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INSTITUTE OF CORPORATE DIRECTORS

Corporate Governance

Risk Management for Intellectual Property

Brands in the Boardroom™

By ***Ruth M. Corbin****, LL.M., Ph.D., ICD.D*

On November 6, 2006, the value of shares in Four Seasons Hotels Ltd. jumped by almost 30%, following an offer by Bill Gates and a Saudi prince to buy the company. What could account for an offer of $93 per share when the company was losing money? It was clearly the brand. There is staggering value in the Four Seasons brand, which the board had protected for all those years, even the years in which the company lost money and market share.

Four Seasons Hotels' most recent Annual Report confirms that its brand value was diligently guarded: "In the highly competitive service industry in which we operate, trade names, trademarks, service marks and logos are very important in the sales and marketing of those services … Significant time and effort are expended each year on surveillance, registration and protection of our trade names, trademarks, service marks and logos. The loss or infringement of any of [them] could have a material and adverse effect on our business, results of operations and financial condition."[1] The Annual Report observes further the particular risks of *licensed* properties, for which management does not have day-to-day control over product and service delivery associated with the Four Seasons brand.

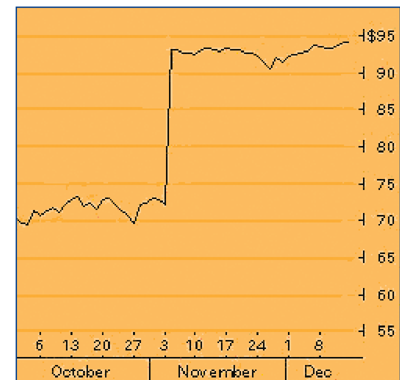

Figure 1 Four Seasons Hotels, 2006 stock performance

[1] Four Seasons 2005 Annual Report, p. 51.

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Mission: The mission of the Institute of Corporate Directors is to represent the interests of directors — to foster excellence in directors to strengthen the governance and performance of Canadian corporations. We will achieve this mission through education, certification and advocacy of best practices in governance.

Vision: The vision of the Institute of Corporate Directors is to be the pre-eminent organization in Canada for directors and recognized as the leading authority of standards of good governance.

Goals: Corporate governance has become a paramount issue in North America for governments, regulators, investors, management and directors. Stakeholders are calling for leadership, accountability and decisive action to raise the standard of governance in Canada and restore confidence in capital markets.

Our goals are to:

- Promote high professional standards for board and director conduct, practice and performance;
- Host regular events to provide a forum for director networking and learning;
- Develop partnerships with leading influencers to better impact corporate governance;
- Communicate with media, educators, investors and directors to improve understanding of board and director issues;
- Support director education through the ICD Corporate Governance College; and
- Collaborate with international organizations on matters of corporate governance.

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Four Seasons Hotels is a leader in Corporate Canada in this "next big thing" in corporate governance: elevating brand equity protection to the boardroom agenda. This article highlights the evolving responsibility of corporate boards in Canada to oversee risk management of its intellectual property (its brands in particular). It then identifies the questions that should be asked and the business analysis that should be requested of management.

Corporate Governance in the Twenty-First Century

Corporate governance of an organization entails the responsibilities of sound, ethical management to enhance corporate performance and safeguard shareholder interests. Various guidelines of the securities regulators in Canada, as well as the TSX, call upon directors to monitor and disclose the risks faced by their corporation. Guidelines emphasize asset protection over profit maximization.

When it comes to brands, there is plenty to protect. A 2005 study of "Canada's Most Valuable Brands"[2] revealed 17 famous Canadian-owned brands in the "billion-dollar value club", including such names as Royal Bank, Loblaws, Bell and Canadian Tire. The estimated asset values of U.S.-based Coca Cola, IBM and Microsoft brands are higher still, each measured not in billions, but in tens of billions of dollars.[3] Figure 2 shows some of the world's favourite famous brands.

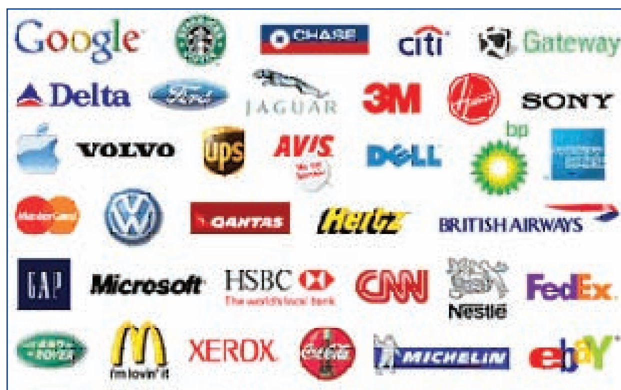

Figure 2 Some of the world's favourite famous brands[4]

Confirmation of financial value in famous brands surfaces when companies are sold. The everyday word "orange" was chosen in 1994 to name a mobile phone brand. In 1999, company Mannesmann paid nearly US$32 billion to buy it. Within a year thereafter, Orange was sold to France Telecom for US$49 billion. The new owners of Orange positioned it as a lifestyle brand, and experienced higher customer acquisition, retention and usage rates than all its rivals in France. Designated as a "Superbrand" by a market-monitoring organization in Europe[5], it has now been licensed into other countries and is being positioned to move into other product categories.[6] A company and its board must clearly pay attention to strategic investment in brands with such lucrative prizes available for achieving fame.

Like the seductive yellow brick road, the path to brand fame is beset with risk. Organizations like MADD Canada, Martha Stewart Living Omnimedia Inc. and Enron Corporation have learned how much an assault on one's brand can threaten credibility, reputation, and stakeholder support, with all the concomitant financial fallout.

Calling it "reputational risk" is only naming the issue superficially. There is clear opportunity for a systematic process of diligent governance to audit, measure, manage and protect this most precious category of corporate assets.

Audit and Measure

"What do we have worth protecting?" Audits (the non-financial kind) of intellectual property are an emerging form of due diligence by boards of directors. An intellectual property audit teases out everything intangible that distinguishes a company from its competitors, and defines its unique competitive advantage.

If the first question is "what do we have worth protecting?", the question immediately following should be "how much is it worth?"

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[2] Brand Finance and Ceteris, *Canada's Most Valuable Brands*, 2005, (United Kingdom: Brand Finance, 2004).

[3] See, e.g., *Business Week Online*, "Brands in an Age of Anti-Americanism", August 4, 2003.

[4] Image compiled by John A. Caslione, Andrew-Ward International, and viewable in its original context at www.caslione.com.

[5] Superbrands Limited, an international London-based organization, serves the European Marketing profession as the current independent arbiter of famous brand status, governed by a council of industry executives.

[6] Described in Brand Finance PLC, "Current practice in Brand Valuation", June 2000 at p.3, available on the company website ***www.brandfinance.com***.

There is already a burgeoning marketing literature on brand equity measurement. "Famous" brands, however, are now a distinct special case. As recently as 2006, the Supreme Court of Canada, reviewing a complaint by the owners of the famous Barbie doll[7], acknowledged more explicitly than had any previous court in Canada, that famous brands may attract a wider ambit of protection by the courts. Owners of famous brands have stronger protection in law to be able to use their brand to diversify into a wide range of related products, and to stop others from coming too close. For example, the owners of Google have a greater likelihood of protecting a car manufacturer from using the name Google-Mobile, than would Air Canada from stopping a company from using the name Tango to advertise an online dating service.

Corporate governors should be aware, however, that there is no clear definition of a "famous brand" in either Canadian law or Corporate Canada, and no common definition among different countries, where brand-owners might like to expand for global reach.[8] Boards are therefore tasked with overseeing a situation of high-stakes ambiguity. While awaiting a global agreement on the treatment of famous brands (and there are developments in progress under the auspices of the World Intellectual Property Organization), corporations should adopt some defensible, actionable measurement system for determining value. As strategy experts are fond of pointing out, "You can't manage what you don't measure". Boards should call upon management to first identify its brands and distinguishing trademarks (whether formally registered or not), provide assessments of their value, measure the extent of their fame, and provide an informed opinion on the premium that the fame of any one brand adds to its overall value. Recognition of when a corporation's brand has passed a threshold of "fame" would justify significant investment in worldwide monitoring for infringement, or investment in costly litigation when competitors come uncomfortably close.

Monitor for Abuse

Once a corporation has a firm hold on the value of its intellectual property assets, it should invest, to a commensurate extent, in a system for monitoring abuse, infringement or depreciation worldwide. Starbucks has such a system in place. Its well-recognized logo appears below, along with some of the copycats Starbucks has tackled in China, Korea, Russia, Japan and the United States. A worldwide infringement monitoring program is a costly but essential undertaking that can entail Internet tracking, media monitoring, monitoring trademark registries and plain old hitting the pavement with investigative shoppers in countries where intellectual property laws are notoriously lax. When companies have licensed their brands for use by other operators (like Pizza Pizza franchisees) or for other goods or services (like Tommy Hilfiger Corp. licensees), a documented policy is in order regarding the rules for displaying and using the brand logo, and the stringent standards for product and service delivery under the brand name.

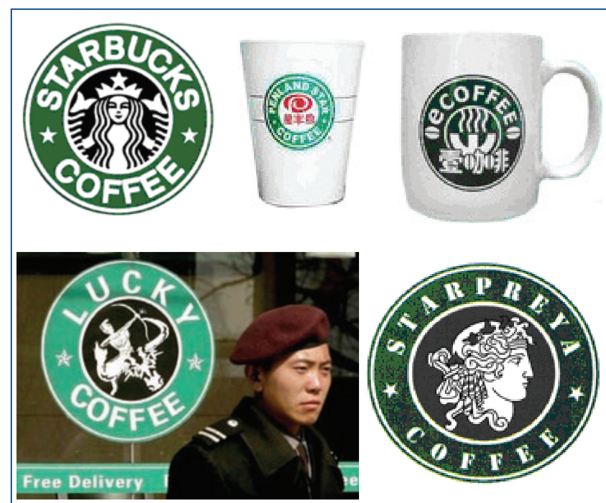

Figure 3 STARBUCKS logo and alleged imitators

Protect and Defend

Among the defensive strategies a corporate brand-owner can implement is the trademark registration of every protectable name, slogan, design, or colour array which distinguishes its products and services from others. A case in point that might surprise you: "Roll up the rim to win" is indeed a protected, registered trademark. The fact that you know whose trademark it is tells the story on its own. Where brands are licensed to others, clear and effective contractual agreements should be put in place protecting all aspects of brand integrity. These management activities are a matter of prudent and diligent corporate governance.

If abuses are discovered, a decision must be made of what to do. When brand abuses concern a contractually licensed brand (as might happen with a fast food chain),

[7] *Mattel, Inc.* v. *3894207 Canada Inc.*, 2006 SCC 22.

[8] Mostert, F., *Famous and Well-known Marks*, New York: INTA, 2004.

the licensing contract will govern the solution. Where there is infringement by a competitor, or depreciation by any other entity, a strategic decision is in order. Ignore? Negotiate? Litigate? Having evidence already in place of the value and possible fame of the brand will go a long way to producing a successful outcome.

Here is an example: Jaguar Cars Limited faced what it perceived to be an attack on its brand by Remo, a company selling backpacks and luggage using the brand name Jaguar. An offending billboard advertisement by Remo Imports Ltd., promoting its Jaguar-named luggage, appears in Figure 4. Jaguar Cars invested significantly over a 10-year period in evidence supporting the fame of its name, and the likelihood of the public's being misled by Remo's use of the name Jaguar on Remo's luggage and advertising. The evidence included surveys, secondary research, statistical analysis of commercial databases, media tracking, and expert marketing opinion. One of the significant challenges for Jaguar Cars, in supporting its lawsuit against Remo, was establishing evidence demonstrating that its reputation in the brand name Jaguar went all the way back to 1980 at least. While Jaguar Cars succeeded in its lawsuit[9], the case offers lessons to owners of famous brands: start now to establish and track the reputation of your brand, *before* a crisis descends.

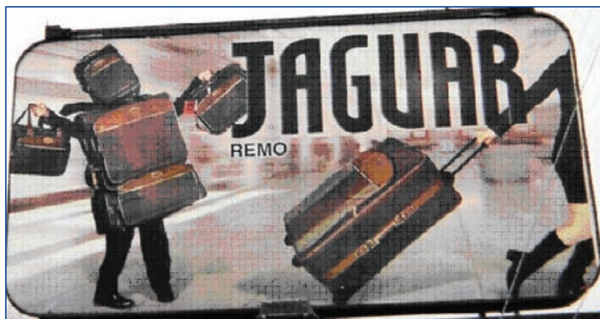

Figure 4 The Remo Imports advertisement, unauthorized by Jaguar Cars Ltd.

Conclusions and Opportunities for Effective Governance

- Famous brands are "first prize awards" for strategic investment and diligent marketing. Famous brands can add billions of dollars to a corporation's value when it is sold. They create sales momentum and opportunities for product diversification, for licensing and for exploiting in creative ways. They create incentives for management to "aim higher", to achieve the exponential paybacks. There is not yet a common worldwide definition of "fame" to help corporations achieve co-ordinated global protection. The extent and speed of investment in brand equity is therefore a matter for insightful strategic judgment.
- Due diligence takes the form of at least four stages: Audit, Measure, Monitor, Protect. Companies need to identify and value what they have, implement a monitoring system against infringers and free-riders, and move swiftly to protect their rights when interlopers are detected.
- With respect to the first of these stages, processes for corporate trademark audits are available in increasingly streamlined form, though perhaps unknown or underutilized by many famous-brand organizations. With respect to the second, corporations have recourse to several plausible models for calculating brand equity to support internal management investment decisions. Directors should ask for and expect the support of sound quantitative analysis for assessing the value of the corporation's intellectual property assets, and concomitant risks of degradation. The third stage of monitoring belongs on the list of other risk-monitoring activities that the board oversees. At the fourth stage, the lawyers take over.

In conclusion, we live in the age of heightened pressures on boards of directors, with heightened expectations for sound, informed, and thoughtful corporate governance. Directors have an obligation to manage the risks of the corporation's assets. For most corporations, none of these assets is more precious than the corporation's intellectual property. Prominent on the list of intellectual property assets are the company's brands. Brands issues have hit the boardroom. Directors should be demanding the best possible business intelligence to do their jobs. Their marketing executives should be keeping their BlackBerries close by.

Dr. Ruth M. Corbin is CEO of CorbinPartners Inc. and Adjunct Professor at Osgoode Hall Law School. She has served on the boards of several publicly listed companies, Crown corporations, and cultural organizations, holding chairmanship positions for audit and corporate governance committees.

[9] The decision is currently under appeal.