

April 2025

Intellectual property licensing



About this issue

This thoughtpiece considers the role of licensing as a method of commercial exploitation of intellectual property (IP).

This issue has been co-authored by Thayne Forbes and Stuart Whitwell from Intangible Business, based on their commercial experience gained from dealing with IP licensing and valuation for over 25 years. Their work has involved advising on hundreds of IP portfolios, including production of many expert witness reports, and oral testimony (including under cross-examination) on more than twelve occasions.

This article also reflects the views of others involved in the commercial licensing process, in particular from businesses, lawyers, and judges.



1. Features of an IP licence

The usual overall features of an IP licence are:

- A definition of the IP owned by the licensor.
- Agreement on the terms under which the licensee will distribute goods or services using that IP in specified channels to market.

Portfolios of IP can be highly valuable if, for example, they support a leading consumer brand.

Example of a licence in a mainstream market

We analysed combined licence and distribution agreements for two leading international vodka and rum brands in their core markets. This type of agreement, being for a mainstream market, is relatively rare and terms are usually confidential. Our analysis revealed key commercial licence terms which formed the basis of our valuing other drinks brands owned by the client.

Example of a licence in another market

Many licences are in other channels from the mainstream channel for the IP. For example a rock band's name is used in its mainstream for music. It may also be licensed in another channel such as for merchandising. Such merchandising can be highly profitable, for example a Rolling Stones T-Shirt costs say £30 online. The cost of the unbranded T-Shirt is likely to be a fraction of that, perhaps around £1.50. The significance of the resulting profit is a pretty stark example of value that can be brought by a brand in other channels from its mainstream use.

2. Key licence terms

Terms of actual licences are often not publicly available but tend to have the following components:

- A definition of the IP being licensed.
- Confirmation that IP ownership is held by the licensor.
- Support to be given by the IP owner such as brand guidelines and central marketing.
- Exclusivity or non-exclusivity in channels to market.
- A definition of channels to be commercialised by

way of the licence.

- The time period of the licence, such as five years.
- The basis of royalties, which is often a percentage of sales.
- Minimum royalties or guarantees.
- The royalty audit process.
- Marketing contribution committed by the licensee.

It is a good idea to have a plan for the development of IP under a licence, so that the parties can agree and coordinate their activities. The licence will then be the documented contractual arrangements between the parties by which they plan to achieve their goals.



Example of a change in IP value over time

The balance of power between a licensor and a licensee can change over time. For example a large multinational FMCG group wanted to establish one of its brands in a secondary market through a ten year licence with another multinational group. By the time the ten years had passed the brand had become well established and powerful in the secondary market. This enabled the licensor to negotiate a new licence on much more favourable terms compared with the previous licence, with the licensee also gaining significantly increased value.



3. IP valuation

IP valuations are now widely carried out for a variety of reasons including business development, accounting, tax and dispute resolution. One of the main standards for such valuations are the International Valuation Standards effective 31 January 2025, published by the International Valuation Standards Council. These standards discuss the relief-from-royalty method as a method for valuing intangible assets. The discussion is contained in paragraphs 60.18 to 60.21 of the intangible asset valuation standard and include *“...the value of an intangible asset is determined by the value of the hypothetical royalty payments that would be saved by owning the asset compared with licensing the intangible asset from a third party.”*

The relief-from-royalty method is therefore based on licensing arrangements, and can be benchmarked with published licence details. There are a number of practical issues with such benchmarking:

- IP is unique. This limits comparison of licensed IP with different IP being valued.
- Some licences are between connected parties

and requires further unpublished information for a full understanding.

- Some licences are not on an arm’s length basis.
- Some licences are not of commercial substance, for publicity or other reasons.
- Only a small percentage of licence terms are publicly available.
- Some published analyses of licence terms contain significant subjective assumptions.

Successful licensing can produce significant value for both parties

4. IP licence disputes

Licence disputes can cover, or have relevance in, many areas, such as:

- If the IP no longer lives up to that required by the licence.
- If the licensor fails to carry out the development of the IP as required by the licence.
- If the licensee is taken over by a competitor of the licensor who then runs down the IP in favour of its own IP.
- If the parties allow substantial grey or parallel market trading (where authorised product is sold in unauthorized channels with a view to maximising short term profit).
- Where there are substantial over production or counterfeiting activities.
- After a licence has ended and the former licensee dumps product in the market.

Example:

We were instructed in a dispute to give an opinion on whether damage to a licensed service brand had occurred after the licensee had been acquired by a competitor of the licensor. We assessed the impact on the licensed brand with respect to its relevance,

differentiation and consistency and concluded that it had been significantly damaged. The arbitral tribunal accepted our evidence and ordered the termination of the licence.

There was then to be a second hearing to quantify losses incurred and we were also instructed to quantify such losses. The dispute was settled while we were carrying out this work.

5. Quantifying losses

Quantifying losses incurred under a licence dispute can be carried out in several ways.

The first step is to understand the commercial terms and meaning of the licence. The next step is to set out the anticipated results under the licence, had the issues the subject of the claim not occurred (the counterfactual scenario). Then it is necessary to compare what actually happened with the counterfactual scenario to arrive at an overall quantification of losses.

It is also relevant to assess the value of the IP in the counterfactual situation compared with the actual IP value. It is usually also helpful to give specific examples of losses incurred.

Then it is relevant to look at wasted commercial costs dealing with the issues and interest.

6. Confidentiality

Due to the confidential nature of much of our work, only a few details can be disclosed and some of the examples given have been edited to preserve confidentiality, whilst fairly illustrating something which has actually occurred in our experience.



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- Accounting and tax
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Analysis of the following

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- Intangible asset and intellectual property value
- Share value
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