THE IDENTIFICATION OF INTELLECTUAL PROPERTY FOR FAMILY LAW PURPOSES

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Valuation analysts are often called on to value intellectual property for family law controversy purposes. This valuation need arises when the marital estate either directly or indirectly owns an intellectual property ownership interest. For family law purposes (and for other valuation purposes), intellectual property includes: trademarks, patents, copyrights, and trade secrets. There are generally accepted approaches, methods, and procedures related to the valuation of intellectual property. However, all of these valuation analyses begin with (1) the identification of the subject intellectual property and (2) the identification of the subject bundle of intellectual property ownership rights. This discussion summarizes the factors that the valuation analyst (and the family law attorney) should consider in the process of identifying the subject marital estate intellectual property.

INTRODUCTION

Valuation analysts are often called on to analyze intellectual property for various different purposes. These different types of analyses may include the following:

1. valuation opinion
2. lost profits/economic damages conclusion
3. royalty rate/transfer price determination
4. remaining useful life/depreciation estimation

These intellectual property analyses may be performed for the following purposes: financial accounting and public reporting, regulatory compliance and corporate governance, financing securitization and collateralization, taxation planning and compliance, management information and strategic planning, transaction pricing and structuring, and litigation support and dispute resolution.

Within the family law context, the marital estate may include either a direct or an indirect ownership interest in an intellectual property. That is, either one or the other spouse may directly own or operate the subject intellectual property. Or, either one or the other spouse may have an ownership interest in a closely held business or a professional practice that owns and operates the subject intellectual property.

Directly or indirectly, the value of the intellectual property may influence the value of the marital estate. And, this is very often the case when one or both of the marriage partners is a licensed professional practitioner.

This discussion summarizes the types of intellectual property that may be included in the marital estate. This discussion also describes:

1. the factors that valuation analysts consider to identify intellectual property and
2. the factors that valuation analysts consider to value intellectual property.

INTELLECTUAL PROPERTY

An intellectual property is an intangible asset that enjoys special legal recognition and protection. The special legal status of an intellectual property is usually the result of specific statutory authority, either federal or state.
Unlike intellectual property, general commercial intangible assets are typically created in the normal course of ongoing business operations. Some common examples of general commercial intangible assets include: customer contracts and relationships, supplier contracts and relationships, employee relations (as represented by a trained and assembled workforce), licenses and permits, business operating systems and procedures, company books and records, and so forth.

Such general commercial intangible assets are typically created over time in almost every successful going-concern business. Company executives do not have to make a special effort to create such general commercial intangible assets. Rather, such general intangible assets naturally develop as the company executives manage the day-to-day operations of the subject business enterprise.

On the other hand, an intellectual property is typically created by the specific and conscious intellectual activity of the developer. The creativity involved in developing an intellectual property can typically be identified and attributed to a specific individual. When created, an intellectual property is a new and unique invention that can be either:

1. artistic, like a book or photographic image, or
2. technological, like a chemical process or computer software code.

There are four types of intellectual property:

1. patents,
2. trademarks,
3. copyrights, and
4. trade secrets.

Each of these four types of intellectual property is summarized below.

A patent grants the subject patent holder the right to exclude others from making, using, or selling the patented invention or product for a specified duration of time. For example, a company that manufactures pharmaceutical drugs will register a patent on each new drug compound formula that it discovers.

While the subject patent is in effect, no other company can manufacture a drug product using that particular chemical compound formula. Once the subject patent expires, other pharmaceutical manufactures can produce identical drug products, generally in the form of generic brands.

A trademark identifies goods as coming from a particular manufacturer. A trademark can be a product brand name, like Versace or Nikon. A trademark could also be a logo, like the red target logo for Target stores.

A trademark grants the subject intellectual property owner the ability to prevent anyone else from using the trademark. Related to trademarks, service marks identify services as coming from a particular service provider. The “golden arches” of McDonald’s is an example of a well-known and recognizable service mark.

A copyright is an exclusive right to reproduce, publish, or sell an original work of authorship. As with a patent, the legal protection related to a copyright lasts for a limited period of time.

An author of any original work of authorship owns a copyright on the original work the moment that it is completed. However, to have assurances of the intellectual property legal protection, the author will typically register the copyright.

Copyright law covers many forms of an author’s expression, including books, movies, paintings, and songs.

A trade secret can be any commercial information that has value. That value is due to the fact that the trade secret (1) is kept confidential and (2) it is not known to the public. In order to qualify as a trade secret, the commercial information must meet the following two criteria:

1. It must be kept secret from the public.
2. It must provide a commercial advantage to the owner/operator.

A trade secret is frequently a secret process, method, or formula for producing a product or service. An example of a trade secret is the “secret formula” for the Coca-Cola soft drink syrup.

**PATENTS**

The United States patent law comes from the Patent Act, which is expressed in Title 35 of the United States Code, Sections 101-376.

A patent grants the inventor of an invention the right to exclude others from making, using, or selling the patented invention for a statutorily determined period of
time. A patent represents a property interest for the patent holder. This property interest derives from the U.S. Constitution, Article I, Section 8: “The Congress shall have the power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

There are three kinds of patents issued by the U.S. Patent and Trademark Office (the PTO):

1. utility patents,
2. design patents, and
3. plant patents.¹

Each of these three types of patents is summarized below.

A utility patent is issued with regard to an invention that has some type of usefulness or utility. An example of a patentable invention that has usefulness would be a new pharmaceutical product to control high blood-pressure.

A design patent can be issued for “any new, original, and ornamental design for an article of manufacture.”² A design does not need to meet the usefulness standard in order to qualify for a design patent.

In order to qualify for a design patent (instead of for a utility patent), the design must be purely ornamental and not functional. However, two patents may be issued for the same device:

1. a design patent for the product design and
2. a utility patent for the product useful characteristics.³

A plant patent may be issued for an asexually reproduced “distinct and new variety of plant.”⁴ A plant also does not need to meet a usefulness standard in order to qualify for a plant patent.

In order to qualify for a patent, an invention must meet certain specific statutory requirements. For example, to qualify for a patent, an invention must have both “utility” and “novelty.”⁵

Utility refers to usefulness, and this criterion is only required for utility patents. Novelty, required for all three types of patents, means the invention, design, or plant must be unique from all prior inventions, designs, or plants. However, an idea can not be patented.

An unusual case of patentability was presented in the 1990 Supreme Court of California judicial decision Moore v. The Regents of the University of California.⁶ In this case, doctors had removed the spleen of a patient named Moore, and the doctors created a cell line from the spleen tissue.

The doctors patented the cell line, which turned out to be very valuable. Moore sued the doctors to claim the value of the patented cell line. The Supreme Court of California ruled that Moore had no property interest in his discarded tissues. The California Supreme Court concluded that the doctors retained a valid patent in the cell line.

It is important to distinguish that the patent the doctors received was not for the human tissue itself, but rather for the cell line they created from it. The human tissue itself would not be patentable. This is because there was no human creativity involved in the formation of the human tissue.

Patents are valuable because a patent holder can license or assign the right to make, use, or sell a patented invention. In order to receive a patent, the inventor must file an application with the PTO.

The application must “follow technical conventions and contain words and drawings to clearly:

1. demonstrate how to make and use the invention,
2. explain why the invention is different from all previous and similar developments (known as the prior art), and
3. precisely describe what aspects of the invention deserve the patent (the patent claims).”⁷

The PTO will then examine the patent application and determine whether or not to issue a patent. The PTO may give the inventor an opportunity to amend the patent application.

If the patent application is rejected twice, then the inventor may appeal to the Board of Patent Appeals and Interferences within the PTO. Any “. . . further appeal may be made either to the Court of Appeals for the Federal Circuit or the U.S. District Court for the District of Columbia.”⁸

Once a patent is issued, the legal life of the patent protection is determined by what type of patent it is. Utility and plant patents are granted for 20 years after the date of the filing of the patent application. A design patent is granted for a period of 14 years after the date that the patent is issued.⁹ The life of the legal protection for all three types of patents is determined by federal statute.
There are many types of inventions that qualify for patent protection. However, not all inventions qualify for patent protection. Many of the creative works that are protected by copyright laws are not patentable. For example, movies, books, artwork, and songs cannot obtain patent protection.

However, the design and functional elements of the camera used to film movies, the printer used to print a book, or the device used to record songs may receive patent protection. In addition, formulas (e.g. chemical, cosmetic, or food) and computer software may receive patent protection.10

Figure 1 presents an illustrative example of a patent document.

TRADEMARKS

A trademark is used to identify a brand or a company. A trademark lets a consumer know that a good is produced by a specific producer. A service mark is a closely related intangible asset to the trademark intellectual property.

A service mark lets the consumer know that a service is coming from a specific service provider. In the United States, the Lanham Act protects trademarks. And, the Lanham Act defines a trademark as “any word, name, symbol, or device, or any combination thereof.”11

A trademark is often valuable because it “may represent investment made in advertising and quality assurance testing.”12 A company that has developed a branded product and has invested in the production of a quality product wants consumers to identify the trademarked product with quality, value, and other positive attributes. The trademark associated with the subject product allows the intellectual property owner to achieve that objective.

A trademark can be licensed. Restaurant franchises often function using the license of the franchisor’s trademark.13 For example, restaurant franchisor Burger King licenses out its name and logo to individual franchisees.

These Burger King franchisees independently operate their own Burger King restaurants. When a consumer sees the restaurant with the Burger King name and logo, the consumer has established expectations. Due to the trademark and trade name, the consumer has favorable expectations as to what food products will be on the menu and how those food products will taste.

Burger King has built a reputation as being a certain kind of restaurant with a specific menu. It is important to Burger King that, if a franchisee uses its trademark, the franchisee must meet specific presentation requirements. If any part of the Burger King experience is subpar to the consumer, the Burger King trademark may lose some of its value.

Either an individual or a corporation can own a trademark or a service mark. An individual who starts a small business may create and register a trademark. Later, a large corporation may acquire the small business, including its intellectual property. After the acquisitive transaction, the acquiring corporation would own the trademark of the seller small business.

A trade name is a different intangible asset from a trademark intellectual property. A trade name is the name of a business entity. A trademark identifies products and a service mark identifies services that are produced by that entity.14

A trade name cannot be registered for trademark protection. However, the Lanham Act does offer some legal protection for a trade name.

Trade dress can receive trademark protection. Trade dress refers to the way a product or service is displayed and promoted. For a product, the trade dress could be represented by the product packaging. For a service, the trade dress may be the décor that the service is provided in.

Trade dress must meet two requirements to qualify for federal trademark protection:

1. The trade dress must be inherently distinctive, unless it has acquired a secondary meaning.
2. The junior use must cause a likelihood of consumer confusion.15

A trademark can be developed through use (i.e. a “common law” trademark) or through registration with the PTO. The benefit of registering the subject intellectual property with the PTO is that the trademark:

1. is presumed to be valid and
2. will not be subject to geographic limitations within the United States.16

There are two ways for the intellectual property owner to apply for trademark registration with the PTO. If the mark is already in use and has been used either in interstate commerce or in commerce between the United States and a foreign country, then the application would be considered “regular.”17
If the mark has not been used, it can be registered under an “intent to use.” However, there must be a bona fide intention to use the subject mark in commerce.\(^{18}\)

The intellectual property owner must continue to use the subject trademark. Otherwise, the trademark may run the risk of being considered “abandoned.” After three years of nonuse, the Lanham Act will consider a mark to be abandoned—unless the intellectual property owner shows otherwise. A trademark does not expire, as long as it continues to be used.

A trademark owner should use the symbol \(\text{TM}\) to identify a trademark. The trademark owner can only use the \(\text{®}\) symbol if the trademark has been registered and approved by the PTO.\(^{19}\) Either symbol gives constructive notice that the subject mark has been claimed as a trademark.

There are restrictions on what names or logos qualify for protection under trademark law. Trademarks are only protected if they are continually used.

According to the Lanham Act, a trademark that has not been used in three years is presumed to be abandoned. This presumption means that the intellectual property owner has the burden of proving that the trademark is still in use.\(^{20}\)

A mark that is too generic will also not be protected by trademark law. For example, a company could not trademark the brand name “Cola.” This is because the name cola is a generic term that describes an entire class of beverages. A company could, however, have a brand name that combines a trademark and a generic term, such as Pepsi Cola.\(^{21}\)

Figure 2 presents an illustrative example of a trademark document.

\[ \text{“The intellectual property owner must continue to use the subject trademark.”} \]

\[ \text{“A trademark does not expire, as long as it continues to be used.”} \]

**Copyrights**

United States copyright law is encompassed in the Copyright Act of 1976. This statute is found in Title 17 of the United States Code, Sections 101-810, 1001-1010.

Copyright law protects “original works of authorship.” To qualify for copyright protection, an original work must display at least some creativity and must be fixed in a tangible medium of expression.

There are eight types of original works of authorship that are listed in the Copyright Act:

1. literary works
2. musical works, including any accompanying words
3. dramatic works, including any accompanying music
4. pantomimes and choreographic works
5. pictorial, graphic, and sculptural works
6. motion pictures and other audiovisual works
7. sound recordings
8. architectural works\(^{22}\)

The Copyright Act does not cover any “idea, procedure, process, system, method of operation, concept, principle or discovery.”\(^{23}\) For example, an author cannot receive a copyright for an idea or fact.

Under the federal copyright law, an author is:

1. the person who created the work,
2. a business that pays someone to create the work in an employment context, or
3. a business that commissions the work under contract.

The author is the owner of the copyright except in two cases:

1. The author assigns away the rights before completing the work.
2. The author is an employee who made the work as part of the author's employment.\(^{24}\)

An author does not have to register a work with the U.S. Copyright Office (a branch of the Library of Congress established by Congress to oversee the implementation of federal copyright laws)\(^{25}\) in order to receive copyright protection. This is because the author's original work is protected by copyright the moment it assumes a tangible form.

This copyright protection is applicable for each of the eight categories of work previously mentioned. However, an author can enhance the legal protection on the work if the copyright is registered. This is especially important if, later, a legal question of intellectual property ownership or infringement arises.

An author can also protect his work by giving the public notice of the copyright by using the symbol ©. The author of a work can use the format “© (year of publication) (author or other copyright owner).”\(^{26}\)
An author who uses that copyright notice notation can be assured that no one can claim he or she did not know the work was protected by a copyright.

The standard legal life of the copyright protection is the life of the author plus 70 years. However, there are exceptions to this rule. If an employee creates the work in the scope of employment or the work was commissioned or published anonymously, then the length of the copyright can vary from 95 to 120 years after publication.27

Figure 3 presents an illustrative example of a copyright document.

**TRADE SECRETS**

A trade secret is any information that has (1) economic value and (2) is not generally known by the public. The owner of a trade secret can ensure that the information is generally unknown to the public by taking reasonable measures to maintain the confidentiality of the information.

An example of such reasonable measures would be to have a nondisclosure agreement signed by all company employees, consultants, and visitors with access to the secret business information.

The term “trade secret” covers a wide spectrum of information. The type of business information that is typically considered to be a trade secret includes the following:

1. information about customers, such as customer order and credit characteristics, customer lists and mailing lists
2. information about personnel, suppliers, or distributors, such as sources of supply
3. information on the costs and pricing of goods, as well as books and records of the business
4. information concerning new business opportunities and current methods of doing business
5. some databases and know-how28

Unlike patents, trademarks, and copyrights, trade secrets cannot be registered with any governmental agency. For copyrights, patents, and trademarks, the registration process involves producing documentation of the invention or work that registration is sought for. If the owner of the trade secret had to register that intellectual property with a government agency, the “secret” would immediately be lost.

Since trade secrets are not registered, they do not have a statutory legal protection life. That is, a trade secret can exist so long as it remains unknown to the general public. This is the second reason why trade secrets are not registered.

Patents and copyrights have a limited legally protected life. Once either a patent or a copyright expires, competitors are free to use the inventions and works that were formerly protected.

Even though a trade secret is not registered with a government agency, it still enjoys many elements of legal protection. If someone obtains a trade secret in an improper way, a court will usually grant the trade secret owner:

1. economic damages and
2. an injunction to prevent further dissemination of the trade secret material.

State law encompasses all trade secret infringement cases. The exact tort that a trade secret owner can seek relief under is different from state to state. However, 45 states have adopted the Uniform Trade Secret Act to protect trade secrets.29

In addition, The Economic Espionage Act of 1996 makes the theft of a trade secret a federal crime. The Economic Espionage Act of 1996 also criminalizes receiving, buying, or possessing trade secret information that has been stolen.30

There are limits as to what information can be considered a trade secret. Clearly, generally known information cannot be a trade secret. In addition, information that others could easily acquire or duplicate will most likely not qualify as a trade secret.31

Figure 4 presents an illustrative example of a nondisclosure agreement related to a hypothetical trade secret.

**INTELLECTUAL PROPERTY-RELATED INTANGIBLE ASSETS**

The main difference between intellectual property related intangible assets and other general commercial intangible assets is that an intellectual property is consciously created. In contrast, general commercial intangible assets tend to be developed naturally in the regular course of ongoing business operations.

For example, an intellectual property related intangible asset could be a logo designed for a company. That
The Intellectual Property Development Process

The development process is different for each kind of intellectual property. Patents frequently relate to an invention of some kind. The inventor may have been trying to create something new or to improve on something that already existed. A discovery of a new invention or process could be accidental. As long as the invention is novel and nonobvious, it may qualify to be patented.

A trademark arises out of a conscious effort to create a mark that will distinguish one product or business enterprise from all others. A trademark can be “a distinctive word, phrase, logo, graphic symbol, or other device.”

The goal for a trademark is to be unique, in order to identify that specific product or service as coming from a specific source.

Only tangible expressions of thoughts and ideas can be copyrighted. That is, an author cannot copyright an idea itself. However, an author may copyright the specific expression of an idea. For example, an author could write a book about wizards.

The book itself would be subject to copyright, but the idea of wizards would not be subject to copyright. Other authors would remain free to write, draw, sing, etc., about wizards.

A trade secret may be developed independently of an already existing business enterprise. Or, a trade secret may be developed within the natural process of a business enterprise. For example, a secret family recipe could become the foundation of an international food processing company.

An important distinction between a trade secret and other types of intellectual property is that a trade secret is never registered. Therefore, the legal protection associated with a trade secret does not have an expiration date. Accordingly, a trade secret could, hypothetically, last forever.

The Intellectual Property Commercialization Process

An intellectual property often enjoys commercialization opportunities that general intangible assets typically do not. Goodwill, a trained and assembled workforce, or favorable supplier contracts are typically intangible assets that can be commercialized outside of the business that owns/operates these intangible assets.

In contrast, intellectual property has transferable legal rights that can be more easily sold or licensed. In addition, intellectual property legal rights can be easily divided, while intangible asset legal rights cannot be easily divided.

For general commercial intangible assets, either the owner uses the subject intangible asset or an operator uses the subject intangible asset. However, for intellectual property, both (1) the owner can use the subject intellectual property and (2) an operator can also use the subject intellectual property though the process of an intellectual property license.

In addition, a second (and a third, and a fourth . . .) operator can use the subject intellectual property through the process of an intellectual property sublicense.

Patents, trademarks, copyrights and trade secrets can be either sold outright or licensed. A license allows the intellectual property owner to permit others to use its intellectual property—without the owner giving up the ownership rights to the subject intellectual property.

In general, this license procedure is how a franchise works. The franchisor is the owner of the patent, trademark, copyright or trade secret, and the franchisee is able to use the franchisor’s intellectual property subject to certain restrictions.
An intellectual property owner does not have to license its intellectual property. That is, the intellectual property owner may operate its own intellectual property by directly entering the relevant marketplace. An intellectual property owner can feel confident in distributing its work, because the subject intellectual property rights are protected either by statute or by common law.

For example, federal copyright law protects the author’s legal right:

- “To reproduce all or part of the work.
- To make new (derivative) versions.
- To distribute copies by selling, renting, leasing, or lending them.
- To perform (e.g. recite, dance, or act) the work publicly.
- To display the work publicly, directly or by means of film, TV, slides, or other device or process.”

**COMMON TERMS OF INTELLECTUAL PROPERTY LICENSE AGREEMENTS**

One of the benefits of owning an intellectual property is the ability to license (or lease) it to a nonowner operator. In order to operate the subject intellectual property, a licensee may agree contractually to pay royalties to the licensor. The licensing of intellectual property can be a very profitable line of business for the intellectual property owner/developer.

Typically, the terms of the intellectual property license agreement will set out the royalty rate (or other royalty arrangement) that the licensee will pay to the licensor. This royalty rate is sometimes expressed as a percentage of the income that is generated by the operation of the licensed intellectual property. When the intellectual property royalty rate is expressed as such a profit split formula, 25 percent of the licensee/operator income is one common royalty rate to pay to the licensor/owner.35

An intellectual property license agreement will typically set out the terms by which the licensee/operator can use the subject intellectual property.

Obviously, the intellectual property licensor has a continued interest in the value of its intellectual property. The licensor does not want the subject intellectual property to be devalued in any way because of misuse by the intellectual property licensee.

Therefore, the intellectual property license agreement will typically set out standards or practices that the licensee/operator must follow in order to maintain the quality of the intellectual property.

**COMMON TERMS OF OTHER INTELLECTUAL PROPERTY CONTRACT AGREEMENTS**

The owner of the subject intellectual property rights is free to grant to another party full ownership of the intellectual property by selling it. In an intellectual property sale contract of this sort, the ownership of the subject intellectual property is fully transferred with the ownership rights.

After the intellectual property sale, no royalties will be paid to the original intellectual property owner.

**COMMON TYPES OF INTELLECTUAL PROPERTY OWNERSHIP**

Intellectual property ownership is important because there are certain legal rights that are only afforded to the subject intellectual property owner. There can be a joint ownership of the subject intellectual property.

And, the owner of the subject intellectual property can be an individual, a corporation, or any other form of business organization.

**COMMON TYPES OF INTELLECTUAL PROPERTY RIGHTS**

Intellectual property rights come from statutory law. In general, the right of ownership allows an inventor to profit from the work that he or she put into the invention. The right to exclude anyone else from using an invention for a period of time gives the inventor an opportunity to benefit economically from the research and development, time spent creating, or any other effort put into the invention.

For example, a pharmaceutical company may spend millions of dollars and years of effort to develop a single pharmaceutical product. If another company was able to commercialize that pharmaceutical product right away,
then the development company would lose its ability to
recover its cost investment and to make a profit.

Also, the other pharmaceutical companies would get to
cheat in a way, by not having to pay anything for the develop-
ment of the subject pharmaceutical product.

There is an underlying issue of fairness in ensuring
that:

1. someone is compensated for his or her work and
2. no one else is allowed to unfairly benefit from it.

**TYPICAL PARTIES TO THE INTELLECTUAL
PROPERTY COMMERCIALIZATION PROCESS**

There are usually three parties to the intellectual property commer-
cialization process:

1. the intellectual property developer
2. the intellectual property owner
3. the intellectual property operator

One party may operate in all three roles. That would be the case
if that party created the intellectual property, continues to own it, and
uses it to generate or protect some measure of income.

Frequently, the intellectual prop-
erty developer may also be the intel-
lectual property owner. Typically, a person receives the
legal rights to an intellectual property the moment it is
created. However, this is not always the case.

For example, if the work was created for hire on com-
mission, the intellectual property developer would not be
the intellectual property owner. The person who commis-
sioned the work for hire would be the intellectual property
owner. If an employee in the scope of his or her employ-
ment creates the work, then the intellectual property rights
would be owned by the employer.

If the intellectual property operator is not the intellec-
tual property owner, then there probably would be some
form of a use license agreement between the two parties.
The intellectual property operator will typically pay a roy-
alty fee to the intellectual property owner in exchange for
the ability to use the subject intellectual property.

**FACTORS THAT THE VALUATION ANALYST
SHOULD CONSIDER**

**Factor One**

Determine if the subject asset is an intellectual property. A

The intellectual property is not the product that is patented or the manuscript that is

**Factor Two**

Determine if the subject intangible asset is a valuable intellectual prop-

The value of an intellectual property comes from its exclusivity. For example, once a patent or copyright
has expired and can be used by any party, it will have far
less value.

A patent or a copyright is typically more valuable at the
beginning of its legal protection life than at the end of its
legal protection period. When a patent is first granted, the
intellectual property owner can be assured of years of the
exclusive ability to prohibit anyone else from using, mak-
ing, and selling the related property.

The intellectual property owner may look forward to
royalty income and/or operating income from the subject
intellectual property. As the legal protection expiration
date approaches, the amount of future royalty and/or oper-
ating income typically decreases. Therefore, the value of
the subject intellectual property typically decreases over
time.
SUMMARY AND CONCLUSION

Valuation analysts are often called on to analyze intellectual property for various different purposes. These different types of analyses may include the following:

1. valuation opinion
2. lost profits/economic damages conclusion
3. royalty rate/transfer price determination
4. remaining useful life/depreciation estimation

This discussion summarized the valuation analyst’s considerations related to the identification of intellectual property as a marital asset within a family law context. And, this discussion summarized the four types of intellectual property assets: (1) patents, (2) copyrights, (3) trademarks, and (4) trade secrets.

These intellectual property assets enjoy special legal recognition (compared to general commercial intangible assets). In addition, an intellectual property asset can generate income to its marital partner owner/operator in the form of:

1. owner’s license royalty income (where the marital partner owner is a licensor who licenses the use of the intellectual property to a third-party license) and/or
2. operator’s operating income (where the marital partner directly uses the subject intellectual to contribute to the operation of a going-concern business or professional practice).

Valuation analysts who practice in the family law discipline should be familiar with the generally accepted procedures related to:

1. the identification of marital estate intellectual property and
2. the valuation of marital estate intellectual property.

Of course, family law attorneys should also be generally familiar with the identification and valuation of intellectual property. This conclusion is true when the marital estate directly owns an intellectual property. This conclusion is also true when the marital estate has an ownership interest in a closely held business or professional practice. This is because that family-owned business or professional may own or operate an intellectual property.

Notes:
5. Rogowski and Young, p. 4.
7. Stim, p. 16.
8. Rogowski and Young, p. 7.
10. Ibid., pp. 7-9.
12. Rogowski and Young, p. 23.
13. Ibid., p. 27.
15. Ibid., pp. 432-433.
16. Rogowski and Young, p. 23.
17. Ibid.
21. Ibid., p. 343.
23. Ibid., Section 102(b).
25. Ibid., p. 294.
26. Ibid., p. 185.
27. Ibid., pp. 186-187.
28. Ibid., pp. 486-487.
29. Rogowski and Young, p. 45.
31. Ibid., p. 482.
32. Ibid., p. 340.
34. Ibid., p. 321.
35. Ibid., p. 31.
An electronic device uses separate surfaces for input and output. One of the surfaces (e.g., the bottom) includes a force-sensitive touch-surface through which a user provides input (e.g., cursor manipulation and control element selection). On a second surface (e.g., the top), a display element is used to present information appropriate to the device’s function (e.g., video information), one or more control elements and a cursor. The cursor is controlled through manipulation of the back-side touch-surface. The cursor identifies where on the back-side touch-surface the user’s finger has made contact. When the cursor is positioned over the desired control element, the user selects or activates the function associated with the control element by applying pressure to the force-sensitive touch-surface with their finger. Accordingly, the electronic device may be operated with a single hand, wherein cursor movement and control element selection may be accomplished without lifting one’s finger.
Figure 1 (continued)
Illustrative Example of a Patent Document

through which a user provides input (e.g., cursor manipulation and control element selection/activation). On a second or for that matter, any other control element is used to present one or more control elements and a cursor that is controlled through manipulation of the back-side touch-surface. When the device is activated or placed into an operational state where it is appropriate, control elements (e.g., soft keys and input windows) may be displayed. The cursor may be opaque or transparent so that as not to obscure prior displayed information such as a video presentation, a picture, a list of elements, etc. The cursor identifies where on the back-side touch-surface the user has their finger. When the cursor is positioned on the desired control element/soft key (i.e., spatially overlapping on the display element), the user selects or activates the control element by applying pressure to the force-sensitive touch-surface with their finger. Accordingly, the invention provides a means to operate a hand-held electronic device with one hand, whereas cursor movement and control element selection/activation may be accomplished without lifting one’s finger.

[0115] Referring to FIG. 2, a cross-sectional view of a multi-media hand-held device 200 is shown in accordance with one embodiment of the invention which includes housing 205 that has a top surface 210 having display element 215 and bottom surface 220 having force-sensitive touch-surface 225. As used herein, a force-sensitive touch-surface is a surface that is adapted to simultaneously detect where one or more objects touch it (e.g., fingers) and the force those objects apply to the surface. Illustrative embodiments of force-sensitivity-capable touch-surfaces are described in the documents identified in [0011].

[0116] Referring to FIG. 3A, hand-held multi-media device 300 is shown in accordance with one embodiment of the invention incorporates the functionality of click-wheel 305 on the device front area 310. The click-wheel is adapted to be simultaneously touched and rotated, as shown in FIG. 2. As shown in FIG. 3B, the touch element 225 of the user's finger against the back-side touch-surface relative to click-wheel 305. The click-wheel embodiment, navigation elements 310 and click-wheel 315 are rendered transparently (not shown). This allows that the user may continue to view whatever information was being displayed at the time they activated the back-side control. Once the user manipulates 320 the click-wheel, the user's finger across the back-side touch-surface 225 to the desired position (e.g. from the right position to the left position). Then, the user can select the element and move a selection (e.g., cursor) by lifting their finger from the surface 225. In this manner multi-media device 300 may be controlled by the user with a single hand.

[0017] In another embodiment, a multi-media hand-held device 300 provides a means for presenting one or more control elements. In embodiments of this type, each control element (e.g., button, key, slider or click-wheel) may be operated. This embodiment is especially useful when each control is displayed as desired (one at a time depending

where upon the user’s finger is detected, or all at once). In yet another embodiment, control element outlines are not etched or otherwise detailed on back-side touch-surface (see discussion below).

[0018] While the interface of FIGS. 3A and 3B may be effective for selecting items from a list, it is not as conve- nient for multi-media input. Accordingly, another embodiment of the invention one or more control elements may be displayed when the device’s back-side force-sensitive touch-surface is activated. Referring to FIG. 4, a one embodiment suitable for a device that incorporates the functionality of the click-wheel (as described above) where device 400 displays numeric soft keys 405 on display screen 215 situated on front surface 210. The user may select or activate one or more of the displayed buttons by moving their finger(s) across back-side force-sensitive touch-surface 225 so as to position cursor 410 above (i.e., spatially coincident with the desired button). Selection may be made by applying pressure to the back-side of the device as discussed above for the user’s convenience, previously selected numbers 415 may be displayed.

[0019] Referring to FIG. 5, is yet another embodiment in accordance with the invention, device 500 displays alpha soft keys 505 on display element 215 on front surface 210. By selecting various keys 505, the user may enter various strings (e.g., string 510). As before, the user positions cursor 515 through movement of their fingers across the device’s back-side force-sensitive touch-surface. button selection is made through the application of pressure to the back-side touch-surface. As shown, device 500 displays alpha buttons 505 transparently so that the user may continue to view information that may be displayed “behind” them. Of course, other interfaces may be used. In still another embodiment, a multi-media hand-held device having a back-side force-sensitive touch-surface may utilize one or more of the interfaces described above. For example, in a first mode (e.g., music playback mode), the click-wheel interface described above with respect to FIGS. 3A and 3B could be employed (with or without back-side surface etching). In an another mode (e.g., telephone mode), the interface described above with respect to FIG. 4 could be implemented. In still another mode (e.g., text input, electronic book reading, game playing, etc.), the interface described in connection with FIG. 5 may be used. Other interfaces will be apparent to one of ordinary skill in the art having the benefit of this disclosure.

[0021] In some embodiments, the control of elements and a menu may be triggered by a specific user action. For example, the user holding their finger on back-side touch-surface 225 within the region defined by an etched control element (e.g., click-wheel 305) for a specified period of time (e.g., one second). Another user action to trigger activation of a mode-appropriate user interface would be to have, for example, the device’s back-side force-sensitive touch-surface for a specified period of time and move it without a minimum specified force (e.g., a “light” grip or poke).

[0022] Alternatively, a change in device 200’s operational state may be triggered in response to a single input. For instance, a specific control element or menu may be displayed when device 200 transitions from a first state to a second state. Illustrative operational states might be, for example, menu locked, play mode, video play mode, audio play mode,
Figure 1 (continued)
Illustrative Example of a Patent Document

US 2007/0103454 A1

calendar mode, email mode, address book mode and image capture mode. Thus, a single user action may have cause different control elements to be displayed (or no control elements at all), depending on the device’s current operational state.

[0023] Referring to FIG. 6, an illustrative implementation of hand-held multi-media device 200 includes force-sensitive touch-surface controller 600, processor 605, memory 610 and display element controller 615. Controller 600 provides the necessary drive and sensing circuitry to obtain location and force information from force-sensitive touch-surface 225. In a typical implementation, touch-surface 225 is comprised of a number of sensing elements arranged in a two-dimensional array. Each sensing element (aka “pixel”) generates an output signal indicative of the electric field disturbance (for capacitance sensors), force (for pressure sensors) or optical coupling (for optical sensors) at the sensor element. The ensemble of pixel values at a given time represents a “proximity image.” Touch-surface controller 600 provides this data to processor 605 or to memory 610. Processor 605, in turn, processes the proximity image information to correlate the user’s finger movement across touch-surface 225 with the displayed information. Memory 610 may include one or more of the following types of storage media: magnetic disks; optical media; and semiconductor memory devices such as static and dynamic random access memory (RAM), Electrically Programmable Read-Only Memory ("EPROM"), Electrically Erasable Programmable Read-Only Memory ("EEPROM"), Programmable Gate Arrays and flash devices. Display controller 615 is responsible for producing the display element signals necessary to actually display information.

[0024] Various changes in the materials, components, circuit elements techniques described herein are possible without departing from the scope of the following claims. For instance, illustrative multi-media hand-held device 300 has been described as including an etched control element on its back-side touch-surface. This is not necessary. Further, multimedia devices in accordance with the invention may include physical buttons/switches in addition to a force-sensitive touch-surface (e.g., power, menu and reset buttons). In addition, processor 605 may be a single computer processor, a special purpose processor (e.g., a digital signal processor or “DSP”), a plurality of processors coupled by a communications link or a custom designed state machine. Custom designed state machines may be embodied in a hardware device such as an integrated circuit including, but not limited to, application specific integrated circuits ("ASICs") or field programmable gate array ("FPGAs"). Processor 605 may also execute program instructions stored in memory 610 to perform the acts described herein.

1. A method for operating a hand-held electronic device, comprising:
   - displaying first information on a display element on a first surface of a hand-held electronic device;
   - displaying control elements and a cursor on the display element when the electronic device is in a specified state;
   - adjusting a display position of the cursor in response to a contact on a force-sensitive touch-surface on a second surface of the electronic device, the second surface being a different surface than the first surface; and
   - activating a function associated with a first displayed control element when the cursor is positioned coincident with the first displayed control element and an activation force is applied to the force-sensitive touch-surface at a position corresponding to the cursor.

2. The method of claim 1, wherein the act of displaying control elements comprises displaying one or more control elements selected from the list consisting of a button, a slider, a spin-wheel, a numeric input key, an alpha input key and an alpha-numeric input key.

3. The method of claim 1, wherein the act of displaying control elements comprises displaying translucent control elements.

4. The method of claim 3, wherein the act of displaying translucent control elements is performed so that the first information remains at least partially visible through the control elements.

5. The method of claim 1, wherein the act of displaying control elements comprises displaying opaque control elements.

6. The method of claim 1, wherein the act of displaying control elements further comprises displaying one or more menu items, wherein the one or more menu items identify at least one operation.

7. The method of claim 1, wherein the act of displaying a cursor comprises displaying a translucent cursor.

8. The method of claim 1, wherein the act of activating is performed continuously with the act of adjusting so that the contact does not leave the surface of the force-sensitive touch-surface.

9. The method of claim 1, wherein the specified state is associated with an operational mode of the hand-held electronic device.

10. The method of claim 9, wherein the operational mode comprises a telephone mode.

11. The method of claim 9, wherein the operational mode comprises a alpha-numeric data entry mode.

12. The method of claim 9, wherein the operational mode comprises a character-based input mode.

13. The method of claim 1, wherein the act of adjusting comprises tracking the contact as it moves about the force-sensitive touch-surface.

14. The method of claim 1, wherein the hand-held electronic device comprises a mobile telephone.

15. The method of claim 1, wherein the hand-held electronic device comprises a hand-held computer system.

16. The method of claim 1, wherein the hand-held electronic device comprises a personal digital assistant.

17. The method of claim 1, wherein the hand-held electronic device comprises a video display unit.

18. The method of claim 1, wherein the hand-held electronic device comprises a digital music device.

19. A program storage device, readable by a processor, comprising instructions stored thereon for causing the programmable control device to perform the method in accordance with claim 1.

20. A hand-held electronic device, comprising:
   - a first surface having a display element coupled thereto;
   - a second surface having a touch-surface coupled thereto, the second surface not co-planar with the first surface, the touch-surface adapted to detect a location on the
Figure 2
Illustrative Example of a Trademark Document

Trademark/Service Mark Application, Principal Register
Serial Number: 78521796
Filing Date: 11/23/2004

The table below presents the data as entered.

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<td>USPTO-GENERATED IMAGE</td>
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<td>LITERAL ELEMENT</td>
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<tr>
<td>MARK STATEMENT</td>
<td>The mark consists of standard characters, without claim to any particular font, style, size, or color.</td>
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<td>OWNER SECTION</td>
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<tr>
<td>NAME</td>
<td>Apple Computer, Inc.</td>
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<td>1 Infinite Loop</td>
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<td>Retail store services featuring computers, computer software, computer peripherals and consumer electronics, and demonstration of products relating thereto; online retail store services provided via a global computer network featuring computers, computer software, computer peripherals and consumer electronics, and demonstration of products relating thereto; retail services in the field of entertainment featuring pre-recorded musical and audio visual works, and music related electronic products provided via the Internet and other electronic and communications networks; data storage and retrieval services; computerized data storage services; data storage of electronic music; information, advisory and consultancy services relating to all the aforesaid.</td>
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| FILING BASIS         | Section 1(b) |
| GOODS AND/OR SERVICES SECTION |         |
| INTERNATIONAL CLASS  | 035 |
| DESCRIPTION          |         |
| FOREIGN APPLICATION NUMBER | 3957768 |
| FOREIGN APPLICATION COUNTRY NAME | European Union OHIM |
| FOREIGN FILING DATE   | 07/28/2004 |
| ADDITIONAL STATEMENTS SECTION |         |
| PRIOR REGISTRATION(S) | Applicant claims ownership of U.S. Registration Number(s) 2835698. |
| SIGNATURE SECTION     |         |
| SIGNATURE             | /Thomas R. La Perle/ |
| SIGNATORY NAME        | Thomas R. La Perle |
| SIGNATORY DATE        | 11/23/2004 |
| SIGNATORY POSITION    | Intellectual Property Counsel |
| PAYMENT SECTION       |         |
| NUMBER OF CLASSES     | 1 |
| NUMBER OF CLASSES PAID | 1 |
| SUBTOTAL AMOUNT       | 335 |
| TOTAL AMOUNT          | 335 |
| ATTORNEY              |         |
| NAME                  | Thomas R. La Perle |
| FIRM NAME             | Apple Computer, Inc. |
| INTERNAL ADDRESS      | MS: 3TM |
| STREET                | 1 Infinite Loop |
| CITY                  | Cupertino |
| STATE                 | CA |
| ZIP/POSTAL CODE       | 95014 |
| COUNTRY               | United States |
| PHONE                 | 408-974-2385 |
Figure 2 (continued)
Illustrative Example of a Trademark Document

The mark consists of standard characters, without claim to any particular font, style, size, or color. The literal element of the mark consists of IPOD. The applicant, Apple Computer, Inc., a corporation of California, residing at 1 Infinite Loop, Cupertino, CA, United States, 95014, requests registration of the trademark/service mark identified above as the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended.

Infringement: The applicant has a bona fide intention to use the mark in commerce on or in connection with the identified goods and/or services and asserts a claim of priority based on European Union OHIM application number, 3957568, filed 07/28/2004 (U.S.C. Section 1126(d), as amended.

International Class 035: Retail store services featuring computers, computer software, computer peripherals and consumer electronics, and demonstration of products relating thereto; online retail store services provided via a global computer network featuring computers, computer software, computer peripherals and consumer electronics, and demonstration of products relating thereto; retail services in the field of entertainment featuring pre-recorded musical and audio visual works, and music related electronic products provided via the Internet and other electronic and communications networks; data storage and retrieval services; computerized data storage services; data storage of electronic music; information, advisory and consultancy services relating to all the aforesaid.

Priority based on foreign filing: Applicant has a bona fide intention to use the mark in commerce on or in connection with the identified goods and/or services and asserts a claim of priority based on European Union OHIM application number, 3957568, filed 07/28/2004 (U.S.C. Section 1126(d), as amended.

The applicant hereby appoints Thomas R. La Perle of Apple Computer, Inc., MS: 3TM, 1 Infinite Loop, Cupertino, CA, United States, 95014 to submit this application on behalf of the applicant. The attorney docket/reference number is TM 8373.

A fee payment in the amount of $335 will be submitted with the application, representing payment for 1 class(es).

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce, to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive, and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

Signature: /Thomas R. La Perle/
Date: 11/23/2004
Signatory’s Name: Thomas R. La Perle
Signatory’s Position: Intellectual Property Counsel
Mailing Address:
Thomas R. La Perle
MS: 3TM
1 Infinite Loop
Cupertino, CA 95014
Figure 2 (continued)
Illustrative Example of a Trademark Document

featuring pre-recorded musical and audio visual works, and music related electronic products provided via the Internet and other electronic and communications networks; data storage and retrieval services; computerized data storage services; data storage of electronic music; information, advisory and consultancy services relating to all the aforesaid.

Priority based on foreign filing: Applicant has a bona fide intention to use the mark in commerce on or in connection with the identified goods and/or services and asserts a claim of priority based on European Union OHIM application number, 3957766, filed 07/28/2004. 15 U.S.C. Section 1126(d), as amended. International Class 035: Retail store services featuring computers, computer software, computer peripherals and consumer electronics, and demonstration of products relating thereto; online retail store services provided via a global computer network featuring computers, computer software, computer peripherals and consumer electronics, and demonstration of products relating thereto; retail services in the field of entertainment featuring pre-recorded musical and audio visual works, and music related electronic products provided via the Internet and other electronic and communications networks; data storage and retrieval services; computerized data storage services; data storage of electronic music; information, advisory and consultancy services relating to all the aforesaid.

Applicant claims ownership of U.S. Registration Number(s) 2835698.

The applicant hereby appoints Thomas R. La Perle of Apple Computer, Inc., MS: 3TM, 1 Infinite Loop, Cupertino, CA, United States, 95014 to submit this application on behalf of the applicant. The attorney docket reference number is TM 8373.

A fee payment in the amount of $335 will be submitted with the application, representing payment for 1 class(es).

Declaration
The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

Signature: Thomas R. La Perle Date: 11/23/2004
Signatory's Name: Thomas R. La Perle
Signatory's Position: Intellectual Property Counsel
Mailing Address:
Thomas R. La Perle
MS: 3TM
1 Infinite Loop
Cupertino, CA 95014
RAM Sale Number: 1342
RAM Accounting Date: 11/23/2004
Serial Number: 78521796
Internet Transmission Date: Tue Nov 23 14:35:04 EST 2004
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IPOD
### Figure 3

**Illustrative Example of a Copyright Document**

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<td>Harry Potter and the Sorcerer's stone / by J. K. Rowling ; ill. by Mary GrandPre.</td>
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<td>Description:</td>
<td>309 p.</td>
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<td>Copyright Claimant:</td>
<td>on text; J. K. Rowling</td>
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<td>Names:</td>
<td>GrandPre, Mary Rowling, J. K.</td>
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</tbody>
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================================================================================
Basic Nondisclosure Agreement

This Nondisclosure Agreement (the “Agreement”) is entered into by and between

________________________ with its principal offices at ___________________________,

(“Disclosing Party”) and __________________________, located at __________________________

(“Receiving Party”) for the purpose of preventing the unauthorized disclosure of Confidential Information as defined below. The parties agree to enter into a confidential relationship with respect to the disclosure of certain proprietary and confidential information (“Confidential Information”).

1. Definition of Confidential Information. For purposes of this Agreement, “Confidential Information” shall include all information or material that has or could have commercial value or other utility in the business in which Disclosing Party is engaged. If Confidential Information is in written form, the Disclosing Party shall label or stamp the materials with the word “Confidential” or some similar warning. If Confidential Information is transmitted orally, the Disclosing Party shall promptly provide a writing indicating that such oral communication constituted Confidential Information.

2. Exclusions from Confidential Information. Receiving Party’s obligations under this Agreement do not extend to information that is: (a) publicly known at the time of disclosure or subsequently becomes publicly known through no fault of the Receiving Party; (b) discovered or created by the Receiving Party before disclosure by Disclosing Party; (c) learned by the Receiving Party through legitimate means other than from the Disclosing Party or Disclosing Party’s representatives; or (d) is disclosed by Receiving Party with Disclosing Party’s prior written approval.

3. Obligations of Receiving Party. Receiving Party shall hold and maintain the Confidential Information in strictest confidence for the sole and exclusive benefit of the Disclosing Party. Receiving Party shall carefully restrict access to Confidential Information to employees, contractors and third parties as is reasonably required and shall require those persons to sign nondisclosure restrictions at least as protective as those in this Agreement. Receiving Party shall not, without prior written approval of Disclosing Party, use for Receiving Party’s own benefit, publish, copy, or otherwise disclose to others, or permit the use by others for their benefit or to the detriment of Disclosing Party, any Confidential Information. Receiving Party shall return to Disclosing Party any and all records, notes, and other written, printed, or tangible materials in its possession pertaining to Confidential Information immediately if Disclosing Party requests it in writing.
Figure 4 (continued)
Illustrative Example of a Nondisclosure Agreement
Related to a Hypothetical Trade Secret

4. **Time Periods.** The nondisclosure provisions of this Agreement shall survive the termination of this Agreement and Receiving Party’s duty to hold Confidential Information in confidence shall remain in effect until the Confidential Information no longer qualifies as a trade secret or until Disclosing Party sends Receiving Party written notice releasing Receiving Party from this Agreement, whichever occurs first.

5. **Relationships.** Nothing contained in this Agreement shall be deemed to constitute either party a partner, joint venturer or employee of the other party for any purpose.

6. **Severability.** If a court finds any provision of this Agreement invalid or unenforceable, the remainder of this Agreement shall be interpreted so as best to effect the intent of the parties.

7. **Integration.** This Agreement expresses the complete understanding of the parties with respect to the subject matter and supersedes all prior proposals, agreements, representations and understandings. This Agreement may not be amended except in a writing signed by both parties.

8. **Waiver.** The failure to exercise any right provided in this Agreement shall not be a waiver of prior or subsequent rights.

This Agreement and each party’s obligations shall be binding on the representatives, assigns and successors of such party. Each party has signed this Agreement through its authorized representative.

_______________________________
(Signature)

_______________________________
(Typed or Printed Name)

Date: ______________

_______________________________
(Signature)

_______________________________
(Typed or Printed Name)

Date: ______________