

The keys to implementing a successful licensing strategy

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The keys to implementing a successful licensing strategy

*Although the specifics of every licensing deal will be different, there are some general principles that all those involved in putting a deal together should bear in mind. And, explains **Patrick D Ertel**, of **Marshall, Gerstein & Borun** in Chicago, they have their roots in the thinking of one of ancient Greece's greatest philosophers*

"If Aristotle ran General Motors, everyone employed there would think of it as a huge partnership, encompassing myriads of smaller partnerships, for the purpose of living well. If he ran the corner grocery store, he would instil in everyone the same mindset. And if he offered you advice, I think this would be at its core: Always think of yourself as entering with other people into partnerships for living well. This highly general truth about the deep beauty of business can provide us with an important perspective on many specific decisions we face." If Aristotle Ran General Motors, by Tom Morris (Henry Holt and Company, Inc. 1997).

Licensing is business, and surely Aristotle is right: you will be successful in licensing so long as you remember you are entering with other people into partnerships for living well. Perhaps these words sound out of place; after all, what does a philosopher know about business? Well, this philosopher knows plenty, and applying Aristotle's "highly general truth about the deep beauty of business" can go a long way towards implementing a successful licensing strategy.

Where it all starts: the intellectual property portfolio

Substantial groundwork must be done before it is possible even to begin the process of establishing a partnership with a licensee. You will need to identify the intellectual property that you will make available for licensing – will it include only non-core technology, or perhaps also core technology but only in non-core markets? Or you may elect to license the technology in your portfolio without limitation as has been done by some of the most successful companies.

As a part of the decision-making process, you will need to assess the value of your intellectual property and the goals you wish to achieve through licensing. For instance, the role of licensing in your company may be for it to serve as a profit centre where intellectual property generates additional revenue. Other possible roles include promoting your technology as an industry standard or providing competitors with a technology they need at an affordable cost.

Why, you may ask, would we ever make our technology available to our competitors? The answer is not simple nor is it necessarily intuitive, but it is entirely logical and persuasive. By providing your competitors with affordable technology, you achieve each of the following:

- Positioning your own company at a competitive advantage in the marketplace since competitors are paying you a royalty.
- Creating a greater awareness and demand in the marketplace for products that embody the technology you are licensing.
- Discouraging competitors from developing next generation technology due to the availability of affordable technology.
- Motivating your employees to develop next generation technology to maintain your position as a recognised industry leader.

Making it happen: the corporate licensing team

In addition to identifying the intellectual property that will be made available for licensing, the corporate licensing team must be established. But, first, those at the highest levels in your company must understand the value and importance of your intellectual property and the licensing strategy you are

Successful licensing strategy

implementing. The CEO should communicate to everyone from top to bottom the company's commitment to, and the strategic significance of, the licensing initiative.

Observers of successful licensing operations will be aware that bold pronouncements from the CEO will not be enough to get the job done. It has most often been the case that success comes when there is centralised management having real control over licensing the company's intellectual property. This means that the corporate licensing team responsible for this function must have well-defined objectives and the skill sets to achieve them.

For this to happen, the corporate licensing team should operate as a dedicated business unit rather than as a group which functions under another well-established corporate department such as law or new business development. The primary functions of such existing departments are very differently focused. Operating under a larger umbrella such as law or new business development will usually mean being saddled with a lack of autonomy in a universe where there is little understanding of the esoteric world of licensing intangible property. This will surely hinder the licensing initiative, if not ensure its doom. However, even for a dedicated business unit to succeed, it must be given a realistic level of financial and human resources, but it also should be held accountable, eg, by having its own profit/loss responsibility.

If a company has a relatively low level of potential licensing opportunities, it will still need a strong commitment from the executive suite. This type of business can utilise a different organisational model by forming a special licensing taskforce which comprises carefully selected employees with business, technology and legal backgrounds, although the financial resources still must be present. Regardless of the organisational structure, the key to success lies in selecting wisely the individuals who will comprise the corporate licensing team.

How Aristotle can help: the philosophy of business

If your company is ever going to implement a successful licensing strategy, the corporate licensing team had better take to heart the wisdom of Aristotle. In a very real sense, a licensor and licensee are entering into "a partnership for living well", ie, the licence will be about something beneficial to both parties. It has been said that a successful licence in an ideal world would be one where both the licensor and the licensee have obtained everything they wanted.

Now, we all know this is not an ideal world, and it will never come to pass that both parties will get everything they wanted from a licence. Nevertheless, both parties need to feel their goals and concerns have been considered and addressed and, on balance, the deal is a fair one that makes sense for their business. However, in many instances, one or both parties look at the negotiation only from the perspective of what they had hoped to achieve from the licence.

Nothing stands more in the way of a successful licensing transaction than the inability of either party to see things from the point of view of the other party. Remember Aristotle's wisdom applied to business: this licence needs to be a partnership for living well between your company and your licensee. Thus, the key to a successful licensing strategy is in your hands regardless of how myopic your potential licensor may be during the course of negotiations.

All you need to do is be able to have an understanding of the key issues from the perspective of the other side. This will always put you in a position to seek creative ways to get the deal done, even when your potential licensee is blinded by an inability to see beyond a particular way to satisfy its important need or key interest. Many times the real need or interest is not verbalised so you must exercise patience and draw that out in the course of negotiations.

Whenever possible it is advisable to get to know your potential licensee over a period of time before getting into the heart of negotiations. The more you can learn about the personality and character of the person(s) negotiating on the other side, the more likely you can be the one to find solutions if problems are encountered. Also, it is of importance to understand as much as possible about your potential licensee to determine the likelihood of a good business relationship.

As Aristotle would advise, you are entering into a partnership for living well so satisfy yourself that your partner in this licensing transaction is one who will see it the same way. Many are the instances where a licensor and licensee have battled across the table in negotiations only to later battle in the courtroom as one or both of the parties feel wronged or deceived.

If your corporate licensing team is to avoid this trap, it must be composed of people who have very good interpersonal skills. It goes without saying that they must have the necessary knowledge and skills to undertake the task of drafting and negotiating licences, but the ability to have a sensitivity to, and

understanding of, others is critical. In other words, whether they have a background in business, technology or law, it is important that they have the outlook of Aristotle.

Ideal candidates for the corporate licensing team will share the vision of the author Tom Morris in *If Aristotle Ran General Motors*: "The essence of business must never be viewed as the attempt to move money from other people's pockets into our own. It should be viewed as a performance art, the creation and care of structures within which people can join together in partnerships for living well."

The bottom line: the value of a fair deal

Much has been written about placing a value on intellectual property and there are experts who can assist in developing such numbers. These experts are well versed in assessing the value of your intellectual property before you initiate negotiations where you will be trying to extract full value from a potential licensee. The bottom line demands that the corporate licensing team properly evaluate the intellectual property and license it as close as possible to full value.

As you learn about the universe of potential licensees and identify the companies you will target, you should undertake an important commercial reality check. There may be a great number of potential licensees, or perhaps just a small group, but there could be only a single licensing target. Whatever the case may be, your corporate licensing team must always keep in mind your alternatives if they are unable to negotiate a deal with a particular party.

By properly assessing alternatives you will be able to ascertain the level the deal you are negotiating must surpass to be acceptable. The expert used to evaluate your intellectual property may have been overaggressive and failed to understand you have a weak bargaining position due to a limited universe of potential licensees. Or it may turn out your company is in the driver's seat because the technology you are licensing is essential for others to remain competitive.

Regardless of what is learned it will go a long way towards helping the individuals who will be negotiating the licence to understand the value of a fair deal. This should always be the goal so it is important that your corporate licensing team and the other side both put aside all unrealistic expectations not based on commercial realities. Once again, Aristotle has it right; this must be considered a partnership between your company and your licensee for living well, ie, it must be beneficial to both parties.

If this is to be a fair deal over the long

term, it is worth thinking of something alien to most cultures but commonplace in Japan. Your corporate licensing team may wish to consider the practice of inserting a clause as to the obligation of the party who achieves an unfair advantage and, thus, greater power as the result of a substantial change of conditions to renegotiate and make things fair to both parties. Rather than simply acquiescing to the fact one party can take advantage of a substantial change of conditions to the detriment of the other party, and especially where the change of conditions was unforeseen and very likely unforeseeable, inserting such a clause would be Aristotelian in nature. While a radical departure from the traditional approach to licensing, it would surely lead to solid, strong licence relationships.

Remember the keys to success

If you wish to implement a successful licensing strategy, the first key is to do the groundwork: identify the intellectual property that will be made available for licensing, place a value on it, and establish the goals you wish to achieve. The second key is to communicate an unwavering commitment to licensing from the highest levels of the company so its importance to the company is fully understood and appreciated. The third key is to set up the right type of organisational structure taking into account the nature of your company and the extent of its intellectual property portfolio available for licensing. The fourth key is to select individuals for your corporate licensing team who embrace an Aristotelian business philosophy and provide them with the authority and resources to succeed. Finally, the fifth key is to insist that your corporate licensing team understand that enhancing the bottom line is achieved by searching for a fair deal - fair for your company, but also fair for your licensee.