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Virtual Worlds, Social Networks and Business

Introduction

Over the past few years Web 2.0 – the rise of social networks and virtual worlds – or to be honest whatever we choose to describe the new form of the internet, has grown rapidly and has become both a social as well as a business phenomenon. In the early days of the internet, communication was something that took place between one to many whereas now the variety of applications available induce a many to many environment. Our teenagers use social networks and virtual worlds as a means of communicating from many to any!

This article will explore the Web 2.0 phenomenon from virtual worlds like Second Life and Entropia, massive multi-player online games like World of Warcraft and Runescape and from the range of social network sites like Facebook to virtual intranets and corporate social networks. In doing so, this article will look at the challenges of blocking or ignoring social networks and the problems of fully embracing them. This article will finally conclude that social networks and virtual worlds are as an integral part of our life now as mobile phones were ten years ago when they were perceived as an invasion of our privacy, but by the same token as we now have policies, practices and procedures to manage email and mobile phones in the workplace so they are also needed to properly manage the use of social networks and virtual worlds. The difference between the internet ten years ago and Web 2.0 now is that ten years ago the internet did not blur the boundaries of work and play, whereas social networks, virtual worlds and other new communication phenomenons definitely blur those boundaries.

Social Networks and Virtual Worlds

Let's remind ourselves what social networks and virtual worlds are. The term social network was first coined by Professor J A Barnes in the 1950s who defined the size of the social network as a group of about 100 to 150 people. Social networks are an environment made available by a service provider that enables subscribers to exchange information, photographs and personal data often like a glorified diary where, in the case of the young particularly, vast amounts of personal information, ideas and "confidences" are disclosed to almost anyone.

Facebook, for example, has more than 200 million active users of which more than 100 million users log on once every day. The fastest growing demographic for Facebook is those 35 years old and older and 50% of the top 100 e-tailers have a Facebook page.

Some social networks like LinkedIn are aimed at business people who are encouraged to network and promote themselves but where, like in so many networks, there is no verification of the data that is provided. This may lead to over exaggeration of prowess and over disclosure of business information. LinkedIn provides prompts as to how to describe oneself from "owner" to "visionary". Personally I always wanted to call myself a visionary but never had the foresight!

Social network providers view themselves as a facilitator of information-sharing to the extent that whilst they set out terms and conditions of use they seek to avoid responsibility or liability for harmful or illegal content.

In social networks and virtual worlds communication between participants is usually in the form of text/email exchanges although in Second Life voice activation is available in a variety of languages.

Virtual worlds are social networks on a grander scale where subscribers not only share information but also emulate activities and events that do or might occur in the real world. Virtual worlds are often perceived as an online computer game. Classic computer games focus on one goal and to reach it the players have to reach a certain score or similar and in the end there are winners and losers. Modern online games are more complex, but in the case of virtual worlds and Second Life in particular there are no points, no scores, no winners or losers and no ultimate strategy. True virtual worlds allow participants to interact in any way possible and Entropia and Second Life are not only used to enjoy leisure but also to exchange political opinions, provide education, research, product testing and generate serious income.

Some virtual worlds are massive multi-player game environments like World of Warcraft or Runescape where players use and create, under licence, characters to participate in the game. Other virtual worlds like Second Life use avatars who may or may not be exact representations of an individual but have the ability within the virtual world to do all the good and bad things that occur in the real world. Second Life distinguishes itself from most other virtual worlds by allowing subscribers to own intellectual property in those "in world" properties that they create such as avatars, goods and houses.

As intellectual property becomes a key asset for both individuals and businesses alike and as both businesses and individuals increase their participation in virtual worlds and social networks so there are new opportunities to use intellectual property rights to protect reputation, innovation and brand. In the same way that football stars like David Beckham, fashion icons like Armani, and supermodels like Elle Macpherson take steps to protect their reputation and brand globally, so it is increasingly likely that virtual world avatars and game created icons will want to maintain their superstar status. Similarly, we have already seen on the one hand the mimicking of real world brands in virtual worlds and on the other hand the creation of virtual world brands such as clothing and jewellery that are earning sufficient money that it may be logical for them to be created in the real world where they will then require brand protection. This raises the question as to the ownership of such rights where they are created by staff in the workplace and in work time, either as part of their job requirements or as part of their private time.

The platforms on which social networks and virtual worlds are available include not only personal computers but also mobile phones and devices such as Blackberries and iPhones. Thus portability exists in the use of these environments. A year ago or more there were predictions that technology was moving at such a fast pace that the next iteration of virtual worlds might include browsers that would allow avatars and their proprietary assets to move between virtual worlds. Now such possibility is reality and so called Gravatars based on the use of common data and descriptions enables the users to create one common avatar that can be spread across any and all social networks forums and blogs. There may soon be a confluence, such that whilst a Gravatar can move between worlds there may be the possibility of mashing up Google Earth with a virtual world so that an Avatar may stroll down a real time Bond Street or through a real time shopping mall providing the next level of reality in the virtual environment. Who knows, if such innovation takes place before too long then my Avatar "Woodbee Telling" could come face to face with myself on Bond Street as I access Second Life on my Blackberry.

Bringing home into the work place

We tend now to carry at least one if not two mobile devices. A mobile phone of our own and sometimes a device like a Blackberry or Palm or iPhone that is provided by work as a business tool. We often have our own laptop which moves between home and work and vice versa and notwithstanding any corporate policies on devices in the workplace we are already used to multi-tasking our communication devices both at home and at work.

At home we receive radio and television through the internet and when watching television are often working, on, or are prepared to work on, other communication devices in the course of our home routines. It is therefore not surprising that we bring our home into the workplace and see no division between private life and business life.

Taking business into the home

Armed with the many communication devices and platforms discussed above and encouraged by employers to work from home, maintain access to work from home and be available 24/7, it is inevitable that business gets taken into the home.

The merging of home and business means that there are increased security risks over access and confidential information and data breaches. Research by Recommind of 100 CIO's and IT directors indicate that 89% of UK businesses have no dedicated guidelines in place to control the use of social networks and virtual worlds. With the range of devices and platforms available to employees in the business place and at home and with uncontrolled transfer of information from within the corporate network to elsewhere as well as the growth of cloud computing, there is a risk that a company which needs to identify particular data may have great difficulty in doing so within strict timelines that might be imposed for example in the case of an e-disclosure exercise.

Do you prevent social networking and use of virtual worlds in the workplace?

It doesn't seem many years ago that we saw the rise in the implementation of email and internet policies in the workplace borne out of concerns over misuse of such tools and a business fear that too much time would be lost to frivolous use of email and internet access as well as the incorrect use of the same facilities.

Blocking and filtering technologies have been and still are common in the workplace to prevent employees accessing websites that are deemed inappropriate or unacceptable and policies have been developed to accommodate new technologies or phenomenon such as mobile phones, Wi-Fi, instant messaging and blogs.

It is inevitable that businesses prevent the home being brought into the workplace by using technologies and procedures to prevent social networking and use of virtual worlds during working hours.

There are good reasons for implementing business policies such as those described above but how long a blanket ban can exist is questionable. The next generation of workers have been brought up on a lifestyle of social networking and will expect access to such facilities in the workplace and indeed do not consider such environments as something that is not part of their every day environment whether at work or at home.

It may, therefore, have the opposite effect to ban something which is perceived by individuals as a useful communication tool or environment within which to produce work and innovation. On the other hand, businesses are rightly concerned that business secrets and creativity that belong to the business are being leaked into the public domain, either intentionally or otherwise, by staff through their use of a variety of communication solutions. LinkedIn, for example, asks a question every day “what are you doing?” and unwittingly an individual who describes precisely what they are doing might give away business information that harms not only the business but also breaches the law and/or confidentiality. Individuals who befriend their line managers on Facebook have had well publicised sackings or disciplinary procedures for being disrespectful about their employer or claiming sick leave when in fact their illness was “self imposed” after a night out.
Businesses have a range of corporate governance issues that are challenged by social networking and whilst business systems can impose controls behind a firewall, data that leaks out through social networking and virtual worlds creates a minefield of liability.
Employers also owe a duty to their employees to caution them of the risks that they may face when using social networks and virtual worlds. There is a vast amount of personal information that is given away by individuals when using social networks and virtual worlds and employers need to put in place policies and procedures to not only protect themselves but also their staff.

Embracing social networks and virtual worlds in the workplace

IBM and Accenture are two examples of large companies that currently use Second Life as a platform for training and have implemented Facebook style intranets in order to encourage creativity through networking in the workplace, thus bringing the home concept discussed earlier into the workplace for the benefits of both employee and employer. Lockheed Martin set up an in-house social network which they substantiated saying “50% of our workforce will retire in 10 years. We have a lot of folks we need to hire in. They grew up with these tools. These recent college graduates aren’t particularly attracted to meetings, email or PowerPoint slides.”

The legal profession is beginning to encourage social networking for work purposes, particularly utilizing providers like LinkedIn in order to help individual lawyers to increase their business opportunities and raise their profiles. In doing so, the law firm increases its own profile though there are compliance and other risks.

The next generation will come to the workplace with no concept that social networking and the use of virtual worlds is not a business norm and businesses may have no alternative but to allow access to these environments. 10 years ago, when businesses were implementing email and internet policies, they did so out of concern over security and confidentiality issues and those same concerns need to be addressed in relation to the social networking phenomenon now.

By blocking or screening employees’ access to social network sites and virtual worlds, employers may be stifling creativity, if not infringing human rights. Conversely, without any controls at all, businesses put themselves and their employees at risk. Policies, procedures and practices need to be put in place to maximise the value that social networking and the creativity and business opportunities that come from virtual worlds.

Training needs to be implemented to help businesses and their employers maximise the opportunities available from the new environments and our “split screen” approach to the use of internet, email, social networks and mobiles means that the blurring of lines between home and work need careful control and careful encouragement.

My mother used to say many years ago “what’s wrong with going and seeing people and why does nobody write a letter anymore!” Unless businesses recognise the permanency of services and environments such as social networks and virtual worlds they will be out of touch with the reality that to question the use of such communication tools in today’s world is akin to the previous generation querying the use of email and mobile phones.

Robert Bond, Partner, Speechly Bircham LLP
robert.bond@speechlys.com

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PRESIDENT’S DIARY

Election fever is upon us: providing an opportunity to review party manifesto’s carefully to try to identify the party that seems most favourable to IP, innovation and technology transfer. (I somehow doubt IP will appear in any of the much publicised debates, but worth listening in to those too just in case.)

With talk of a potential change of government, it is timely to remind you that regime change is also imminent in our Society. **Mark Wilson** will take over from me as your President, and, in turn, **Jennifer Pierce** replacing Mark as Vice-

President, at the Annual Meeting in June. As you think about the changes you want your vote to achieve at national level, it would be helpful also to consider the direction in which you would like your Society to be going in the years ahead, and let me and my successors know your views. It is somewhat alarming to realise that two years have slipped by since I took over the Presidency, and I'm sure Mark and Jennifer will also find time passing more quickly than they expect. So if you want changes made, let us know early. They take time to implement.

One change the current officers have been discussing is the appointment of a Marketing Manager. Council has not yet approved this, and the detail of the job spec, including time commitment and remuneration, are not yet final. But if you know of anyone with marketing experience who would in principle be interested, please send me their contact details. One of the roles we are considering asking the new Marketing Manager to assist with is the editing of this newsletter. This results from the decision of **Mary Elson** to hand over the reigns so that she can spend more time with her family and on other priorities. Mary has done a great job on this for many years, including during some difficult times. We are hugely indebted to Mary for all she has done for us. On behalf of all of us, Mary, a big "Thank you", and best wishes for the future.

Meanwhile, we continue with a packed meetings programme. The main event in the LES annual calendar - the LES International Conference - has just taken place in South Africa, and was, I understand, very well attended. Family health issues unfortunately prevented me from attending, so I will leave it to others to report on this elsewhere. But it is a sharp reminder that it is now only 14 months until we host this event here in the UK in early June 2011. As I have said before, if you want to participate, or have suggestions for speakers for plenary sessions or workshops, please pass them on to our organising committee chair, **Anne Lane**, now.

Back at home, **Ada Nielson** of LES USA/Canada kindly arranged a meeting for us here in London on Cybercompetitive Intelligence on 15/16 April. That was due to be followed by our annual 3 day "Fundamentals of Intellectual Asset Management" course at Cranfield, scheduled to start on World IP Day (26 April). Unfortunately, the course had to be postponed at the last minute and is now likely to be run in late June (dates to be confirmed); so if you had thought it was too late to book, thinks again! It provides a stimulating mix of lectures and interactive exercises, starting with the basics of IP and licensing, moving on to the framework for licensing and getting the deal done, and ending with a session on "living with the deal". Feedback from previous years' sessions has been extremely positive, and I have no doubt that the same will be the case this year. Yet another example of the fantastic value for money our meetings/courses present for members.

The next London evening meeting will be on 29 April entitled "Intellectual Property - The Investors' Perspective" in which **Jon Calvert**, Co-founder and Managing Director of ClearViewIP Ltd will explain which aspects of IP are key to their investment decisions, and what they seek in prospective investment targets in terms of intellectual assets, processes and management behaviour.

We then head out of London again for meetings in May - see the Diary page for details - and return to London for our Annual Meeting at the Institute of Directors on 17 June.

My thanks to all those involved in organising all of these events, and for those who support them by attending. I hope to meet you at one of these meetings.

In the meantime, don't forget to vote for the pro-IP and innovation party (whichever you may decide that is), and to let Mark, Jennifer or me have your thoughts on the priorities of the new regime in our own Society.

Nigel Jones
President, LES B&I

Will cross-dressing sell?

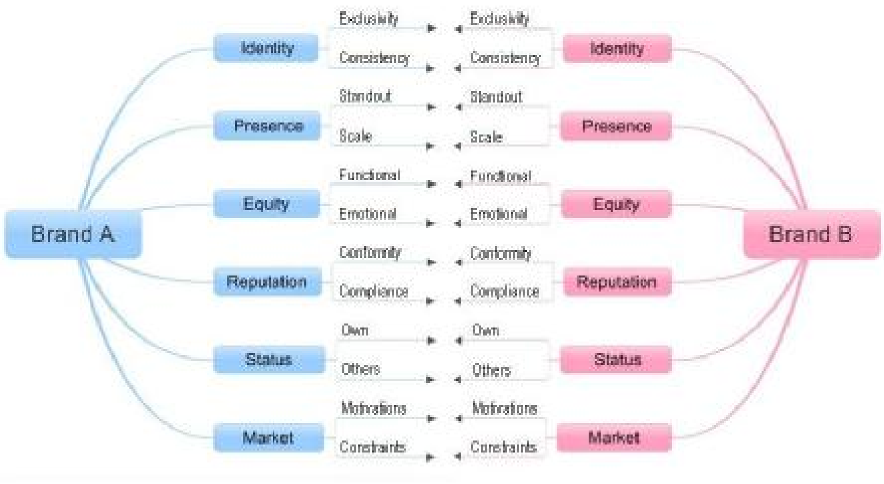
Assessing brand compatibility in co-branded ventures

Not all licensing arrangements are discrete affairs. When brands meet with a view to public partnership in pursuit of innovation or strategic fulfilment, their guardians make a careful evaluation of compatibility. Momentum and the lure of "low-hanging fruit" must not lead the parties blindly beyond the point of no return. What values will each brand bring to the proposition? How might the strengths and weaknesses of one brand affect another?

Alongside financial projections, we need to understand the condition of the underlying brand assets and their potential synergy. Figure 1 suggests a simple framework for this assessment. It represents the six interacting cylinders of a smooth-running brand engine: identity, presence, equity, reputation, status and market.

Figure 1

Comparing two brands for compatibility and synergy



Source: Abrahams, D.J. (2008), *Brand Risk: Adding Risk Literacy to Brand Management*, Gower

Identity

The quality of a brand's identity is underpinned by two fundamentals: *exclusivity* and *consistency*.

- *Exclusivity*. The familiar territory for licensing professionals, ensuring that there is suitable protection of brand identifiers: name, trade marks, logos, designs, web domains. Clearly, a branded business can be substantially weakened by inadequate registrations in key jurisdictions or by shortcomings in safeguards against infringement, counterfeiting and 'look-alikes'. Perhaps not so obvious are the issues which may arise if two *legally* operated brands or identities are easily confused.

- *Consistency*. Uniformity of look, style, tone and content lies at the heart of effective brand management. Lack of consistency in brand representation weakens its projection and downgrades perception of its quality.

All these issues of identity management become more challenging when there are licensees.

Presence

In principle, the value of a brand increases as it achieves visibility and favourability. It is therefore important to assess the awareness which a candidate brand has already achieved. This is defined by two parameters: *standout* and *scale*.

- *Standout* describes a brand's conspicuousness and recall from the perspective of a single respondent. It is a reflection of the relevance and relative impact of prior marketing messages and the customer's experience of product use.

- *Scale* is the quantitative complement to standout. It measures the number of people for whom a particular brand (or brand quality) achieves standout for a given length of time. In some cases, scale may be undesirable, especially in high-end consumer markets where exclusiveness may be part of the brand's appeal.

Equity

Not everything we remember about a brand determines our behaviour towards it. Brand equity is the term to describe those elements of a brand's image which shift economic demand in its favour, maintaining differentiation or competitive advantage.

A feature of robust brand equity is that it should reflect both *functional* and *emotional* (or psychological) benefits conferred by experience of the brand. For example, speed of service is a functional benefit, whereas customer confidence is an emotional benefit. Brands lacking in emotional equity are more vulnerable to competitive assault and product life cycle.

Reputation

A brand acquires reputation through meeting expectations that apply to any comparable competitor in the same field. Reputation elements are the minimum stakes to stay in the game. Merely complying with norms of performance will not create competitive advantage. Conversely, failure to perform in these areas can result in a sudden loss of public confidence and brand collapse.

We distinguish between *conformity* and *compliance*, because some reputation essentials are created by the need to comply with regulation, others by the need to conform to other norms. Typical reputation essentials are customer safety – often a matter of regulation – and trustworthiness of a brand and its managers – often a matter of ethics.

Whereas a brand's equity may be founded on unconscious or inadmissible motivations (for example, a customer's psychological needs), reputation elements tend to be matters of public knowledge or concern. Brands can excel in an area of reputation, so that the same characteristic contributes to competitive advantage as a component of brand equity.

Status

It is important to understand the *status* of a candidate brand in the hierarchy of its current competitors. This is because perceptions of status can influence customer choice in the face of uncertainty or unfamiliar innovation. There may be an exchange of status (favourable or unfavourable) between collaborating brands and their owners.

Brand status is not quite the same as reputation or equity. To take a domestic parallel: a pet dog may have a good reputation because it is well behaved – but its status remains low.

Market

The ambition of a co-branded venture will clearly be affected by the number of prospective customers to which the collaborative offering might respond. This is not to argue that prior overlap of franchise is necessary for success. Some co-marketing ventures are designed to take at least one brand into a new market space. However, it is important to know whether a candidate brand draws its authority from a category that is growing or declining – and whether there are foreseeable changes in its customers' *motivations* (needs and attitudes) relevant to the prospects of a co-branded venture.

Due diligence should also identify *constraints* affecting a candidate brand's 'licence to operate', its strategic freedoms and other market-based limitations. For example, it may be subject to regulatory roadblock or restricted access to desirable channels of distribution for reasons of market structure.

Conclusion

Successful and well-managed brands are annuities of demand. They can accelerate penetration of new products and new markets. They can substantially reduce commercial risk. Alongside single-brand licensing, the potential power of co-branding should not be ignored. Neither should assessment of compatibility.

David Abrahams
Brand Mediation

David Abrahams is founding director of Brand Mediation and a member of the LES B&I Brands Committee. A consultant to manufacturers, retailers, licensors and licensees in strategy, product development and brand management, David is a graduate in law from the University of Cambridge, an accredited commercial mediator (MCIArb) and the author of Brand Risk – Adding Risk Literacy to Brand Management *(2008).*

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When is a Trade Mark not a Trade Mark?

The case of *Google v Louis Vuitton* (Case C-236/08) was decided by the European Court of Justice at the end of March. It concerns the manner in which Google sell keywords ("AdWords") as links to websites. Google allows advertisers to select keywords. When the keyword is subsequently entered by a user of Google, the advertiser's website will appear as a "sponsored link" at the top of the search results. If a user subsequently clicks on that sponsored link, a fee is payable by the advertiser to Google.

The advertiser can improve its ranking by paying more for the use of the keyword. Fashion house Louis Vuitton complained that third parties were paying for keywords that were trade marks of Louis Vuitton. Furthermore an advertiser could "buy" the right to use such a keyword in combination with the word "copy" or "imitation" in order to be directed to a website that was selling counterfeit goods. Louis Vuitton complained to a French court that Google was infringing its trade marks.

The European Court of Justice has today given its judgment in this case. Essentially it has decided that:-

- Louis Vuitton can prevent use of its trade mark as a keyword, without the consent of Louis Vuitton;
- Louis Vuitton cannot directly prevent use of its trade mark as a keyword by Google unless Google has "*played an active role of such a kind as to give [Google] knowledge of, or control over, the data stored*".

While the first of these seems clear, the second is not. It begs, among others, the questions "how much knowledge" and "how much control".

A similar case, this one emanating from the English court is due to come before the European Court later this year. That is the case of *Interflora Inc v Marks & Spencer and Flowers Direct*, in which Google allowed the keyword (and trademark) "interflora", a trademark of the international flower franchise Interflora Inc, to be used by the defendants, Marks & Spencer and Flowers Direct. Interflora complained of Google's practice of allowing others, in this case Marks & Spencer and Flowers Direct, to "buy" the sponsorship so that the user was directed to the websites of Marks & Spencer or Flowers Direct, rather than to Interflora's website.

On the basis of this decision in the Louis Vuitton case, it is unclear whether Interflora will be able to prevent this use by Marks & Spencer and Flowers Direct. The ruling by the European Court so far is ambiguous. The European Court has been asked for a slightly different ruling in the Interflora case. If the European Court again "fudges" the issue in a similar manner, it may well be that a UK court interprets what has been decided so far and rules in favour of Interflora.

As to whether Google will need to change its practices, it is likely that the full story has yet to develop. There will undoubtedly need to be further references to the European Court, before the matter is fully determined.

Google and eBay benefit where a user is confused into buying counterfeit goods on the internet, believing them to be genuine goods. This case is the first nail, but only the first nail, in the coffin of that practice. The only thing that can be said with absolute certainty after the unclear judgment in the Louis Vuitton case is that there is more litigation to come!

Dai Davis, Partner, Brooke North LLP

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"A Perpetual Licence" – Will it actually last forever?

How often have you come across the word "perpetual" in intellectual property licences? It is frequently used to describe the type of licence granted; even when in clear contradiction to later termination provisions in the same licence.

The meaning of the word has finally come before the court, in the recent case of *BMS Computer Solutions v AB Agri*. The case concerned a software licence for a product called "MillMaster" (animal feed software).

In 1994, at the same time:

- BMS granted J. Bibby Agriculture a 10 year software licence for MillMaster (subject to provisions for early termination, most notably, early termination if the parallel technical support agreement was not kept up).
- BMS and Bibby entered a parallel technical support agreement, which provided for termination by either party on 12 months' notice. The agreement did not expressly provide for termination of the MillMaster licence if the support agreement itself was terminated. However, the agreement did stipulate that all copies of the MillMaster software should be returned to BMS if the support agreement itself was terminated.

In 2000, Bibby novated the Agreements to Agri and at the same time the 10 year MillMaster licence was varied in a number of ways, in particular, the licence was "… **extended** to be a UK-wide **perpetual** licence".

By 2008, Agri no longer needed BMS' support agreement and therefore served notice to terminate it. At the same time Agri asserted that it remained entitled to use BMS' MillMaster software on the basis that the MillMaster licence was "perpetual". BMS disagreed, pointing out that the MillMaster licence was conditional upon the support agreement remaining in force, and that the word "perpetual" should be interpreted accordingly.

The Court agreed with BMS, finding the MillMaster licence terminated on termination of the support agreement. Even though the licence was stated to be "perpetual" (due to the 2000 novation) the MillMaster licence still contained the original 1994 termination provisions. It was especially relevant that the 2000 variation had not expressly varied the 1994 termination provisions and that if the parties had intended to delete them they would have done so explicitly rather than just by the use of the word "perpetual". The High Court provided the following guidance: *"The word "perpetual" can carry different shades of meaning. It can, for example, mean "never ending" (in the sense of incapable of being brought to an end) or it can mean "operating without limit of time" (so as… to grant a licence of indefinite duration but subject to any contractual provisions governing termination of the licence."*

Thus, the meaning of the word "perpetual" in a licence very much depends on the context in which it is used and its meaning is therefore inherently unclear. It is not enough to add the word in the hope of granting a never-ending intellectual property licence where the underlying factual matrix suggests the parties must have intended otherwise. The lesson is simple, if you want a licence that lasts for ever, the licence must last forever, it is not enough to call it perpetual if there are termination provisions which suggest it is not.

Alice Proby, Charles Russell
alice.proby@charlesrussell.co.uk

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Patent Settlement Agreements in the Pharma Sector

As reported previously in News Exchange, the European Commission's investigation into the behaviour of companies operating in the pharma sector in the European Union culminated in the publication of a Final Report on 8 July 2009. One particular topic addressed by the Commission was 'pay for delay' patent settlement agreements between originator and generic companies. Under these arrangements, an originator company might pay to a generic company a sum of money. In return, the generic company might withdraw any pending legal challenge to the validity of the originator company's patent and/or agree to remain off the market for a defined period of time.

These kinds of deal have long attracted controversy in the USA and the US Federal Trade Commission's hostility to 'pay for delay' settlement agreements is well known. Recently, a proposed blanket ban on these deals in the USA was mooted, but then dropped from President Obama's package of healthcare reforms. In assessing the value to society of these arrangements, there is a difficult balancing exercise of different public interests to be undertaken. On the one hand, it might be said that the originator companies should remain free to take commercial decisions about the strength of their patent rights and to enter freely into any kind of litigation settlement deals with their generic competitors. Settlements should not be discouraged by antitrust regulation. On the other hand, the public purse should be protected against a 'carve up' of the market between the originator and the generic companies.

Prior to the Sector Inquiry, it was well known that contractual clauses such as those granting exclusivity and other restrictions on a company's ability to compete have been sensitive topics for European competition regulators - particularly in agreements where the contracting parties have significant market shares. But where does the European Commission stand on patent settlement agreements in the pharma sector? Despite the detailed analysis in the Sector Inquiry Final Report, there is no specific guidance in that document on the compatibility of these deals with the European competition rules.

There are some passages in the Guidelines that accompany Regulation (EC) No. 772/2004 (the European Technology Licensing Block Exemption Regulation), but the guidance offered there is really on cross licensing deals. Nevertheless, there are one or two passages that might help. For example, it says in the Guidelines that where it is clear to the parties to a negotiated agreement that no 'blocking' patent position exists (such as in circumstances where both the originator and the generic company believe that the originator's patent is invalid), the consequence is that the "*...the settlement is merely a means to restrict competition that existed in the absence of the agreement*". This kind of 'sham' agreement is bound to be viewed suspiciously by antitrust regulators. This was confirmed by a Commission representative at a recent European Pharmaceutical Law conference, hosted by the Academy of European Law on 15-16 April 2010 in Brussels.

Agreements providing for substantial payments to generic companies ('reverse' payments) and that do not relate to plainly invalid patents are in more of a grey area, although Commission officials have made some unfavourable, off the record comments in articles and at conferences from time to time. For example, one official has said: "*Parties need to explain any value transfer well; failure to do so may be a significant indication for a competition concern* [sic]".

However, the Commission has not yet committed itself officially and publicly as to how these agreements should be treated.

The Commission does not intend to issue guidance. It intends to proceed instead on a case-by-case basis, investigating particular instances of suspicious company behaviour. One such investigation (of Les Laboratoires Servier and others) was announced simultaneously with the publication of the Commission's Final Report, in July last year.

In a further development, on 12 January 2010, the Commission issued a press release stating that it was following up its interest in patent settlement agreements during the Sector Inquiry with further requests for information to both originator and generic companies, in which they were asked to submit copies of all settlements entered into from 1 July 2008 to 31 December 2009. The Commission announced that it is looking carefully at patent settlement agreements where an originator "*pays off*" (in the words of Mrs Kroes, the former Commissioner for Competition) a generic competitor in return for delayed market entry of a generic drug. It is likely that the Commission will issue a short, supplementary report with its analysis of these additional settlement agreements, later this year. It is hoped that this supplementary report may contain a few more clues as to the Commission's approach, but in the meantime, matters remain in a state of limbo.

The investigations that are presently ongoing demonstrate the Commission's commitment to restoring the competitive process, where it perceives that harm has been done to the consumer interest, in particular by reverse payment or 'pay for delay' settlement deals. However, until the Commission starts concluding its investigations and issuing some decisions, the full extent of the 'reach' of competition law into the realm of patent settlement agreements remains unknown. Developments continue to unfold and members of the Laws Committee are keeping a watching brief on the Commission's activities.

Dr Duncan Curley,
Director, Innovate Legal, London (on behalf of the Laws Committee)

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East looking West: Issues to consider when looking to partner with a Chinese Company entering into the UK/European Market

This article aims to outline certain Intellectual Property (IP) issues UK companies should consider when intending to partner with/enter into an agreement with Chinese companies looking to enter into the UK/European market for the first time.

China's drive to become a global player on the world stage and the Chinese Government's drive to be an innovation-based economy by 2020 and to increase the amount of outbound Intellectual Property generated by China, has lead to some relaxation in the restrictions previously placed on Chinese companies.

The IP Commissioners at Provincial level are currently engaging in education and awareness raising campaigns in relation to IP overseas issues. Key technologies are the target for the current drive with Government support and links in the short term to international expertise being provided. As a result, more and more Chinese companies are seriously considering foreign expansion opportunities and it is likely that the Government's drive will lead to significant increase in overseas IP acquisitions by Chinese companies and to overseas joint venture or distribution projects. So what does this mean for UK companies?

An important task when engaging in a new commercial adventure with a potential new partner is due diligence. The extent of due diligence will vary depending on the nature of the project.

A Chinese company coming into the UK or European market will often be looked on more favorably if they have some form of IP protection. The IP protection is often going to be in China only, especially if the company is a first time entrant into the UK/European market. A Chinese company quoting an IP portfolio of 30 plus patents sounds great but is it really as good as it sounds?

One question to ask is "Are the Patents actually Patents as we in Europe know them?"

In China there are three types of patent protection available:

- **An invention patent**, similar to what we understand in the UK/Europe as a patent, which protects inventions that provide a new technical solution or improvement to a product or process;
- **A utility model patent**, similar to the utility model protection available in some European countries such as Germany and Spain, but for which there is no equivalent form of protection in the UK. This patent protects a new technical solution which relates to the shape or structure of a product but has a lower requirement for inventiveness than a patent in the UK/Europe;
- **A design patent**, similar to the registered design protection available in the UK and in Europe, which protects the aesthetic appearance of a product, but not the idea behind it.

It is therefore quite important to check exactly what form of IP protection is in place, i.e. what proportion of the patent portfolio is an invention patent, a utility model patent or a design patent, as certain rights are stronger than others.

Once it has been established what is protected, it is also important to ascertain whether the IP protection can be extended to cover the UK or Europe. Under international agreements, it is possible to extend IP protection in foreign territories through the filing of one or more applications during a time period known as the priority period. The priority period is 12 months from the filing date (or earliest priority date) in relation to a Chinese Invention patent or Utility model patent and 6 months from the filing date (or earliest priority date) in relation to a Chinese Design patent.

As negotiations can go on for months, it is important to establish early on in negotiations the priority deadlines for any IP for which an extension of protection outside China may be desirable. Protection outside China should be strongly considered for products which are to form the back bone of the commercial project.

It is worth noting that China used to have a local novelty requirement, where inventions or designs not disclosed in publications anywhere in the world and not publicly used or made known to the public in China by any other means before the filing date could be protected even if the product was in use outside China. This is quite different to the requirement in the UK and Europe where any public disclosure in the world affects the novelty of the product or design. As a result, it is quite possible for IP rights to be granted in China for an invention on the basis of local novelty but which would not be protectable in the UK or Europe for lacking novelty.

The recent changes to the Chinese Patent Law which came into effect in October 2009 have, however, brought the novelty requirements in China in line with that in the UK and Europe reducing the occurrence of this issue in the future, but it is a question worth asking in the short term at least.

Freedom to operate in the desired market should also be investigated, as there may be UK or European players who have built up a dominant position and who have IP protection in the European market which would not have been a concern to the Chinese market. The protection obtained by the Chinese company may be for the same invention or an improvement on the invention. It is therefore important to look at potential competitors in the market and to do a search to identify what sort of protection, if any, the competitors have before introducing new products even if these products have previously been sold without concerns in the Chinese market. In this way product development decisions can be influenced to avoid IP clashes in the target markets.

Considering these issues at an early stage will hopefully lead to a prosperous and fruitful partnership and experience with a Chinese commercial partner looking to enter into the UK/European market for the first time.

Dr Abdulmalik Lawal,
Murgitroyd & Company
abdulmalik.lawal@murgitroyd.com

Book Review:

"Brand Risk - Adding Risk Literacy to Brand Management"

Author: David Abrahams[1]
Publisher: Gower 2008
x + pages 212 (incl index)
RRPrice £55.00

'*Risk literacy'* is not, I suspect, a term with which many readers of NewsXchange will be familiar and yet the majority of us are called upon to make assessments regarding the level of risk that we, our businesses, or those of our clients, face every day. Indeed, it is hard to be involved in business without an awareness or an appreciation of risk and yet, as David notes in his introduction, marketers (and I would add, other professionals too) are often ill-equipped to argue in support of their plans when challenged because they are either unaware of, or have failed to understand the nature of the risk and risk-taking, or to consider risk management thinking and some of its methods for risk analysis, opportunity assessment and decision analysis. This book is David's attempt to encourage marketing professionals and those involved in brand management to explore the fundamentals of risk management and to apply them to marketing problems and other brand related issues.

The book comprises 7 chapters, an Appendix with diagrammatic summaries of each chapter and a useful Bibliography in case you wish to explore further any of the references or theories that David discusses. The first two chapters are in effect introductions, the first to the notion of risk literacy, the second the notion of a brand and how and where brand risk arises - as David indicates '*it is important to be clear what is a brand before you can identify and address its risks and uncertainties*'. In David's assessment, a brand comprises three aspects: a legal asset (affording legal rights), a relational asset (building affinities) and an economic asset (creating value) and he uses a model for brand risk

[1] David's article, "Will cross-dressing sell? Assessing brand compatibility in co-branded ventures" appears in this edition of NewsXchange

comprising of six interacting components of risk relating to identity, presence, equity, reputation, status and market to help explain and provide insight into the various risks that brands and the companies responsible for them face.

Chapters 3, 4 and 5 provide the tools for understanding and analysing risk, mapping the risk and managing it whilst chapter 6 concerns different approaches to risk modelling. The final chapter aims to put the tools and techniques introduced in earlier chapters into context to provide insight and understanding and support decision making. It also seeks to address some of the issues that arise in practice when applying risk thinking within an organizational context, where to gain acceptance of the approach to brand risk thinking, the latter not only needs to complement strategy but also take into account the organization's prevailing culture.

Not having studied risk management theory myself before, I found David's book to be an interesting and thought provoking introduction to what is a very important aspect of business. David's clear and accessible writing style, together with his frequent use of diagrams, charts, maps and case studies drawn from his wealth of experience as a marketer all help to make this book interesting and straightforward to follow and I would encourage all those involved in marketing or branding issues, or indeed risk assessment more generally, who have not previously studied the subject, to read this book with a view to gaining a deeper understanding not only of the concept of risk but also of its evaluation so that they are better equipped to make more informed decisions.

Belinda Isaac
Principal, Isaac & Co Solicitors
belinda.isaac@isaacandco.com

News From the Regions – Meetings, Meetings, Meetings….

LES Scotland

13 May 2010
"Renewables IP Green Tea"
The Park Inn, 2 Port Dundas Place, Glasgow G2 3LD
(Beside Buchanan Bus Station) - 15.00 – 18.00

We are delighted to bring another IP event with difference, focusing on the strengths of the renewables sectors here in Scotland and the IP surrounding them.
Following the success of our last Cream Tea event on IP due diligence, the format for this event will naturally be a "Green Tea" – it's been a test for the catering staff but I think they are up to that challenge!
We have drawn together a great line up of speakers as follows:

· **Mervyn Jones, Chairman, Aquamarine Power and non-executive Director of Greenrock Energy Supply Company – "The renewable energy timescale and IP":** the requirement to deliver sufficient renewable energy in time to address the challenge of climate change is making increasing demands of all of the supporting processes, including the protection of
intellectual property

· **Alex Reid, Offshore Renewables Team & Saltire Prize –** "**Scotland's Offshore Renewable Energy Potential and the Saltire Prize":** the Scottish Government's policies to support the development of the offshore renewables sector – given Scotland's unparalleled natural resources. Alex will also provide an insight into the Scottish Government's £10m Saltire Prize – one of the largest innovation prizes in history – specifically aimed at the commercial deployment of wave and tidal stream devices.

· **Robin Smith, Director, 4C Design Ltd – "Deep Diving intoWave Power":** an insight in to how 4C Design generated 90 ideas leading to 30 design solutions and 10 prototypes for AWS all in one day! By careful facilitation and recording, this workshop led to new intellectual property for our one of 4C Design's most important clients in the renewable sector

· **Ian Phillips, Director, CO2 Infrastructure: "Carbon Capture and its role in fighting climate change"**: a review of global energy supply, and the continued role of coal and gas in the energy mix over the next 20 years and the role that carbon capture and storage will play in making this possible whilst avoiding the worst effects of climate change"

This is a topic in which all of us should have an interest whether it's in the intellectual property or for the good of our planet. In the words of our First Minister speaking recently about the recent wave and tidal power plans for Scotland, *"Leading international energy companies and innovators continue to be drawn to Scottish waters, which boast as much as a quarter of Europe's tidal and*
offshore wind resource and a tenth of the continent's potential wave capacity. Together with some 11GW of planned offshore wind developments, these latest marine renewables projects show that Scotland is powering ahead in the development and deployment of clean, green energy."

As always there will be an opportunity during the event and afterwards over drinks, to network and speak further with presenters.
We look forward to seeing you on May 13th at what promises to be a great event!

For further information please contact: LES@northernnetworking.co.uk

Stephen Robertson, Chair, LES (Scotland)

Full meeting details are circulated regularly to members via email.

For further information please see the LES B&I website: www.les-bi.org or email: LES@northernnetworking.co.uk

LES Ireland

14 May 2010
"The Importance of IP in Venture Capital and Private Equity Funding"
A&L Goodbody, North Wall Quay Dublin 1
Speaker: Michael M Donnell, Executive Chairman, Growcorp Group Ltd.
8:30am

With over 25 years international experience in technology based business development, Professor Donnelly returned to Ireland, after 20+ years in the US, to establish Growcorp in 2000. He set up the European Bioscience Fund in 2001, which was the first life science dedicated fund in Ireland. He has researched and successfully commercialised numerous products for paediatric health care. He has numerous patents and publications in the life sciences and has participated in and chaired international standards and strategy development committees.

He has held senior executive positions in industry, and academic and research positions in US universities and has directed multidisciplinary research and product development programs fort the US National Institutes of Health and the US Department of Defence's Advance Research Projects Agency.

Prior to establishing Growcorp, he was Vice President and General Manager of a Medical Products company in Cincinnati, Ohio from 1996 – 1999, Vice President of IEP Group, Research Triangle Park, NC from 1993 –1996, Professor of Research Paediatrics, College of Medicine, University of Cincinnati, Ohio and Director of Bioengineering Research at the Perinatal Research Institute, Cincinnati, Ohio from 1986-1996, Director of Research and Development from 1983 – 1986 and Director of Marketing from 1980-1983 with Air-Shields Vickers, Philadelphia, Pennsylvania.
Michael sits on the boards of Growcorp Group, North Wall General Partners, Growcorp G.P., Merrion Pharmaceuticals, Neutekbio, Fluorocap, Pharmatrin, Gas Sensor Solutions, Orakine, Ireland – Asia Chamber of Commerce and he just recently stepped down as the chairman of the Irish Venture Capital Association.
For further information please contact Jeanne Kelly.
Jeanne Kelly, Chair, LES (Ireland)
jkelly@MHC.ie
Mason Hayes & Curran

LES B&I Members' Page

Congratulations to Peter Bolger!

Peter Bolger who is the PRO for the LES Irish Section has recently been promoted to Partner at Mason Hayes+Curran in Dublin. Peter specialises in IP and IT law with a focus on technology transfer and research collaboration projects. Peter is a regular contributor to IP journals and to NewsXchange itself, although we hasten to add that he did not write this item!

LES Ireland Secretary, Brian McElligott, is on the move>>>

Brian recently joined the highly regarded IP/IT team of A&L Goodbody Solicitors in the International Financial Services Centre in Dublin. He will be working in many areas of IP/IT law both contentious and non-contentious and including licensing of technology.

Photographs from the last LES event in Ireland:

Tara Mcmahon, IP Lawyer and member of the recent Irish Innovation Task Force was talking about the task force's recent Innovation report. It was at Mason Hayes+Curran's offices in Dublin and was well attended as the task force report is very, very recent and high profile in Ireland.

Peter Bolger

Tom McManus and Maureen Daly

Madeleine Kelly, Barry Moore, Brian McElligott, Peter Bolger, Eleanor Keoghan

Members on the Move>>>>

Matthew R Hogg
Liberty International Underwriters
3rd Floor Minister Court
Mincing Lane
London EC3R 7YE
Phone: +44 (0)20 7860 6208
Mobile: +44 (0)7825 953 918
Email: matthew.hogg@libertyiu.com

(we published Matthew's contact details in the last edition of NewsXchange without his address)

Brian McElligott
A&L Goodbody
IFSC
North Wall Quay
Dublin 1
Phone: +353 1 649 2000

New Members:

Council are pleased to welcome the following new members to the Society:

- **Steven Gahlings** of Schlumberger
Steven is interested in the following business sectors:
Energy, Renewable Energy, Computer Software

- **Vanessa Kodilinye**,
Vanessa has not listed her business sector interests.

- **Helen Newlands**, of the Scottish National Blood Transfusion Service
Helen is interested in the following business sectors:
Biotechnology, Pharmaceutical, Healthcare