

Bird & Bird & Wellness

A guide to start-up success



We're in love with Wellness

We've been supporting the Wellness industry for many years, working with growth stage businesses in this incredibly exciting & dynamic space to start their journey to success.

Now, we'd like to get to know you.

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The 3 tiers of start-up success

We have long helped clients protect the knowledge, intellectual property and products that are their key assets and advise them on the best ways to maximise their ROI. The most successful start-ups & SMEs we have worked with have turned great ideas into greater businesses. These companies understand the need to strategically focus on three key areas of activity.

Starting and scaling a new venture is an exciting journey that can generate unexpected challenges. Overcoming legal hurdles, inevitable with any growing business, can feel like a distraction from the crucial activities of getting your product to market or marketing your services. Investing in legal support to help you address these issues

strategically and commercially will ultimately ensure your business is better placed for success.

You won't need legal advice all the time, but getting the right advice, at the right time, from people who understand how your business and industry work, will be absolutely crucial in ensuring you are well protected and ready to meet the challenges of the next stage in your growth.

Experience tells us there are 3 tiers of start-up success, and our aim in this guide is to show where we think great legal input can really make the difference between business success and failure.



Structuring your legal support

We understand that when you start a business, you start from scratch. All you have is an idea and your determination to make it work. Nobody can take your ambition away from you, and that's yours from start to finish. But building business acumen, knowing what to share and when to seek help comes with time and experience.

Intellectual property is crucial for any Wellness SME

The good news is that the law provides you with a framework which allows you to maintain control and ownership of valuable intangible business assets from the beginning. A business can be full of ideas, but it's important to know that you can't own an idea as an abstract thing – but you can control key elements of those ideas. The different elements are known as intellectual property (IP) and by ensuring you have the right protection in place, you can make your business more attractive to partners, retailers and investors, guard against others copying your valuable brand and build loyalty with your consumer base.

There are some kinds of IP which are created automatically, but others which need positive action to be secured. Securing the right scope of IP protection doesn't always need the help of lawyers, but it does need a solid IP strategy informed by a decent understanding of your options.

So, while you're probably familiar with IP in general terms, have you thought about how it applies to your Wellness business, and what you should be doing about it? You may not be in a position to take legal advice yet, so we set out the basics in this guide, to get you thinking in the right direction and to put you in charge of your IP.

Making fair, robust agreements that will grow with your business

Once you've protected your business assets, you'll need to start putting together the commercial framework to allow you to scale and get your product or service to the people who want it. So, you'll need to start making legally-binding agreements, whether those are with suppliers, buyers, distributors or franchisees.

To enable your Wellness startup to thrive, you'll need to ensure that the contracts you sign are structured to allow your business to grow, encouraging great working relationships and futureproofing your success.

We've explained the different agreements you may need to consider, and some of the pitfalls and opportunities they might present. When the time comes, we can help you draft contracts to present to your partners, or review the agreements that they present to you, to make sure your interests are fully protected.

Up, up and away...

The question of 'how do we fund the next stage' can come round quicker than you expect. There are several different options to consider, as well as questions around corporate structuring and share options for you and your employees. There's a lot to think about, but preparing early and planning well can smooth out the ride. Our at-a-glance guide to the basics of start-up funding demystifies the different options, so you can start to develop the approach you want to take.

So, let's get started...

An overview of IP rights



Understand what you can protect

IP includes a very diverse group of business assets. Although we talk about it as a single concept, it's actually a collection of several very specific rights. Some relate to your brand, some to technical inventions, and others to your product or how your product or service is made or provided. Knowing the difference will stand you in good stead – especially for future investor conversations. Here are the main rights you should be familiar with:

Copyright

Protects literary, artistic and dramatic works from copying without permission. Key areas for Wellness businesses include the content on your website/blog, the source code, your social media content, photographs you've taken and recipes or studio/instructor manuals.



Design rights

Protects aesthetic designs, if they are new. Normally just for products, but other things like surface decoration or packaging can also be protected. Rules on getting design rights differ between countries – if you're a product led business, consider **BEFORE** you make your product design public, due to restrictions in places like China.

Trade marks

This deals with your brand name and logo. Scope of protection is given in relation to a specific range of goods/services – think about what you want your business to do in 3-5 years. Which countries do you want to be operating in? Trade marks are invaluable as they allow you to stop others coming too close to your brand, helping you preserve your important market space.



Patents

Technical inventions that must be completely novel and inventive. Conveys an absolute monopoly over the use of that technology, but only lasts 20 years.

Technical businesses will normally invest in patent protection early on and it requires the help of a specialist attorney to describe the invention.

Patents relate to very definite technological solutions – general ideas or business methods cannot be protected. It also gets tricky when thinking about software.



Trade secrets & Confidentiality

Sometimes, secrecy is the best protection. This takes trust and planning, but can have significant benefits. One main benefit is that nearly any information can be confidential if confidentiality is agreed, and you can secure this protection via a simple non-disclosure agreement (NDA). It's crucial for things like business plans, know how, customer lists or pricing models, which are not protected by any other IP right.

Understanding the language

It's useful to understand these terms – using them in the right context shows you are serious about the longevity of your business and marks you out as more sophisticated than the next founder. Misusing them can give the opposite impression, especially in front of business partners or investors – now that you know there's no such thing as copyrighting your brand or patenting an idea, you won't fall into that trap.

Learn to leverage your IP – and make it work for you

In the next section, we look at how IP fits into the rest of your business operations and planning.



Take the right steps and bootstrap where you can

To protect some IP you need to take positive steps, but others are automatic.

For example, copyright is automatic in most major countries. As soon as you write some text or draw a drawing, so long as it has some creativity you will own copyright in that from the precise time of writing. You don't need to do anything except keep good records. Take advantage of this, and make sure you keep records of everything creative so you can rely on copyright in the future.

Trade marks should usually be registered if you want good, strong protection – otherwise you will have to rely on the laws against 'passing off', which requires you to already have made prominent use of the brand through strong marketing. Sadly that's easier to show if you've been trading for several years.

If you're coming up with new inventions, you should think carefully about applying for patents – this is an expensive and detailed process, but provides the strongest possible protection for your technical IP.

Get the rights in writing

Now you know that copyright is free and automatic, this should be a warning sign: what if you're using content created by someone else?

Normally you will need to come to an agreement with the owner of the IP, to get a license or assignment. This is the case even when using images you find on the internet or on social media – the copyright will belong to someone!

When you're working with collaborators and freelancers - if someone is designing your brand; if someone is coding for you; if you've commissioned a photoshoot – whatever the scenario, if you've got content being created for you by someone else, make sure you have the conversation with them about who is going to own the IP. This should

be an easy conversation to have in the early stages. If they agree to assign it to you, make sure you get it in writing – preferably signed. If you don't do this, you may find a few years on that someone else owns the source code to your app, making it impossible to issue an update without paying a ransom.

Open source software: Using others people's work

In software, it's likely that you or whoever is coding for you will incorporate some open source elements into any code.

Make sure you know about this, and keep good records. It's important to respect the contribution of the open source community and abide by the terms of the licence that code is released under. We recommend keeping a record of open source contributions, even if it's just a plain text note, that you can refer to later.

Keep it secret, keep it safe

Having the right discussions, airing ideas and leveraging contacts is integral to start-up success.

This will inevitably involve sharing secrets with others. Some of these – such as mentors – you might trust implicitly, but others, like investors or service providers, will be relatively unknown to you.

If you want to stop people competing with you unfairly – like by copying your business plan – the only IP right that will help you is secrecy.

Secrecy, or confidentiality, is a very fragile concept and requires proper steps to be taken at every stage. Use a template confidentiality (or non-disclosure) agreement, or at the very least get it agreed in writing beforehand (e.g. by email) that your meeting and correspondence will be confidential.

If you decide something will be a secret, record the identity (not the secret) in a register, with creation dates and names of the people you have told. That helps (1) persuade investors that you have an asset that can be

monetised and (2) address infringement if someone else uses it in future.

Most importantly, if you have decided something is a trade secret, never disclose it unless you've agreed confidentiality beforehand. Secrecy is free, but it only takes one slip up to destroy the whole process.

Employee agreements

When you start employing people to dedicate time to your business on a permanent (full- or part-time) basis, you'll need an employee agreement (or 'employment contract') that defines the scope of their employment.

This is all very normal and well understood. But what is less well understood is that the employment contract should contain IP provisions. Remember, your employees will be creating content for your business, adding to your ideas, and they will be exposed to confidential information. Make sure it's explicit that any IP created for the company will be owned by the company, and make sure that there are secrecy provisions in the contract.

Branding for big impact

Your brand will be the face of your company – it's what people first learn about you, it's how they remember you, and (most important of all) it's how they will recommend your product to their friends.

And brands are all about IP. You want your brand to be functional. Communicating your mission and being pronounceable are two normal considerations. But make sure it's distinctive – avoid descriptive words or a phrase which clearly describes the characteristics of your product or service. There is a really important balance here between something which resonates with marketing & PR and a brand which can be successfully protected and monetised. Strike the right balance and you add significant value to your business balance sheet. Remember also that slogans don't need to be, and often

can't be, protected – unless they have something special, keep these as a by-line to your core brand, as they may change over time.

The goal of registering your mark is to prevent others using it – but you're not the first person to have had that idea. So, it's best to do thorough checks to make sure that nobody else owns the name you've chosen. Search online for anyone else in your industry or any other similar industry. And bear in mind that trade mark protection applies to similar brands, not just identical ones, so instead of looking for exact matches it's best to vary your search up a bit. Remember that just because the potential mark isn't showing on the first three pages of a search engine does **not** mean it's free to use.

Provided your initial searches are clear, you can move on to searching the trade mark registers yourself. Although they are intricate and you can't get a full legal opinion just by searching, they are free and will give you an idea of what is already registered. If you're ready for this, search for TMView - it's an international database that connects to most major markets.

And don't be fooled – company name and domain name registrations are not the same as trade mark registrations! Domains are important for other reasons, but they will not provide you with the legal rights you need. If you want strong legal rights, invest in a trade mark registration.

Identify, clarify, protect

The key steps in protecting your IP are identifying what kind of IP right applies, working out exactly what is original and capable of being protected, and then taking the appropriate steps to protect it. Hopefully, the information above is enough to get you started, but our dedicated Wellness IP team have helped many start-ups get off the ground, and we'd be delighted to help you out at any stage of the process.

Making great agreements

What sort of agreements will you be making, and what are the vital considerations in each type of contract?

You will be making all sorts of agreements as a Wellness start-up – with suppliers, buyers of all sizes from market stalls to massive supermarket chains or department stores, with the folks who make your killer app and, if you choose to franchise your business, with franchisees. Whatever the agreement, you'll need to ensure your ideas and business are well protected before you sign, but each different type of contract has its own particular set of areas that need special focus.



Supplier Agreements

Wherever your suppliers are, they provide the basic ingredients for your business offering. If your product is unique, you could ask for exclusivity, so they don't start to supply anyone else – but beware that this can restrict competition and get you into a lot of trouble. You need to make sure your supply can grow with your business – and if it can't, you need to be able to switch supplier quickly and easily. You also need to think about protection for product liability, so you can go back to the supplier if you need to action an emergency recall.

Buyer Agreements

Amazing! Someone wants to buy lots of what you're selling! But the price needs to be right, and they need to respect you and your brand – how much control over marketing and price are you willing to give up? Can you meet the demands of scale if things really take off? How do you get out of the agreement if they're not holding up their end of the bargain?



Employment Contracts

As your business grows, you'll need more and more people to help you. Providing employment for people is an amazing feeling, but the pitfalls can be significant. You need to reward your staff appropriately, but in a way that ensures your business stays financially viable. Employees have rights which need protecting, and they will learn all about your business model and IP – you need strong confidentiality and non-compete provisions, especially with your senior staff.



Franchising

If your Wellness business model is suitable for franchising, this can be a great way of building your brand quickly and with lower risk, helping you reach new markets by leveraging local skills and knowledge, at a relatively low financial cost to you. But letting someone else take control of a portion of your brand can be risky – you need to ensure they keep up the high standards of product and service you set for yourself, and to make sure that they stay true to the brand you've put so much time and effort into establishing. Can you take control if they fail to do so? Is your IP suitably protected?

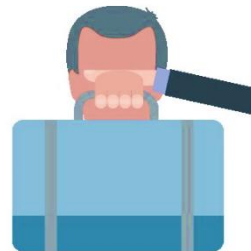
Every agreement is different

No two negotiations will ever be the same. You need to always be sure what you need from the agreement, what you're prepared to offer in return, and when you're prepared to walk away if you're not being treated fairly.

You know your business better than anyone, but we can help out by letting you know what the market usually expects on either side of a deal, drafting a contract for you to send to the other side, or even just advising on specific clauses where you're just not sure what you should be expecting.

Get out of the “little-fish-big-pond” mind set

No doubt you have entered the world of entrepreneurship with a mission. You need steely determination to make it successful, and your mind set when contracting with much bigger/more mature parties is crucial. We're by your side to give you the confidence you need, to get the deal that best suits your business.



Sign on the dotted line

Signed agreements are important and necessary, but make sure you understand what you are signing.

Whilst in the early stages of a start-up, you may have sealed agreements with a handshake, a hasty email and a mutual understanding of each other's obligations, which creates a serious headache if the relationship breaks down. On the other hand, you don't want to enter into an agreement in a rush, as it's likely to be more difficult to amend terms at a later stage – so you might be stuck with an undesirable situation for longer than you'd like.

Give and take

A bad agreement helps neither party.

A good contract should be fair to all parties, with flexibility built-in to cater for lean periods and for rapid growth. You don't want to be exploited, but sometimes you'll need to recognise that someone may be taking a bit of a punt on you, and expecting to have a reward for their risk when you do make it big.

An understanding of what is generally accepted in the market is very useful when you're looking at an agreement that's been presented to you, and this is where we can help. By the nature of our work, we see a lot more contracts, and we will be able to advise you on what you should accept, and what you definitely shouldn't.

It's also useful to have your preferred terms set out in a template agreement, for example supplier or logistics contracts. This should save you time and money in negotiations.

Consumer law

Compliance with consumer law is an ongoing, and ever-changing, responsibility

If you're selling products or services to the public, you'll need to ensure you comply with what can seem a dizzying amount of laws and regulations. Product safety, labelling, website terms of use, terms and conditions of sale, end user licence agreements, subscription terms and conditions. You won't need to think about all of them right away, and quite often – as long as you're not doing anything too crazy – the answers are usually easy to find. But not complying can have serious legal and reputational consequences, so it's well worth checking you're ticking all the boxes before going live.

New markets bring new compliance challenges

Currently, complying with UK law generally means ensuring compliance across the EU, but in some sectors, such as food labelling or finance, some countries can be more restrictive. And with Brexit looming, there may well be a gradual divergence between standards.

Likewise, huge new markets like China or the US can be very attractive to the expanding business, but have their own sets of rules and regulations. It's important to plan your compliance with these well in advance, to ensure that launch dates and contingent agreements are not put in jeopardy at the last minute.

Data, data, everywhere

You'll no doubt have seen the recent furore over GDPR, and clicked on thousands of website notifications telling you about cookies – there's no getting away from customer data

If you're dealing directly with customers, you'll have to collect their data. And that means you need to be clear with them about what you're collecting, why you're collecting it, what you'll do with it when you've collected it, and how long you'll keep it for. You also need to give them the option to opt out of collecting all but the essential data you need to provide them with your service.

And once you've collected the data, you need to make sure that you have adequate systems in place to keep it safe. As you recruit staff, you need to ensure they all receive appropriate training to handle customer data. If you're handling very sensitive data for your customers, such as medical history, the regulations are even more restrictive. The fines for non-compliance are very heavy, and letting your customers down by losing or misusing their data can have seriously damaging consequences.

Putting in place appropriate systems and safeguards from the very beginning will make things easier as you build; trying to undo a year of poor data management because you were too busy growing your business won't satisfy the Data Commissioner if you suffer a breach!

Competition time

It's not just huge multinationals who can fall foul of the competition authorities

When we think of anti-competitive practices, we tend to imagine the CEOs of large companies holding clandestine meetings in smoky, wood-panelled clubs, and fixing prices over a well-aged cognac.

However, agreements between companies of any size can be anti-competitive, and the penalties for contravention of the regulations can be severe. Franchise and agent agreements, where markets are divided up between companies, are particularly liable to this, but so can any agreement where prices are fixed or open competition in the market in any way restricted.

Whilst the basics of competition law are fairly simple – don't be anti-competitive – this can be a very complicated area of law. If you think someone is asking you to sign an agreement which might have an anticompetitive effect, it's a good idea to get some legal advice before putting pen to paper. Even if it's the other sides standard terms that you sign up to, you will still be liable for agreeing to them.

The last resort

Even taking all the precautions we've described, at some point in the life of a company, its almost inevitable that you'll find yourself in a dispute. Anticipating this at the outset of your agreements is a very sensible thing to do. Even if you're getting along like old friends with your commercial partners, building appropriate dispute resolution mechanisms into your contracts is the best way to ensure any disagreement which does arise can be resolved as soon as possible.

This doesn't mean going straight to court – dispute clauses will often have escalation provisions. If there is a problem, often the CEOs will meet to discuss and try to find a solution. If that doesn't work, the parties can look to mediation (a negotiation moderated by a professional mediator) or arbitration (an assessment by independent senior lawyers or judges of the dispute on agreed terms – this is sometimes preferred to going to court, as the proceedings and even the existence of the dispute can be kept confidential). Having this escalation set out clearly, with specified time periods for achieving a resolution at each stage, gives certainty to both sides

Additionally, the agreement will specify by which laws it is governed (such as the law of England and Wales, or of New York, for example). It may also specify in which country's courts the dispute should be decided – and this need not be the same as the governing law (just to make things extra complicated).

Nip it in the bud - if you can

If the worst does come to the worst, and you end up in a dispute, the best thing you can do is to get good advice as early as possible. Of course, we're lawyers, we would say that. But the longer a dispute goes on, the more expensive it is, the more entrenched each side becomes in their position, and the more fractured the original commercial relationship. Getting good advice at the outset will give you an idea of where you stand, and let you know when you should give some ground or fight all the way – whether you should settle early or go all the way to court. And the decisions you take right at the beginning can have massive impacts on your chances of success later on.

An overview of start-up funding

Unfortunately, it doesn't grow on trees. Sourcing the right funding for your start-up is vital if you're going to reach your potential.

Your own funds and the faith and support of family and friends can be a massive boost to a start-up. But at some point you'll need real backing to become the global behemoth you know you should be. There are plenty of options, but you need to make sure the funding structure suits you and your business. Obtaining the right support can let you realise your dreams, but you'll have to give up at least a portion of your equity, and perhaps some control of your business. This can have benefits, however – angel investors, for example, can give you the benefit of their experience and success.

Angel Funding

Typically wealthy individuals and successful entrepreneurs, they often invest in unofficial groups or syndicates. Typically investing **£25k-250k each**, they will receive ordinary shares in your company in return for their investment, and will want some real input into the business, often taking a (shared) seat on the board. Of course, with their experience, they can provide valuable business experience and advice, having once started from scratch, just like you, and can provide mentorship and access to their network of contacts as well.

Venture Capital

This involves funding from VCs in investment rounds (Series A, Series B, etc.). Each round will offer different terms to investors, with earlier investors taking more risk for more return.

Vcs typically invest between **£1million and £10million** per investment round, and look to take between **5%- 20% of the share capital** of the company. If a company is successful or promising, they may invest on subsequent investment rounds. They will typically take a less hands-on approach to investment, but, with a lot of money on the line, they will be quick to take action if things start to go wrong.

Venture Debt

Venture lenders may allow you to borrow for the short or long term, at more favourable rates than you will get from other lenders. They will want to take security over your assets or IP in return. The terms of the borrowing will often have an 'equity kicker', whereby the lender has an option to purchase shares in the company at a set price in the future.

Strategic Investors

These will typically be established corporate bodies, who have set up a separate investment fund, such as Microsoft Ventures. The investors will of course be interested in pure investment return, but will often have other strategic reasons for investment – they may have an eye on getting first refusal to buy a disruptive start-up in their market, or may want to gain some control over entities which have become vital in their supply chain. They may be great partners if you're looking for an early exit, but may restrict your plans in the future.



Growth and exit

Once your start-up has turned into a successful business, it will be time to think about growing further. You may want to diversify, restructure, or set up offshoots across the globe. By this point, you'll have a whole team set up to help, and may even have your own legal advisers – but we can still help out, as we have offices and contacts all over the world.

Finally, at some point, you may look to realise the fruits of your labours by exiting (either partially or fully) the empire you've built – either by floating the company on a stock market, or selling some or all of the business to another company.

And another thing. And another. And...well, you get the idea.

As your business expands and you accrue external shareholders, you and your fellow directors will be held to account for your actions. You need to make sure you are compliant with the Company Act, and all the other rules and regulations applying to your industry.

You'll also need to think about creating share incentive schemes for your employees, and ensuring these fit in with your funding proposals.

As you expand, you may need to think about setting up a group structure, and establishing new entities to manage your affairs in your priority countries.

And, as always, there's tax to consider...

We know it's a lot to take in

And sometimes you won't need anything more than a quick sense-check or a helpful nudge in the right direction. At Bird & Bird, we've been advising start-ups since the word was invented, and there's very little we haven't seen before. Aligned to our passion for Wellness and our absolute commitment to be at the cutting edge of technology, we think we're just about the best place to come when you need help with any of the legal issues discussed in this booklet.

We'd love to meet you and get to know you and your start-up personally, so we'd be happy to arrange an initial no-charge consultation with our Wellness experts. This allows us to identify where the key legal risks to your business are, and lets you decide whether we are the kind of people you want on your team. Following this session, we can provide a costed proposal, with a pipeline of work with individual fixed prices and/or suggested bundles of support that will allow you to budget and take control over how you address your legal and compliance issues.

If you're ready to start, then so are we.



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