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Protecting your IP – Think outside the box but make sure the box is locked



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It is vitally important to develop adequate safeguards around one's intellectual property, whether one is an individual owner of such IP or a company. Intellectual property is an asset after all, especially where such intellectual property is not capable of being protected by way of statute, for example copyright (other than cinematographic films), trade secrets, business and operation know-how, processes, expertise, improvements, specialised technical information and all such related 'life-blood' that sets an enterprise apart from its competitors.

One of the ways in which this type of intellectual property can be protected is by building adequate restrictions into appropriate contracts, for example employment agreements governing an enterprise's intellectual property and where such intellectual property is developed or created by employees in the course and scope of their employment. Other examples are restraints of trade and non-disclosure agreements and non-circumvention and confidentiality agreements where an enterprise engages with a third party who will have access to the enterprise's intellectual property.

The general position in respect of a work created by an employee under a contract of service in the course and scope of employment, is that such work is assigned to and resides with the employer from the date on which such work is created. However, discrepancies arise around this general principle, depending on the facts so it is always best to be proactive and cater for this in an employee's employment contract. Such contractual terms need to be highlighted to employees at the commencement of the employment relationship.

Obviously, where an individual or a company has intellectual property that is capable of statutory protection namely, trade marks (brand names, logos, strap lines, musical jingles, colours, distinctive smells, shapes and all such distinguishing material that is recognisable by consumers and competitors as belonging to you or the company), patents, designs, domain names and in some instances, copyrights such as cinematographic films; it is strongly recommended that such intellectual property be registered to protect and enforce one's rights in and to that intellectual property.

Similarly, the intellectual property of a company's clients (and competitors) must  treated with the highest standard of care to avoid exposing the company to an action

with potential damages claims and resultant reputational harm where there is, for example, a leak of such client's or competitor's valuable intellectual property that was entrusted to the company. In the recent case of [EOH Abantu v CCMA \[2019\] 12 BLLR 1304 \(LAC\)](#), an employee was held to be negligent in distributing valuable intellectual property of a client to an unauthorised third party. The negligent distribution could have resulted in severe reputational harm for the company as the client may have reasonably concluded that its intellectual property was not in safe hands and was compromised. The employee was consequently dismissed, as the court held that his negligence and his carelessness merited a dismissal.

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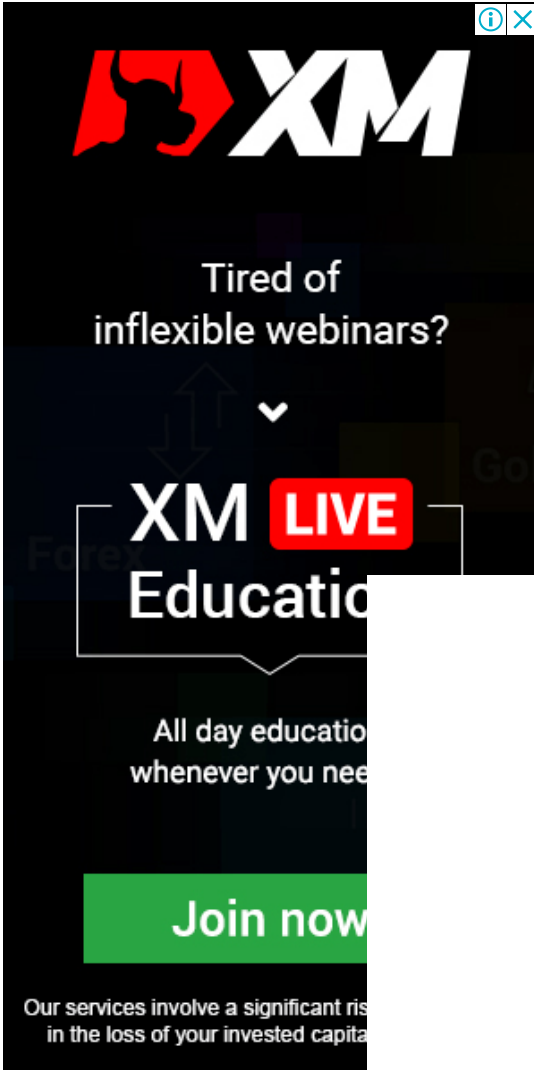
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