

Brands, Corporate Social Responsibility, and Maintaining Goodwill

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Brands and CSR

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BRAND PROTECTION – IP and CSR

“It takes 20 years to build a reputation and five minutes to ruin it. If you think about that you will do things differently.” Warren Buffet

Customers buy products they **value** and **trust** = **BRAND EQUITY**

CSR programs

- **manage risk** – product safety, supply chain compliance, ethics
- **build good will** – contribute to charitable efforts, promote equality, do the right thing, better the world...

Rana Plaza – Bangladesh



Lumber Liquidators



PROP 65 – Lead in lipstick

SAFEGUARDS
SGS CONSUMER TESTING SERVICES

NEWS RELEASE 10/19/08 AUGUST 2008

California Proposition 65 Settlements : Californian Judge gives lead the "Kiss-off"

The release of a report in 2007 titled "A Poison Kiss: The Problem of Lead in Lipstick" by the Campaign for Safe Cosmetics (CSC) as well as court cases regarding the presence of lead in lipstick have raised public concern about whether the presence of lead in lipstick violates Proposition 65.

The Attorney General, State of California, Department of Justice, concluded that the level of lead in lipstick, up to 9.0 ppm per milligram, does not make a reasonable claim of a Proposition 65 violation and ought not to be litigated.

The exposure data is based on the assumption of the use of lipstick of 100 milligrams per day. Comparing this to the 0.5 milligram per day "safe" level, "Maximum Allowable Daily Intake (MADI)" from Proposition 65, it appears that a reasonable claim for harm in a day to harm would not arise until consumers used 200 mg/day.

The Attorney General advised that Lead is not readily absorbed through skin by application of lipstick.

As the leader in consumer product quality services, SGS is equipped with state-of-the-art facilities and an expert team. With their strong technology and background we offer a high level of expertise in testing, certification, technical assistance and inspection of products for the reproductive industry. Through extensive experience that we have gathered over the years, SGS simply can help.

Please do not hesitate to contact us for any further information.



Lead in toys

Mattel shifts into crisis mode after quality problems

By LOUISE STORY AUG 28, 2007

\$2.3 M fine

EL SEGUNDO, California — The wake-up call for Mattel came just as it was preparing to announce that the company would recall 1.5 million Chinese-made toys that were tainted with lead paint.

Surrounded by boxes of Barbie dolls, Hot Wheels cars and other sample toys, Tom DeBrowski, Mattel's executive vice president for worldwide

United States
CONSUMER PRODUCT SAFETY COMMISSION

Home » Recalls » Reebok Recalls Bracelet Linked to Child's Lead Poisoning Death

Reebok Recalls Bracelet Linked to Child's Lead Poisoning Death

\$1 million fine & settlement

Note: Reebok has agreed to a settlement resolution in phone number:

FOR IMMEDIATE RELEASE Firm's Contact Number: (888) 225 2253

BRAND PROTECTION – IP and CSR

- Brand IP image and California Prop 65 labeling requirements
- <http://www.sgs.com/en/news/2016/10/safeguards-16116-new-prop-65-labeling-requirements>
- <https://www.p65warnings.ca.gov/>

One example of warning language for Prop 65

"This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer."

» Effective date: 08/30/2018

BRAND PROTECTION – IP and CSR

- Brand IP image and Modern Slavery Acts
 - California Transparency in Supply Chains Act of 2010 (SB 657)
 - UK Modern Slavery Act 2015 (MSA)
 - Broader scope and reporting each year
 - » Global turnover £36 Million (\$49 Million) and carries on a business in UK
 - » Approved by Board of Directors
 - » Company's structure, supply chain, due diligence processes, risk analysis, steps to manage and effectiveness, etc.

BRAND PROTECTION – IP and CSR

- In 2016, est. 40.3 Million people are in modern slavery
 - 24.9M forced labor
 - 16M private sector
 - 4.8M forced sexual exploitation
 - 4M imposed by State authorities²

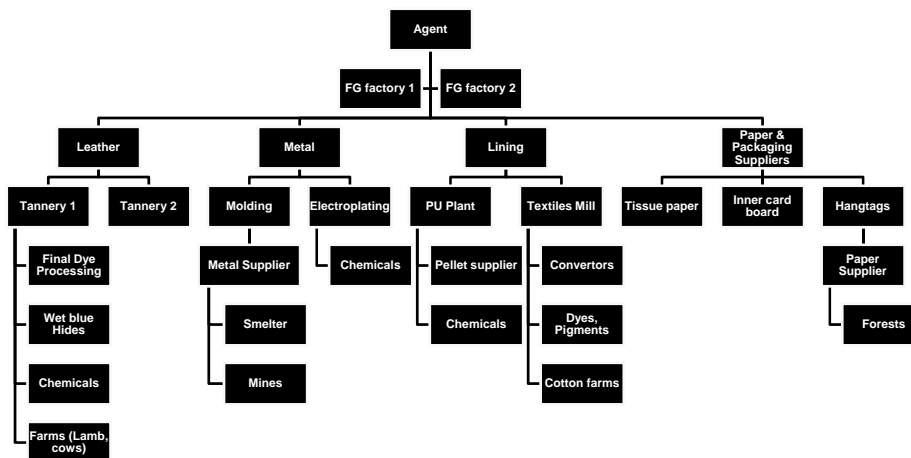


Uzbekistan ends systematic use of child labour and takes measures to end forced labour¹

- An ILO team monitoring the cotton harvest in Uzbekistan has found that child labour is no longer systematically used and that measures are being taken to end the use of forced labour.

1. http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_613562/lang-en/index.htm
 2. ILO, Global Estimates of Modern Slavery: Forced labour and Forced Marriage, Geneva Sept. 2017
http://www.ilo.org/global/publications/books/WCMS_575479/lang-en/index.htm

MAPPING THE HANDBAG SUPPLIER



SUPPLY CHAIN LEGAL RISK ANALYSIS – overview

- EU timber regulations (paper and viscose)
- EU and US conflict minerals
- Human trafficking and slavery regulations
- Uzbek cotton
- Restricted Substances in products
- Manufacturing RSLs (mRSL)
- Environmental violations
- Labor and pay issues
- Animal welfare policies
- N. Korean declarations

SUPPLY CHAIN LEGAL RISK ANALYSIS – overview

Countering America's Adversaries Through Sanctions Act³

- CBP's CF-28s request the following information from companies:
 - Do you as an importer have a due diligence program that includes examining whether supply chains are free from forced child, convict or forced labor?
 - What supply chain audits have been done to ensure that you as the importer have an ethical (socially responsible) supply chain free of forced child labor and forced labor in order to ensure compliance with 19 U.S.C. § 1307?
 - How do you as an importer identify whether or not your supply chains include goods made wholly or in part by North Korean laborers, wherever located?
 - Have you as an importer conducted internal audits, and/or hired a third party to conduct an audit, to ensure there is no forced labor or forced child labor in your supply chain? If yes, what were the dates of the audits, who conducted the audits, and what were the findings?
 - Please furnish to CBP copies of all forced labor and forced child labor supply chain audits, including findings and recommendations.

3. Countering America's Adversaries Through Sanctions Act (H.R. 3364, Pub.L. 115-44)

BRAND PROTECTION – IP and CSR

- **BRAND EQUITY** – what can you do to protect it?
 - BUILD a compliance program
 - KNOW your supply chain and assess potential risks
 - WHO makes your products?
 - » Direct, agents, licensees
 - INCLUDE contractual terms for vendors, licensees, suppliers (ideas for language -- not legal advice)

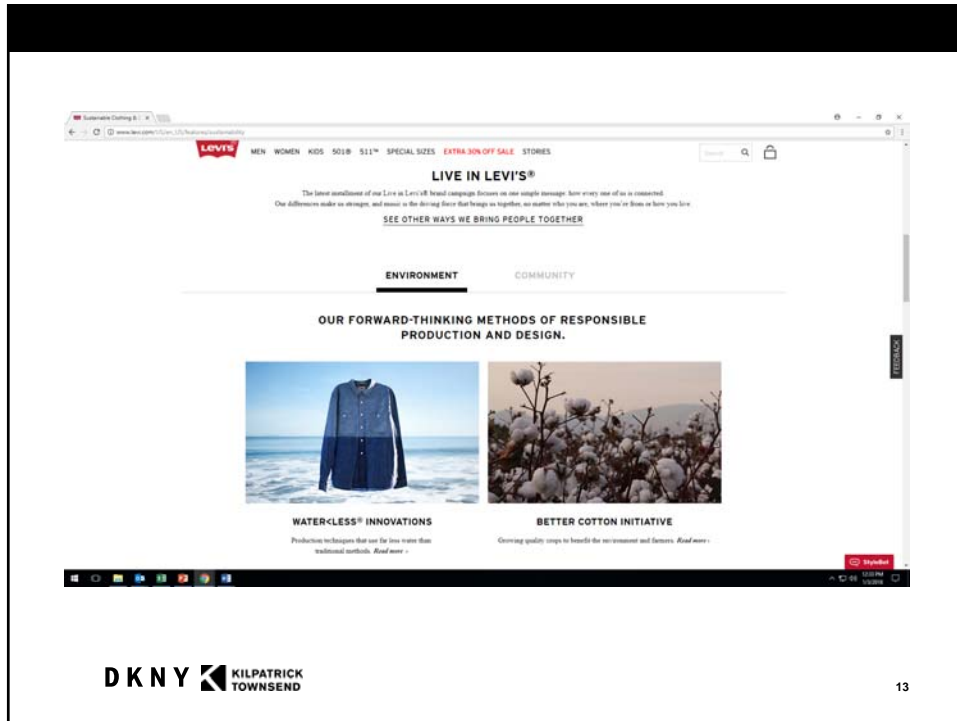
Supplier will provide Purchaser with all information required in order to fulfill Purchaser's duties to communicate and/or notify regarding substances of very high concern (SVHC) as included pursuant to REACH and products do not contain any substances banned by Proposition 65.

Supplier certifies that it and its subcontractors and suppliers, with respect to the goods and the materials incorporated into the goods, comply with the laws regarding slavery and human trafficking in the country or countries in which they conduct business.

BRAND PROTECTION – IP, CSR, and Marketing

- Charitable affiliations
- “Messages” and **MIS**-perceptions
 - Eco-friendly
 - made with clean energy
- FTC Greenwashing⁴
- Sustainability reports – What’s the spectrum?
 - Organic cotton, Better Cotton (BCI)
- Made in the USA (country of origin)

4. <https://www.ftc.gov/news-events/press-releases/2012/10/ftc-issues-revised-green-guides>



BRAND PROTECTION – IP, CSR, and Marketing

Made in the USA (country of origin)

– Federal

- must meet the "*all or virtually all*" standard⁵

– State of California

- Article/parts from outside the US **are not more than 5% of the final wholesale value**⁶
- Article/parts from outside the US **(that can not be obtained in US) are not more than 10% of the final wholesale value**⁶

5. <https://www.ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf>
 6. https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=2015201605B633

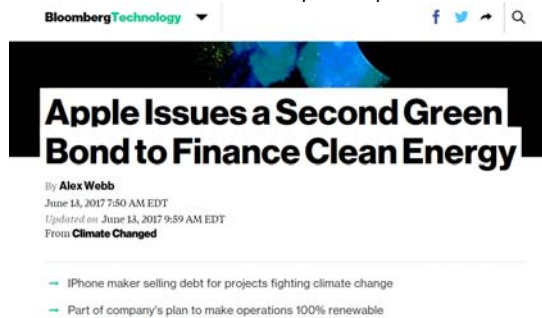
BRAND PROTECTION – IP, CSR, and Marketing

- **BRAND EQUITY** – what can you do to protect it?
 - BUILD Guidelines
 - EDUCATE your teams and business partners
 - INCLUDE contractual terms for vendors, licensees, suppliers (ideas for language -- not legal advice)

Suppliers for the Company shall not make any environmental claims or use any social or environmental certifications, symbols or logos on products unless the claim is accurate and the supplier has original documentation available to validate the claim, statement, symbol or use of logo. Suppliers shall not use or make any such claims unless the claim, statement, symbol, or logo has been approved in advance and in writing by the Company's legal department.

NEXT PHASE of IP and CSR – start then continue to evolve

- Continued social and environmental regulations
 - Australia Modern Slavery Act
 - France's reporting law
 - EU's Environmental Directive, UK's ESOS
- Leading corporations leading sustainability efforts
- Lagging behind competitors based on consumer perceptions
- Wall Street is starting to look...
 - ESG Green bonds
 - More detailed surveys



BloombergTechnology

Apple Issues a Second Green Bond to Finance Clean Energy

By Alex Webb
June 13, 2017 7:50 AM EDT
Updated on June 13, 2017 9:59 AM EDT
From **Climate Changed**

- iPhone maker selling debt for projects fighting climate change
- Part of company's plan to make operations 100% renewable

CONTRIBUTING FACTORS TO BRAND WORTH

It's not just sales...

- Goodwill/Brand equity
 - Corporate and Social Responsibility
- Agreements (licenses, JVs, etc.)
- Brand/Product Line Extensions
- Distribution Channels
- Intellectual Property and Other Assets

THE FACTS ABOUT BRANDING and CSR

A 2014 study titled [The Nielsen Global Survey of Corporate Social Responsibility](#) examined more than 30,000 consumers in 60 countries worldwide to better understand the impact of CSR on behavior. Of the over 30,000 global consumers surveyed:

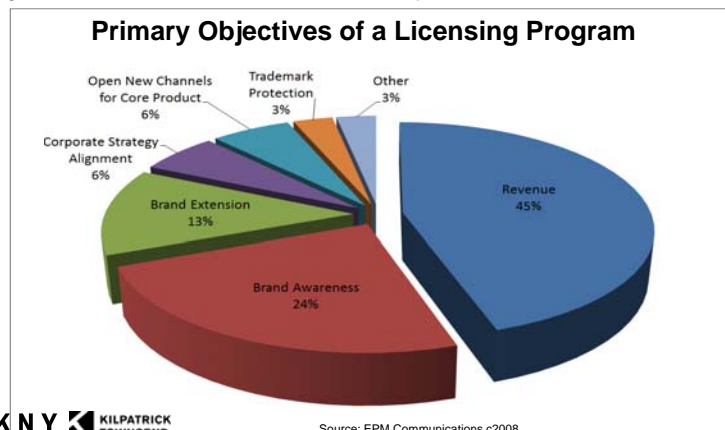
- 67% prefer to work for socially responsible companies
- 55% will pay extra for products and services from companies committed to positive social and environmental impact
- 52% made at least one purchase in the past six months from one or more socially responsible companies
- 52% check product packaging to ensure sustainable impact
- 49% volunteer and/or donate to organizations engaged in social and environmental programs

LICENSING PROGRAM OBJECTIVES

- Royalty Income
- Increase Brand Awareness
- Support Core Product
- Protect the Trademark
- Domain Names and Internet enforcement
- Expansion, e.g., new products, services; develop new brands.

LICENSING PROGRAM: primary objectives

- Royalty Revenue is not the primary licensing objective for 55% of the companies.



THINGS FOR BRANDS CONDUCTING CSR to CONSIDER

- Trademarks – who owns what – register – monitor
- Consider Royalty – do you want one – need one?
- Consider Scope – narrow market – do not want to harm other channels – maybe license locally
- Quality Control – crucial to brand image – crucial to those receiving products/services
- Compliance – Local Laws – Industry Regulations – Supply Chain – Labor – Materials
- Audit/Inspection
- Ability to terminate/transfer
- Indemnity?

IMPORTANT FACTORS IN CO-BRANDING

- **CO-BRANDING:** Agreement to market a good or service under more than one trademark
- Use of the mark
 - What exactly is the mark that will be used?
 - How will it be used?
 - Who may use it?
 - Where may it be used?
 - Who will monitor the use?
 - Who will own?
 - Who will enforce?

MORAL: assess and adapt



DKNY  **KILPATRICK TOWNSEND**

Superfluous SWEDOW



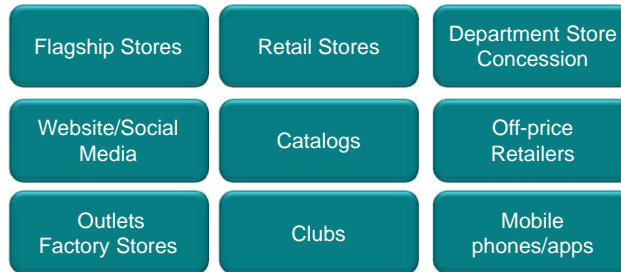
STRATEGIC PARTNER SELECTION

- Choosing the Right Licensee
 - Local market presence or reputation
 - Stable and effective distribution network
 - Safe and efficient manufacturing capacity
- Working with a Licensing Agency
 - Strong reputation
 - Strong connection to licensing community
 - Quality of agency's relationships

STRUCTURING THE LICENSE AGREEMENT

	Licensor	Licensee
Pre-License Considerations	<ul style="list-style-type: none"> • Protection of the brand/IP • Expansion of the brand/IP • Royalty structure; Minimum Guarantees 	<ul style="list-style-type: none"> • Full and clear warranties and representations • Delayed financial commitment • Royalty structure; Low Minimum Guarantees
The Grant Considerations	<ul style="list-style-type: none"> • Define the trademark/IP narrowly • Non-exclusive rights • Define the products/services • Retention of rights • Maximize revenue stream; minimums and guarantees • Limit Renewal Rights 	<ul style="list-style-type: none"> • Define the trademark/IP broadly • Exclusive rights • Retain goodwill for investment • Maximize profit; minimize guarantees • Expanded Renewal Rights; Right of First Refusal/First Negotiation
Territory	<ul style="list-style-type: none"> • Narrow • Internet usage • Social media/mobile applications 	<ul style="list-style-type: none"> • Broad • Geographic options
Approval Process	<ul style="list-style-type: none"> • Everything must be submitted for approval • Silence is not approval 	<ul style="list-style-type: none"> • Reduce time for approval process; reduce interference
Quality Assurance, Controls, and Monitoring	<ul style="list-style-type: none"> • Strict quality control • Supervision • Narrow testing guidelines • Broad audit rights • Third party mfg. Control 	<ul style="list-style-type: none"> • Self-regulation • Less supervision • More leeway in testing, manufacturing, packaging, advertising • Recycling fees
Termination Rights	<ul style="list-style-type: none"> • Licensor terminate at will • Right to damages for breach, including guaranteed revenue • Choice of law, jurisdiction, and venue • Arbitration/mediation clauses 	<ul style="list-style-type: none"> • Licensee has right to terminate • Choice of law, jurisdiction, and venue for dispute resolution • Right to litigate

DISTRIBUTION CHANNELS



Marc A. Lieberstein, Partner

New York
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Bar Admissions
Connecticut (1992)
New York (1993)
Colorado (2005)

Court Admissions
U.S. Court of Appeals for the Federal Circuit (1995)
U.S. Court of Appeals for the Second Circuit (2000)
U.S. District Court for the Eastern District of New York (1992)
U.S. District Court for the Southern District of New York (1992)
U.S. Supreme Court (2005)

Marc's practice focuses on intellectual property licensing and franchising in the retail/consumer goods and services areas, fashion/apparel and accessories, and commercial/industrial design, including the drafting, negotiation and enforcement of license and franchise documents and agreements, as well as implementation of branding and commercialization objectives for clients via licensing and franchising. In conjunction with the services above, he counsels clients on creating effective strategies for procuring, protecting and enforcing their global intellectual property assets. Marc also provides intellectual property litigation services involving patents, trademarks and copyrights, including related e-commerce, domain name, trade secret and unfair competition. He has also participated in and used alternative dispute resolution forums such as arbitration and mediation to enforce intellectual property rights. Marc frequently lectures and writes on intellectual property issues for a variety of intellectual property organizations and publications, including International Trademark Association (INTA), New York State Bar Association (NYSBA) Intellectual Property Section, American Bar Association Forum on Franchising, Wharton Business Law Association at the University of Pennsylvania, New York University, Association of the Bar of the City of New York Fashion Law Committee, Licensing Industry Merchandisers' Association (LIMA), National Law Journal, IP Strategist and The New York Law Journal, Practical Law, The Licensing Journal.

Marc is listed in the 2016 and the five years immediately preceding editions of World Trademark Review 1000 – The World's Leading Trademark Professionals. He was recognized as a New York "Super Lawyer" in Intellectual Property by Super Lawyers magazine in 2016 and the six years immediately preceding, and, for the last six years, he was named a Top 100 New York Metro "Super Lawyer" in Intellectual Property. He has been recognized as an "IP Star" in 2016 and the three years immediately preceding by Managing Intellectual Property magazine. Marc was also recommended by Legal 500 US in 2015 and 2016 for Copyright. In 2013, he received the Lexology Client Choice Guide - International 2013 Award and is the sole winner in the Intellectual Property: Copyright category for New York. He was also listed in the 2012 and the four years immediately preceding editions of Chambers USA: America's Leading Lawyers for Business for Intellectual Property: Trademark & Copyright. Chambers noted that Marc has "tremendous business savvy and is tenacious in his work ethic," according to his clients (2012).

Representative clients/brands include: JOE FRESH, THE MEN'S WEARHOUSE, BILLY REID, JOSEPH ABBOUD, MOMOFUKU GROUP, RIVER STREET SWEETS-SAVANNAH'S CANDY KITCHEN, PATTY MADDEN, Georgia-Pacific, Cree, Spectrum Brands, and UPS.



**Jennie McCarthy, Sr. Director, Vendor Compliance
Donna Karan Company, LLC**

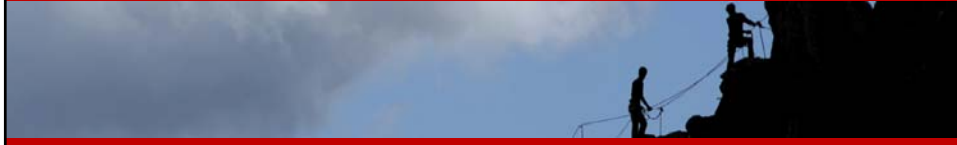
Jennie M. McCarthy, Esq. is the Sr. Director of Vendor Compliance at DKNY/G-III. Her expertise includes corporate social responsibility, environmental matters, restricted substances, regulatory compliance, supply chain sustainability and product compliance. Prior to DKNY she worked at PVH/Calvin Klein in the Global Human Rights Department and was a founding member of CapSquires LLC where she practiced family, zoning, and criminal law. She is a former elected official in Massachusetts where she chaired the Zoning Board and was a member of the Board of Health. Prior to her legal career, she worked in strategic advertising and marketing at Digitas and Hill/Holliday. Jennie is licensed in Massachusetts, New York and the Federal bar and attended Denison University, Harvard University, and New England Law.



Thank You



Corporate Social Responsibility, Goodwill & Corporate Value



Presented by:
William R. Samuels
Partner

Trademarks & Good Will

- Trademarks have *dual* roles:
 - Protect consumers from deception
 - Protect trademark as property
- The law promotes economic efficiency:
 - Encourage production of quality products
 - Reduce purchasing costs
- TM only gives the right to prevent use to protect good will to the extent against the sale of another's products as his.

– McCarthy § 2:15

Good Will

- "the advantage or benefit...beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation..."
 - Newark Morning Ledger Co. v. United States, 507 U.S. 546, 555, 113 S. Ct. 1670, 1675 (1993), Citing Metropolitan Bank v. St. Louis Dispatch Co., 149 U.S. 436, 446, 13 S. Ct. 944, 948, 37 L. Ed. 799, 802, 1893 U.S. LEXIS 2314, *18; quoting J. Story, Partnerships § 99 (1841).

Trademarks & Good Will

- Goodwill is an intangible asset that represents the extra value ascribed to a company by virtue of its brand and reputation.
 - The Economist, p. 70, January 24, 2009,
 - <http://www.economist.com/node/12992559#print>
- A lot of discussion regarding brand and what brands are: embodiments of good will.
 - Brand Is All About VALUE
 - McCarthy §2:15

Good Will & Value

- Good will is characterized as the “going concern” value of the business
 - McCarthy §2:19, 24 F. Supp. 222 (N.D. Cal. 1938)
- “Going concern” value:
 - “...includes the liquidation value of a company's tangible assets as well as the present value of its intangible assets (such as goodwill)...and is the main reason why the purchase price of a company tends to be higher than the current value of the assets of the company.”

• Going-Concern Value, https://www.investopedia.com/terms/g/going_concern_value.asp#ixzz53GifXZM6;
See also, Valuing a Business: The Analysis and Appraisal of Closely Held Companies, 5th Edition

Good Will & Value Cont'd

- Brand value increases 8% to \$3.6 trillion, led by tech in year of disruptive change
 - http://brandz.com/admin/uploads/files/BZ_Global_2017_Report.pdf
- Consumers say brand, not price, is most important buying factor
- Brand Embodies Purpose:

Corporate Social Responsibility

CSR: Corporate Social Responsibility

- A commitment to improve community well-being through discretionary business practices and contributions of corporate resources.

Value & Corporate Social Responsibility: Good Will

- Brands with a purpose outperform others
- Trademarks, unlike patents and copyrights, have no existence independent of the good will of the products and services.
 - McCarthy §2:20

Corporate Social Responsibility: Market Identity



Rise of the B Corp

- B Corps meet the highest standards of verified social and environmental performance, public transparency, and legal accountability, and aspire to use the power of markets to solve social and environmental problems.
 - <https://www.bcorporation.net/>
- Best **in** *FOR* the world

Good Will, Value & CSR

- Survey asked people how they perceived the “world value” of 149 well-known organizations
 - <https://www.fastcompany.com/3060207/the-brands-that-do-the-most-and-least-good-for-the-world-ranked-by-consumers>
- The 2017 World ValueSM index

1. Goodwill	11. Home Depot	21. McDonald's	31. General Electric	41. eBay
2. Girl Scouts of the USA	12. Kellogg's	22. Newman's Own	32. LAY'S	42. Ben & Jerry's
3. Amazon	13. Walmart	23. Disney	33. Coca-Cola	43. Intel
4. Save The Children	14. Colgate	24. Samsung	34. Whole Foods	44. Panera
5. Google	15. Kraft	25. Nestlé	35. Target	45. Pepsi
6. World Wildlife Fund	16. Johnson & Johnson	26. Wikipedia	36. Apple	46. Hewlett-Packard
7. YMCA	17. Lowe's	27. CVS Pharmacy	37. AAA	47. Trader Joe's
8. Microsoft	18. UPS	28. Lipton	38. Yoplait	48. Ford
9. Dove	19. PayPal	29. Proctor & Gamble	39. Facebook	49. Petfinder
10. Subway	20. FedEx	30. Sony	40. NIKE	50. TOMS

Valuation of Good Will

- An accounting consideration:
 - Price premium customers will pay
 - Cost to recreate the mark and good will
 - Capitalizing the good will profits:
 - Estimation of past profits attributable to good will and an estimation of the time such profits would continue into the future. Kimball Laundry, 338 U.S. 1 (1949)
 - See McCarthy §2:23, etc.
 - (Average Gross Revenue over 3 Years - Operating expenses) x 10 = Y; Y(.5) = Good Will

Patagonia: CSR in Practice

- Maintains that its environmental preservation efforts give it standing to sue re: National Parks matters
- CEO emphasized that Patagonia is a benefit corporation and its articles of incorporation mandate that it confronts environmental threats.
 - Corporate Social Responsibility: <http://www.patagonia.com/corporate-responsibility.html>
 - Company as Activist: <http://www.patagonia.com/the-activist-company.html>

