

## CHAPTER 29

# Intellectual property: Protecting products and processes

Patrick J. Couzens

## 29.1 Introduction

The history of chocolate making is full of creativity and invention, from the very first chocolate tablet to the wide variety of chocolate products, brands and processes we have today. These creations of the human mind can be owned, and the owner may be able to stop other people using them. This is called *intellectual property* and the associated legal rights are *intellectual property rights*. Intellectual property is usually divided into two categories: (i) industrial property, which includes patents, trade marks and industrial designs and (ii) copyright, which includes literary and artistic works. Intellectual property is an asset and can be bought, sold or licensed just like any other property. The main types of intellectual property are listed in Table 29.1.

Although the concepts of intellectual property are fairly straightforward, the details can be complex. This chapter aims to provide an overview of the subject for chocolate manufacturers, but it is important to seek competent professional legal advice to answer specific questions. Infringing other people's rights or missing an opportunity to protect your idea could weaken or even destroy your business.

The laws governing intellectual property vary around the world, but for members of the World Trade Organisation (WTO; around 160 countries) the minimum level of protection is defined by the TRIPS agreement (Agreement on Trade-related Aspects of Intellectual Property Rights; WTO, 1994).

## 29.2 Patents

### 29.2.1 What is a patent?

A patent is an exclusive right, granted by a State, to an invention. A patent allows the owner of the patent to stop others from making, using or selling the invention without their permission. Patents only last for a limited period,

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**Table 29.1** Summary of the main types of intellectual property.

Type	Description	Normal duration	Advantages	Disadvantages
Patents	Patents are used to protect solutions to technical problems – known as inventions. A patent is a monopoly granted by a government in exchange for sharing knowledge. They are known as “Utility Patents” in the USA	20 years from filing	Clearly defined protection for technical developments Most useful for “visible” inventions such as new ingredients, products or packs	Releases know-how Less useful for “hidden” inventions such as new processing methods
Utility models	Similar to a patent but with less stringent requirements. Primarily used for mechanical innovations. Only available in certain countries, for example Austria, Germany, France, Spain, Russia, China and Japan. A similar right in Australia is called an “Innovation Patent”	Usually between 7 and 10 years, but varies from country to country	Cheaper and quicker to obtain than a patent Particularly suited for “minor” improvements to existing products	No detailed examination at filing, so there is a risk that the Utility Model will turn out to be invalid when you go to court to try and enforce it
Trade secrets	Trade secrets are information that companies keep secret to give them an advantage over their competitors. A well-known example is the recipe for COCA-COLA®	Until it is no longer a secret	No fees to pay Useful for protecting production “know-how”	Unlikely to work for long periods Competitors may have the same idea and patent it
Trade marks	A trade mark is a badge of origin showing who makes a product. Words, logos, signs, shapes, colours or pieces of music can be registered as trade marks	Potentially lasts for ever if it continues to be used	Long duration of protection	With only a trade mark to protect your product it may be copied by a competitor as long as they do not use your trade mark
Industrial designs	New designs with “individual character” can be registered to protect the way something looks. For example a new shape for a chocolate assortment box. Called “Design Patents” in the USA	Up to 25 years, but varies from country to country	The product itself need not be new as long as its visual appearance is new	Only protects the look of something, not its technical function
Copyright	Copyright protects original literary, dramatic, musical and artistic works. Equipment instruction manuals and engineering drawings can all be protected by copyright	The rules are complex but copyright normally extends for a number of years after the author's death	Automatic protection, no registration required	Does not protect an idea, only its “fixed form”, e.g. how it is written down