



Licensing

in 30 jurisdictions worldwide

Contributing editor: Bruno Floriani

2011



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Law**Business****Research**

Overview Bruno Floriani <i>Lapointe Rosenstein Marchand Melançon LLP</i>	3
Albania Gjergji Gjika and Jonida Beqiri <i>Drakopoulos Law Firm</i>	5
Austria Sonja Hebenstreit and Christian Tuscher <i>Herbst Vavrovsky Kinsky Rechtsanwälte GmbH</i>	11
Brazil Alysson H Oikawa <i>Bhering Advogados</i>	17
Canada Allen D Israel, David Kyffin and Samara Sekouti <i>Lapointe Rosenstein Marchand Melançon LLP</i>	24
Chile Claudio Magliona and Celia Chávez <i>García Magliona y Cia Limitada Abogados</i>	31
China Jie Chai <i>Tian Yuan Law Firm</i>	37
Denmark Tom Bork Petersen and Søren Eeg Hansen <i>Norrbom Vinding</i>	44
Ecuador Maria Rosa Fabara Vera <i>Fabara & Guerrero</i>	49
Finland Patrick Lindgren <i>Advocare Law Office</i>	54
France Delphine Touboul and Emmanuel Schulte <i>Bersay & Associés</i>	61
Germany Stefan Abel and Pascal Böhner <i>Bardehle Pagenberg</i>	69
Greece Panagiotis Drakopoulos and Eleni Lappa <i>Drakopoulos Law Firm</i>	75
India Diljeet Titus, Rai S Mittal and Debashree Mukherjee <i>Titus & Co Advocates</i>	80
Israel Zvi Tamir and Ohad Ofra <i>Zvi Tamir & Co</i>	87
Italy Laura Opilio and Paola Nunziata <i>CMS Adonnino Ascoli & Cavasola Scamoni</i>	94
Japan Kozo Yabe and Masakazu Hoshino <i>Yuasa and Hara</i>	101
Korea Sun R Kim <i>Kims and Lees</i>	106
Malaysia Benjamin J Thompson <i>Thompson Associates</i>	112
Mexico Ignacio Dominguez-Torrado <i>Uthoff, Gomez Vega & Uthoff, SC</i>	119
New Zealand Stewart Germann <i>Stewart Germann Law Office</i>	124
Peru Ruddy Medina Plasencia <i>Iriarte & Asociados</i>	129
Poland Bartek Kochlewski <i>Patpol</i>	135
Romania Adrian Roseti and Andra Filatov <i>Drakopoulos Law Firm</i>	140
Russia Vyacheslav Khayryuzov and Konstantin Chromenkov <i>Noerr OOO</i>	146
South Africa Pieter CR Venter, Victor Williams and Janusz Luterek <i>Hahn & Hahn Inc</i>	153
Sweden Göran Antonsson and Jonas Näsman <i>Sandart & Partners Advokatbyrå</i>	158
Switzerland Andrea Mondini and Philipp Groz <i>Schellenberg Wittmer</i>	165
Taiwan Simon Hsiao <i>Wu & Partners</i>	171
United Kingdom Lewis Cohen and Mark Abell <i>Field Fisher Waterhouse LLP</i>	178
United States Bruce H Bernstein, Michael J Fink and P Branko Pejic <i>Greenblum & Bernstein, PLC</i>	186

New Zealand

Stewart Germann

Stewart Germann Law Office

Overview

- Are there any restrictions on the establishment of a business entity by a foreign licensor or a joint venture involving a foreign licensor and are there any restrictions against a foreign licensor entering into a licence agreement without establishing a subsidiary or branch office? Whether or not any such restrictions exist, is there any filing or regulatory review process required before a foreign licensor can establish a business entity or joint venture in your jurisdiction?

Foreign licensors are very welcome in New Zealand. If a foreign licensor wishes to establish a New Zealand company, it must comply with the Companies Act 1993, the Financial Reporting Act 1993 and the Financial Reporting Amendment Act 2006. In relation to the formation of a company, there is no requirement for any director of a foreign licensor to be a resident of New Zealand. Prior to the Financial Reporting Amendment Act 2006 becoming law, if a New Zealand company with foreign directors and shareholders was incorporated and 50 per cent of the capital was owned offshore, then that company would have needed to have its financial accounts audited. However, pursuant to section 6A of the Financial Reporting Amendment Act 2006, the foreign-owned company will now be deemed to be an exempt company if at least two of the following sub-paragraphs apply:

- as at the balance date of the accounting period for which financial statements are required, the value of the total assets of the company (including intangible assets) reported in the statement of financial position did not exceed \$1,000,000;
 - in the accounting period for which financial statements are required, the turnover of the company did not exceed \$2,000,000;
 - as at the balance date of the accounting period for which financial statements are required, the company has 5 or fewer full-time equivalent employees; and
- as at the balance date of the accounting period for which financial statements are required, the company –
 - was not a subsidiary of another body corporate or association of persons; and
 - did not have any subsidiaries.

The above will also apply in relation to a joint venture involving a foreign licensor, and there are no restrictions against a foreign licensor entering into a licence agreement without establishing a subsidiary or branch office.

Kinds of licences

- Identify the different forms of licence arrangements that exist in your jurisdiction.

In New Zealand there are many types of licence arrangements, including product licensing; trademark or service mark licensing; software

licensing; patent and know-how licensing; and technology transfer licensing. The term 'licence' means permission to practise all or a part of a proprietary right and licences may be exclusive or non-exclusive. There is no statutory definition of a licence in New Zealand.

Law affecting international licensing

- Does legislation directly govern the creation, or regulate the terms, of an international licensing relationship? Describe any such requirements.

As far as we are aware, there is no legislation governing the creation of an international licensing relationship and there is no legal requirement for registration of a licence with local authorities in New Zealand.

- Are there any pre-contractual disclosure requirements imposed on a licensor in favour of its licensees, or any requirements to register a grant of international licensing rights with authorities in your jurisdiction? If so, do these requirements still apply if your jurisdiction forms part of a multi-jurisdictional territory in respect of which rights are being granted?

There are no pre-contractual disclosure requirements imposed on a licensor in favour of its licensees. There are also no requirements to register a grant of international licensing rights. The Trademarks Act 2002 is relevant in New Zealand and any international trademark should be registered in New Zealand pursuant to that Act in relation to any licensing of that name or brand. Registration of a trademark is important in each overseas jurisdiction.

- Are there any statutorily or court-imposed implicit obligations in your jurisdiction that may affect an international licensing relationship, such as good faith or fair dealing obligations or the obligation to act reasonably in the exercise of rights?

The New Zealand government is currently looking at reforms to the consumer law legislation. Those reforms include the possibility of introducing laws to cover unconscionable conduct, fair dealing obligations and possibly, good faith. The deadline for submissions has closed and currently the Ministry of Economic Development is looking at the submissions and the possibility of introducing draft legislation. From what we understand the government will not be pursuing good faith but there is a strong possibility that legislation will be introduced in 2011, which will affect unconscionable conduct and fair dealing and this would impact on licence agreements.

- Does the law in your jurisdiction distinguish between licences and franchises? If so, under what circumstances, if any, could franchise law or principles apply to a licence relationship?

There are no laws that distinguish between licences and franchises.

Intellectual property issues

- 7** Is your jurisdiction party to the Paris Convention for the Protection of Industrial Property? The Patent Cooperation Treaty (PCT)? The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)?

New Zealand is a party to the Paris Convention for the protection of intellectual property. The Convention began with the Paris Convention, London Act – 14 July 1946. There is also a Paris Convention Stockholm Act, articles 13 to 30, and dated 20 June 1984. New Zealand is also a party to the PCT, as of 1 December 1992. In addition, New Zealand is a party to the Trade-Related Aspects of Intellectual Property Rights, as of 1 January 1995. New Zealand has been a member of each of these since the early days of their promulgation and tends to be a supporter of IP rights worldwide.

- 8** Can the licensee be contractually prohibited from contesting the validity of a foreign licensor's intellectual property rights or registrations in your jurisdiction?

In our opinion, the licensee can be contractually prohibited from contesting the validity of a foreign licensor's intellectual property rights or registrations, and we know of no law that would preclude this; it would be prudent for such a clause to be included in any agreement.

- 9** What is the effect of the invalidity or expiry of registration of an intellectual property right on a related licence agreement in your jurisdiction? If the licence remains in effect, can royalties continue to be levied?

If a trademark or patent (or any other intellectual property right capable of registration, like a registered design) expires in relation to its registration or be declared invalid, then the legal effect would be to take away the protection of such intellectual property right that may lead to abuse of it by a licensee. However, the tort of passing off would assist any licensor should a renegade licensee try to take advantage of the situation.

- 10** Is an original registration or evidence of use in the jurisdiction of origin, or any other requirements unique to foreigners, necessary prior to the registration of intellectual property in your jurisdiction?

There is no such registration or evidence of use necessary, but it would certainly expedite any New Zealand registration of intellectual property if it is registered in an overseas jurisdiction. Any new registration in New Zealand must go through the Intellectual Property Office, which is based in Wellington. There is always a time lapse for objections and legal requirements.

- 11** Can an unregistered trademark be licensed in your jurisdiction?

An unregistered trademark may be licensed, and it is a matter of contract, but there is no statute that would preclude this. However, trademarks should always be registered to enable full protection for the owner.

- 12** Are there particular requirements in your jurisdiction: for the validity of an intellectual property licence; to render an intellectual property licence opposable to a third party; or to take a security interest in intellectual property?

In relation to the validity of an intellectual property licence, the relevant law or statute in New Zealand must be complied with. The subject matter of the protection sought must not be illegal or offensive and the legal procedures must run their course. As to whether

an intellectual property licence could be opposable to a third party, it would depend on the circumstances of the particular case and whether a third party has any legal rights to object. As for taking a security interest in intellectual property, the Personal Property Securities Act 1999 allows for the registration of a security interest in intellectual property which includes a patent, trade secret, copyright, trademark, trade name, industrial design, plant breeders' rights and integrated circuit topographies.

- 13** Can a foreign owner or licensor of intellectual property institute proceedings against a third party for infringement in your jurisdiction without joining the licensee from your jurisdiction as a party to the proceedings? Can an intellectual property licensee in your jurisdiction institute proceedings against an infringer of the licensed intellectual property without the consent of the owner or licensor? Can the licensee be contractually prohibited from doing so?

A foreign owner may institute proceedings in such a manner without joining the licensee, although it would be normal for the foreign owner or licensor of intellectual property to consult with the New Zealand licensee, who may be very helpful in providing information for the attack on the infringing third party. In relation to proceedings against an infringer of the licensed intellectual property without the consent of the owner or licensor, it would depend upon the exact wording of a clause in the relevant agreement. Normally, however, an agreement should preclude a local licensee from attacking an infringer without the consent of the owner or licensor.

- 14** Can a trademark or service mark licensee in your jurisdiction sub-license use of the mark to a third party? If so, does the right to sub-license exist statutorily or must it be granted contractually? If it exists statutorily, can the licensee validly waive its right to sub-license?

A trademark or service mark licensee could only sub-license the use of that mark to a third party if the agreement provided such a right. It would be unusual in our opinion, and such agreement should preclude any right to sub-license.

- 15** Is your jurisdiction a 'first to file' or 'first to invent' jurisdiction? Can a foreign licensor license the use of an invention subject to a patent application but in respect of which the patent has not been issued in your jurisdiction?

In New Zealand it is the 'first to file' who wins a patent application. There is, however, an arrangement between New Zealand and Australia that if a company lodges a trademark application in one jurisdiction on a particular date and later files the same trademark application in the other, then in relation to the second jurisdiction the date of filing will be backdated to the original date of filing in the first.

A foreign licensor may license the use of an invention subject to a patent application for which the patent has not been issued in New Zealand.

- 16** Can the following be protected by patents in your jurisdiction: software; business processes or methods; living organisms?

The current legislation involving patents is the Patents Act 1953. A Patents Bill (to replace the Patents Act) has been through its first reading in parliament and has now passed into the Select Committee stage. The Commerce Select Committee has heard submissions on the Patents Bill and is preparing a report. After the Select Committee reports back, the Patents Bill will proceed through its second and third readings in parliament and be passed into law, anticipated to be in 2011.

- 17** Is there specific legislation in your jurisdiction that governs trade secrets or know-how? If so, is there a legal definition of trade secrets or know-how? In either case, how are trade secrets and know-how treated by the courts?

There is no specific legislation that governs trade secrets or know-how, but there are common law principles that would apply and give protection. In particular, there are laws covering breach of confidential information, which includes know-how, business data, trade secrets, product and process inventions.

- 18** Does the law allow a licensor to restrict disclosure or use of trade secrets and know-how by the licensee or third parties in your jurisdiction, both during and after the term of the licence agreement? Is there any distinction to be made with respect to improvements to which the licensee may have contributed?

New Zealand law allows a licensor to restrict disclosure or use of trade secrets and know-how by the licensee or third parties, and it is a matter of contract. There are no restrictions except in the area of restraint on competition or restraint of trade, both during the term and after the expiration of the term or termination of a licence agreement. If restraints on competition are too wide and basically too tough, they will be determined to be against public policy and be declared illegal pursuant to the Illegal Contracts Act 1970. There is no distinction to be made with respect to improvements to which the licensee may have contributed.

- 19** What constitutes copyright in your jurisdiction and how can it be protected?

The law relating to copyright in New Zealand is contained in the Copyright Act 1994. There is no registration system for copyright, although, as a signatory to the Berne Convention, it is possible to register copyright works internationally. In essence, copyright is inherent, but it is not the ideas that are protected by copyright: it is the tangible evidence of skill, labour and judgement that have resulted in the copyright work.

- 20** Is it advisable in your jurisdiction to require the contractual assignment of copyright by the licensee to the licensor for any artwork, software improvements and other works that the licensee may have contributed to?

Such a provision is advisable, but not essential.

Software licensing

- 21** Does the law in your jurisdiction recognise the validity of 'perpetual' software licences? If not, or if it is not advisable for other reasons, are there other means of addressing concerns relating to 'perpetual' licences?

Yes, New Zealand law recognises perpetual software licences.

- 22** Are there any legal requirements to be complied with prior to granting software licences? In particular, are there import or export restrictions on software?

There are no restrictions in relation to software licences unless the subject matter is offensive or against public policy. There are no prohibitions in relation to parallel importing and there are no restrictions, as far as we are aware, on the import or export of software.

- 23** Who owns improvements and modifications to the licensed software? May a software licensee obtain bug fixes, upgrades and new releases from the licensor in the absence of a contractual provision to that effect?

Unless the contract provides otherwise, the licensor would own any improvements and modifications to the licensed software. In relation to a software licensee obtaining bug fixes, upgrades and new releases from the licensor, there must be a suitable provision in the contract or such would be unenforceable against the licensor.

- 24** May a software licensor include a process or routine to disable automatically or cause unauthorised access to disable, erase or otherwise adversely affect the licensed software?

Such processes are allowed, and such a provision is fairly common and recommended to protect the licensor.

- 25** Have courts in your jurisdiction recognised that software is not inherently error-free in determining the liability of licensors in connection with the performance of the licensed software?

We are not aware of any such cases in New Zealand.

- 26** Have courts in your jurisdiction restricted in any manner the enforceability or applicability of the terms and conditions of public licences for open source software (ie, GNU and other public licence agreements)? Have there been any legal developments of note in your jurisdiction concerning the use of open source software?

As far as we are aware, the courts have not restricted the enforceability or applicability of the terms and conditions of public licences for open source software. There have been no legal developments concerning the use of open source software in New Zealand.

Royalties and other payments, currency conversion and taxes

- 27** Is there any legislation that governs the nature, amount or manner or frequency of payments of royalties or other fees or costs (including interest on late payments) in an international licensing relationship, or require regulatory approval of the royalty rate or other fees or costs (including interest on late payments) payable by a licensee in your jurisdiction?

There are no laws affecting royalties in such a manner.

- 28** Are there any restrictions on transfer and remittance of currency in your jurisdiction? Are there any associated regulatory reporting requirements?

Although there are no restrictions on the transfer and remittance of currency from New Zealand to an overseas jurisdiction, the tax laws of New Zealand must be complied with. In relation to the payment of royalties, dividends or interest, non-resident withholding tax (NRWT) must be deducted by the payee (or licensee) before the funds are remitted to the overseas licensor. The tax deduction must be paid by the New Zealand licensee to the New Zealand Inland Revenue Department (IRD), but a tax credit would be available to the overseas licensor. The rate of tax varies depending on the country involved, and New Zealand has double taxation treaties with a large number of countries. For example, in relation to Australia, the rate of NRWT is 10 per cent in relation to royalties and the same rate is applied to the United States. In relation to Canada, Fiji, Indonesia, Japan, Malaysia and Singapore the rate is 15 per cent. The Double Taxation Relief (United States of America) Amendment Order 2009 came into effect on 12 November 2010 and the protocol between New Zealand and the United States has been updated and strengthened.

- 29** In what circumstances may a foreign licensor be taxed on its income in your jurisdiction?

A foreign franchisor may be taxed on its income in New Zealand but it will certainly be taxed when it tries to move that income offshore. NRWT must be deducted by the New Zealand paying entity and paid to the New Zealand IRD, and the net amount available would be remitted by the licensee to the foreign licensor.

- 30** Can a judgment be rendered by courts in a foreign currency in your jurisdiction? If not, would a contractual indemnity for any shortfall to a foreign licensor due to currency exchange fluctuations be enforceable?

There is precedent in New Zealand for suing in a foreign currency but it is most uncommon.

Competition law issues

- 31** Are practices that potentially restrict trade prohibited or otherwise regulated in your jurisdiction?

Such practices would be governed in New Zealand by the Commerce Act 1986, and great care must be taken by any foreign licensor to comply with that Act, as the penalties for non-compliance are severe.

- 32** Are there any legal restrictions in respect of the following provisions in licence agreements: duration, exclusivity, internet sales prohibitions, grant-back provisions and non-competition restrictions?

In relation to duration, exclusivity and grant-back provisions, there are no legal restrictions. However, if any agreement is deemed to be in perpetuity (in relation to duration) then that can have some inherent problems as the courts have ruled that nothing lasts forever and, in relation to one party wishing to terminate the arrangement or contract, the courts may allow a reasonable period of notice (six or 12 months) to be given, after which the agreement could be legally terminated. In relation to non-competition restrictions, if such restrictions are unreasonable or unfair, then the courts will not enforce them, so great care must be taken in drafting. Australia commonly has 'sprinkler clauses' under which one party will try to restrict the other party for different periods in relation to different geographical restrictions. The New Zealand courts are unimpressed by such clauses and will normally strike them out, with the end result that there may be no restriction on competition. It is always essential to obtain local counsel's advice in relation to this area.

Indemnification, disclaimers of liability, damages and limitation of damages

- 33** Are indemnification provisions commonly used in your jurisdiction and, if so, are they generally enforceable? Is insurance coverage for the protection of a foreign licensor available in support of an indemnification provision?

Indemnification provisions are commonly used in New Zealand, and they are generally enforceable. As far as we are aware, insurance coverage for the protection of a foreign licensor is available in support of an indemnification provision.

- 34** Can the parties contractually agree to waive or limit certain types of damages? Are disclaimers of liability generally enforceable? What are the exceptions, if any?

Yes, parties may agree to waive or limit damages, and such disclaimers of liability are generally enforceable.

Update and trends

We have already mentioned the proposed changes to the consumer laws in New Zealand and it is fairly certain that there will be amendments to the legislation next year. Also, the out-of-date Patents Act 1953 is due to be replaced next year with a new Act.

Termination

- 35** Does the law impose conditions on, or otherwise limit, the right to terminate or not to renew an international licensing relationship; or require the payment of an indemnity or other form of compensation upon termination or non-renewal? More specifically, have courts in your jurisdiction extended to licensing relationships the application of commercial agency laws that contain such rights or remedies or provide such indemnities?

To the best of our knowledge, New Zealand's laws do not impose any conditions in relation to the right to terminate or not to renew an international licensing relationship, or require the payment of an indemnity or other form of compensation upon termination or non-renewal. As far as we are aware, the courts in New Zealand have not extended to licensing relationships the application of commercial agency laws that contain such rights or remedies or provide such indemnities.

- 36** What is the impact of the termination or expiration of a licence agreement on any sub-licence granted by the licensee, in the absence of any contractual provision addressing this issue?

The normal rule would be that any sub-licence arrangement would fall over should the (head) licence agreement be terminated or expire through the effluxion of time. However, any licensor would probably want to continue with a sub- licensee but there would be no obligation to do so if there was no contractual provision.

Bankruptcy

- 37** What is the impact of the bankruptcy of the licensee on the legal relationship with its licensor; and any sub-licence that licensee may have granted? Can the licensor structure its international licence agreement to terminate it prior to the bankruptcy and remove the licensee's rights?

Bankruptcy in New Zealand only applies to a person, and normally a licensee would be a company. However, if the licensee is a person who is adjudicated bankrupt, then that would be a ground for the licensor to terminate the licence agreement. If the licensee is a company and it becomes insolvent and goes into receivership or liquidation then, again, that event would give the licensor the right to terminate the licence agreement. Upon termination all of the rights of any licensee would cease, but the liability of the licensee would continue in relation to any unpaid monies owed to the licensor.

Governing law and dispute resolution

- 38** Are there any restrictions on an international licensing arrangement being governed by the laws of another jurisdiction chosen by the parties?

As far as we are aware there are no such restrictions.

39 Can the parties contractually agree to arbitration of their disputes instead of resorting to the courts of your jurisdiction? If so, must the arbitration proceedings be conducted in your jurisdiction or can they be held in another?

It is recommended that the parties contractually agree to arbitration of any disputes instead of resorting to the courts, but any agreement should provide for the right of either party to seek injunctive relief if the matter is very serious and an injunction is the right remedy. In relation to arbitration, the relevant statute in New Zealand is the Arbitration Act 1996 – however, any arbitration proceedings can be conducted in any jurisdiction, provided the parties agree at the outset and there is a relevant clause in the agreement covering the matter.

40 Would a court judgment or arbitral award from another jurisdiction be enforceable in your jurisdiction? Is your jurisdiction party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

The answer to both questions is yes, arbitral awards and court judgments from other jurisdictions are enforceable. New Zealand is party to UNCITRAL.

41 Is injunctive relief available in your jurisdiction? May it be waived contractually? May the parties waive their entitlement to claim specific categories of damages in an arbitration clause?

Injunctive relief is available, and in our opinion, all agreements should contain an injunctive relief provision to protect the parties should one party 'go off the rails'. If the parties so choose, they may waive their entitlement to claim specific categories of damages in an arbitration clause, but it would be normal not to have such provision.

SGL

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