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OVERVIEW

Unpicking the legal tangle of Brexit

Confused by a snap general election, Brexit poses problems for intellectual property lawyers and their clients seeking protection of the law

DAN HAYES

One of the clarion calls of Brexit was its potential to peel away red tape enforced by the European Union while allowing innovative UK companies to reap the benefits of unfettered access to a global marketplace.

Where better to start, you might think, than the realm of intellectual property (IP), an area where EU legislation has for years directly influenced UK business?

Such a thought, however, is decidedly naive, suggests Sally Shorthose, IP partner at international law firm Bird & Bird. “Red tape and regulations may sound like a bureaucratic nightmare, but in fact they mean we don’t have cases such as Thalidomide any more. The rules are there for a good reason,” she says.

Ms Shorthose emphasises the complexities of unpicking IP laws that are harmonised across Europe, with much of the UK legislative framework composed of directly effective EU regulations and transposed EU directives.

“Increasingly, companies have EU trademarks (EUTM) that cover the whole of the EU, but they’ll no longer apply in the UK from the moment Brexit takes place. So the best advice for companies that have brands they want to protect in the UK is to apply for UK rights as well as EUTM simultaneously.”

June’s general election has thrown more factors into the equation, with the result potentially influencing the nature of the UK’s ultimate relationship with the EU regarding IP law.

Arty Rajendra, a partner in the IP group at law firm Osborne Clarke, adds: “There’s a lot of uncertainty at the moment, but Brexit is going to affect nearly all IP rights. For example, trademark legislation has been harmonised across the EU for the past 20 years and, as English lawyers, we currently try and interpret national cases in accordance with European law.”

But does Brexit have the potential to streamline IP legislation and help innovative companies get their products to market quicker and cheaper?

Ms Rajendra suspects not, at least in the short to medium term. “The Great Repeal Bill is going to allow the UK to transport EU legislation into UK legislation. In the time available that’s really the only thing the government can do,” she says.



“Yes, it would be great if we could look at those laws, refine them and perhaps make them better, but the reality is there is not going to be enough time to do that along with all the other things which have to happen to transport EU law into UK law. Maybe in five to ten years’ time we’ll have a law that’s really streamlined and clear, but I think that’s a long way down the line.”

Indeed, how the UK will be involved in two long-awaited innovations designed to streamline Europe’s IP process, the unitary patent and the Unified Patent Court (UPC), is now in question.

Intended to introduce a genuine Europe-wide patent, these were scheduled to come into operation in mid-2017.

“One of the purposes of the UPC was to try and make patents more enforceable for smaller businesses,” says Ms Rajendra. “They would be able not only to get a unitary patent cheaper than registering in every country individually, but they would also be able to enforce their rights in a more cost-effective way.”

The UK announced in November 2016 that it would ratify the UPC agreement, although such rati-

fication is likely to be delayed by the general election and there remain significant political issues regarding what might happen after Brexit. A key reason for this is that the UPC ultimately will have to submit to the jurisdiction of the Court of Justice of the European Union (CJEU).

Ms Rajendra explains: “Prime minister Theresa May has said that the CJEU will play no part in UK law, but the CJEU will still have a role with the unitary patent. We don’t know yet how the situation will be squared with the rhetoric coming from the government.

“If the UK does not join the UPC, British companies will have to enforce their patent rights in two ways. They’ll have to litigate in the UPC to deal with the rest of Europe and they’ll have to litigate in the UK to deal with the UK. It’s still cheaper than having to run the case in every country, but it’s more costly than it would have been if we’d remained in the EU.”

Bird & Bird’s Ms Shorthose agrees: “There may be a compromise and we’ll be allowed into the UPC through the side door, as it were. Complete disassociation would be a disaster.”

While the UPC debate is set to rumble on, there is at least one area of IP where post-Brexit positives may be clearer – copyright.

Joel Smith, IP litigator and commercial IP specialist at law firm Herbert Smith Freehills, explains: “UK copyright law is fiendishly complicated. It hasn’t been reviewed since 1988 and technology has moved on a lot since then. There is now an imperative to consider starting again and Brexit gives us an excuse to do that.”

Even so, close co-operation with other European nations would be advisable. He says: “I think that’s the general IP message – alignment is sensible for business. Unfortunately keeping things aligned means in some areas we’re going to need more legislation to fix gaps and unexpected consequences of leaving the EU.”

So what can businesses reliant on IP do to prepare themselves for Brexit, especially in the face of an impending general election? “Register UK trademarks now,” Mr Smith advises. “Also review key licensing and other contractual agreements. Conduct audits, think about where the value is in the business and where the most important IP is. Achieve clarity now as opposed to waiting and seeing what comes out of the negotiations.” ●



8.5%

of global Patent Co-operation Treaty applications in 2016 came from the digital communications sector



9.4%

of global Madrid trademark applications came from computers and electronics



11.3%

of global Hague design applications came from furnishing

TRADE SECRETS

High stakes in realm of trade secrets

Stealing trade secrets can be ruinous for a company aiming to get rich by marketing intellectual property belonging to a potential competitor

TOM PHILLIPS

When Mark Zuckerberg made a foray into virtual reality back in 2014, he created an industry. In buying the little-known startup Oculus for \$2 billion, the Facebook chief executive validated a technology that had for years promised much but delivered little.

Tech giants Google, Sony, HTC and Microsoft quickly followed his lead, a lot of venture capitalists got excited, and a lot of clever youngsters got very rich. VR was going to happen, this time for real.

"Imagine sharing not just moments with your friends online, but entire experiences and adventures," Mr Zuckerberg declared. "One day, we believe this kind of immersive, augmented reality will become a part of daily life for billions of people."

What followed was an arms race, with investment piling into the in-

dustry that same year. A slight dip in 2015 left some industry watchers wondering if it was going to live up to the hyperbole. But 2016 put paid to that, with VR funding rebounding to reach \$1.8 billion, a 140 per cent growth over the previous year and the largest ever in the space, according to CB Insights.

But while others played catch-up, Facebook's early leap into the future brought with it unwanted baggage. In this case, a lawsuit, the kind that no proud parent-company chief executive wants to hear from his lawyer's lips: the dreaded "trade secrets".

What followed was a dispute that has clouded the company's VR vision, showered Oculus in bad publicity and could even see the company's flagship Rift headsets banned from sale in the United States.

With an even more public trade secrets fight kicking off this year between Google-owned Waymo and Uber-owned Otto – this time involving driverless-car technology – the issue of who owns the intellectual property is at the forefront of investment in emerging technology.

Facebook's problems began shortly after the Oculus deal was announced. Video game publisher ZeniMax hit the company with a serious complaint, claiming Oculus executives, some of whom were former employees at ZeniMax, had broken non-disclosure agreements when setting up on their own.

Even worse, the complaint alleged Oculus chief technology officer John Carmack stole documents and

source code, later used in the Rift, when he was an employee at ZeniMax-owned id Software and that Facebook knew about it, but went ahead with the deal anyway.

Facebook vigorously denied the claims, but following a major court case in which Mr Zuckerberg himself testified, in January this year a Dallas jury slapped the company with a \$500 million fine for intellectual property infringement and "false designation". In this case, false designation related to the "origin story" for the Rift, which the jury found former Oculus chief executive Brendon Iribe and co-founder Palmer Luckey had lied about.

Crucially, the jury rejected the trade secrets element. "The heart of this case was about whether Oculus stole ZeniMax's trade secrets, and the jury found decisively in our favour," Facebook said after the ruling.

This didn't stop ZeniMax from asking a federal judge to block Oculus from using the disputed code in games made for the Rift. If upheld, the move could seriously damage Facebook's entry into the market it created.

Facebook plans to appeal the original decision and, while it's unlikely the case will derail its plans for a VR revolution, the company has promised to plough a further \$250 million into the project. This certainly piles pressure on the Oculus team, whose poster boy, Mr Luckey, recently quit the company.

If the decision is upheld, damages combined with employee compensation disclosed at the trial, could push

the total cost associated with its Oculus acquisition to upwards of \$4.3 billion.

Why was the trade secrets element so important? And what can Silicon Valley investors, including those with shallower pockets than Mr Zuckerberg, do to avoid finding themselves in court?

"Trade secrets are the hardest form of IP to diligence because they are not registered with any governmental authority and very often are not even recorded in any tangible medium," explains Dror Futter, a partner at US law firm Rimom, specialising in advising emerging companies and their investors. "At the same time, a venture built upon misappropriated trade secrets is

Facebook was this year slapped with a \$500-million fine for IP infringement and false designation over its virtual reality technology

01



The issue of who owns the intellectual property is at the forefront of investment in emerging technology

at much at risk as a venture that infringes a third-party patent."

Under the recently enacted US Defend Trade Secrets Act of 2016, a trade secret owner can recover a combination of actual losses, unjust enrichment and/or a reasonable royalty. Hence ZeniMax's damages award reached the half-billion-dollar mark.

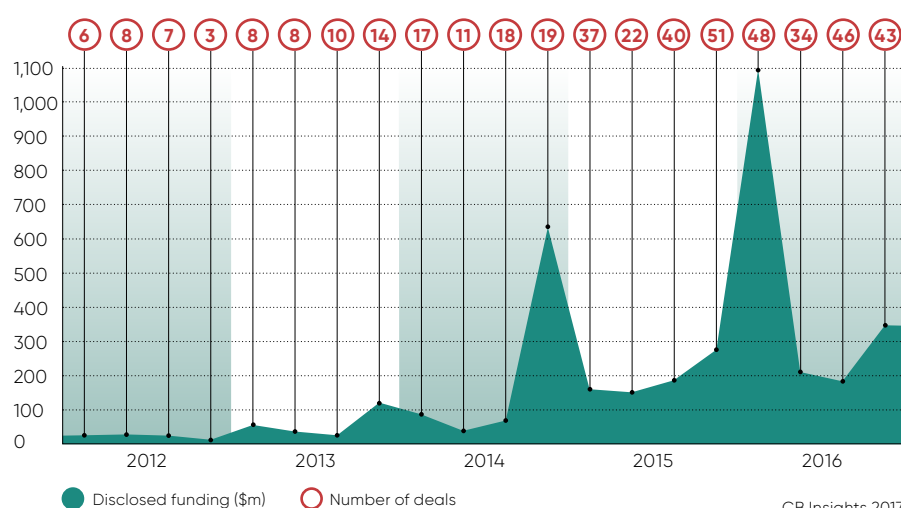
The law also means that, in certain circumstances, a trade secret owner can obtain an injunction against the product in question, preventing it from being sold.

"Recently, an increasing number of M&A deals include the purchase of representation and warranty insurance for the benefit of the buyer, which covers liabilities arising from a breach of a representation or warranty," says Mr Futter.

Whether any such contracts would have influenced the Oculus case is open to debate. But one thing is certain, while the ZeniMax v Oculus litigation rumbles on, competitors like Microsoft's HoloLens, Qualcomm-backed Magic Leap and GoPro are free to develop their systems without distraction, making gains over Facebook's first-mover advantage. ●

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Why you shouldn't buy your boat from IP Centrum

The IP industry is experiencing an unprecedented period of rapid change, just like the boat-building industry did centuries ago

The advent of specialist service providers such as IP Centrum, which specialises in single-instruct European patent validation, renewals and IP translations, has unsettled the industry. Many originally saw this disruptive influence as a commoditisation of services previously the domain of more experienced, qualified professionals. They're right and it's actually OK. Called "industry layering", it's a phenomenon found in any successful service industry throughout time.

Centuries ago, if you wanted a boat, you'd go and see your local boat builder. He was skilled, highly experienced and knew everything about boat building. Once instruct-

ed, he would go to the forest, select the correct trees, chop them down, slice them up, smelt the metal for the oarlocks and gradually craft you a spectacular boat.

Eventually, the reputation of the greatest boat builders grew and their order books filled, leaving one of two options: tell customers they're on a long waiting list or charge more for boat building. Ultimately, both of these happen until a disruptive technology comes along.

Scale and service levels are re-established by one or two forward-thinking boat builders asking a specialist wood company to chop and prepare the wood for them. Those specialist wood companies honed the skills and processes of wood handling to a fine art, and because they would then be able to service many boat builders at the same time, they could scale their operation to achieve far greater efficiency, therefore reducing prices and still making a profit. But they can't build you a boat.

This causes an industry "layer" to appear. This layer cannot be uninvented. It becomes absolutely clear that the future of boat building will, from that point onwards, depend on this much cheaper, much more efficient way of handling wood. This can seem scary to the boat building industry as they watch it unfolding

but, if embraced, this frees them up to charge more per hour because they are now only spending time on the skilful, clever stuff. They can service more customers, with a greater level of service and attention, in a shorter timeframe, and earn more profit overall for the same investment.

No one is immune to this; not even the wood-handler. The layering process continues, when eventually,

We fiercely stick to what we can be the best in the world at

The laws of natural selection dictate that those who embrace this will prosper

the wood-handling companies get too busy, and so they investigate whether there are specialist forestry companies who can harvest and deliver the raw wood to them, allowing them to focus on the value they create by preparing and distributing it. And so it continues.

Traditionally, years ago, your patent attorney would draft your patent, personally file all the documents, process fees, liaise with the patent office, pay renewals and organise translations. Clearly their years of training and qualifications were not required for much of this work. As firms grew, they employed paralegals and formalities professionals as the first layering process, but these people became too busy, and with further layering can provide great, additional value to their firms and clients.

IP Centrum can't draft your patent for you or even advise which patents you should renew. But we're outstanding at organising any necessary translations, paying renewals and handling your European patent validation formalities once decided, with great efficiency, speed, reliability and at a reduced cost.

We're the best and most efficient wood-handling company in the world. We obsess over it. We can't build you a boat nor advise you on the same. You need a boat builder for that. IP firms and patent attorneys have extraordinarily experienced and skilled wood experts – their IP formalities teams – in-house who deal with us regularly. They understand every detail of boat building and can even advise you far better than we can on exactly which type of wood to use for your specific requirements. They should charge you for this added value and it is likely to be money well spent.

Of course, some very large organisations build their own boats in-house. They probably, therefore, source their wood from somewhere other than a boat builder. In these cases we can help and we do work with many very large organisations that do just that. But in most cases we advise potential clients to in-

struct their boat builder, to gain advantage of all their qualified advice.

The smartest firms will, of course, select IP Centrum to support their clients and will quite rightly add a small margin to cover the costs of those great decisions. Again, this is money well spent. No matter how great a wood-handling company is, you probably wouldn't free-issue your wood to your boat builder.

For many operating within the industry, navigating the rapidly changing waters of the IP industry can seem uncomfortable. A dichotomous attribute of the industry is that while it is all about innovation and change, the inherent value and importance of diligence within the industry causes an understandably conservative discomfort towards change. But what we work hard to do is focus clearly on remembering which layer we're good at and which layers are better served by others, and we urge all members of this incredible industry to do the same.

IP Centrum will never try to be an IP firm. We actively avoid blurring the edges of our services and so do not try to offer consultative advice or perform any kind of traditionally fee-earning services. We don't think we can be the best in the world at that, so we fiercely stick to what we can be the best in the world at.

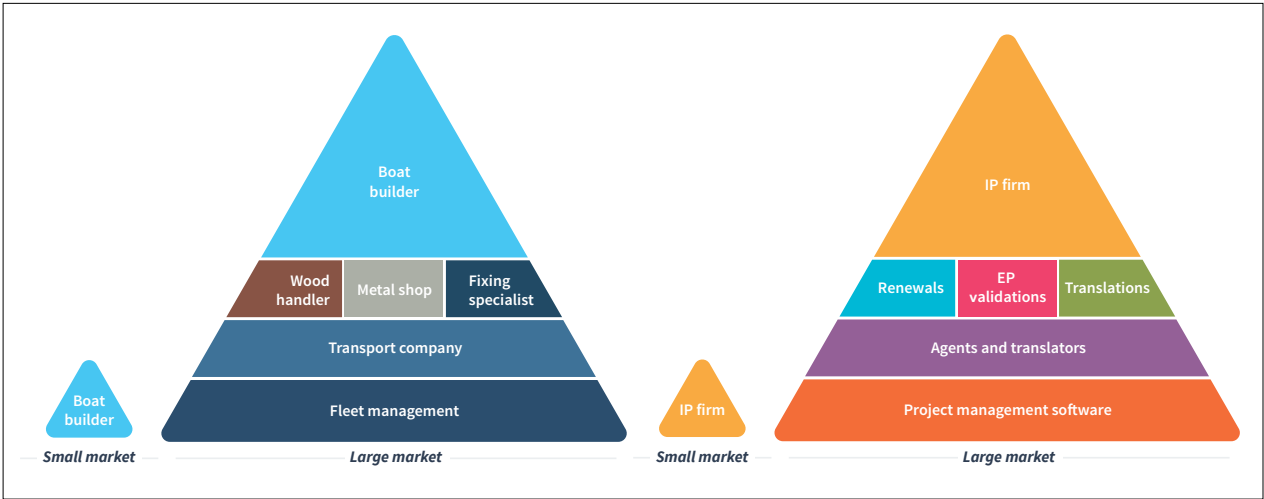
The layering will continue. There is no way to avoid it. The laws of natural selection dictate that those who embrace this will prosper; the end-client is the prime focus. Somewhere there is a boat builder who still collects and processes his own wood. I bet he makes one or two stunning boats a year and I'm sure I'd really enjoy spending a day with someone with that much passion. I just wish there was a way he could share that passion and his beautiful boats with so many more customers.

IP Centrum's global market-leading service has reinvented IP formalities processes such as European patent validation. Reducing timescales from months to days, removing extensive administration and complication, reducing costs by about a third, and sporting an unprecedented zero-fail rate, having never failed a validation in its history. Building on this success, IP Centrum is entering the renewals market, with an industry-redefining new service, which they say will irreversibly transform the way renewals are handled, worldwide, forever.

For more information please visit www.ipcentrum.com



SIMON DE BANKE
FOUNDER AND CHIEF EXECUTIVE
IP CENTRUM



COUNTERFEITS

True story of fake goods being sold online

Online marketplaces, such as Amazon and eBay, are fertile ground for fraudsters selling fake goods at knockdown prices to eager shoppers

DAN MATTHEWS

Since the dotcom boom, advances in technology have provided a conduit for fraud. The digital space is perfect for criminals – it's dark and ungoverned, plus it grants easy access to a colossal number of eager, vulnerable consumers.

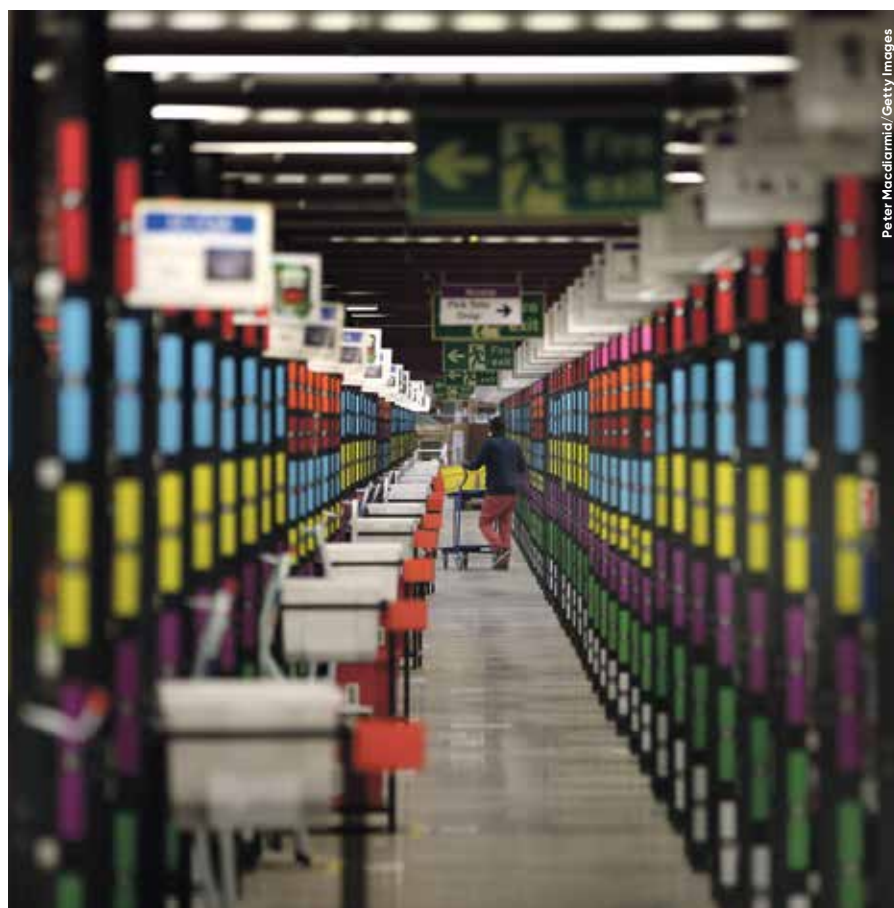
And while technology evolves and updates quickly, providing loopholes for scammers, the law is a slow and lumbering animal. It is especially weak in the face of international frauds cooked up in one country and spooled out in another.

Nowhere are the authorities less effective than in policing online marketplaces, which connect buyers with sellers in a quick, convenient setting. Sellers are, on the whole, small businesses and private individuals enjoying exposure to large audiences.

But among them lurk people who peddle counterfeit products. These are criminals who pretend to sell popular brands at discount prices, but are really offering low-quality fakes.

There is no way to authenticate a product from an ad on eBay, Amazon Marketplace, ASOS or Alibaba, so it's easy to become a victim of a scam if you don't know what to look for. Counterfeiters do everything they can to look legit so it's hard to address the problem proactively.

Derek O'Carroll, chief executive of Brightpearl, says online sales of fake



Almost 90 per cent of Apple products sold on Amazon's US site are reportedly fakes

consumer goods increased 15 per cent last year, not far off the growth rate of legitimate e-commerce transactions. He says marketplaces are a factor behind this figure.

"Online marketplaces like Amazon and eBay have become vulnerable incubators for fraudsters looking to harness their global reach to sell their phoney products," he says.

"These individuals look to exploit every possible piece of digital marketing technology to disguise themselves as well-known brands and lure unsuspecting users into paying for products that will never arrive.

"Counterfeiters use social media, scam e-mails and mobile apps to elevate their replicas' profile via paid search and popular hashtags to gain consumer trust. Then they flood sites with low-cost products and coax consumers to their site, where they will pay money directly into the scammers' accounts."

Fakes are damaging to brands, particularly in the luxury sector.

Companies are not so concerned with direct loss of sales; people snapping up copies don't generally have the spending power of those who are in the market for the real McCoy.

But exclusivity is a strong currency for ultra-indulgent items. When copycats flood the market with watches, bags and sunglasses, it removes some of this sheen, the mystique that attracts big spenders.

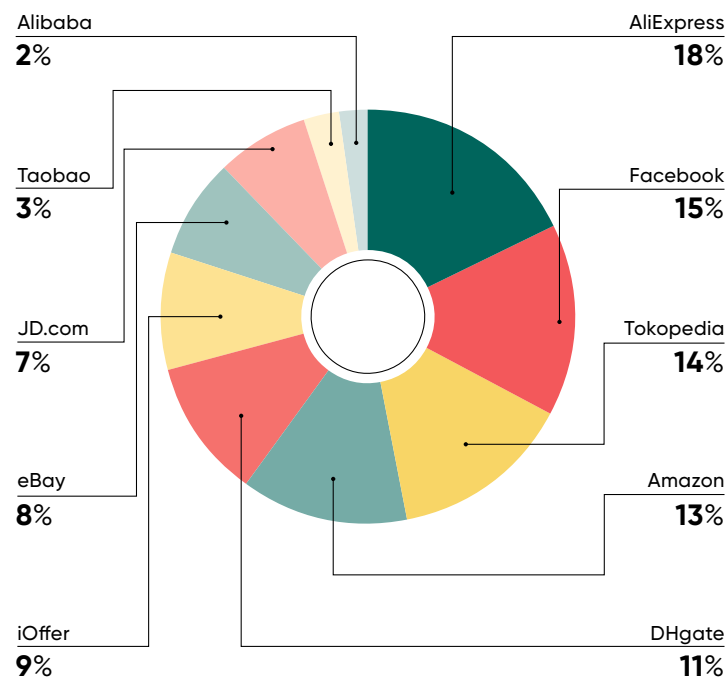
"Brands invest millions in promoting their brand as a guarantee of a high standard of design, safety and quality," says Oliver Smith, intellectual property specialist at Keystone Law.



Proactive measures protecting brands and consumers are required

TOP 10 WEBSITES WITH THE MOST COUNTERFEIT MERCHANDISE

BASED ON DATA ON FAKE MERCHANDISE ON BEHALF OF CLIENTS OF BRAND-PROTECTION FIRM RED POINTS



Red Points 2017

"If customers receive a fake product of poor quality and do not realise it is a copy this will undermine the brand's reputation. If they realise it is a fake it will create uncertainty in the market and people will be reluctant to buy the product for fear they get a fake. Cheap copies also make the brand more prevalent and less exclusive, and potentially reduce its attractiveness."

This thorn in the side of the luxury market is getting thornier by the day. Amazon's decision two years ago to give Chinese manufacturers direct access to its marketplace exposed it to the world's biggest producer of fakes.

Meanwhile, the old review-based system of policing marketplaces, in which buyers rate sellers based on the quality of product and service, only goes so far. Traders with plenty of negative feedback can still ply their wares.

And when one is eventually shut down, they reappear quickly with a new name and amended offering.

Mr Smith says the main legal responses to fraud – 2013 EU Consumer Regulation, 1994 Trade Marks Act and 1988 Copyright, Designs and Patents Act, as well as search and seizure orders under civil law – can't combat the problem fast enough.

"The problem with these laws is the time and money it takes to deal with each infringer and the 'whack a mole' effect where as soon as you stop one seller they start up again under a different name or other sellers take their place," he says.

Clearly, proactive measures protecting brands and consumers are required. These can only come from a collaborative effort of brands, marketplaces, regulators and consumers. The latter group can play a part by reporting forgeries and not turning a blind eye because of the rock-bottom prices.

Marketplaces have come in for criticism for failing to deal with counterfeiters. It's true that pro-

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CASE STUDY

HOW ALIBABA GROUP TACKLES COUNTERFEITS



Alibaba Group is one of a number of marketplaces accused of dragging their feet over sales of counterfeits. But monitoring more than 100,000 brands and ten million small business accounts is not without its challenges.

Recently, founder Jack Ma called for tougher sanctions against fraudsters. Some in the industry applauded this as a sign of the company's commitment, while others considered it a way of shifting responsibility away from the marketplaces and on to law enforcement.

Whoever is right, Alibaba has taken steps to counter the problem. The business says: "Alibaba proactively monitors and automatically takes down counterfeit product listings on our platforms using industry-leading technology. In the 12 months ending August 2016, we removed more than 380 million IP-infringing product listings and closed approximately

180,000 storefronts run by counterfeiting criminals.

"We also work with law enforcement in offline investigations, providing them with evidence which they use to arrest and jail counterfeiting criminals. In 2016, we provided 1,184 leads to the police, assisted in the arrests of 880 suspects and the shutdown of 1,419 counterfeiting locations."

Earlier this year, it launched the Alibaba Group Big Data Anti-Counterfeiting Alliance alongside 20 brands, including Louis Vuitton and Samsung, to promote industry collaboration and the use of big data and technology to stop counterfeiters.

Last year it restructured its online IP enforcement tools to create a single Intellectual Property Protection platform, which streamlines the process for rights holders to submit notice-and-takedown requests across all Alibaba's marketplaces.

gress has been slow, partly because it takes a large investment to catch them all and because there's not enough incentive to do so; many provide an income stream to the sites that host them through the fees they pay.

But the biggest players have recently stepped up efforts to combat the crime. Notably Amazon and Alibaba have responded to criticism with action.

"Amazon is broadening its anti-counterfeiting programme by letting brands register their logo and IP with the marketplace in a bid to make counterfeit products more easily recognisable, which could be a significant step in the anti-counterfeiting movement," says Helen Saunders, head of intelligence and operations at INCOPRO, a business helping brands protect their IP.

Mr Smith adds: "Amazon has a new scheme called Brand Gating, where certain brands cannot be sold on their platform unless you produce receipts from the brand owner and a letter confirming authority to sell.

"eBay runs Authenticate which may be useful for high-value items where you can pay a third-party expert to verify authenticity of a product like a £10,000 watch before buying it online."

But more can be done, according to Ms Saunders: "These platforms have big data at their disposal; if they employed the technology to better understand the problem and shared that intelligence with their counterparts, we would finally start to see a real crackdown on the sale of counterfeit products by tackling the manufacturers at the source."

On the whole, marketplaces need to work harder to counter the damage done by fakes. Brands have the power to penalise those who fail to act by withdrawing genuine products from listings, while governments also have the power to fine companies that indirectly facilitate fraud.

In the end, a solution will arrive when all parties work together to create one. Work has been slow to date, but it's moving in the right direction. ●

Implementing IP strategies

UK companies are well-known for lagging behind their European competitors when it comes to patenting their inventions



The European Patent Office's recent annual report reveals that UK applicants filed only 5,142 European patent applications last year compared to 25,086 applications from German applicants and 10,486 from the French.

"Many of the UK's small and medium-sized businesses [SMBs] do not realise the value of developing an effective intellectual property strategy. Others appreciate the value, but hit difficulties when they try to implement one," says Ed Round, a chartered and European patent attorney at intellectual property firm Marks & Clerk.

By taking a strategic view of how IP affects a business, alongside helping clients secure patent protection, Mr Round has seen the fruits of good and bad IP planning at all stages of business growth.

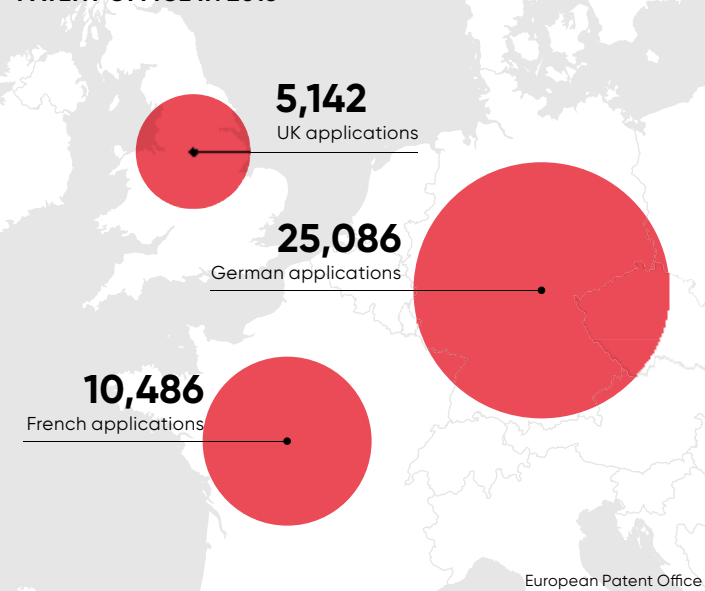
Businesses have different reasons for investing in IP. "Some SMBs protect their IP simply because they are looking for investment. Many investors refuse to invest in a company unless it has protected its crown jewels with IP rights like patents. Others look beyond the priorities of investors to how the protection afforded by IP will help them protect and increase their revenue streams," he says.

"Having a monopoly might mean they can sell their product for more. Or it might simply prove impossible to compete with cheap knock-off products, so securing a patent is the only way to ensure profit can be made at all."

Most SMBs will have a business strategy in place as they begin their product development process. They will have commercial objectives and a plan to achieve them.

"The key is allowing time at the beginning to develop an IP strategy that helps you achieve these ob-

NUMBER OF APPLICATIONS FILED AT THE EUROPEAN PATENT OFFICE IN 2016



“If you can ensure your IP strategy and its execution evolve alongside your business planning, your patents, trademarks and other rights should add value to your business

"By that point, it may be too late for a patent application if the product has already been made public. Even if the invention has not entered the public domain, it is difficult to draft a decent patent application in such a short time period and it will prove massively stressful, not just for the management, but for the product development and sales teams too."

Once a business has established its IP strategy, executing and maintaining it can also prove to be a challenge. "Establishing good internal processes will prove vital. Implementing an IP capture process ensures you know what your research and development teams are doing. Using your strategic business objectives as criteria, you can then make an informed choice about what to protect with IP rights," Mr Round explains.

"IP capture processes can also incentivise valuable innovation within your teams and help you keep your teams aligned with your business's strategic objectives.

"Ultimately, if you can ensure your IP strategy and its execution evolve alongside your business planning, your patents, trademarks and other rights should add value to your business."

As UK business looks beyond Europe for exporting opportunities, IP will only become more fundamental to high-performing SMBs' business planning.



ED ROUND
PATENT ATTORNEY
MARKS & CLERK

jectives – what you want to protect with registered IP rights like patents and trademarks, what territories you want to seek protection in, what further protection you want to secure as your research and development continues," says Mr Round.

"You can't start by creating an IP strategy in isolation and then bolt it on to your business plan afterwards."

Business owners also need to consider how to avoid being sued by a competitor. Just because they have their own IP rights in place, it doesn't mean they are not infringing other parties' rights.

"Time is almost always a challenge for business owners and management teams, but sufficient time needs to be invested by board-level decision-makers in developing an IP strategy that helps you fulfil your business objectives," he says.

"We sometimes have businesses coming to us days before a product launch saying 'we're going to market and we need a patent, and we need to know if we're going to infringe any competitor rights'.

For more information please visit www.marks-clerk.com

A new approach to accounting and reporting for long-term value

An increasing number of companies and investors realise the way value is defined, measured and reported no longer reflects how it is created. For example, most industries show intangibles such as intellectual property represent more than 50 per cent of market value, but this is rarely communicated to stakeholders



The traditional annual report and accounts need to evolve to reflect the reality of the modern business. A growing number of business leaders are concerned that the current version, which has its roots in the 19th century, doesn't tell investors and other stakeholders enough about the long-term value of the company. Nor does it give an organisation's leadership enough useful information from which to make informed decisions.

"Today there's a growing disconnect between what is covered in traditional reporting and the true value of a company," says Hywel Ball, UK managing partner for assurance, at EY, a global leader in assurance, tax, transaction and advisory services. "It's partly measuring the wrong things. In particular, it doesn't take into account intangible items such as intellectual property (IP) and human capital, which form a growing part of how companies are valued by investors and other stakeholders. The real concern here is that this disconnect, with the lack of clarity it brings, is exacerbating the breakdown of trust between the corporate world and society as a whole."

EY is collaborating with academics, business leaders and investors to develop a new approach to reporting, helping businesses to communicate the long-term value they are creating for their stakeholders. They have expressed concerns about the inadequacy of current reporting practices. As well as encouraging short-termism, the current arrangements are based on a narrow set of simplistic measures and a limited concept of value.

Meanwhile, the value of a company is increasingly being affected by issues of governance and trust, equity and fairness in society, and environmental pressures. As such these factors are becoming more relevant to organisational performance, and investors are demanding better disclosure of them and the way organisations manage the risks associated with them.

Barend van Bergen, an EY partner and part-time Yale fellow in the area of impact valuation, points out that as companies are being required to publish more pages of facts and figures in their reporting, rather than helping audiences to understand a company, this quantity of information can often have the opposite effect. Deluged with information, they can't see the wood that is the company's true, long-term value including its intangibles, for the trees of the detailed, but less significant, figures and regulatory requirements.

"Big data and new technology offers great opportunities here," he says. "They can help enable companies to measure and express the value of their intangible assets, such as an organisation's culture, by looking at a whole range of different metrics. They're able to convey a true sense of what an organisation is worth now and how its leaders are going to use their growing portfolio of IP and their vital human capital to grow the business and create long-term value for shareholders in a rapidly changing business environment."

However, this technology can also pose a threat to those companies who are slow to adopt it. Mr Ball says: "If you're not using it to



understand the true value of your company, you can bet that other organisations and investors will be doing so. As a result, a board can find that it has less and less control over the reporting of the company and the information that's being circulated about it."

The collaboration with academics, investors and business leaders will help to understand these issues better and develop a new approach to reporting to take into account long-term value and measure intangibles such as IP more effectively. The aim is to provide a simpler and more concise, but more insightful and holistic, picture of the organisation and how well it is creating the long-term value its shareholders are looking for.

"This new approach to financial reporting could offer major benefits to all parties. By adopting it, organisations should be able to communicate to investors more effectively and maintain a clear sense of where they're going by identifying opportunities to create value," says Mr van Bergen.

Organisations that adopt this new reporting model have an opportunity to improve their understanding of macro-economic, technical, social and environmental trends

so they can make better-informed decisions. They will also be able to account for intangible value drivers based on six key capital inputs – financial, human, social, natural, manufactured and intellectual.

There is a wider benefit too. As Mr Ball says: "Enabling businesses to communicate the long-term value

they are creating for their stakeholders should in turn help to re-establish the trust and the social contract between the corporate world and society as a whole – and that's increasingly important."

For more information, please visit www.ey.com/longtermvalue



HYWEL BALL
ASSURANCE MANAGING PARTNER UK
EY



BAREND VAN BERGEN
ASSURANCE PARTNER UK
EY

BETTER REPORTING, BETTER UNDERSTANDING, BETTER LONG-TERM VALUE

EY has worked with academics, investors and business leaders, to identify six criteria for effective long-term value reporting:

- 01** Clear about context – it must look at the industry as a whole plus business cycles, competition and macro trends.
- 02** Material to stakeholders – should be informative enough to help stakeholders make evidence-based decisions.
- 03** Core to purpose, strategy and business model – it must define what the organisation stands for and how that affects stakeholders and strategy.
- 04** Assured and trusted – information must be seen to be accurate and well sourced.
- 05** Provide a more complete view of value – as well as financial reporting, it should include information about all the key drivers of value.
- 06** Simple to understand – the new reporting framework must be more transparent, concise and understandable.

ARTIFICIAL INTELLIGENCE

Computers put IP law in the dock

The question of whether a computer should be recognised as the creator of a patentable invention is vexing intellectual property lawyers



MARK FRARY

Ask a child what an inventor looks like and they will probably describe someone in a moth-eaten white coat with wild hair, mixing colourful chemicals and turning dials on bizarre machines in a makeshift laboratory.

But ask the same question of a child in the not-so-distant future and they might instead describe an inventing machine, a computer powered by artificial intelligence (AI), to which humanity has outsourced all innovation.

As AI becomes more powerful, the role it plays in the creative process

becomes more problematic, particularly for those involved in crafting intellectual property (IP) laws.

IP laws are usually conceived to encourage innovation and economic growth, to offer fair compensation for creative work or to respect the dignity and honour of the creator.

“Like most legislation, [IP law] is about pragmatic compromise between different stakeholders with different ideals and objectives,” says Carrick Flynn, research project manager with the University of Oxford’s Future of Humanity Institute.

“It is better to continue to frame IP as requiring intermixing with human ingenuity and creativity.

The product of an AI system in this framework is two steps removed from this intermixing and therefore should not be owned any more than the owner of a paintbrush should own whatever is painted with it.”

Dani Kramer, a patent attorney with Mathys & Squire, says the current IP law system is not geared up for AI.

“It is always a bit behind the curve,” says Mr Kramer. Much of the patent law currently in force dates from the 1970s, before the rise of personal computing and the internet, let alone AI.

Patent disputes usually arise when a product becomes successful and a disgruntled inventor challenges the company producing it

because they were not properly cited, were poorly compensated or claim they did not assign their rights to the company.

Now consider the world of AI. “Google has lots of elaborate algorithms for running search and maybe one of those algorithms will invent a new and better algorithm. At some point, Google may come before a court when they try to enforce a patent. Would the other side say that Google doesn’t own that because it had not properly tied up ownership of that invention?” asks Mr Kramer.

Ashley Winton, a technology and cyber law attorney with Paul Hastings, says: “Although the discussion around intellectual property generated by AI is new, the concept has been around for some time. Computers have long generated music and artwork without specific direction from humans, and in the UK there are already provisions in the Copyright, Designs and Patents Act 1988 for the ownership of copyright in computer-generated works. The author of that work will be the person who commissions the work.”

The US Copyright Office is clear that to qualify for authorship, a work must be created by a human being. Its compendium of practices now specifically rules out photographs taken by monkeys for example, a reference to a 2011 monkey selfie case. Interestingly, the same chapter rules out registering works produced by a machine or mechanical process that operates “without any creative input or intervention from a human author”.

Yet consider the Cybernetic Poet software created by Ray Kurzweil, who popularised the idea of singularity that the creation of an artificial superintelligence will lead to runaway innovation.



It is important for regulators to come up with rules that promote certainty

The Cybernetic Poet analyses the works of a particular poet, creating a language model which is then used to write original poems. Who, then, should own the copyright? The original poet, Ray Kurzweil or perhaps the computer itself?

AI is now routinely used in many areas of product design, from pharmaceutical and biotech companies designing new drugs to aerospace manufacturers creating innovative, fuel-efficient planes.

If we extend the Cybernetic Poet concept to product design you begin to see the challenges facing those with an interest in IP.

IP law expert Professor Ryan Abbott of the University of Surrey believes that companies are not disclosing the involvement of machines in the creative process “for fear of making inventions unpatentable”.

“I have advocated recognising the computer as inventor,” says Professor Abbott. “It is the cleanest option and most consistent with how we treat property and would result in the most innovation.

“It is important for regulators to come up with rules that promote certainty. We will eventually get to a singularity of invention. If one looks not too far into the distance, where computers are developing their own software and have the ability to exponentially improve themselves, it takes us into a very different world.” ●

CASE STUDY

MONKEY SELFIE



The US Copyright Office in 2014 declared that only content created by a “human being” would be registered as an original work of authorship. The ruling followed a lawsuit involving a photo of a macaque monkey by British photographer David Slater and Wikimedia Commons, with the latter claiming it had the right to use the photo as it had been taken by the monkey itself.

The US Copyright Office also added that copyrights cannot be registered for works “produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author”.

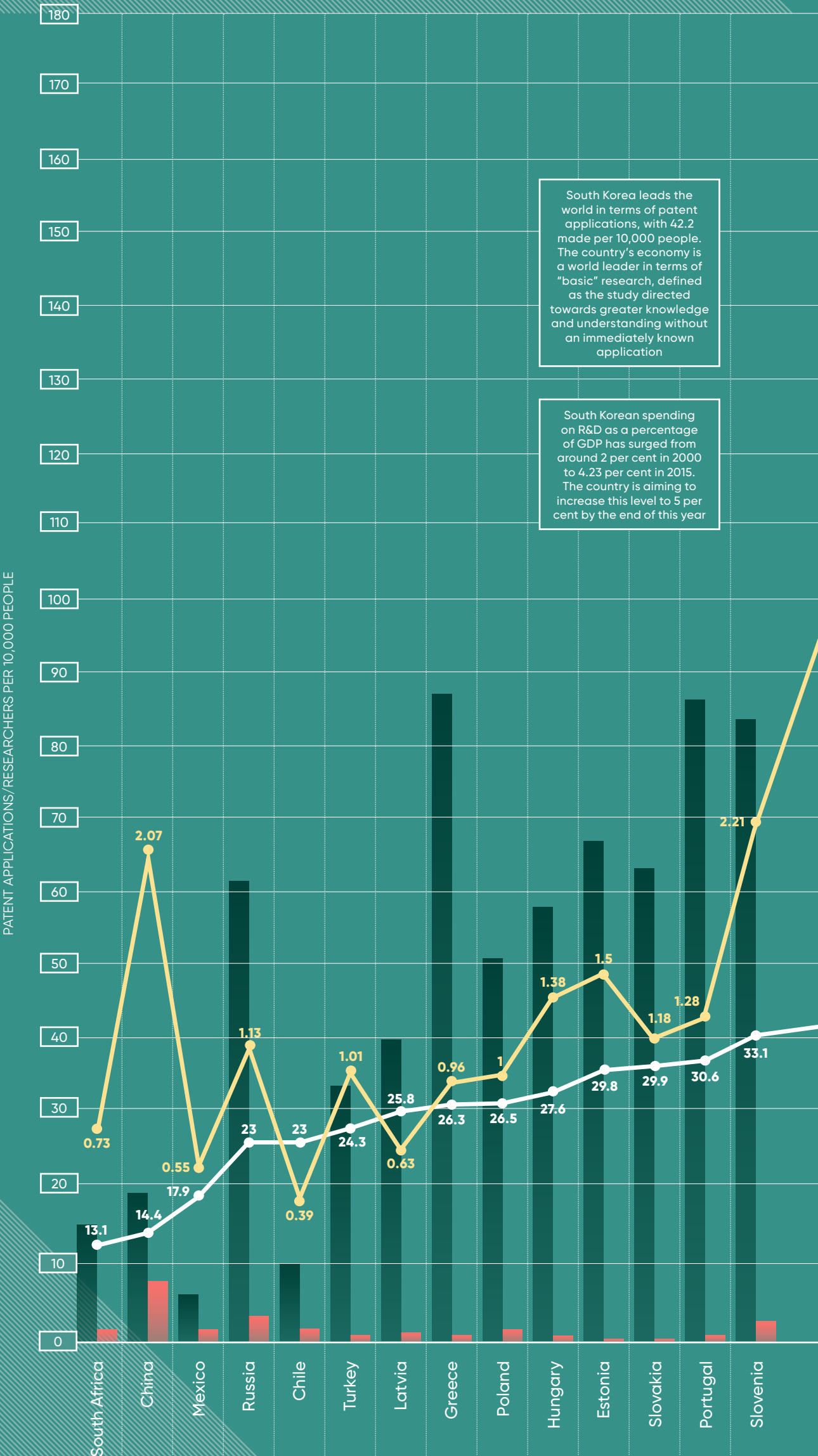
R&D AND THE ECONOMY

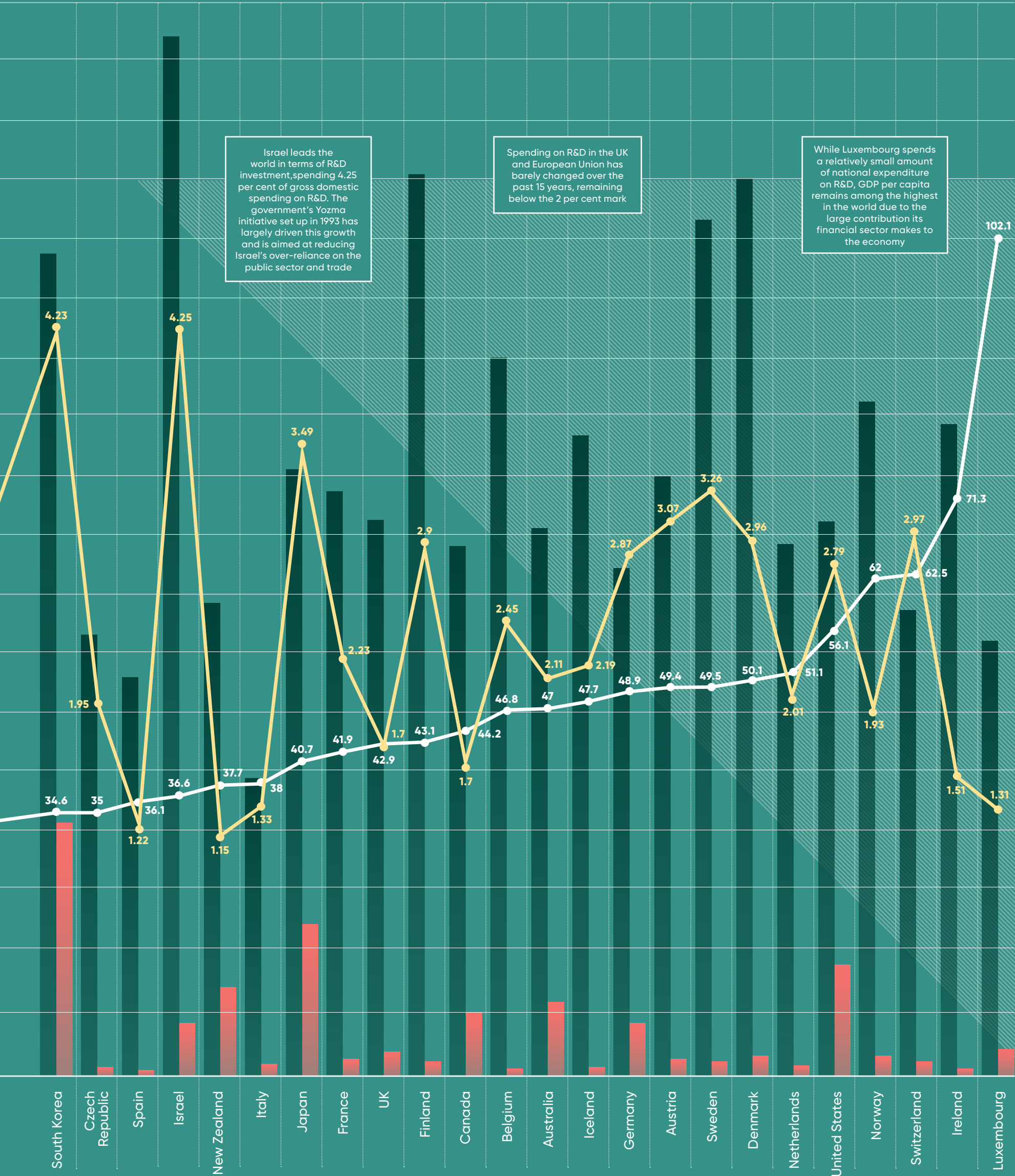
The positive correlation between national spending on research and development (R&D), patent applications and economic growth shows just how important R&D can be to the global economy

Gross domestic spending on R&D is defined as the total expenditure (current and capital) on R&D carried out by all resident companies, research institutes, and university and government laboratories in each country. It includes R&D funded from abroad, but excludes domestic funds for R&D performed outside the domestic economy

- Researchers
- Annual patent applications
- 2016 GDP per capita (\$k)
- Gross domestic spending on R&D (% of GDP)

World Bank/OECD/UNESCO





SOCIAL MEDIA



Robert Nickelberg/Getty Images

Protecting IP from bloggers and tweeters

Social media, with possible infringements of intellectual property rights online, has added an extra layer of complexity to the law

CATHERINE BAKSI

The world of social media presents most of us with an opportunity to waste time online, checking out Donald Trump's latest presidential profundities, keeping up with Kardashians or marvelling at the humanity pouring forth from Katie Hopkins.

For lawyers, it presents the next frontier in the battle to protect intellectual property (IP) rights and prevent infringement by third parties seeking to use images, brand names or slogans to imply an association with big sellers to increase their own exposure or peddle downright dodgy gear.

While law moves slower than technology, Kostyantyn Lobov, an IP lawyer at media firm Harbottle & Lewis, says the law in England and the European Union has done a "reasonably good job at keeping up with the explosion in popularity of social media".

The growth of online commerce, where searching for a single word will drive customers to a website and that word will often be trademark, says Peter Brownlow, an IP lawyer at Bird & Bird, has propelled trademark protection to board level.

And, in an attempt to protect IP rights on social media sites, he says there has been a trend to file trademark applications for hashtags – a word or phrase preceded by a hash sign (#) used to identify messages related to the same topic – connected to their products and brands.

To prevent "ambush marketing", where rival companies seek to associate themselves with an event for which they are not the official sponsor, ahead of the 2016 Olympics, the United States Olympic Committee added hashtags to a list

of words associated with the games that they had already trademarked and sought to prevent commercial users from referring to them, or to #Rio2016 or #TeamUSA.

The rules for trademarking a hashtag, says Sally Britton, IP partner at Mishcon de Reya, are the same as for any other trademark. Just as distinctive slogans or words that have become associated with a brand, such as Carlsberg's "probably" or Nike's "just do it", should have been registered as trademarks, similarly associated and distinctive hashtags can be registered.

Research by Thomson Reuters CompuMark showed that 1,398 applications were filed globally during 2015, up from seven in 2010.

While internet users are entitled and often encouraged to refer to a brand's trademarks and hashtags on social media, a line is crossed, says Jo Joyce, an IP and media lawyer at Anglo-German firm Taylor Wessing, where they seek to do so for their own financial gain or misleadingly to imply an association with the brand.

Jo Farmer, head of brands and IP at Lewis Silkin, says: "The days are gone when you can think about social media in a different way from the offline world. All the existing rules that protect IP rights offline, apply online." But, she adds, because IP protections have developed on a territorial basis, the global nature of the internet can add difficulties.

When it comes to policing unauthorised IP use there has been an ongoing battle between brand owners and online platforms about where the responsibility lies, says Mr Lobov.

Historically, the English and EU courts have sided with the platforms, but in the last few years, he says, that has begun to shift.

Platforms such as Facebook, Twitter and Instagram have developed their own take-down facility where brand owners notify them of infringement, which can be very prompt when issues are clear-cut, says Ms Farmer.

The scale of the task is a challenge. "You can't have a team of lawyers scouring the internet all day," says Mr Brownlow. Thankfully, internet monitoring systems such as NetNames and Yellow Brand Protection come to the rescue, scraping the internet and sending automated take-down notices.

When it comes to enforcement, warns Ms Britton, companies should be mindful of their approach. BrewDog sparked a social media backlash after it threatened legal action against a music promoter who wanted to open a bar called Draft Punk, which the brewer claimed infringed its rights over the word "punk".

Ownership of a Twitter "handle" or id, says Ms Joyce, can be an issue and is cropping up in employment contracts and IP disputes.

After journalist Laura Kuenssberg left the BBC for ITV in 2011, there was frenzy over the ownership of her Twitter account, @BBCLauraK and 67,000-strong followers, before the BBC allowed her to transfer her account and followers to @ITVLauraK. She later returned to the BBC.

And in 2012, US mobile phone site PhoneDog sued former employee Noah Kravitz when he left, taking his 17,000 Twitter followers with him. The company alleged misappropriation of trade secrets, arguing that the Twitter following was akin to a traditional customer list.

The case settled, but it illustrates the importance of having policies in place in advance, says Ms Joyce. It is critical, she says, not only in relation to IP protection, but

from a brand and reputation management perspective.

"People treat social media in a casual way," she says, putting account passwords on office notice boards or giving responsibility to junior members of staff, not realising that carelessness from within poses a greater risk than an external attack from hackers.

More positively, from the brand owners' perspective, social media can be used as evidence in IP litigation, says Ms Britton, as in the dispute between pop star Rihanna and clothing store Topshop.

Used effectively, social media can be the IP lawyer's friend, rather than just causing them a social media headache. ●



In an attempt to protect IP rights on social media sites, there has been a trend to file trademark applications for hashtags

‘The UK government should treat IP as a priority and shield brand owners from potential, negative impacts of Brexit’

ETIENNE SANZ DE ACEDO
Chief executive
International Trademark Association

The UK looks set to leave the European Union and the single market by the summer of 2019. There are a number of factors for UK companies to consider ahead of the country's departure to ensure their businesses can survive, and indeed thrive, post-Brexit.



Moreover, this may prove critical for the UK to retain its place as one of the world's most innovative economies.

The Global Innovation Index 2016, a report co-published by Cornell University, INSEAD and the World Intellectual Property Organization, placed the UK third among the 128 countries featured in the study. It is becoming increasingly clear to business leaders and policymakers in all corners of the world that innovation is the key driver of competitive advantage and economic prosperity. In its synopsis of the UK, the report identified “creative outputs” as one of the country's key strengths. Let's not forget, creativity breeds innovation.

Looking broadly at intellectual property (IP), innovation has traditionally been associated with patents and technology, but there is a real nexus between brands and innovation, in the sense that brands can stimulate innovation and, at the same time, pave the way for innovation to take hold.

No doubt, innovation, driven by brands to remain competitive, is not only beneficial for companies and the national economies in which they operate, but for consumers too. Innovation leads to new products and services, new technologies, greater efficiencies, and to solutions to all sorts of problems.

However, it is critical that companies of all sizes, including startups and small businesses, do not overlook the role that their trademarks, which serve to protect both their brands and their customers, play in the shopping aisles and in their ability to remain innovative. Trademarks not only enable consumers to make quick, confident and safe purchasing decisions, they promote freedom of choice and, in doing so, encourage vibrant competition in the marketplace.

If it is not navigated carefully, Brexit could undermine the ability

for UK brand owners to leverage their trademarks effectively by limiting their market access. The impact of Brexit remains uncertain and is largely dependent on the terms of departure that the UK government

is able to negotiate with the European Council. Prime minister Theresa May has said the UK leaving the EU also means leaving the single market and that a new free trade agreement with the EU will be sought. Such agreements usually contain provisions on IP rights.

For trademarks, we do know that the system of registration and protection is unlikely to change until the UK actually leaves the EU. Following Brexit, however, there may be a number of changes for brand owners. For one, the UK will no longer be part of the harmonised European Trademark Regime. As a result, EU trademarks will no longer offer protection in the UK. This will be a big problem for any business having a registered EU trademark, but no corresponding UK registration covering goods or services sold in the UK, particularly where that business wants to continue to use its trademark in the UK after Brexit.

The UK government is considering various options to deal with the gap in trademark protection brought about by Brexit. This includes a possible transitional system in which EU trademarks would be converted to UK trademarks that offer protection in the UK only. It is unclear how this system would operate. The conversion could kick in automatically or trademark owners could be required to make a separate application for which there may be an associated fee.

The need for businesses to enter the marketplace, and to register and use their trademarks, will remain necessary no matter how the political landscape may change. In the two years of negotiations ahead, the UK government should treat IP as a priority issue and work to shield brand owners from the potential negative impacts of Brexit. This will support innovation and allow the UK economy to remain competitive in the post-Brexit world.

Protect against IP threats

The cloud is revolutionising computing and driving digital transformation, but like any new frontier it presents opportunities and risks

Digital technology in the cloud is profoundly changing the way we live and the way businesses and organisations operate, offering huge benefits for users in flexibility, reliability and innovation. It allows them to harness the power of big data to reach new audiences and customers.

To some degree, every company, whatever its sector, is now a digital business. It is estimated that the cloud will generate more than \$1 trillion in IT spending by 2020, according to research firm Gartner.

One of the features that makes the cloud so attractive is that it relies on shared environments and an ethos of collaboration that harks back to the early days of the world wide web.

However, moving to the cloud also brings possible hazards and, although most users are aware of the importance of cyber security and privacy, there is less understanding about the risks to intellectual property (IP).

Cloud users rely heavily on IP, whether they are retailers or technology pioneers in the internet of things, but many do not have an IP strategy and may be unaware of their vulnerability to litigation.

“As the cloud grows in size and sophistication, patent trolls are growing bolder and posing a significant potential threat to the unwary

Lawsuits between technology companies are a fact of life as we have seen in the legal battles between mobile phone companies over many decades and just recently between rival driverless car developers.

But there is another threat to IP that puts many cloud users at risk and that is from so-called non-practising entities (NPEs), commonly known as “patent trolls”.

NPEs do not make or sell products or services, but hold a portfolio of technology patents and sue others for alleged patent breaches.

The risk for companies on the receiving end of litigation is that, if they refuse to pay royalties or a cash settlement, they could be sucked into years of expensive legal action.

NPEs are getting more aggressive, which can be intimidating for cloud users who do not have expertise in

this area. A recent study by Boston Consulting Group found a 22 per cent rise in cloud-based litigation over the past five years.

There is a real concern that abusive activities by IP trolls will not only damage individual cloud users, but will stifle the innovation of the cloud itself.

Microsoft's Azure cloud computing service is among the world's largest and has launched what analysts have praised as the industry's most comprehensive protection programme against the threat of IP litigation.

Nicolas Schifano, senior director of cloud and IP strategy, says: “At Microsoft, we heard directly from our customers about concerns they have navigating IP risks in the cloud. We want to support businesses of all sizes as they take full advantage of the digital opportunities in the cloud and ward off unwarranted patent litigation so we can encourage an ecosystem where developers, entrepreneurs and enterprise can innovate with confidence.”

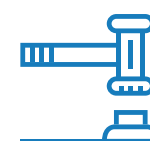
The Microsoft Azure IP Advantage programme forms a three-way defence against opportunistic patent litigators, offering protection to big corporates and small companies alike.

It offers Azure customers uncapped indemnification which will include any open source technology – so important to the development of the cloud – that powers Azure services.

Customers will have access to 10,000 Microsoft patents on which they can draw to defend themselves against lawsuits.

And Microsoft has pledged that if it transfers patents to a non-practising entity in the future, they cannot be used against its customers.

The launch of Azure IP Advantage has been welcomed by customers including carmaker Toyota, toy company



22%
rise in cloud-based litigation over the last five years



35%
increase in acquisition of cloud-related patents from non-practising entities (NPEs)



40%
increase in patents issued by the European Patent Office



130%
increase in transfer of cloud patents to NPEs since 2011

Mattel and smart meter maker Itron.

As the cloud grows in size and sophistication, patent trolls are growing bolder and posing a significant potential threat to the unwary.

Mr Schifano concludes: “We can help Azure users deter legal attacks so they can focus their energy on growing their businesses and serving their customers rather than worrying about lawsuits.”

For more information please visit azure.microsoft.com/en-us/overview/azure-ip-advantage



THESE BASELESS LAWSUITS ARE EXPENSIVE AND DISTRACTING. WORSE, THEY MAY BLOCK A COMPANY'S ABILITY TO INNOVATE, OPERATE AND SUCCEED.

LEGAL BATTLES

Eight times when David beat Gol

Lady Justice wears a blindfold, holding her scales to weigh the law impartially, without reference to wealth, power or status. But can a minnow really win an intellectual property case against a better-funded adversary?

CHARLES ORTON-JONES

01 STARBUCKS V BEA'S OF BLOOMSBURY

What do you get if you cross a doughnut with a muffin? A duffin, apparently. This calorific hybrid became a staple of Bea's of Bloomsbury, a small chain of tea rooms in central London founded by Bea Vo. In 2014 Starbucks also started selling duffins and took Bea's by surprise when the supplier trademarked the name. Cue fireworks. Ms Vo whipped up support on social media: "No one should own the name duffin," she said. "Food inventions should be credited, not trademarked. I put the duffin recipe in my cookbook for a reason: so people could make them." The furore triggered a climbdown from Starbucks, which admitted it neither invented the duffin nor would seek to block rivals selling duffins.

LESSON Intellectual property (IP) needs to be original; putting jam in dough with a portman-teau is not enough.

02 EASYGROUP V EASY PIZZA

Entrepreneur Sir Stelios Haji-Ioannou can be a litigious chap and with good reason. He's turned easyGroup into a powerful conglomerate, comprising an airline, car hire and around 20 others businesses. All too often look-a-likes appear and he calls his lawyers. He almost always wins, but there are notable reverses. Pizza joint EasyPizza won a case in 2006 against easyGroup. David Hansel, the lawyer acting for the victorious minnow, says: "easyGroup cannot claim a monopoly over trading names beginning with the word 'easy'. This applies even where they have obtained a registered trademark, but are seeking to stop an earlier trader from using the 'easy' name." Mr Hansel's firm Hansel Henson now offers a specialist service for clients who are facing action from Sir Stelios, though the lawyer



01

The Starbucks "duffin"

warns: "If you are looking to rip off easyJet or easyGroup branding then please do not contact us."

LESSON An active IP strategy can keep out all but the most peripheral of threats.

03 MITCHELL V ALAMY

Most companies want to comply with the law. But for companies trading over the internet, the scale and volume of material can make it a challenge. Photo agency Alamy receives two million images a day, so struggles to verify the copyright of the images it then sells to clients. Photographer Eddie Mitchell challenged Alamy over unlicensed use of his aerial drone image of a school on fire. The picture was used by a number of newspapers and media outlets. Mr Mitchell took his case to Worthing County Court, settling out of court for £750. The original offer was £400. He also reached settlement with newspapers.

LESSON Vetting huge volumes of IP is tricky; out-of-court settlements are a good way to resolve errors.

04 TURTLE WAX V DODO JUICE

Can an IP conflict be down to sheer coincidence? That was the conundrum in the odd case of Turtle Wax v Dodo Juice. The pair are brands of car polish. In 2014, Turtle Wax unveiled



02

easyGroup founder Sir Stelios Haji-Ioannou

a new marketing wheeze in which customers would take a selfie in the bodywork of their shiny car, hashtag "reflectie". A brand new Ford Mustang for the best pic. Then up popped British brand Dodo Juice, claiming it was running an identical campaign with #reflectie. The duo fought in the press. Dodo Juice claimed they asked Turtle Wax for clarification, only to get a "cease and desist" letter. Turtle Wax's boss furiously denied being behind the letter, asking: "Why wouldn't they call Turtle Wax direct and have a civil conversation about the situation?" Slowly it emerged it really was a coincidence and both parties tacitly agreed to ignore each other until their campaigns had run.

LESSON Coincidences happen and it helps to ascertain facts before assuming infringement.

05 RHYTHMIX V SIMON COWELL

Music fans will know the old line "where there's a hit there a writ". The music industry is awash with IP infringement claims, some of which test the philosophical boundaries of legal theory. Even pop mogul Simon Cowell can get on the wrong side of the law, as he did when *X Factor* girl band Rhythmix was forced to change its name. Brighton children's charity Rhythmix claimed the band using the same name would cause confusion. The charity hired lawyers, ran a social media campaign and asked for an early capitulation. The campaign gained traction and Mr Cowell relented. While changing a band name is a risky tactic,

as TV audiences can be fickle in their support for reality-show stars at the best of times, the move paid off. The band became Little Mix, now boasting four platinum albums, four number-one singles and a Brit award.

LESSON Social media can be a powerful persuader.

06 NUEVAS TECNOLOGIAS V APPLE

The explosion of IP disputes around mobile phone technologies looked like holding up the entire smartphone industry at one point. A row between Nokia and Apple threatened to block the sales of iPhones and Apple successfully had the Samsung Galaxy Tab banned by a US court during a case. So it's surprising to hear of a tiny company winning against a major brand. Five-employee Nuevas Tecnologias y Energias Catala SL of Spain won a trademark infringement dispute against Apple over the design of its NTK android tablet. Apple initially made the Spanish authorities hold a shipment of 70 devices in customs for year. Nuevas struck back with a counter-suit. The small Spanish company emerged victorious in November 2011, offering a healthy reminder that size and wealth are no guarantee of victory.

LESSON It is possible to win against Apple and the iPad.

math and won against all the odds

07
NISSAN V NISSAN.COM

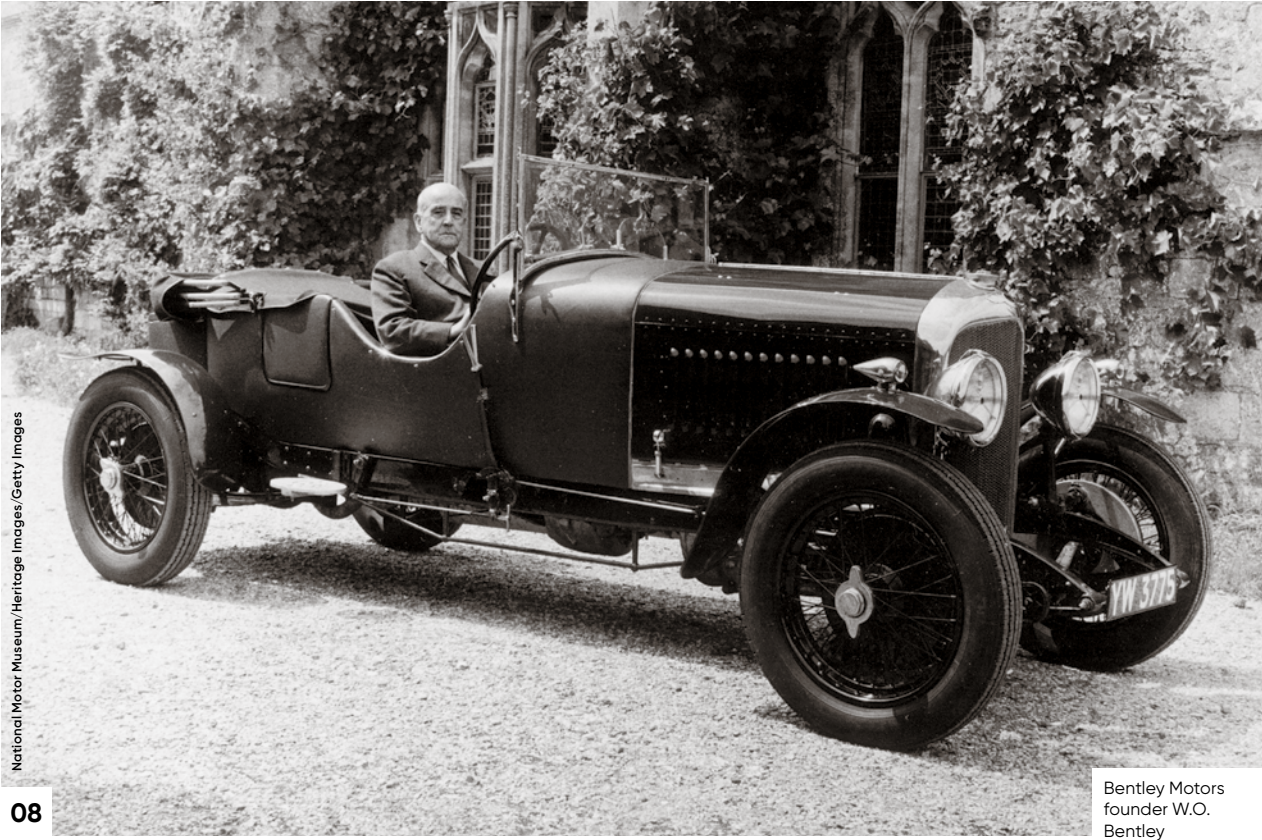
Log on to Nissan.com and you'll see the full case laid bare. An Israeli born entrepreneur by the name of Uzi Nissan came to the United States in 1976 and used his surname for a variety of businesses. In 1987 he founded and import-export business called Nissan International and in 1991 founded Nissan Computer Corp. In 1996 he registered Nissan.com and used the domain to offer internet connection services. In 1999 the motor company Nissan began legal action against the entrepreneur, asking for the domain and \$10 million in damages. Again and again the matter went to judgment. Each time Uzi Nissan won. Key to his argument is the fact that Nissan initially traded as Datsun in the US. He claims he intended no violation of a trademark which at the time was not in significant usage in the States. Today Nissan.com remains in the possession of Mr Nissan. The car company is forced to use NissanUSA.com and national variants.

LESSON Prior use is a strong defence.

08
BENTLEY MOTORS V BENTLEY CLOTHING

W.O. Bentley founded his car company in 1919 and won Le Mans five times in the next decade. The brand is now a subsidiary of Volkswagen and retains its founder's vision of matching aristocratic excess with engineering prowess. Bentley Clothing is an unconnected brand. Earlier this year, the car brand challenged the clothing brand, with Bentley Motors claiming it had used the Bentley mark for clothing since 1920 and had a "very high level" of goodwill. The hearing found for the clothing brand. The presiding official stated: "I do not accept that Bentley Motors have met the burden upon them to show that they have used their mark... during the relevant period." Christopher Lees, director of Bentley Clothing, said: "This battle has been so extreme, involving the CEOs of both Volkswagen and Bentley Motors, that a film producer has asked to make a film about it."

LESSON Use it or lose it. ●



08

Can a different framework of value enable greater trust in business?

Defining the journey towards more effective measurement and reporting of value

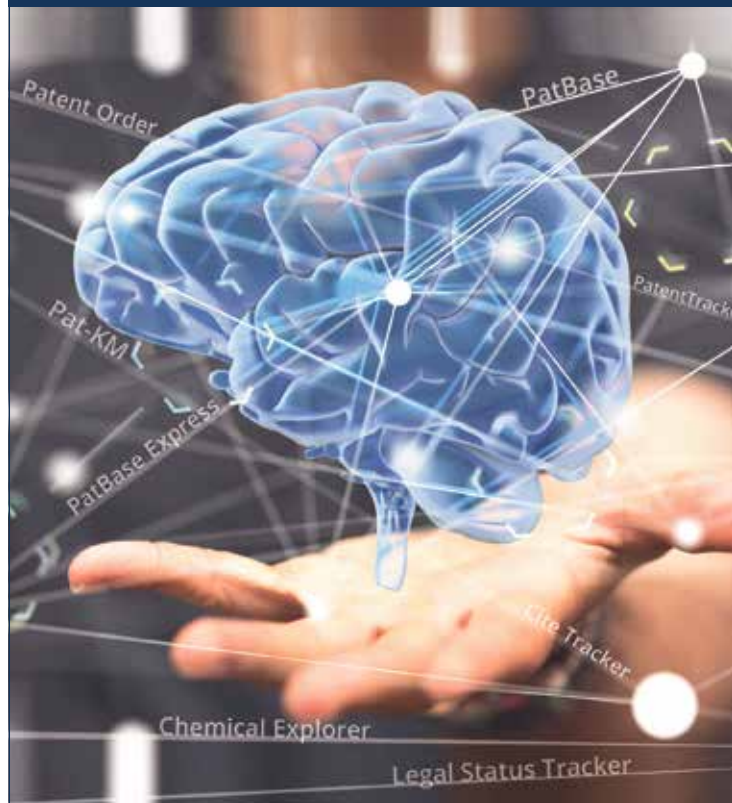
ey.com/longtermvalue

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The better the world works.



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TOPIC TITLE



Kevin Costner as Robin Hood

Merry men of the movies

The film industry shines a spotlight on the issue of copyright, protecting authors and studios alike

TOM PHILLIPS

If you thought Russell Crowe's dubious English accent in 2010's *Robin Hood* was the last time the world's most famous archer would grace the cinema, then prepare yourself.

There are currently four new Robin Hood movies in the making. Warner Bros, Sony, Lionsgate and Disney are all preparing new cinematic tales of Robin and his band of merry men, with Sony even planning a Marvel-style universe featuring Little John and Will Scarlett spin-offs.

After scores of movie adaptations dating back to 1908, audiences may feel the big screen has paid more than enough attention to the Sherwood Forest anti-hero. But Hollywood feels enough time has passed since Errol Flynn, Kevin Costner and Crowe took on the Sheriff of Nottingham to invest in a crop of remakes.

And there's something else going on too. For the studios, the story is a safe bet. Like Peter Pan, Frankenstein's monster and, more recently, Sherlock Holmes, Robin Hood is not covered by copyright.

Unlike an eighties TV series or a nineties book, no one owns the rights, dispensing with the need for an expensive licensing deal. Helpfully, the Robin Hood myth dates to at least the 16th century, so no such

barriers exist. Yet thanks to countless incarnations going back more than 100 years, the man who stole from the rich to give to the poor is one of the most enduring tales ever, fixed in the minds of those over a certain age, but apparently with enough purchase on their children's imagination for a reboot.

With four studios releasing movies on the same theme, keeping control of the intellectual property (IP) will be more essential than ever. Studios are meticulous in ensuring scripts and storylines are locked. A common tactic is to ensure all script drafts are marked so they can precisely track which copy is allocated to what person, with everyone under strict confidentiality obligations.

But despite this, mistakes still happen, as Simon Baggs, head of IP at law firm Wiggin, explains: "I once represented a studio in proceed-



Like Peter Pan, Frankenstein's monster and, more recently, Sherlock Holmes, Robin Hood is not covered by copyright

ings against a newspaper because a journalist there had been handed a script synopsis for a forthcoming film and had written an exposé.

"The studio applied for, and ultimately obtained, an order requiring the newspaper to disclose how it had obtained the storyline. In this case, the synopsis had been placed in a bin rather than shredded and had ultimately found its way to the journalist."

While no one owns the rights to the story of Robin Hood, things could still get sticky if the title is too similar to a previous work. When a proliferation of films on the same subject occur, studios can find it hard to come up with a sufficiently distinctive title that is both capable of protection as a trademark, while still identifying the film.

Get it wrong and lower-budget film companies may produce their own "mockbuster" with the same or similar title, in the hope of confusing consumers into buying the DVD.

Mr Baggs says: "It's surprising how common this is – some low-budget film companies have this as their business model."

If a title or character is under copyright, a major studio will clear the rights or face the financial penalty of having to settle with the author.

"I once represented a studio that had produced a film that it was about to release 'based on' a novel by an author who was still alive, albeit the author was in hiding from a terrorist group," Mr Baggs reveals.

"When the author found out, he made a claim for copyright and moral right infringement. The studio settled the case, but its negotiation position was weakened considerably by the fact that it had already made the film and had it ready for release."

Once released, the studios then face a copyright battle of their own, this time against piracy. The latest trend is the sale of set top boxes that look like an Apple TV or Amazon Fire, which give access to movies, TV and sports without paying a fee. ●

No insurance on your IP? You could be putting your company at risk

Intellectual property is becoming increasingly important and valuable, yet it's thought that less than 1 per cent of IP is insured



In today's highly competitive, knowledge-based economy, the hunger for innovation and fresh ideas is greater than ever. Ideas and intangible assets such as patents, copyrights, trademarks and designs, known as intellectual property (IP), now have as much value as tangible assets.

A look at the world's youngest self-made billionaires, such as the founders of Facebook, Snapchat or Airbnb, demonstrates how much an innovative idea that is well executed can be worth. However, with less than 1 per cent of IP thought to be insured, many businesses are not taking the necessary steps to protect these valuable assets.

"The increasing number of IP-related lawsuits each year and a rise in the damages awarded means businesses without IP insurance are playing a dangerous game that could cost them millions and lead to the destruction of the company itself," says Aoife Woulfe, an underwriter at specialist insurer Tokio Marine Kiln. "Today, a company's IP can relate not just to its brand and designs for products, but also to the processes and algorithms it uses to create its competitive advantage – all of which can be under threat."

Any business that is manufacturing, marketing or selling goods or services runs the risk of being accused of infringing the IP rights of a third party. According to a recent



report by PwC, average damages from patent lawsuits in the United States have surged to \$7.3 million in the past five years. In addition to possible damages, companies will need to foot the cost of legal representation, which the World Intellectual Property Organization estimates to be on average between \$3 million and \$10 million.

“Many companies are unaware that IP insurance even exists

For many companies, these legal fees alone are a cost too large to bear. "This is where IP insurance could be crucial in protecting a company's bottom line," says Ms Woulfe. "The insurance we offer at Tokio Marine Kiln covers representatives' fees and expenses as well as damages awarded, so CEOs and their lawyers can rest assured if they are subjected to an infringement case."

Patents are essential to ensuring a fair and ethical playing field. Registering a patent secures an invention or process, enabling the

owner to control its use and maximise profitability. However, there are companies that see the patent system not as a regulator, but as a potential revenue stream. "Businesses should be wary not only of potential lawsuits from competitors, but also from non-practicing entities, known colloquially as 'patent trolls'," says Ms Woulfe.

"Patent trolls are companies that generate income through patent lawsuits and licensing requests. These companies target businesses whose products or services have allegedly infringed one of their own patents. They will then approach the business and demand they stop using the process or product, or allow them to continue using the process in exchange for past and future compensation – sometimes with devastating financial consequences for the company in question."

The number of patents being filed each year is on the rise with more cases being brought to court and an increasing number of these suits are believed to be the result of patent trolls.

In the US, the ten parties that filed the most patent lawsuits in 2016 were all patent trolls, according to a recent report by Lex Machina.

"While patent trolls were previously only really an issue in the US, they have begun to appear in the UK, the EU and Asia. The cost of



50m
patent rights in force globally



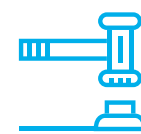
500%
growth in patent troll lawsuits in the past ten years



\$7.3m
average compensation awarded from IP lawsuits in the US over the past five years



\$3.3m
average cost of defending a patent troll lawsuit



10k+
companies have been sued by a patent troll

CASE STUDY

INSURING AGAINST PATENT TROLLS

When a letter from a patent troll arrived at the offices of Energetic Trading* threatening legal action and demanding compensation for patent infringement, the team understood how significant the effect on the business could be.

People far beyond the technology industry were talking about the \$22-million compensation bill that Apple had been ordered to pay Acacia Research Corp, but Harry Carpenter*, chief executive of Energetic Trading, which manufactures and supplies monitoring equipment for the energy sector, had never considered he might find himself at the centre of a similar legal battle.

Lawyers appointed to represent Energetic Trading advised it was

unlikely that any court would grant the trolls an injunction preventing them from making the component in question, so they decided to challenge the inflated royalty demand. After a long period of legal wrangling and escalating legal fees, Energetic Trading agreed to pay damages and legal fees to the patent troll totalling £2.5 million, significantly below the projected cost had they lost the case at trial.

Fortunately, the Tokio Marine Kiln intellectual property insurance policy that Energetic Trading had in place paid their legal costs and the damages, which enabled them to continue trading.

*Names are hypothetical and this case study is based on our experience of a number of clients.



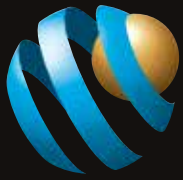
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UNDERWRITER
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defending cases from patent trolls could put a small company out of business, but patent trolls also pose a serious threat to large businesses, which can suffer a huge loss as a result of multiple cases," adds Ms Woulfe.

Many companies are unaware that IP insurance even exists, she says. "The IP insurance market is vital to any business providing goods or services, but many companies have been self-insuring this risk for years and are only just realising there is a possibility to transfer that risk to insurance," she explains. "We are working closely with businesses in all sectors, from product manufacturers to online retailers, to raise awareness and provide an important element of risk management via insurance."

With so much at stake for businesses in the UK and Europe, it's clear that companies of all sizes need to act now.

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PHARMACEUTICALS

Patents are the lifeblood of pharmaceuticals

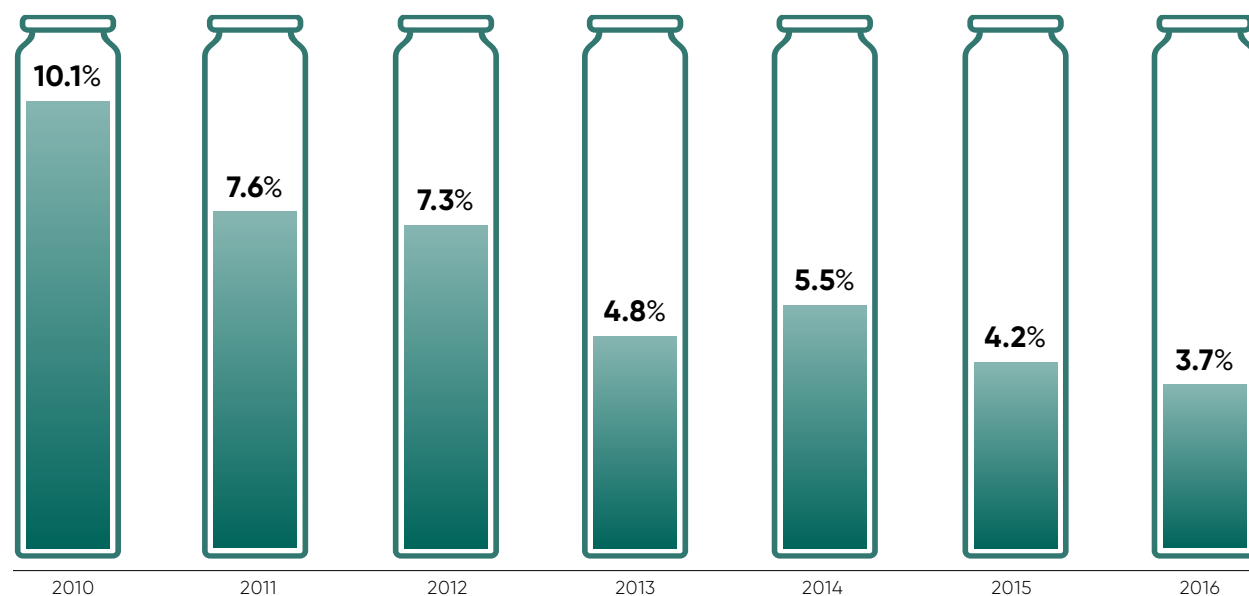
Safeguarding intellectual property is essential for pharmaceutical companies that need a monopoly period to recoup often substantial investment



Mitch Kezar / Getty Images

RESEARCH AND DEVELOPMENT RETURNS IN BIOPHARMACEUTICALS

BASED ON R&D INVESTMENT FROM 12 LARGE BIOPHARMACEUTICAL COMPANIES



Deloitte 2016

DANNY BUCKLAND

When it costs an eye-watering £1 billion to bring a major drug to market, it is easy to understand how protecting that investment becomes a prime focus.

Pharmaceutical companies are staffed by ranks of attorneys, and the intellectual property (IP) specialist is now a pivotal position in the research and development (R&D) cycle that keeps a company profitable and new drugs flowing to patients.

Tighter regulatory frameworks and even tighter purse strings controlled by healthcare systems are putting the squeeze on pharma returns and limiting R&D budgets. Figures from analysts Deloitte in 2016 reported projected return on investment was at a six-year low while development costs had risen by almost a third.

The litany of market changes is vexing for the industry. The generation of blockbuster drugs, with massive returns, has ended, national healthcare budgets are receding, traditional management methods are being challenged and new players, such as electronics and software companies, are entering the arena.

“For pharmaceutical companies, the patent system is its lifeblood and it simply wouldn’t survive without it,” says Simon Wright, a patent attorney with J A Kemp and chairman of the Chartered Institute of Patent Attorneys’ life sciences committee. “The cost of getting a product to market is high and there is a high failure rate, so you are not going to get investment unless you can protect your product and innovation. Quite frankly, it would all collapse without good IP.”

Companies get 20 years’ patent protection, but the clock starts ticking from the moment a product details are filed. It can take up to 15 years to reach a market launch although a supplementary protection certificate, extending exclusivity by up to five years, can be obtained.

But once that patent expires, other companies can start selling generic copies of a drug, often at discounted rates as they have not had to make the initial discovery outlay, so a lucrative market can disappear quickly.

The stakes are high and AbbVie is fighting on multiple fronts to protect its blockbuster arthritis drug Humira, which generated \$14 billion revenue in 2016, from generic alternatives as its initial patent expires.

Further battles are also expected along with test cases over who owns the IP to patient data across healthcare and lifestyle sectors. In March, for example, adidas filed a lawsuit against sport shoe maker Asics over wearable fitness tracker technology rights, claiming ten IP patents had been infringed.

Susie Middlemiss, partner and head of the intellectual property practice at law firm Slaughter and May, which acts for major pharma firms, sees an “exciting and expanding world” of healthcare IP.

“IP is growing everywhere, including healthcare, and it is an increasingly competitive landscape with more diverse companies involved,” she says. “There is a huge amount of data being used in healthcare and in the NHS to model patient care, and that is all underpinned by IP.

“If there wasn’t IP, then companies would start to work in secret on products that couldn’t be reverse engineered and areas where secrecy couldn’t be maintained would be neglected. A company needs that monopoly period to recoup its investment to ensure it can continue with its R&D programmes.”

The profile of pharma business has been changing over the last 20 years

with niche startups, specialist genetic companies and spin-offs from academic institutions generating a large proportion of the innovation and discovery work that was once contained in-house. With new fields such as electronics and computer software driving medical devices and data collection, the IP field has become complex.

“IP has become harder to pin down,” adds Ms Middlemiss. “In the old days, the pharma company would simply buy a product or the company, but those companies are now hanging on to their IP and licensing it to the bigger companies which requires a lot more structuring to deals.”

The challenges presented by new technologies to healthcare IP and licensing was a featured topic at the recent Licensing Executives Society International Conference in Paris, attended by members from 33 national societies and leading figures from industry.

IP in healthcare is growing steadily with the government’s Intellectual Property Office, which manages patents, trademarks and copyright, reporting that healthcare patents in the UK had risen from 1,098 in 2011 to 1,358 in 2015.

A prime example of IP working to the advantage of healthcare was highlighted when British pharma giant GSK joined forces with Google’s life sciences vehicle Verily to develop and commercialise implantable devices that can modulate electronic signals along nerves in the body to treat some chronic conditions. The joint venture, known as Galvani Bio-electronics, creates synergy between GSK’s pharma traditions and the disruptive influence of electronics.

So many industry experts believe IP is the key to a successful company as it is a powerful tool for R&D, as well as revenue generation, allowing non-core products to be licensed out to fund other research. It is even more important for the myriad of startups populating healthcare that need pay as much attention to IP to protect their assets as they do to innovation and discovery. ●

CASE STUDY

CANADA GETS TOUGH ON PHARMAS



AlexLMX / Shutterstock

The Canadian government is probably one the last suspects when it comes to charges of stifling innovation, but the pharmaceutical world is still struggling to deal with its hard-line approach to patent law.

A major legislative shift has made it tougher for companies to get patents and the administration has even revoked 20 existing patents with a stringent interpretation of internationally recognised statutes.

The controversial Promise Utility Doctrine was adopted a decade ago and has been gathering pace as government and big pharma face off in an increasingly hostile confrontation.

The Canadian courts believe the pharmaceutical sector has had it too easy so has ramped up the threshold of the standard clause that a new drug should be “useful” or “capable of industrial application” by asking companies to detail how useful their inventions will be as commercial products.

The fallout has been spectacular and costly with the Canadian division of UK company AstraZeneca recently watching the patent for its widely used gastrointestinal reflux drug, Nexium, being ripped up.

The approach has caused dismay across the industry which believes established checks and clinical trials prevent speculative patent applications.

“The courts have turned utility into a test of an inventor’s ability to predict the future,” says Philip Stevens, of Geneva Network, a UK-based public policy research organisation specialising in international intellectual

property health and trade issues.

“This test puts things backwards. An invention and the patent on it are only the first step on the way to a useful commercial product. Innovators rely on patents to secure the investment they need to fully test and commercially develop their inventions into products. Businesses and investors need a patent before spending money on the testing required to develop an invention into a safe and effective commercial product. This is stifling innovation.”

Eli Lilly recently lost an arbitration hearing under the North American Free Trade Agreement to overturn the Canadian courts revocation of its drugs Strattera, used with attention deficit hyperactivity disorder, and the anti-psychotic Zyprexa, and to seek £300 million in damages for lost profits.

But Canada remains an outlier in its approach and experts believe the doctrine will not spread to Europe.

Simon Wright, a UK and European patent attorney at J A Kemp, says existing tests and interpretations of “industrially useful” are adequate, adding: “Companies already have to show that a set of compounds has the affect ascribed to them and if you cannot prove that, you don’t get the patent. You need scientific and technical proof and support.

“Any changes would have to come at European level and I don’t think there will be any stomach for it here. It sounds like a somewhat unjust extra hurdle as it is impossible to predict exactly what will happen over the long cycle of drug development.”



Quite frankly, it would all collapse without good IP

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