

# Resolutions for a Brand New Year

Pseudo-scientific consensus suggests that at least 90% of New Year's resolutions will fail by February.

Pessimists can stop reading now.

Those optimists among you may be aware that 60% or more of a company's value is often tied up in its brand value and/or IP. And the largest companies usually have brands that are very valuable indeed. Forbes estimates Google's at \$132 billion (£105 billion, up 30% from the preceding year) and Amazon's at \$70.9 billion (£55 billion, up 31%).

Companies can grow the value of their brand and IP through big moves (technological advances, product launches, big name hires and advertising campaigns), but also through doing a lot of small things well. Day-to-day customer service, social media interactions, employee welfare and legal strategy can all help. The legal side of brand value is sometimes viewed as an exercise in preservation (minimising threats and risks in order to stand still), but the truth is that an effective brand management strategy can add significant value in itself.

With this in mind, here are some thoughts (let's not call them "resolutions") to help you get 2019 off to a great start.

## 1. Take stock

All good IP strategies (and articles) start with an audit. Dust off the trade mark and design portfolios: do you have the right geographical coverage? Are all of the most important trade names, insignia and designs registered? Are renewals under control?

Look more broadly: do you have crucial copyright materials and/or trade secrets? Can you prove ownership of, or the right to use, your key IP? Have transactions and changes of ownership been registered? The last thing you want when trying to enforce an IP right quickly is to have to assign or license it (and register the transaction) before starting.

Conversely, do you hold IP assets that are collecting dust? Do they retain strategic value for the business? If so, consider whether the business needs to (start to) use it, lest the right be lost through non-use. This is particularly important for EU trade marks primarily or exclusively used in the UK – what counts as "genuine use" in a no-deal scenario is currently unclear.

## 2. Look to the future

What do the next 12 months hold? What is your company's strategic direction, and which big projects are coming up? Establish direct and regular lines of communication between your development, marketing and legal teams: the sooner the legal team knows about major developments, the better it will be able to design a comprehensive IP strategy.

Clearance searches sometimes throw up challenging issues which require more time to resolve than first thought. It is always better to rule out a name before the CEO becomes wedded to it, or at least to be on the front foot in a trade mark dispute. Trade mark “trolls” are often one step ahead of slower-moving large companies, and will happily “squat” on a proposed trade mark or domain name. It is often a costly and frustrating process to reclaim such rights.

Is your business thinking about IP resilience? Do you license in any crucial rights and, if so, is there a clear plan for if and when such rights can no longer be used? Should alternatives be developed, which could in turn deliver bonus value through licensing to third parties?

### 3. Out with the old

Don't automatically let unused or low-value IP rights lapse. Consumer appetite for heritage and nostalgic brands and products has rarely been higher. Examples such as the Co-op's return to its 1960s “cloverleaf” logo, and the second life of fashion brands such as Mackintosh and Dr. Martens, show that yesterday's news will not always stay in the past.

Some non-core brands might find willing buyers, often from emerging markets. Alternatively, it might be worth the renewal fees required to hold on to particularly well-known heritage assets (although there will always be the risk of revocation for non-use).

### 4. In with the new

Do you use any trade names, insignia or designs that might benefit from registration? Is it time to apply for the non-traditional trade mark (sound, colour, motion, shape, etc.) that you always wanted?

The deadline for the filing of Registered Community Designs (12 months from when a design was first made available to the public to the EU) is often overlooked. Three years of unregistered design protection (or 15 years in the UK for limited aspects of a design) can become 25 years with minimal effort and cost. There is no other form of IP protection that allows a year to test the reaction of real consumers to a new product before deciding whether to commit to filing and renewal fees. Keeping an eye on the calendar can pay dividends.

### 5. Ask your friends for help

Businesses, large and small, are often bad at identifying and protecting promising IP in a systematised way. At best, this can make securing IP protection more challenging. At worst, this can lead to early or unintended public disclosure, which can completely compromise the prospects of getting a patent for an idea, or protecting it as a trade secret. Marketing departments can also be the source of all manner of trade mark headaches – from inadvertently letting a trade mark become generic (and therefore invalid) to changing the format of a logo without telling the legal team (therefore risking the validity of any trade mark based on the original logo).

Education is the best form of prevention. Although we are biased, training on IP law tends to interest a surprising number of people. Also consider providing quick reference guidelines to help non-specialists practise “safe IP”.

### 6. Reinvent yourself

Sometimes a bit of creative thinking can completely transform a brand's value. In 2012, two years after Ocado's flotation, it was yet to record a profit. The firm's shares were being pummelled by short sellers, who were sceptical that Ocado's model could work. The following year, Ocado signed a 25-year deal with Morrisons to license Ocado's back-end infrastructure (including its logistics software) to

allow Morrisons to launch an online grocery business. Five years on, Ocado has concluded similar deals with the US grocery giant Kroger, Canada's Sobeys and France's Casino, among others.

In 2018, Ocado made the FTSE 100 for the first time, with a market capitalisation of over £7 billion, compared to the 2012 valuation of around £1 billion.

What changed? Arguably, nothing: Ocado still uses (and licenses) similar fulfilment technology to the software that it had in 2012. The key difference is that the market now sees Ocado primarily as a tech company with valuable IP to be exploited and licensed, albeit one that happens to deliver groceries. Perception is a powerful thing.

So when you are reviewing your IP assets, think outside of the box (or shopping basket). Perhaps their full potential has not yet been exploited. (This does assume that IP rights have been properly identified and protected early in the creation process).

## **7. Broaden your social circle**

Collaborations are in fashion, and rightly so. A well-conceived and properly executed co-branding can be a win-win: a smaller partner gets access to bigger and better resources and networks; the larger gets the "cool factor", know-how and maybe a shake-up from the smaller brand.

The fashion sector does this well – from Adidas Originals by Alexander Wang to Whistles x Boardies, and Supreme NYC x Levi's to Uniqlo x Thomas Maier – but there is no reason that other sectors cannot broaden their creative and commercial horizons. The key is to ensure that both know what is required of each of them, both brands are legally protected from partner risk, and it is clear what happens next (e.g. who owns any IP created, what are the rules for exploring future collaborations, and how any disputes will be resolved).

## **8. Cut out the bad stuff**

Many brands are increasingly interested in developing more sustainable and ethical business practices. Not only do such efforts have inherent value to society, but they can also confer a competitive advantage. Consumer demand for ethical brands is rising – over a quarter of UK consumers avoided a product or service last year due to its negative environmental impact – and investing in more sustainable business practices can actually lead to savings (Pepsi saved \$600 million between 2011 and 2015 by cutting waste).

It might be that the rising tide of consumer demand will mandate all companies to make changes in time but, right now, brands that are at the forefront of the change can get significant attention. However, with attention comes scrutiny. Companies that signal their virtues loudly to the market will need to be careful to avoid accusations of "greenwashing".

From an IP perspective, protecting "green" trade marks can be difficult because they are not usually very distinctive (e.g. "BIO"), but the longer the period over which one uses a less distinctive trade name, the greater the chance there is of acquiring the distinctiveness necessary for registration.

## **9. Keep up with current affairs**

An effective brand watch or monitoring strategy can make the difference between nipping an infringement issue in the bud and dealing with a large-scale problem. The costs of readily available search and monitoring services can be dwarfed by the savings made by quicker and more effective enforcement action.

Even better than reactive policing, consider a novel anti-counterfeiting strategy. Many companies, particularly in the luxury fashion sector, are becoming interested in the potential of blockchain technology (for example) to eliminate counterfeits. While we are still at the “early adopter” stage for this technology, investing in technological countermeasures can bring benefits beyond merely making the lives of counterfeiters more difficult; customers will be reassured of authenticity and safety, and might view an early adopter brand as more innovative and exciting.

#### 10. Be a good neighbour

There are certain challenges and opportunities that are common to many brands. Some are familiar – 3D printing, AI, virtual reality, evolving advertising regulation (particularly of social media channels), environmental, social and governance concerns – some less so. Often the best way to deal with common issues is collective action, whether through formal industry or professional bodies, informal collaboration, or intermediaries. Know-how can be pooled, and public statements and responses to consultations carry more weight. It pays to keep an eye on the horizon individually and (sometimes) to act alone, but remember the power of working together for common benefit in some circumstances.

#### Happy New Year!

The Fox Williams IP team has extensive experience helping companies (large and small) and individuals design strategies to maximise the potential of all their IP assets. Please get in touch for an informal discussion about how we can help you meet your Brand New Year Resolutions in 2019.



**Simon Bennett**

Partner

[sbennett@foxwilliams.com](mailto:sbennett@foxwilliams.com)

+44 (0)20 7614 2522



**Alex Woolgar**

Senior Associate

[awoolgar@foxwilliams.com](mailto:awoolgar@foxwilliams.com)

+44 (0)20 7614 2654

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