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# "Exclusivity in Manufacturing and Service" in The Entrepreneur's Intellectual Property & Business Handbook

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## Exclusivity in Manufacturing and Service

Jon M. Garon\*

This article is part of a series of book excerpts from [The Entrepreneur's Intellectual Property & Business Handbook](#), which provides the business, strategy, and legal reference guide for start-ups and small businesses.

Manufacturing is the most common realm for process innovation and efficiency goals. Patents allow manufacturers to maintain extended exclusivity in their products. Trade secrets protect the methods of creating the products and the inside know-how on the best way to get the job done. Copyright is useful to protect the text of the manuals, brochures, and other printed materials, diagrams, and tools that assist with the products. Finally, trademarks provide companies the tools to build product lines and create a strong presence among the purchasers regarding the company's products and services.

Service companies have no tangible products, so they have far fewer of the manufacturer's tools available to build patent exclusivity. They must rely almost exclusively on trademarks to generate relevance, but they can also use copyrights and trade secrets to augment their core services.

### ***1. Exclusivity through Licensing.***

In licensing a patented new invention, the license to exploit the patent may be exclusive or non-exclusive. A non-exclusive license provides the party receiving the license (the licensee) with the permission needed to use the patent, but it does not stop the party licensing the patent (the licensor) from giving the same permission to multiple parties. An exclusive license grants permission to use the patent to only one party. The scope of the exclusive license, however, can vary dramatically. Often exclusive licenses are restricted by geography, time, and type of usage.

For example, assume an inventor creates a newly patented voice recognition device. The software algorithms are sufficient to satisfy the patent requirements that the software is both new and nonobvious. The inventor sells the patent to MicroVoice, Inc., a software manufacturer, in exchange for a payment and royalty. MicroVoice purchased the software in order to use it with its own operating software. That transaction is a sale. While MicroVoice will have a duty to track the sales of the product and pay the royalty to the inventor, all other ownership decisions and control over the patent are now held by MicroVoice.

The following year, MicroVoice is approached by Cuddly Toys, Inc. to use the software in its plush toys. The teddy bears and other Cuddly Toys products listen to their owners, responding to identified words with appropriate pre-recorded responses. Cuddly Toys acquires licenses for use of the MicroVoice software for its toys. Because Cuddly Toys does not wish to compete with any other toy companies for this special kind of toy, it seeks an exclusive license from MicroVoice.

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Exclusivity is not all-or-nothing. Instead, exclusivity is carefully defined for each transaction. Absent any other consideration, the greater the amount of exclusivity, the greater the cost of the license. Cuddly Toys wants sufficient exclusivity to eliminate competition, but still desires to keep the cost of the license manageable. Cuddly Toys should not pay for exclusive rights it does not hope to use. As a result, the negotiated license agreement may provide that Cuddly Toys will have the exclusive right to use the patented software in plush toys for a period of five years. MicroVoice could then license the patent to Mattel, Inc. for use in a new line of Hot Wheels toy car garages and Barbie salons. If Cuddly Toys did not want this type of competition, then it would have to purchase the exclusive license to cover all toys rather than merely plush toys. The length of the initial license will also affect the annual cost of the license, with longer licenses generally costing less per year.

## **2. *Creating New Products.***

James Dyson has become legendary, particularly in Europe, with continual inventions and improvements in vacuum cleaner design. His original 1993 bagless vacuum cleaner resulted in patent infringement claims against Amway, which allegedly negotiated to purchase the patent in bad faith and then manufactured without consent, as well as with Hoover UK, which refused to license the patents and instead infringed them.

Dyson proved successful first in the two patent disputes and then in the marketplace. Each new product is the beneficiary of an increasing number of patents. The company remains family-owned in Britain, and in 2018 Dyson was listed as the 12<sup>th</sup> richest British citizen, according to the Sunday Times in Britain.<sup>1</sup>

Electrolux has had a more difficult history. Also starting as a vacuum cleaner company, the Swedish consumer equipment giant has been struggling of late and losing some market share to its rivals. In response, the company has focused on efficiencies and increased its emphasis on research and development to build the next generation of products that can sustain it against the fierce competition from smaller rivals like Dyson and larger competitors like Whirlpool. Led by the new Pronto vacuum, new designs in ovens and washing machines, Electrolux hopes to have repositioned itself through new technologies to stay competitive in these fierce consumer product segments.

## **3. *Trumpeting Recognition, Awareness, and Relevance.***

The insurance industry is highly regulated, selling products that are much more like services. These companies are generally known for their staid, traditional stature. Prudential's former slogan, "Get a piece of the rock," captured the essence of the industry and made those in the business feel secure. The trouble was that the approach did not provide relevance to the public. While the existing client base might have found some assurance from the message, such messages did little to motivate consumers' purchasing decisions.

American Family Life Assurance Company (AFLAC) had similar problems. The company had little name recognition. Its acronym, AFLAC, was far from a household word. Then Dan Amos, company CEO, broke the mold and allowed the company to be represented by a duck. The AFLAC commercials featured a frustrated duck trumpeting out the company name. This strategy increased the company's name recognition to over 90% of consumers. A second wave of commercials used the duck but focused on illustrating the benefit behind AFLAC's supplemental medical insurance. While the first campaign might have provided a bit more focus on relevance, the two-step process

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<sup>1</sup> Robert Watts, *The Rich List*, SUNDAY TIMES, May 13, 2018.

transformed AFLAC from an unknown entity to a household name. The company used this public awareness to increase the relevance of its services.

Companies use ducks and other creatures to support their campaigns. Commercials featuring the Geico gecko have actually featured the talking lizard explaining why his presence in the ads helps engender trust by the public.

#### **4. *Extending Innovation to Brand Enhancement.***

The 3M Company stands out as a corporate innovator, developing products from sophisticated medical equipment and military technology to Scotchgard and Post-it Notes. The Post-it Notes story has become famous as a failed experiment. An attempt to make a stronger glue resulted in a weak formula that was fully removable. From there, the simple yellow square tab of paper was born.

And growth continued after its birth. The patented technology once provided exclusivity, but that source disappeared when the semi-permanent adhesive entered the public domain. Instead, 3M has extended the reach of the product to a wide range of interesting services, including semi-sticky photograph paper and colorful children's stick-um books. The Post-it brand knows no boundaries because of the innovation that has gone towards extending the brand across multiple sectors.

#### **5. *Athlete Endorsements: From My Field to Yours.***

Sports figures loom large in product support. The current pitchman leader is Shaquille O'Neal, who commands a wide range of endorsements and an annual salary that may be twice his former NBA salary. Although LeBron James has become a top endorsement earner with estimates above \$45 million, O'Neal continues to beat James off the court. Tiger Woods, who has had more surgeries than titles in recent years, is still reported to have earned \$65 million in his 2017 endorsement compensation.

Other examples include Michael Jordan's endorsements with Nike, Hanes, Gatorade, and Upper Deck, as well as Serena Williams' endorsement of Puma tennis shoes, and thousands of others. As mentioned earlier in the book, George Foreman took his fading fame to an entirely new profession with the expansion of cooking products. Magic Johnson extended his fame and endorsement prowess to become a principal owner of his chain of California movie theaters.

The product support for manufactured goods provides instant credibility to those products and affords attention far past the paid ad exposure. Whether it is apparel that the athlete is seen wearing, mentions in sports pages, or enhanced attention from retailers, the effect is significant. There are Federal Trade Commission rules that require the endorsements to be truthful, particularly regarding the celebrity endorser's use of the product.<sup>2</sup> For the right fit of personality, endorsements can lift a commodity to the top of the market.

Athletes popular in the local sports market can also achieve similar success. Miami Dolphins Coach Don Shula has created a successful national chain of restaurants that began in Florida and the South. Chicago Bears Coach Mike Ditka did the same, starting in Chicago. Football's defensive linemen and other less glamorous skill players often find themselves popular with local car dealerships. At a certain scale, the fame of the individual can be tied to the reach of the audience, benefiting both the athlete and the manufacturer or retailer.

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<sup>2</sup> Guidelines Concerning Use of Endorsement and Testimonials in Advertising, 16 C.F.R. §§ 255.0–255.5 (2018).