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**MG Rover****Alasdair Bleakley of TMIP Group explores the demise of MG Rover and suggests what lessons can be learnt for the future****The case for IP audits**

The Article looks at the IP aspects of Rover, IP aspects of a corporate transaction and the increasing use of IP Audits to value IP assets.

To survive, and prosper, MG Rover needed to achieve success in two key areas. The group needed credible brands and it needed the capacity to manufacture its products and sell them at a profit in the fiercely competitive high volume car market.

Sadly, the value of the Rover brand had devalued over the last few years and The Rover Group had debts of more than £1.4 billion when it collapsed. (It is estimated that only £85.5 million of assets will remain after paying off secured bank loans and preferential creditors.) However, it is clear that the MG marque is still highly regarded, particularly in the Japanese and American markets, and could still be sold by the administrators-PricewaterhouseCoopers. It has recently been reported that MG Rover's former Japanese partner, Honda, may be interested in the MG brand but why did the once legendary Rover brand lose its appeal?

The irony of Rover's demise is that its flagship model, the 75, is an excellent, high quality, award-winning product. The problem is the badge on the front of the car.

The Rover logo deeply impressed bank managers and company executives in the 50's, 60's and 70's. In the 21st Century, however, it failed to impress middle class professionals in the crowded market niche it occupied. They bought into the brand values of BMW and Audi instead.

But what exactly is a brand? A brand does not exist in a physical sense. It exists in customers' minds.

It is what the company and the company's product 'stands for'. It is also a collection of product features, positioning qualities and emotional values. Unfortunately, it seems all of the impressive product features of the 75 were not enough to save the brand because the car was positioned in the wrong, niche market and didn't have the right emotional values. According to brand expert, Kristie Tamsevicius, '75% of buying decisions are based on emotion.' Brands, like other Intellectual Property Rights, are an increasingly important corporate asset and new accounting rules will require that blue chip companies value their intangible assets. The Rover debacle not only highlights the significance of branding, it also clearly illustrates the crucial importance of understanding Intellectual Property rights and the benefits of IP audits.

The intellectual property rights of the Rover 25 and 75 were sold to Shanghai Automotive Industry Corporation for £67 million while the Chinese company was negotiating a joint venture deal with MG Rover.

The Chinese company claims that it has purchased the exclusive rights to build Rover cars and engines. The administrators dispute this. If SAIC does hold the rights but lacks the capability to develop new models then the rights are worthless. However, if SAIC can strike a deal with another car manufacturer its £67 million outlay could turn out to be a very shrewd investment indeed.

On the other side of the forecourt, many potential buyers are saying, understandably, that they are not keen in pursuing their interest unless they can acquire the Intellectual Property Rights from SAIC.

This is why trade union leaders from Amicus, The Transport & General Workers Union and GMB have been urging the Trade and Industry Secretary, Alan Johnson, to buy back the rights from the Chinese to facilitate a rescue deal.

**Three important points:**

The transition away from the 'tools of the trade' such as plant and equipment to 'knowledge of the trade' as represented by the wherewithal to manufacture and to own exclusive rights over intellectual properties is becoming more and more widespread.

The ability to know and value assets, particularly for any acquiring blue chip company that is subject

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to the IFRS accounting rules, is essential. (It is now a requirement to recognize, record and report the value of acquired individual tangible assets including IPR.) Conducting thorough IP audits is vitally important in order to capitalize on the potential benefits of IP assets and to maximize their value.

Of course, the web of separate companies woven by The Phoenix Group, who acquired Rover from BMW back in 2000, only adds to the potential confusion and emphasizes the importance of locating exactly where the rights to a brand are held within a highly complex corporate structure. All too often a purchaser can discover that rights in a brand are held in a separate company vehicle that is excluded from the sale.

The two most common types of corporate transactions requiring IP investigation are business (asset) sales and share sales but there are a number of others including takeovers, flotations/ IPQs, Rights issues, Placings, Public to Private, Managements buy-outs and Joint Ventures.

### **Business assets sales**

The acquisition will be of the goodwill of the business and some, or all, of the assets needed to run the business.

This structure is often chosen where specified assets or liabilities are to remain with the seller. Unlike a share sale, the assets in a business sale need to be specifically assigned or licensed to the buyer. This will often require the specific drafting of IP assignments or licenses and other transactional documents.

Warranties and indemnities are normally given by the seller to the buyer in relation to the business, assets and liabilities being sold and will usually include warranties regarding IP.

### **Share sales**

When an acquisition (via a 'share sale and purchase agreement') of some, or all, of the issued shares of a company is undertaken, the purchaser acquires the company itself which comes with all of its assets, liabilities and employees. Warranties and indemnities are normally given by the seller to the buyer with regard to the affairs of the company being sold and will usually include warranties concerning IP. In a share sale, however, intellectual properties/ licenses are not normally required. However, there will be circumstances where assignments and/or licenses (usually intra-group) are required pre-completion to ensure that the target owns or can continue to use the intellectual property it uses.

The fact that, with share sales, the company comes with all of its assets and liabilities means that IP warranties merit extra special scrutiny.

### **Takeovers**

An offer to acquire all of the shares in a PLC (usually listed on the London Stock Exchange or AIM) has an identical effect to a share sale/purchase but is structured as an offer to shareholders. Warranties and indemnities are rare in this field.

### **Flotations/IPQs**

When a company raises capital by listing its shares on a stock exchange a due diligence exercise is usually required in order to identify any IP/IT/Data or E-commerce issues that could be material enough to affect the attractiveness of the proposition to potential investors. Key areas include: drafting intellectual property assignments or licenses to ensure that the new company is legally entitled to use the intellectual property used in its businesses, reviewing the draft prospectus to ensure that it is accurate in respect of IP and obtaining a patent agent's report on the validity/enforceability of key patents.

The key aspects of a transaction involving IP are, in the chronological order in which they arise during the transaction, as follows:

- Legal due diligence, intellectual property searches, warranties, other transaction documents and disclosure.
- Legal due diligence
- A review of compliance of websites can often be valuable as distance selling and e-commerce regulations can easily be overlooked.
- 'Due diligence questionnaires' are sent to the seller when are acting for a buyer/investor and are then tailored to the type of business being acquired and cover all IP aspects.

### **Intellectual property searches**

When we are acting for the purchaser of a business or company which has domain names and/or registered/ registerable intellectual property, these assets will normally be disclosed in response to our due diligence questionnaire. However, it is usually advisable to carry out independent searches to verify the ownership and status of the relevant IP and to identify any licenses attached to registered IP, any oppositions to applications for registration and charges against the IP.

### **Warranties**

It will be crucial from the buyer's perspective to pay close attention to the

IP/IT/Data Protection warranties to ensure that it is getting the protection it needs.

### **Other transaction documents**

In many transactions there will be a variety of additional transactional documents such as intellectual property assignments and/ or assignments, name licenses and transitional services agreements.

Intellectual property assignments/ licenses are commonly required on business sales to transfer intellectual property rights, whether registered or unregistered, from the seller to the buyer or to grant rights to the buyer to use them. On share sales they can also be required if any group restructuring is required prior to the sale taking place in order to ensure that the relevant IP is owned by the target company or that it has the right to use it.

Generally speaking, a buyer will prefer to own material IP rights rather than to license them as licenses can normally be terminated. However, licenses are often acceptable if, on a business sale, the buyer wishes to continue to use the seller's name or other trademarks for an interim period until it can re-brand the business that has been purchased or where the seller needs to continue to use the IP in question in its retained business.

In business sales IP can be assigned by a clause in the sale and purchase agreement itself. However, if there is registered IP involved in the transaction it is common to have separate assignments of those rights to avoid having to file or produce the whole sale and purchase agreement at the relevant registries, or where the assignor of the IP is not a party to the sale and purchase agreement.

In a sale and purchase agreement the definition of 'Intellectual Property' will often include domain names which will often be 'assigned' together with the other IP. However, domain names are not intellectual property as such and, in order to transfer them, certain formalities must be met.

When a buyer purchases a company from group they will have a choice to procure or provide the services or to continue to receive those services from the seller's group, generally for a short interim period. In the latter situation we will usually draft and negotiate a 'transitional services agreement' which will clearly set out the services to be provided, the terms on which they will be provided (duration, price etc) and, usually, levels of service.

### **Disclosure**

Most sales and purchase agreements include a mechanism whereby there can be no claim made under the warranties in respect of matters that have been set out in a separate disclosure letter from the warranties to the buyer. The purpose of the disclosure letter is to set out all of those matters which, if not properly disclosed, would constitute a breach of warranty. For example, if a warrantor is giving a warranty that all IP rights used by the business being sold are owned by that business then, if the business uses any IP licensed to it by a third party such as software, details of those licenses will need to be set out in a disclosure letter if the warrantor is to avoid giving an untrue warranty.

A common disclosure is the content of all matters on patent and trademark registers. Whether this should encompass just those registered in the UK or on a worldwide basis depends on the rights being sold.

By following the above process in a structured manner, it will be possible for both buyer and seller to fully get to grips with the IP issues involved in a particular transaction.

### **Highlighting needs**

The Rover case serves to highlight the need for a prospective buyer to know exactly what it is investing in and also for a business to know itself what IP it holds.

To this end, IP Audits are increasingly being used as a valuation tool both pre-acquisition and also by businesses as part of good corporate governance.

An IP audit identifies, monitors and values a business's assets ensuring that their full value is extracted. The business can then make informed decisions with regard to acquiring IP assets,

mergers and acquisitions, licensing, collateral, enforcement and cost reduction.

### Acquiring IP assets

Knowledge of a company's intellectual property and its value will help to identify the type of IP rights that should be acquired and maintained. It will also show how the successful management of the IP assets can be achieved on an ongoing basis.

### Mergers and acquisitions

A good knowledge of what IP assets a company owns can lead to a significant increase in the value of the business. Investors value a company on the basis of their expectations of future profits and this may, to a considerable extent, be based on the exploitation of IP rights.

### Licensing

A business can increase its revenue by licensing out its IP rights to a third party. An IP audit will assist in determining the value of IP in order to obtain maximum benefit from license agreements. The resulting increased revenue could increase the market value of the business.

### Enforcement

Knowing the value of a company's IP assets can help the business to take decisions with regard to the practicality of taking action against infringement. And in what way this may be done on a case-by-case basis.

### Cost Reduction

A well-managed IP register can help to identify obsolete IP assets-enabling the company to reduce IP asset maintenance costs and to avoid infringing other people's IP rights.

Maximizing the value of IP is crucially important. By establishing a culture of identifying and cultivating IP assets, and using them strategically, a company can increase revenues, establish a competitive edge and position itself better in the marketplace in which it operates.

Only time will tell whether MG Rover or The Shanghai Automotive Industry Corporation conducted effective IP audits in the course of their negotiations.

### About the author

Alasdair Bleakley is a solicitor in the firm's TMIP Group. He specialises in all aspects of Intellectual Property (Trade Marks, Passing Off, Domain Names, Copyright, Design Rights, Patents). He advises on brand protection and exploitation for leading brand owners.

Alasdair is co-author of the Intellectual Property and Media Law Companion, is a speaker on IP issues and is published in the national press.

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