

UNIQUE OPPORTUNITY IN AN UNTAPPED MARKET

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REPRINTED FROM

agency sales magazine

January 2010 • vol.40, no.01


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Licensing intellectual property presents a new opportunity for reps in today's digital age, but this emerging market requires the fine-tuning of contracts to reflect a new way of selling.





We live in an economy that is, more than ever, driven by technology. As a result, there are a growing number of companies that are in the business of developing, owning and marketing patents, trademarks and other intellectual property. As with traditional manufacturers of goods and providers of services, these companies may occasionally turn to independent sales representatives for their sales and marketing.

This offers sales reps in a variety of industries new and unique opportunities to generate commissions. But selling a patent or trademark license is not nearly the same as selling an actual product, so along with opportunity comes certain risks that the sales rep must be aware of if he is going to make a profit.

The sales rep must assume that “selling” a license will take some time. First, there is the time it will take to convince the customer of the value of the intellectual property. But unlike selling a product, once the customer is “sold” on the value, the next step will be the negotiation of a license agreement between the principal and the customer. Also, unlike forwarding an order to a principal for its acceptance, negotiating a license agreement is likely to involve considerable time and energy. It will also involve both the principal’s and the customer’s legal counsel.

Long-Term Agreement

Because of the lengthy selling process, the representative’s agreement with the principal should be for a relatively long term. The typical sales agreement, which is terminable by the principal for convenience on short notice, simply does not work in this case. Instead, we would recommend an initial term of at least three years. Moreover, in addition to commissions, the sales representative should be paid a fixed monthly retainer for a certain period of time, perhaps for the entire initial term of the representative’s contract with the principal. This is the case because selling technology licenses will require the sales rep to pioneer a territory or market; there will not be any existing book or backlog of business to generate immediate or even short-term commissions.

The representative will need to understand this process and the issues that are likely to be involved for two reasons. First, the representative can serve a vital function in helping the parties to resolve issues and reach an agreement. In other words, the representative must be able to step in and “broker the deal.” To do so effectively, however, the representative will need to

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have a working knowledge not only of the intellectual property, but also of the basic terms and provisions contained in a typical license agreement. This may include how royalties or other consideration for the license is to be determined; what the term of the agreement should be, the rights of the parties to terminate the agreement; the rights and obligations of the parties with respect to infringement matters; and the right, if any, of the licensee to purchase or otherwise acquire the intellectual property from the licensor.

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Second, the representative must understand how the terms of the license agreement will impact his commissions and how his commissions will be paid. A typical patent license agreement, for example, will require the licensee (your customer) to pay a royalty to the licensor (your principal). While a certain portion of the royalty might be paid up front, the bulk of the royalties will be paid over the life of the license agreement. Because U.S. patents can be valid for as long as twenty years, the license agreement may continue for a long period of time. Therefore, the commission payments to the sales rep should also continue for a long period of time.

The prospect of receiving commissions for 20 years may seem appealing, but consider the practicalities of actually collecting commissions over such a long period. Obviously, a lot can change over the life of such an agreement, not only for the licensor and licensee, but

for you and your business. Moreover, it should come as no surprise that principals may be unwilling to pay commissions for the entire term of the license agreement.

There is no perfect solution to this problem. One approach is to be paid at a higher rate of commission during the early years of the license, but it is important to keep in mind that royalties are typically a percentage of sales, and sales during the first few years of the license may be much lower than in later years.

So with all of that to consider, does it make any sense for a sales rep to promote intellectual property? The answer is probably “yes” if the rep can call on an existing customer base in an emerging technological market that can potentially benefit from licensing intellectual property – and if both the principal and the rep are willing to make the necessary long-term investment in developing that market. ⁸⁸

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