitable for markets with high demand for the IP and where broad dissemination is beneficial.

Licensing allows the licensor to retain ownership of the IP while earning royalty income, it further offers the opportunity to access new markets with existing products or services, and enables entry into a market with the licensee's established customer base, thereby reducing the risk of market failure.





Companies seeking to commercialise their IP assets through licensing should:

- Clearly define the scope of rights, including territorial and temporal limits.
- Determine the royalty structure (fixed fees, percentage of sales, etc.).
- Ensure provisions for quality control and performance monitoring.
- Address renewal terms and conditions for termination.
- Seek legal advice to ensure compliance with South African IP laws and avoid common pitfalls.

2. Franchising: This is a unique form of licensing that allows the replication of the owner's (franchisor's) business model in different locations, while providing ongoing support and training to the recipient (franchisee). Since business concepts involve the use of IP essential for operations, franchising is inherently linked to IP through the licensing of intellectual property rights (IPRs) and know-how.

While structuring franchise agreements, businesses should ensure to:

- Conduct a feasibility study;
- Outline the business model, including operational guidelines and brand standards;
- Include terms related to initial and ongoing fees, advertising contributions, and royalties;
- Specify training and support provisions to ensure franchisee alignment with the franchisor's standards;
- Set up performance metrics to monitor franchisee success and compliance; and
- Ensure adherence to the Consumer Protection Act, which governs franchising in South Africa.

3. Joint Ventures and Partnerships: Joint ventures (JVs) are business partnerships between two or more independent organisations (venturers) that collaborate on a specific project or goal, sharing both risks and rewards. Intellectual property plays a crucial role in these collaborations, as each venturer



contributes their own IP assets to ensure the JV's commercial success. The parties must agree on their initial contributions, responsibilities, and obligations, which are detailed in the JV agreements.

Joint Ventures provide mutual benefits to partners as they leverage each partner's strengths to enhance market reach, innovation capacity, and competitive positioning. Partners also share risks and costs associated with the development and commercialisation of IP.

Crucial Points to consider during JV Agreements

- Define the objectives and scope of the collaboration, including contributions from each party.
- Establish governance structures to ensure effective decision-making and conflict resolution.
- Determine profit-sharing arrangements and IP ownership rights resulting from the collaboration.
- Draft a detailed agreement covering financial commitments, milestones, and exit strategies.

4. Sale of IP Assets: The sale of intellectual property (IP) assets is another strategic approach to IP commercialisation, allowing businesses to unlock the value tied up in their intellectual property by transferring ownership to another entity.

Should you opt for this strategy, the first step to take is IP valuation. Various methodologies may be employed in valuation, including cost-based, market-based, and income-based approaches. There are also factors to consider during the valuation process and they include the IP's market potential, revenue-generating capabilities, and the stage of its lifecycle. Engaging professional valuers and consultants is crucial in deriving an accurate and defensible valuation.

Once the IP is valued, the next step is to structure a detailed sales agreement. The agreement must include the following key elements:

- Clearly define what is being sold, i.e. patents, trademarks, copyrights, designs, or trade secrets.



- Specify whether the payment will be a lump sum, paid in instalments, or based on royalties tied to future revenue.
- Include clauses that protect both parties from future legal disputes. The seller may provide warranties about the IP's validity and ownership.
- Ensure that the sale complies with South African laws, including the requirements of the Companies and Intellectual Property Commission (CIPC).
- Outline the circumstances under which the agreement may be terminated and the implications thereof.

Laws regulating IP commercialisation in South Africa

South Africa has a robust legislative framework designed to protect and regulate intellectual property (IP) rights. This framework ensures that both domestic and international businesses can effectively manage and commercialize their IP assets within the country. This policy guide provides an overview of the key IP laws and regulations in South Africa:

International treaties and agreements: South Africa is a member of many IP-related international agreements including:

- Patent Cooperation Treaty (since 1999)
- Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (since 1997)
- WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (since 1995)
- UPOV Convention for the Protection of New Varieties of Plants (since 1977)
- WIPO Convention (since 1975)
- The Paris Convention for the Protection of Industrial Property (since 1947)
- The Berne Convention for the Protection of Literary and Artistic Works (since 1928)

Domestic Legislations: South Africa also has an expansive legislative framework for IPR protection and they contain specific provisions that regulate IP commercialisation.





- **Patents Act (Act No. 57 of 1978)**

The Patents Act governs the protection of inventions and grant of patents in South Africa. It provides exclusivity to inventors to exploit their inventions for a limited period, typically 20 years, ensuring that innovations are adequately rewarded and protected.

- **Trade Marks Act (Act No. 194 of 1993)**

This Act protects registered trademarks by granting exclusive rights to use specific signs, logos, or brand names. It aids businesses in establishing a unique identity in the marketplace, thereby preventing unauthorized use by others.

- **Copyright Act (Act No. 98 of 1978)**

The Copyright Act offers protection for original literary, musical, and artistic works, as well as broadcasts, films, and computer programs. This Act ensures that creators can control and benefit from the use of their works for a certain period, usually the life of the author plus 50 years.

- **Designs Act (Act No. 195 of 1993)**

The Designs Act protects the aesthetic aspects of a product, covering shape, configuration, pattern, and ornamentation. This allows businesses to safeguard their unique product designs against unauthorized copying or exploitation.

- **Trade Secrets Regulation**

Although there isn't a specific Act for trade secrets, South African common law provides substantial protection for confidential business information. Businesses must implement adequate measures to maintain the secrecy and demonstrate the economic value derived from protecting such information.

Bodies regulating IP commercialisation in South Africa

- **Companies and Intellectual Property Commission (CIPC)**

The CIPC is the main body responsible for the registration and management of IP rights in South Africa. It ensures compliance with various IP laws and facilitates the commercialization process by providing regulatory oversight and support





The do's and don'ts of IP Commercialisation Strategy in South Africa

When considering expanding into South Africa, businesses must approach IP commercialisation with a well-thought-out strategy. Here are the key dos and don'ts to guide you through this process:

The Dos of IP Commercialisation Strategy in South Africa

1. Conduct Thorough Market Research:

- Before entering the market, conduct thorough market research to gain a deep understanding of the demand for your IP-related products or services.
- Analyze the competitiveness to identify potential opportunities and threats.

2. Secure Robust IP Protection:

- Consider various commercialisation strategies, from licensing and franchising to direct sales or even IP-based collaborations to determine the most suitable for your business.
- Ensure patents and trademarks are registered with the Companies and Intellectual Property Commission (CIPC) to secure exclusive rights.
- Confirm your IP protection complies with South African laws and international treaties.

3. Seek Professional Legal and IP Advice:

- Engage South African IP attorneys and consultants to navigate local regulations and practices.

4. Structuring Sale and Licensing Contracts:

- **Licensing Agreements:** Draft comprehensive licensing agreements that clearly defines the IP asset being sold, conditions, payment term, scope of use and all relevant documentation completed.





- **Partnership Contracts:** Ensure all joint venture and partnership agreements are detailed and legally binding.
- **Double-check Contract Compliance with Extant Regulations:** Company's legal team must ensure compliance with South African legal requirements and IP transfer regulations, and seek legal review to validate the agreement's enforceability.

5. Valuing IP Assets:

- Use established methodologies such as cost-based, market-based, and income-based approaches to value IP assets.
- Engage local professional valuers and consultants to ensure an accurate and defensible valuation.

The Don'ts of IP Commercialisation Strategy in South Africa

1. Neglect IP Due Diligence:

- Do not ignore thorough due diligence before entering the South African market. Verify that your IP does not infringe on existing local rights.
- Ensure all IP documentation is complete, accurate, and up-to-date.

2. Overlook Local Laws and Regulations:

- Do not assume that IP regulations are the same globally. Each country, including South Africa, has unique legal requirements.
- Avoid risks associated with non-compliance, such as legal disputes or financial penalties.

3. Undervalue the Importance of Cultural Sensitivity:

- Do not ignore cultural factors that may influence the acceptance and success of your IP.



4. **Assume One-size-fits-all Strategies Work:**

- Avoid applying the same IP commercialisation strategy used in other markets without modification. Tailor your strategy to South African market peculiarities.
- Be ready to adapt and evolve your strategy based on market feedback and performance.

5. **Potential IP Conflicts:**

- Do not underestimate the risks associated with IP commercialisation and potential conflicts with existing entities in South Africa.
- Avoid overextending your resources without a clear risk management plan in place.

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