



# Unlocking the True Value of Intellectual Property

By Peter Matthews and Lloyd Mullenger

*There is clear evidence that it is getting increasingly difficult to create and register meaningful trade marks, let alone find matching high level internet domain names.*

*Acquiring or licensing existing IP based on consumer-friendly 'real language' becomes more and more attractive. Additional benefits include a much shorter time-to-market.*

**W**hat have Viagra and Coke Cola got in common? Literally speaking nothing, but as brand icons, they are rated as two of the strongest trade marks in their marketplace. The pharmaceutical industry is synonymous with catchy and memorable brand names and with every good reason. New drug discoveries can often have a short monopoly, particularly if the time from patent application to eventual marketing of the product is long. Pharmaceutical companies need to establish a brand identity that not only establishes an immediate impact but carries a lasting identity long after the patent has expired.

Strong trade marks are the foundation for strong brands, irrespective of whether they are prescription drugs or over-the-counter medicines. Unlike patents, trade marks can be renewed indefinitely so there should be ample opportunities for companies to build some form of sustainable competitive advantage. Trade marks should not only be chosen for sound commercial reasons, but they must also identify and differentiate the company's products and service offerings.

It is a routine exercise for branding consultancies to test anything from ten to twenty brand names for each drug, making sure that each is acceptable in a multitude of languages and cultures. Searching global databases first to make sure that these names have not already been registered as trade marks is, again, routine but a time consuming and expensive business. These databases can take up to a year to research, and the whole branding process typically taking two to four years to complete.

Intellectual property rights are a major source of wealth creation in our modern global economy and continue to grow in strategic significance. It surprises no one that the industry takes branding very seriously. However, patients are far more interested with the efficacy of a medicine than they are with its ingredients, and names need to create

positive associations that reflect the benefit of the treatment.

Viagra is a good example of effective branding; it's a strong, powerful name which resembles nothing of its generic name (sildenafil) or the condition it treats. What Pfizer has created is a sense of familiarity and trust which, in turn, encourages brand loyalty. Positive associations with a brand name have far reaching benefits for any company.

Another good use of branding creativity was GlaxoSmithKline's antirheumatic prescription drug Ridaura. Developed in the 1970s, it was not exactly a household name but one that was cleverly created to recognise a major leap forward in the treatment of the debilitating disease rheumatoid arthritis. Ridaura (auranofin) is an oral gold preparation. Gold is a very effective treatment for rheumatoid arthritis which, until the development of Ridaura, could only be given by injection.

*With its antirheumatic drug 'Ridaura', GlaxoSmithKline achieved three trade marks in one.*

Although there is a slight association with its generic name, Ridaura was ostensibly created from three areas; 'RID', remission inducing drug, 'AU', the chemical element for gold, and 'RA', rheumatoid arthritis.

Not only was the branding strong for GlaxoSmithKline, but it also capitalised on another pharma marketing first by developing a tablet that tilted, enabling patients with the disease to easily grasp the tablet from a flat surface. In addition to the

trademark on the name of the drug, the design of the tablet and the term 'tiltab' were also trademarked; 3-in-1! Had this drug become as widely prescribed as its stable mate Tagamet, generic equivalents would have had a tough time competing successfully.

But there are many whose branding fails to meet the grade. One of the reasons is that branding options are often restricted by having to use names that have been registered as trade marks very early in the product development process, often in parallel with the patent filings. This means that the name is set long before the product comes to market and before customer benefits are properly known or the value proposition defined.

This has led to some fairly uninspiring names that don't sufficiently and clearly differentiate the 'branded' product from the generic imitators once the drug comes off patent. There is an increasing need to grow pharmaceutical brands beyond single efficacy drugs with life spans well beyond their patent life. This requires fmcg brand thinking, with sub-brands, supporting variants and even attached services. With these new requirements the naming of new products becomes much more critical in the lifetime value creation/realisation process.

A rose by any other name; another difficulty facing the industry is that the chosen names may end up being rejected by the regulatory authorities.

Organisations such as the US Food & Drug Administration (FDA) not only judge the safety and efficacy of drugs submitted by pharmaceutical companies, they also judge the name. One of the reasons for this is that the names submitted could be too close in their soundings to other drugs or to their generic names. In these cases, the names may be deemed to be "unsafe". Thousands of errors have been recorded when drugs sound alike - for example, Cerebyx which is an anticonvulsive and Celebrex, a non-steroidal anti-inflammatory.

A number of years ago, companies could get away with names that incorporated a large part of the generic name - for example, 'Loxatane' from loxapine'. But today, generic sounding names, or those that have a close association with their official name, are unlikely to be accepted. Had two recent blockbuster drugs paroxetine and fluoxetine (Paxil and Prozac) been trademarked with brand names that closely resembled "oxetine", the drug regulators would most likely have turned them down because they would eventually compete with the generic equivalents once they had come off-patent.

Additionally, brand names that relate to the drug's pharmacological function will almost certainly be rejected. This is because the regulatory bodies want to avoid a name that makes claims about the drug's efficacy. 'Erectus' instead of Viagra and 'Carcinocure' for Arimidex, AstraZeneca's breast cancer

treatment, would definitely be declined!

In 2004, it was reported that the FDA had turned down more than a third of the proposed names it received, and it is widely predicted that the rejection rate could grow higher. This, in itself, is creating huge costs for pharmaceutical companies. Clinical trials cost hundreds of millions of dollars and it is nothing for companies to spend a further million on branding and packaging, only to find the latter is wasted when the branding is rejected by the authorities.

Although the pharmaceutical industry appreciates more than most the value of intellectual property, the term in itself tends to remain excluded from CEOs' corporate business plans. One of the reasons is that many chief executives still regard patents, trademarks, copyrights, and other forms of intellectual property as legal matters best left to the corporate attorneys. However, if any chief executive is asked whether or not it is tolerable for shareholders to accept that valuable assets were potentially being under-exploited, the likely response would be that senior management strives for an efficient balance sheet and, as part of that, company assets are actively managed. Maybe the issue is that intangible means invisible, and those involved with Intellectual Property on a day-to-

day basis do not have the wherewithal to raise the subject of asset management as a strategic business issue.

If, as has been suggested by numerous writers, we now live in a 'knowledge economy' and if, as has also been suggested, the UK is the economy with (perhaps) the most to lose or gain from the way that it approaches its intellectual capital,

then the stage is set for a new form of business competition where intangible assets, rather than just physical ones, become a principal source of competitive advantage and shareholder value, and a critical measure of differentiating a strong performer from an average or poor performer. The world is changing; Intellectual Property management cannot simply be considered in isolation to the overall corporate business plan. Planning for the future demands that it must be an issue treated seriously by functional and business-unit leaders, as well as the corporation's most senior executives. But herein lies the challenge; it's one thing knowing that these intellectual assets exist it's quite another figuring out how to unlock their true potential.

If pharmaceutical companies adopt strict management procedures with their tangible assets, such as property deeds, then why don't they manage their Intellectual Property assets as strategically?

It is often a case of old practices die hard, in which case Intellectual Property will rarely be considered as a strategic asset which provides potentially unique opportunities to be exploited for financial gain and competitive advantage. The challenge is to figure out the best way in which to unlock the hidden value of these assets.

To start with, pharmaceutical CEOs would be well advised to consider the following questions:

1. What sustainable competitive advantages do the company's Intellectual Property rights provide?
2. Can the intellectual property rights establish barriers to entry and, if so, how?
3. How can we identify under-utilised or dormant Intellectual assets?
4. What changes in organisational structure do we need to make in order to develop effective Intellectual Property strategies?
5. What is the approach we need to take to monitor the effectiveness of those strategies?

Since Intellectual Property should be treated as a major business issue, the Intellectual assets and sunk investment costs represented by trade marks, domain names and other proprietary rights should be proactively managed as a

portfolio.

In any portfolio of rights, they are made up of three parts:

1. Assets that are being actively used;
2. Assets where strategic decisions have been made to retain them, even though they may not be currently in use; and
3. Historic rights, old brands, and initiatives that did not proceed – known as the dormant Intellectual assets. Whilst this may be a grey area, it is one that provides hugely unrecognized and untapped opportunities. How much value is there waiting to be unlocked from those dormant rights? Is it acceptable to hoard them because doing nothing with them is seen as the safest option when, in reality, it's just the easiest one?

Where Intellectual assets form a large part of the intangible assets on a balance sheet, there should be procedures in place that strategically manage those assets. Even if it is not possible, or impractical, to manage dormant Intellectual assets proactively to create a profit, they should at least be managed to assess what benefits they can provide even if it is simply to cover the costs they incur to maintain.

*Some companies might be interested in acquiring an off-the-shelf solution from other companies that have already gone through the trade mark process.*

It is widely accepted that a good brand should bring to mind a set of related characteristics. These may include the kind of person who will use the product, the "personality" of the product itself ('Viagra' is a strong and robust name) and other characteristics that may have close associations with a country or culture. Ultimately, the association with these characteristics serves to create an attractive and lasting image of the product in the mind of the consumer. But what if appropriate brand names are unavailable or too expensive to invent?

Consider for a moment how much easier it might be if a company looking to create a portfolio of relevant protection could acquire, or perhaps even license, dormant Intellectual assets from a sector that it does not directly compete in. The time and costs associated with inventive name development, particularly in foreshortened timescales, only to find the names insufficiently protectable, or even worse unavailable at all, is rendered unnecessary if, in one fell swoop, a ready-made portfolio of assets was already available to acquire or license.

Is it not perfectly reasonable that companies might be interested in acquiring an off-the-shelf solution from other companies that have already gone through that exercise and, in the process, done the

groundwork on alternatives that they ultimately “rejected”? It is also feasible that a company with a dormant asset might be willing to sell it since it almost certainly has no strategic use for it and, to all intents and purposes, it is a wasting asset. This is particularly appropriate when the mark, or marks, are bundled with high-level domain names and are to be used in different market sectors. So long as there is no competitive tension in acquiring an asset from someone else, why would anyone voluntarily want to go through the process of creating, researching and protecting a name from scratch, when one could acquire an existing known equity?

Few will dispute the existence of dormant Intellectual Property. Therefore, what is needed in an increasingly competitive world is the ability to leverage under-used assets so far as is sensible.

There may be some, however, who will believe that, in the fast-paced economy in which they operate, it is not worth the resources developing a sound Intellectual Property strategy given that the life span of a new product or service may be short. Whilst it might seem inappropriate to build a strategy around one asset or service, the fact remains that each asset or service deserves to be separately considered and strategies developed that set out what the business needs to achieve from its assets.

## CONCLUSION

There can be no doubt of the difficulties in creating and protecting a unique and appealing brand name, both as a trade mark and domain name, in all relevant countries and classes. The scope of the Internet alone means that although there are increased opportunities for companies, their brands are far more vulnerable to pirating online than they are offline. The costs of global protection aren't difficult to calculate but the measurement of Intellectual Property value can be both difficult and expensive, leading to a potentially uncertain result. Although a large number of valuation methods have been developed, most are intended to apply only to specific circumstances.

Treating Intellectual Property as assets to be exploited in ways that might not have been originally envisaged will result in reduced corporate risk, less wasted new product development costs for an acquirer, and new income streams and lower IP portfolio management costs for the seller. The intention is not to promote a radically different way of treating Intellectual Property, but to encourage a different mind-set – a mind-set that considers Intellectual Property assets as valuable assets which deserve to be integrated into the business mainstream, exactly where they belong.

## About the authors



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Nucleus Ltd and trade mark attorneys, Hallmark-IP. His organisation has developed an Intellectual Property asset management service that seeks to identify and bring together a proprietor who wishes to realise end-of-life value of his Intellectual Property and another who wants to create a new brand portfolio.



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