

PROTECTING THE COLLECTED KNOWHOW OF AN ASSEMBLED AND TRAINED WORKFORCE

By Michael A Mann
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The notion of protecting knowhow is strange to those who think of intellectual property as comprising patents, trademarks, and copyrights. Knowhow is not associated with agencies of the US federal government that issue “Letters Patent” and Trademark and Copyright Registration Certificates. Knowhow has no federal agency to give it sovereign gravitas. However, public and private schools issue documents, such as diplomas, degrees and certificates, that indicate particular students have demonstrated knowhow by meeting defined requirements.

Federal rights are exclusive; diplomas and degrees confer no such rights. The exclusive rights attached to letters patent and registration certificates but not to knowhow is great but it is not everything. Patent rights, for example, have limited lifetimes and do not protect market share from competitors who design around those patents, invalidate patents, or obtain their own patents. Patent rights do not guarantee the patented product will have a market, will work as expected, or will never be obsolete. And patents are not self-enforcing.

Similarly, a registered trademark does not forbid new brands of existing products from appearing on store shelves, rendering last year’s “in” brand to lower shelves.

Your copyright registration certificate for your photograph or song may evidence your exclusive rights but will not guarantee others will want to pay for the use of those rights.

In short, the notion of intangible property rights as providing “protection” for our ideas may be a lot less meaningful than we would want it to be. Nonetheless, intellectual property is still an important business asset.

A business, however, needs to think of intellectual property not in terms of patents, trademarks, copyrights, trade secrets. Business intellectual property is a dynamic asset, not a static one. Intellectual property for a business includes (1) the collected knowhow of an assembled and trained workforce; (2) innovation, whether patentable or just a good idea; (3) a compelling message to employees and customers; and (4) business reputation.

Of these, knowhow is fundamental – a business cannot begin to engage in business without it. It is where business begins.

The collected knowhow of an assembled and trained workforce *can* be protected, as will be explained below, perhaps not perfectly, but not to try is as foolish a mistake as getting a patent and then never considering improving it.

What exactly is the “collected knowhow of an assembled and trained workforce?”

Thirty years ago this month, in 1987, I started a law firm focused on intellectual property. At first, I was the only employee. If there was work to be done, I had to do it. I wrote the letters, typed the letters, mailed the letters; I got the mail and made the photocopies. I made the coffee, drank the coffee, and cleaned the coffee pot. After a while, when the level of business permitted it, I gradually hired a small staff: a clerk, an associate, a secretary, and eventually had five or six employees.

Then, a day came in the growth of this little firm when I sensed that not only was work being done that I didn't do personally, but that I didn't have to tell my staff to do it or how to do it. My employees knew what had to be done, knew how to do it, and they just did it. The sensation I experienced at that moment is about as close to the sensation called “quickenning” I'll ever get. Quickening that sensation a pregnant woman experiences when something starts moving on its own in her womb, something with a life of its own, still dependent but *living*. I had assembled and trained a workforce with *collective knowhow*. This little law firm was the manifestation of an objective I had conceived and nurtured.

Not coincidentally, analogies with offspring abound in intellectual property: we *conceive* of inventions; we *adopt* trademarks; “that’s my brain child;” “necessity is the *mother* of invention.”

The collected knowhow of an assembled and trained workforce instantiates itself as a “smooth, well-oiled machine.” That is a useful metaphor and is easy to visualize. You can think of the employees as the parts of the machine, and the oil is the dynamic human interaction and cooperation among them that enables work to be done in good order. People who interact get to know each other and come to accommodate each other’s shortcomings and use their corresponding strengths. They can work well together. They may not want to let each other down. On the other hand, a work force that is poorly trained, has high turnover with factions among the employees, high absenteeism, with fiefdoms that refuse to cooperate with each other, may still have collected knowhow but certainly not enough.

Consider a business with that well-oiled-machine feel to it, one with well-trained employees and managers. How did it come to run so well? The quality of the motion of that human machine results from the compelling messages from management to customers and to employees that generates demand for that business’s products and services, and motivates employees to use their collected knowhow to meet that demand.

Add innovation. Innovation makes this smooth well-oiled machine run smoother, quieter, and faster and turn out better products.

Well made, innovative products, plus advertising creates reputation. Reputation is *organic advertising* based on the business’s past performance that builds a reservoir of goodwill among consumers and drives repeat business and brings in referred customers, and can yield forgiveness from customers if that business ever falters.

In order to protect the collected knowhow, you have to generate the assembled workforce.

The movie MIRACLE ON ICE¹ is about the 1980 US Olympic hockey team's triumph -- over themselves -- and over the highly ranked Russian team for the Olympic gold medal. Early in the movie, there is a scene in which a group of business people approach the coach, played by Kirk Russell. These business people really want the US to win the gold medal. They offer to help the coach "find and recruit the best players." The coach snaps back, saying, "I don't want the best players; I want the best team!"

This is the first lesson in assembling a work force: having the best team does not require the best employees, or, said the other way, you can have the best team without having the best players. The second lesson is that: it is the *employers'* job to coach his or her employees into becoming the best team.

Protecting collected knowhow thus starts with the assembling and coaching employees for the workforce, but the most important factor in *protecting* a workforce is also the most important in *assembling* a workforce. That factor is having a vision.² The vision must be credible, crisp, compelling, and embraced, rather than the usual mile-long mission statement made up by a committee. The vision must become part of the substantive fabric of the business and not just a part of the wallpaper.

In *Miracle on Ice*, the vision was to beat the Russian hockey team in the Olympics, and for those who became part of that team, it was just the challenge they needed. They each had something to prove.

In 1980, the US Armed Forces advertised the message: A Great Place to Start.³ For those who needed a place to start after high school or college, this was an effective vision: many high school and college graduates had no idea where to start their careers.

Borg Warner, a company that makes electromechanical control systems, says "Borg Warner will drive the cars of the future." That is

¹ MIRACLE ON ICE is a 2004 American sports docudrama directed by Gavin O'Connor and written by Eric Guggenheim.

² WHAT TO ASK THE PERSON IN THE MIRROR, by Steven S Kaplan 2011

³ 1980 Armed Forces recruiting commercial, see <https://www.youtube.com/watch?v=NRe2yR2E-IU>

a powerful vision for young engineers who want to be part of something big and exciting.

A compelling vision not only draws employees to your company, but particularly those who want to be part of that vision, of something bigger than themselves, and it keeps them together -- read about the 35-year reunion of the 1980 US hockey team. It will leave you no doubt that that team is *still* a team after 35 years.⁴ A compelling vision attracts employees *and* holds employees.

A compelling vision also is a way to *self-select* employees motivated by that vision, which can result in a workforce that *wants* to go where management wants to take them and is already motivated to get there.

The next step in protecting collected knowhow is to not give your employees a reason to leave. Be an *enlightened employer*. Enlightened employers provide employees what they need to work for it: good pay and good benefits, time off, and sometimes a little flexibility, but just as importantly, a chance to have input. They come to work for you because they want to be part of your compelling vision. So give them a chance to do exactly that. Disregarding employees will break the attraction of the compelling vision.⁵

After a compelling vision and enlightened management, the next step in protecting that assembled work force is to make backup copies of your employees' knowhow. You might lose an employee, but you do not necessarily have to lose that *knowhow* if you made a good copy of it. A business needs to establish the institutional capability to continue on despite attrition. Attrition happens. Train and cross-train your employees, particularly those in the skill positions. Write down procedures as they are actually done by the employees with the most knowhow. Review those procedures periodically. Improve the procedures. Use apprentices, understudies, mentoring,

⁴ <https://www.si.com/nhl/2015/02/23/1980-usa-olympic-hockey-team-miracle-on-ice-35th-reunion-at-lake-placid>

⁵ Six Reasons Your Best Employees Quit You, Louis Efron, FORBES June 24, 2013;

<https://www.forbes.com/sites/louisefron/2013/06/24/six-reasons-your-best-employees-quit-you/#587d915273ae>

and coaching “360 degrees.” Preserve your company’s institutional memory according to a formal plan.⁶

Training of employees, in addition to increasing their native knowhow, can also give them a chance as employees to interact and bond with each other. They will get to know each other’s strengths and weaknesses and, through cross-training, get to experience the difficulties of doing the jobs of other employees they work with, so the “Them vs Us” barriers fail to arise. Understanding and empathy are friction-reducing lubricants for the smooth well-running machine.

Interpersonal conflict issues can disrupt workflow. Step 4 is to have a wellness/safety program that includes workplace stress minimization.⁷ Almost 80 years ago, Dr. Hans Selye surmised that all illness was caused by stress.⁸ Stress has a corrosive effect on the parts of this well-oiled machine that can bring it to a grinding halt. Train your management to spot stressed employees and have a plan for dealing with it. Let an employee take a walk around the block; grant a little extra time off; provide training for management so they know how to manage employees effectively. Company-wide events may also help to reduce stress and build *esprit de corps*.

Succession planning is important but *resilience* planning encompasses succession planning plus other events, both bad and good, that could suddenly leave a business short-handed. There can be a surge in workload or projects all due at the same time or when a few regular employees are unavailable. Just as you would keep an inventory of photocopy paper, have an inventory of those with skill sets that you can bring to bear in the event needed.⁹

Knowhow sometimes includes patentable subject matter and trade secrets. Handling knowhow that qualifies as patentable subject matter or as a trade secret may enable you to avail yourself of state

⁶ Designing Organizational Memory: Preserving Intellectual Assets in a Knowledge Economy, Jeff Conklin, PhD

⁷ Workplace Stress Leads to Less Productive Employees, Karen Higginbottom, Forbes 9/11/2014

⁸ Transforming Stress Through Awareness, Education and Collaboration, The American Institute of Stress, <https://www.stress.org/what-is-stress/>.

⁹ Succession Planning, Retaining Skills and Knowledge in your Workforce, HR Series for Employers, Catalogue Item #759914 <https://www.albertacanada.com/successionplanning.pdf>, Copyright 2012 Government of Alberta, Human Services

and federal law remedies for getting that knowhow back, preventing its dissemination, enjoining its use, or recovering damages for its misappropriation or infringement.¹⁰

The use of employee agreements can also be effectively used to properly define what belongs to the company, and is therefore a company asset, and what belongs to the employee. In appropriate circumstances and with certain employees, covenants-not-to-compete are useful for protecting company trade secrets and confidential information. Entrance and exit interviews are also effective in clarifying and reinforcing boundaries and expectations. Respecting the knowhow that the employee had when joining the company is as important as expecting respect in return for the knowhow your company has.¹¹

Sometimes there are employees who have such critical experience and skills that replacements cannot be found within the organization or hired. How do you protect that knowhow? Its loss could be devastating to the company. There is one option: key person insurance. Insurance may enable your company to survive economically and to keep the balance of its assembled and trained workforce together while a replacement is found and trained or the enterprise reforms around the knowhow it still has.¹²

To build and protect knowhow in your business:

- have a compelling vision that draws and holds employees;
- treat your employees like the valued components of the business they are;
- make backup copies of their knowhow through cross training and written procedures;
- prevent and treat for workplace stress;
- use trade secrets and patents to secure rights in certain types of knowhow when applicable;

¹⁰ See Nexsen Pruet, LLC, www.nexsenpruet.com, Intellectual Property Practice Group

¹¹ See Nexsen Pruet, LLC, www.nexsenpruet.com, Employment Law Practice Group

¹² See Nationwide Insurance Company, www.nationwide.com, or other insurance companies.

- use employee agreements and covenants not to compete; and
- consider key person insurance for individuals with especially critical skillsets.