Push the boundaries of your trademark

More than just a source of additional revenue, licensing can be a way to grow and expand into new markets. That was one of the messages from the panelists at yesterday’s session Leveraging Your Brands Through Alternative Revenue Streams.

Moderator Lauren Fernandez cited her previous work managing the CINNABON brand as an example of how a powerful brand can be used in new and interesting ways.

“Brand research ... showed us that the brand meant so many things to consumers: indulgence, treats, decadence—but it was really the sensory experience—not just the taste but also the smell that really resonated,” she said.

This realization has led to the licensing of the CINNABON brand and distinctive scent into a range of products that go far beyond packaged food. Some of the more interesting products include CINNABON-flavored vodkas and CINNABON-scented air fresheners.

Alison Tan of Procter and Gamble made a similar point. The marks for Procter & Gamble’s FEBREZE odor-eliminating products have been licensed to areas that are natural extensions of the brand, such as laundry detergents. In addition, there are now FEBREZE-branded air purifiers. She explained that though some may argue that air purifiers are a replacement for the core FEBREZE products, Procter & Gamble saw it as an opportunity to expand into new and lucrative markets.

Judy McCool from HBO said that one challenge that she faces is trying to anticipate the markets that consumers want to see their branded products sold in. Though HBO’s business remains focused on television programs, it regularly has to arrange licensing deals for merchandise related to its more popular shows, sometimes in surprising markets. For example, in support of its “True Blood” program, HBO has partnered with a soft drink company to produce a real-life version of the drink consumed by the show’s main characters.

Licensing can even be a way to enter new geographical regions. Caldwell Camero of General Mills explained that because her company has a relatively small presence in some international markets, it has created a joint venture with Nestlé to sell and distribute many of its products abroad. The deal, she noted, has to be constructed carefully to delineate clearly which products are covered and how the IP is handled. That said, the JV has been a very successful endeavor, even though Nestlé and General Mills are fierce competitors in the U.S.
American football players and comic book villains featured in a discussion yesterday about the balance that should be struck between First Amendment protections and an individual’s right of publicity.

Much of the discussion in the Sports and Entertainment—The Intersection of the First Amendment, the Lanham Act and State Rights of Publicity session focused on the transformative use test, which was created by Comedy III Productions v Gary Saderup in 2001. This was a right of publicity dispute over an artist’s use of the image of the Three Stooges on t-shirts. The test said when a work contains significant transformative elements it is worthy of First Amendment protection and also less likely to interfere with the economic interest protected by the right of publicity.

Courts have been grappling with the question of whether a work is significantly transformative ever since. In Winter v DC Comics in 2003, two Texan musician brothers claimed that two characters in the Jonah Hex comics were based on them. The characters were singing Wild West cowboys who battled worm-like creatures from below the surface of the earth. The California Supreme Court found the use to be transformative.

In Kirby v Sega in California in 2006, the lead singer of Dee-light claimed that the character Ulala in the video game “Space Channel 5” was an unauthorized use of her likeness. However, Robert Lee of Alston & Bird noted in the session that the Ulala character “killed characters with crazy dance moves and a ray gun.” So despite Sega also asking the singer to help promote the game at one point, the court found the character contained sufficient expressive content to constitute transformative use. “This is a case where context is key,” said Lee.

In contrast, the courts in three cases brought against video game maker Electronic Arts did not find transformative use. College football players were depicted with the same characteristics such as shirt number, team, height and weight as the plaintiffs. “There is a lot of expressive content in these video games but the court focused on the fact that these players were depicted in a context in which they are known in the real world,” said Lee.

Patrick Perkins of Warner Bros also noted: “There was also a sense of unfairness that everybody was making money on their likeness because they were amateur players, so it was very results driven.”

“The Ulala character killed characters with crazy dance moves and a ray gun.”


Photography by David Braun Photography
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The INTA Daily News is also available online at www.INTA.org and www.managingip.com.
Private practice lawyers and their clients can find ways to make alternative fee arrangements a win-win, said panelists at yesterday’s session, Show Me the Money: Creating Alternative Fee Arrangements That Provide Value.

Clients and outside counsel are increasingly discussing alternative fee arrangements (AFAs) such as contingency fees, flat and fixed fees and banked fees. For clients, the appeal is relatively simple.

Elizabeth R. Pearce of American International Group (AIG) noted that her company’s difficulties during the great recession was a primary driver.

“[The new CEO] wanted to pay back the Federal government and streamline our businesses, and that was going to include the legal group,” she explained. “We had to cut expenses.”

Though cost cutting is often a primary driver for AFAs, other considerations are also at play. Issues such as cost predictability, lowering administrative burdens, risk sharing and pushing for early resolution are also important factors.

“You need to talk to your clients and understand why they’re looking at AFAs because that will help you structure it,” explained Sarah Lockner, Senior Trademark Counsel at 3M. “What I’m looking for may be very different from what my litigation colleagues are looking for.”
It is the million-dollar question: how can you manage your trademark portfolio on a budget while ensuring your brand is protected? Registrants yesterday received tips for doing more with less.

Moderator Cameron Olsen of Sports Direct and the other panelists explained how IP counsel can protect their brands and cut costs using three scenarios that covered the “birth, life and (avoiding the) death of a trademark.”

Tom Heremans of CMS DeBacker, Nicole L. Linehan of Schneider Electric and Natalie Salter of Lane IP began by offering advice on trademark prosecution, including tips for in-house counsel who want to rethink their relationship with external counsel. “You need to decide what your priorities are if you want to hold an external panel review,” said Linehan. She suggested that they focus on levels of transparency, collaboration, efficiency and cost control.

They discussed the pros and cons of outsourcing global filing work to a single firm, or managing relationships with trademark agents in each of the countries where protection is sought. Olsen explained that his company has brought much of its filing work in house. “If we have a question related to a trademark license, or an infringement issue in a particular country, it can be very effective to have a single point of contact in the relevant market.”

The panelists also addressed the potential “death” of the trademark by looking at ways to cut the costs of dealing with infringement. Olsen offered a scenario to work through: “Your CEO tells you that if fake products aren’t off the market within a week then you are out of a job.”

Heremans and Salter outlined the ways that trademark owners can make use of customs rules to prevent counterfeiters entering the European market. “If you can do that then you don’t incur high costs and you can keep your job,” said Heremans.

As for ensuring job security in the longer term, Linehan advised in-house counsel to keep management updated about the budget they require. “You need to have a good talk about long-term strategy and how you can manage those costs.”
Industry Awards 2015
Winners revealed
www.WTRIndustryAwards.com

World Trademark Review is pleased to announce the winners of the World Trademark Review Industry Awards 2015, revealed last night at the San Diego Natural History Museum. The awards shine a spotlight on the vital work performed by in-house counsel across the globe and identify the teams and individuals that deserve special recognition for their exceptional achievements over the past year.

World Trademark Review congratulates the award winners on their success and thanks its law firm partners for all their assistance in hosting such a memorable event.

For more information about the awards visit Booth 1338 in the exhibition hall or go to www.WTRIndustryAwards.com.

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Alibaba
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BMW
Sponsored by Locke Lord

Europe Middle East & Africa Team of the Year
GlaxoSmithKline
Sponsored by zmp

Fashion, Cosmetics & Luxury Goods Team of the Year
Kate Spade & Company
Sponsored by VENABLE

Not-for-Profit Team of the Year
The Federation of the Swiss Watch Industry FH
Sponsored by Davis Wright Tremaine

In-house Counsel of the Year
Sophie Bodet, GlaxoSmithKline
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www.WorldTrademarkReview.com
Meet Twitter’s first trademark counsel

California-based Twitter faces unique trademark challenges in its role as an online social network. Stephen Coates explains his role as the company’s first trademark counsel.

How long have you been at Twitter?
I have been here a little over a year. I came on as Twitter’s first trademark counsel, and manage the trademark, domain and marketing practices here. Prior to that I was at Amazon for three-plus years in Seattle, and before that I was at the firm of Kilpatrick Townsend in the New York office.

Being the first was definitely something that attracted me. To come in and really rethink everything and build a team from scratch was super exciting for me. Twitter as a brand is also used in ways that a lot of brands are not, and to tackle those was really exciting.

The Twitter brand is probably one of the most widely used in the world. People use it to refer to it as Twitter, but they also use it to indicate the source of where their user handles or hashtag campaigns may be. People use it for marketing purposes. People use it in the media to denote where a specific article may be, so it is on just about every media channel so you can share articles.

It is definitely one of the most widely used brands. So fair use is super important to me because we can’t go out and license each one of these specific uses, individuals and brands. I want all those individuals and brands as much as possible to use our bird logo to refer to the platform. But many countries don’t explicitly recognize fair use of logos. Clearly there is no user confusion. People don’t confuse these people as being Twitter, they are referring to the platform. So I don’t believe that such use should harm our brand in any way so long as they are using it to refer to the platform. But I think that the law isn’t quite there yet.

What are Twitter’s main brands?
Our main consumer brands are Twitter—we obviously have a number of brands under Twitter like the bird logo, tweet and retweet—and we have our Vine service, which is our video app, and we just launched Periscope, which is a live streaming video app. Those are our consumer-facing brands. Then we have a lot of other brands that are largely developer and business-to-business facing brands.

How do trademarks fit into the company’s overall strategy?
They are extremely important. The Twitter brand is our most valuable asset in the company. The bird logo is a symbol of not just this platform but of the company itself. Most importantly, the brand also means a lot to our users and other brands. People use that not only as their marketing platform but to refer to their online presence in some cases. So it is important to us to preserve the brand for others to use. That is our chief purpose here: to protect and allow others to use the brand.

What is your strategy for how you use outside counsel?
We use outside counsel globally for a variety of trademark, domain and marketing issues, whether that is prosecution.
or enforcement. What I look most for in outside counsel is an understanding of the product and technology, especially when you are doing things that haven’t been done before. I know the phrase is used frequently, but I look for thinking outside the box, thinking about everything, such as how do we rethink how to enforce a trademark. One of our core values is to recognize that passion and personality matter. I actually have it emblazoned on my laptop. That’s my favorite of the core values. So when I look at outside counsel I want someone who has passion and lots of personality.

Generally people who have that are probably closer to the product and those people tend to be younger than the more senior people at law firms when we are looking at outside counsel.

What countries cause the most issues for you?

The places where we face the most issues are less IP focused than they are free speech focused. We are a free speech platform. We define ourselves as a real time information network. But certain governments have blocked access to Twitter. One of our core values is reaching everyone on the planet, and we can’t do that if governments have blocked access to Twitter.

What are you looking forward to at this year’s INTA Annual Meeting?

You can kill all of your birds with one stone. It is a great place to meet your global counsel if you have issues. It is the only place and the only time where I can really get anybody in the same room. On the Friday before the Annual Meeting we are going to have our first outside global summit. We are going to have everyone in the same room and for two hours we are going to talk about Twitter, we are going to talk about what it is, everybody is going to tweet something, we’ll talk about what issues we are facing.

Are you seeing any impact from the launch of the new gTLDs?

I’m involved at INTA on the new gTLD Subcommittee. Some days I think I live and breathe gTLDs. But honestly right now we are looking at gTLDs just in terms of registrations from a defensive standpoint and for possible marketing use.

We have had some challenges that a lot of others have faced, such as premium pricing. A few of our brands were on the name collision list where ICANN blocked the ability for us to register those names. We have all the same issues that the brands have with .sucks and some of the other TLDs that have been somewhat controversial. But has it had a huge user impact? Not yet. Nothing more than any other brand has to face.
China’s revised Trademark Law has been effect for a year. Rachel Zhang, Shanshan Du and Yue Li of China Patent Agent (HK) discuss the effect of those changes on proceedings before the China Trademark Office and the Trademark Review and Adjudication Board and how to work effectively with the busiest trademark office in the world

The revision to the Trademark Law had several changes designed to speed up proceedings, especially registrations and oppositions. What has been the result so far?

Rachel ZHANG: With the implementation of the revised Trademark Law, we’ve had the feeling that the trademark applications are being processed much quickly than before. For a smooth application, the applicant can get a registration certificate in no longer than 12 months, usually within a nine-month examination period plus three-month publication period. This is indeed quite effective for a Trademark Office (TMO) that receives more than 2 million filings in a year. It has brought lots of benefits for overseas companies who need to get registration certificates to get their business started in China.

On the other side, in order to make sure the process runs effectively and in a timely manner, the TMO has adjusted their examination process. They’ve postponed the issuance of filing receipts until the examination of goods description and formality of the filing. With such a change, the TMO saves itself quite a lot of time. If there are any minor defects in the filing, which in the past can be fixed by an amendment request, the TMO will now usually issue a non-acceptance notice to the applicant. This puts the pressure on the applicant and the examiners can also be exempt from the nine-month examination deadline. That’s why in many cases, the TMO only gives the client one chance to amend their questioned goods description. If the amended descriptions are not acceptable, a non-acceptance notice is very likely to be issued.

These rigid changes have made filing trademark application sometimes a risky thing if the applicant’s products are quite new and cannot be found in the Nice Classification Book. Therefore, at least for the coming year, the applicant needs to pay attention to this requirement and try to use as many Nice descriptions as possible.

For those accepted applications, in order to complete the examination as soon as possible, the TMO has recruited a number of new examiners to take care of the huge filing volume. These new examiners, who only have a couple of years of experience, tend to be conservative with their examinations. For likelihood of confusion issues, if it is a borderline case, examiners tend to issue a rejection notice as they don’t want to risk to allow a confusingly similar mark get registered. Because of the nine-month limitation, the examiners lack the time to give careful examination to an application where several similar prior rights are located.

For oppositions, because the evidence submission period is exempted from the examination time limit, the TMO has about 18 months (12 months plus two 3-month evidence submission periods). As the revised Law came into effect last May, we haven’t received many opposition decisions so far. But we believe the TMO has more time for the examination of opposition cases than for new applications.

The new examiners, who only have a couple of years of experience, tend to be conservative with their examinations.

Another bright spot of the revised Trademark Law is that multi-class applications are now available. If the application is rejected on partial goods/services, the applicant may choose to file a divisional application, so the approved part can be registered, while the rejected part will go into the procedure of review of refusal. However, the official fee is not reduced and is still charged per class, the same as the single-class application. Furthermore, after the mark is registered, it cannot be divided, which may cause some inconvenience to the registrant.

Since the revised Law has been in effect for less than one year, we are still waiting to see more practical cases showing the effect of the changes. The improvement of the practice needs the participation of examiners, trademark attorneys and their clients.

Do you have tips on how to successfully and effectively engage with the TMO and Trademark Review and Adjudication Board (TRAB)?

Yue Li: The revised Trademark Law and the revised Implementation Regulations of the Trademark Law of China took effect on May 1 last year. The revised Law and Regulations bring many changes in respect of both formalities issues and substantive issues to which trademark holders should pay attention in order to successfully and effectively engage with the TMO and the TRAB. Here are some things to keep in mind:

You need to show your identification document.

The revised Regulations require that in addition to a signed power of attorney, a copy of the applicant’s identification document must be submitted when filing various applications. For a company, an identification document refers to an official document indicating the existence of the company (such as a certificate of good standing or existence in the USA). For an individual, a copy of his or her passport is needed. This document is very important, because it must be submitted when filing applications and cannot be supplemented.

Think twice before you decide to file a multi-class application.

The revised Law allows multi-class applications. However, the introduction of a multi-class application does not bring desired benefits expected by applicants. First, there is not a deduction in official fee for filing a multi-class application. Second, a multi-class application cannot be easily divided. The revised Law only allows an applicant to divide a trademark application when it is partially rejected, so that the application in connection with the approved goods or services will be assigned with a new filing number and published, and an appeal to the rejection against the application in connection with the rejected goods or services with the original filing number can be filed and examined by the TRAB. A division of a multi-class application is not allowed in any other circumstances, such as opposition, record of name and address change, recordal of assignment, cancellation, withdrawal. Please think twice before you decide to file a multi-class application.

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Failure in an opposition does not mean an end. The opposition proceedings under the revised Trademark Law are different from the ones under the previous law in several respects. One of the differences is that if TMO makes a decision in favor of the applicant rather than the opponent, the trademark application will be approved for registration and the opponent will not have opportunities to delay registration of the application by filing an appeal to the opposition with the TRAB. Under the revised Law, however, the opponent can file an application for invalidating the registration with the same reasons and facts as those raised in the opposition with the TRAB. If the registration was invalidated by the TRAB, the registration will be deemed to have never existed.

Do not wait until it is too late to claim your rights. In China, assignment of a trademark application or registration needs to be recorded at the Trademark Office in order to claim the ownership of the trademark application/registration. The revised Trademark Law requires that the assignment of a trademark application or registration be filed by both the assignor and the assignee, rather than by the assignee alone as under the old law. As a result, the assignor should file necessary documents in order to record the assignment of a trademark application or registration as well. Please do not delay the recordal of the assignment when it is impossible for the assignor to provide necessary documents.

A trademark license agreement is no longer a must. In the past, TMO required that the original trademark license agreement should be submitted when recording the license of a trademark registration and that the agreement must contain certain contents accepted by TMO. This posed several challenges. First, trademark owners usually did not wish to submit the original license agreement due to confidentiality concerns and second, they had to revise and re-sign their license agreement in order to satisfy TMO’s requirements. The revised Law no longer requires submission of a trademark license agreement when recording the license of a trademark registration. This brings conveniences to both the trademark owners and licensee. You can call a time-out now. Under the revised Law and Regulations, in some proceedings such as an appeal to opposition against a trademark application and an application for invalidating a registration, parties involved can request a suspension of the examination of the appeal to the opposition and the invalidation application pending the disposition of an action against a conflicting right involved. Once the status of the conflicting right becomes stable, the examination of the appeal to the opposition and the invalidation application will resume. For an appeal to the rejection against a trademark application, the applicant can also request a suspension of the appeal pending the disposition of an action against a conflicting right. The examiners will usually approve the suspension request if an action against the conflicting right has been taken.

The revised Law and the revised Regulations bring many changes. Trademark owners need to adapt to these changes in order to better protect their rights no matter whether these changes are convenient or not.

Parties can request a suspension of the examination of the appeal to the opposition and the invalidation application pending the disposition of an action against a conflicting right involved.
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In an uncertain legal environment, we are one law firm that is not content simply to accept the status quo. We work constantly to influence the evolving body of Mexico’s intellectual property laws, with the goal of ultimately bringing them in line with international standards. While we continue to make great strides in this regard, clients from all over the world rely on us to prosecute, manage, and defend their IP portfolios under the laws that exist today. In other words, we work effectively within the system, even as we seek to change it.

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If anyone could fill me in on karma implications of eating shark tacos before surf session this would be a great time to speak up #INTA15

Matthew Hintz
Turning now to cybersquatting! If you have cybersquatting issues with legacy domains, likely to have same with new gTLDs #INTA15

Owen Smigelski
Response to data breach needs to match what the brand stands for. People will be disappointed otherwise #INTA15

Erik Pelton®
Who wants to chip in to register dotsucks.sucks (you know, to encourage public discourse, with irony) #INTA15

Matthew Murphy
Major Memory #INTA15 - awesome client meetings and dinners.

The IPKat
Best non-traditional TM at #INTA15? It has to be Sanford T Cob’s chopped liver. Totally distinctive, with more than 30 years continuous use

Transatlantic TM
Only about 30% of companies have cyber threat insurance! #INTA15

Sara Delpopolo
Most arguments re right of publicity seem to fall within parody unless there’s unauthorized use of brands within an ad @INTA #INTA15

Dana Patel
Trademark rights in Social media talk by the IP attorneys for @Facebook @zynga and @Airbnb at #INTA15 - “The Internet is in permanent ink”

Dirceu Santa Rosa
8 out of 10 startups that rocked the Internet in the last few years do not use the “tm” sign with their marks. Interesting!! #INTA15

#INTA15
Today's Schedule | Wednesday, May 6, 2015

All events take place at the San Diego Convention Center unless otherwise indicated. Consult the Final Program for times and locations of invitation-only events and Committee Meetings.

**8:00 am – 10:00 am** CONTINENTAL BREAKFAST Hall B

**8:30 am – 2:00 pm** NETWORKING EXCURSION DESK Hall A Lobby

**8:00 am – 2:00 pm** INFORMATION/MEMBERSHIP DESK Hall A Lobby

**8:00 am – 2:00 pm** HOUSING DESK Hall A Lobby

**8:00 am – 2:00 pm** EXHIBITOR REGISTRATION DESK Hall A Lobby

**8:00 am – 2:00 pm** REGISTRATION Hall A

**8:00 am – 4:00 pm** HOUSING DESK Hall A Lobby

**8:00 am – 10:00 am** BREAKFAST TABLE TOPICS Room 6A

**10:15 am – 11:30 am** CW01 Annual Review of U.S. Federal Case Law and TTAB Developments Advanced Level Room 6B

**10:15 am – 11:30 am** RW01 Regional Update: The Regional Trademark Balance in Oceania/Asia-Pacific—The Trans-Pacific Partnership and Plain Packaging Proposals Intermediate Level Room 6D

**10:15 am – 11:30 am** RW02 Regional Update: Africa—The Implementation of International IP Treaties in Africa Advanced Level Room 6C

**10:30 am – 11:30 am** SPEED NETWORKING Hall B

**11:45 am – 1:00 pm** CW20 Are “Not So Well-Known” Trademarks Protectable in China? Advanced Level Room 6F

**11:45 am – 1:00 pm** CW21 Protecting and Enforcing Color Marks: An International Perspective Intermediate to Advanced Level Room 6B

**11:45 am – 1:00 pm** IW20 Industry Breakout: Fashion Forward Intermediate Level Room 6C

**11:45 am – 1:00 pm** IW21 Industry Breakout: The Nonprofit Industry—Nonprofit Trademark Protection and Nonprofit Association Brand Protection Challenges Beginner Level Room 6D

**12:00 pm – 1:00 pm** SPEED NETWORKING Hall B

**1:15 pm – 3:15 pm** LUNCHEON TABLE TOPICS Room 6A

**6:00 pm – 10:00 pm** GRAND FINALE Gaslamp Quarter Block Party

**CONCURRENT SESSIONS**

**10:15 am – 11:30 am** CW01 Annual Review of U.S. Federal Case Law and TTAB Developments Advanced Level Room 6B

**10:15 am – 11:30 am** RW01 Regional Update: The Regional Trademark Balance in Oceania/Asia-Pacific—The Trans-Pacific Partnership and Plain Packaging Proposals Intermediate Level Room 6D

**10:15 am – 11:30 am** RW02 Regional Update: Africa—The Implementation of International IP Treaties in Africa Advanced Level Room 6C

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**1:15 pm – 3:15 pm** LUNCHEON TABLE TOPICS Room 6A

**6:00 pm – 10:00 pm** GRAND FINALE Gaslamp Quarter Block Party

**INTA quiz results**

Go to the information booth (Hall A Lobby) in the San Diego Convention Center to collect your prize!

**SATURDAY:** Jersey Boys premiered at the La Jolla Playhouse in San Diego in 2004. **WINNER:** Barry F. Soalt, Procopio Cory Hargreaves & Savitch, San Diego, California, U.S.

**SUNDAY:** One America Plaza is San Diego's tallest building, at 500 feet. **WINNER:** Zsofia Fulajtar, Berczes Law Office, Taliandorogd, Hungary

**MONDAY:** The name of the stadium where the San Diego Padres play is Petco Park. **WINNER:** Paul Reidl, Law Office of Paul Reidl, Half Moon Bay, California

**TUESDAY:** Bai Yun, Gao Gao and Xiao Liwu are Panda bears at the San Diego Zoo. **WINNER:** Ankit Sahni, Get Set IP Group, New Delhi, India

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