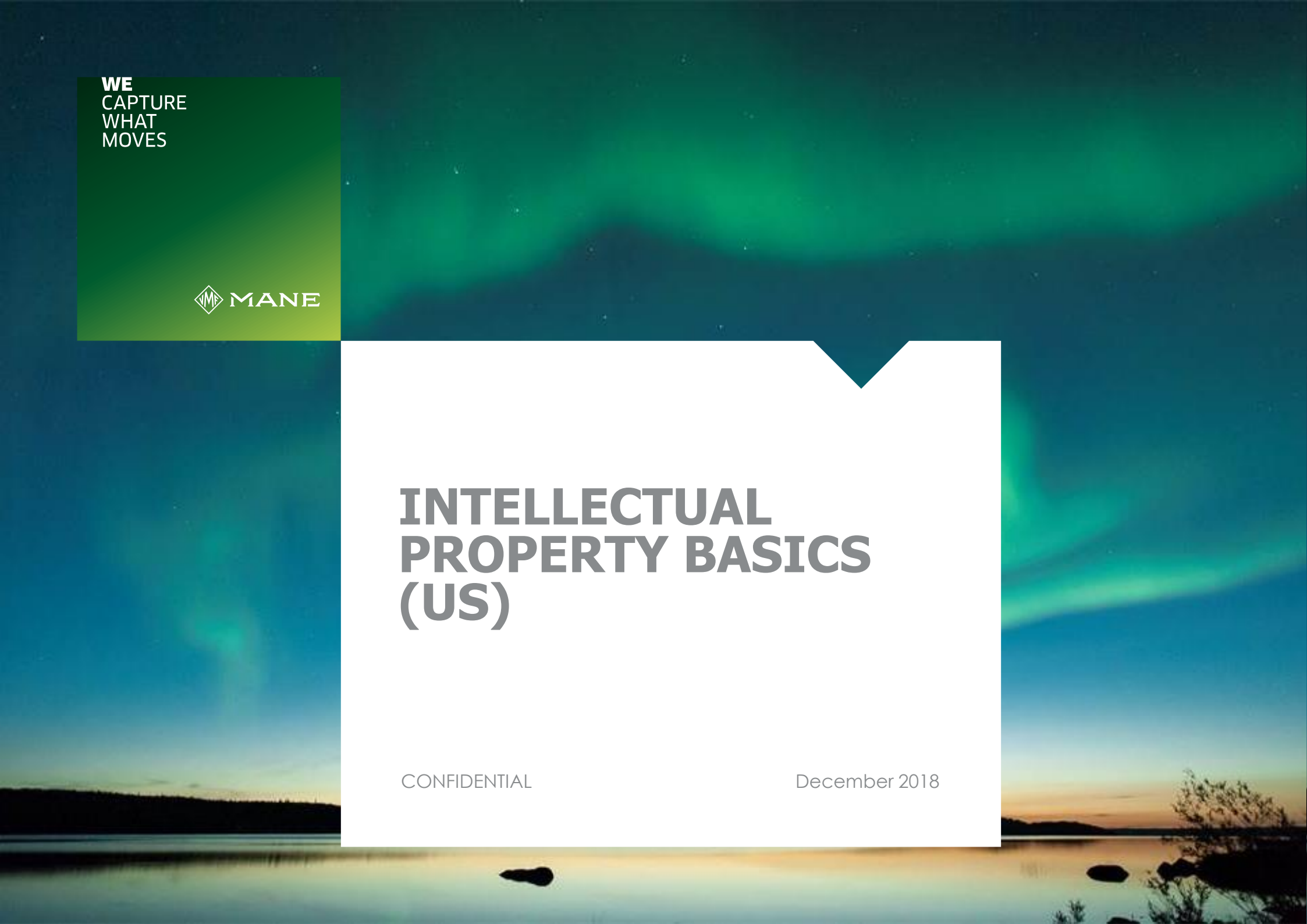


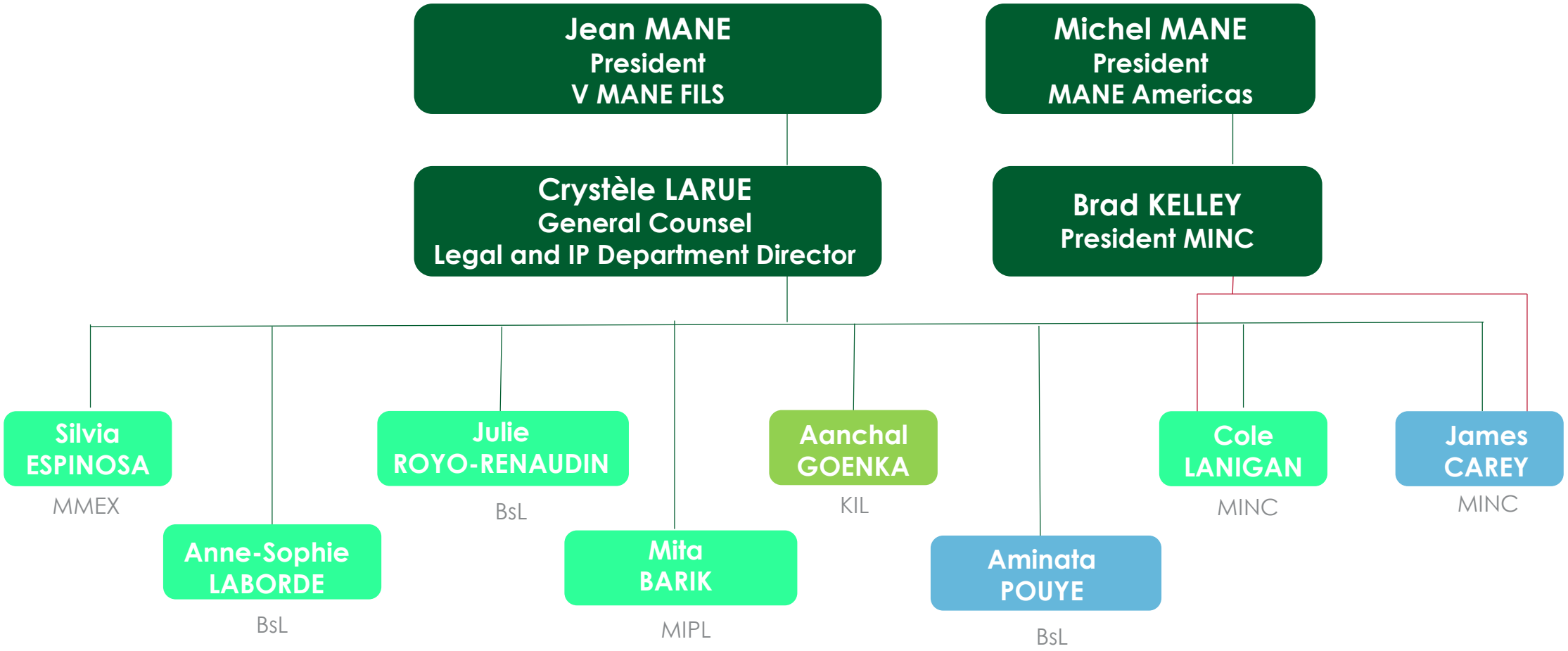
INTELLECTUAL PROPERTY BASICS (US)

CONFIDENTIAL

December 2018

ORGANIZATIONAL CHART

LEGAL AND IP DEPARTMENT



CONTENT

01 DEFINITION OF INTELLECTUAL PROPERTY

DEFINITION OF INTELLECTUAL PROPERTY

Intellectual Property (IP): Any product of the human intellect that the law protects from unauthorized use by others. The ownership of intellectual property inherently creates a limited monopoly in the protected property.

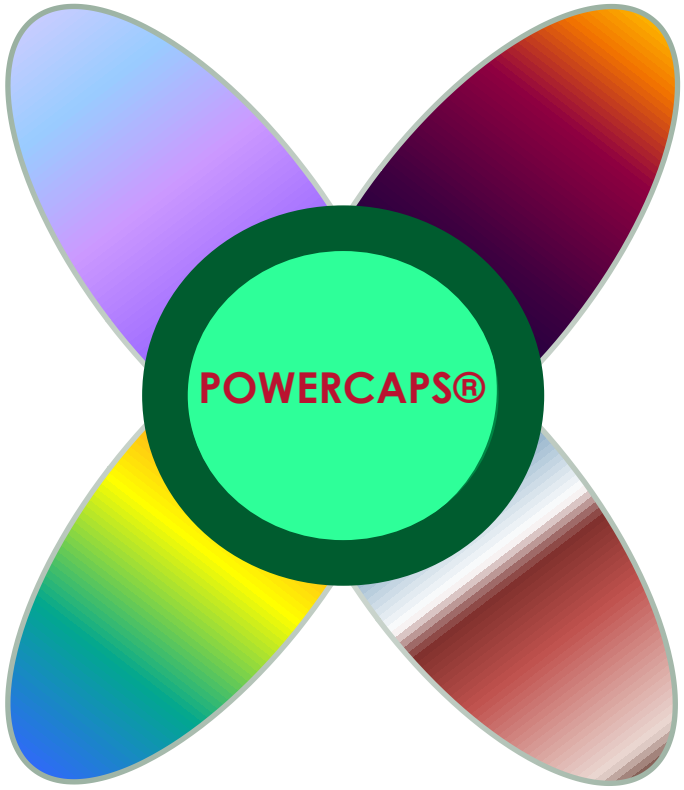
Corporate IP generally includes Copyrights, Trademarks, Trade Secrets, & Patents.

Intellectual property rights allow creators, or owners, of the IP to benefit from their own work or investment in a creation.

- **Copyright Act (17 USC §101 et seq.)**
- **Lanham Act (15 USC §§ 1051 et seq.)**
- **Defend Trade Secrets Act (18 USC §§ 1836 et seq.)**
- **America Invents Act (35 USC § 100 et seq.)**

MORPHING OF IP INTO A SINGLE PRODUCT LINE

Marketing materials
Copyright Act



Brand name
Lanham Act

Manufacturing method and ingredient sourcing
Defend Trade Secrets Act

Novel, useful, non-obvious aspects
America Invents Act

02 COPYRIGHTS

COPYRIGHTS – 17 USC §§ 101-122

- **Protect original works of authorship, per the US Constitution.**
  - **Literary works, music, dramatic works, pantomimes and choreographic works, sculptural, pictorial, and graphic works, sound recordings, artistic works, architectural works, and computer software.**
- **The owner has the exclusive rights to: reproduce, distribute copies, publically perform or display, and prepare derivative works based upon the work.**
- **Fixed in a tangible medium of expression**
  - **Words/pictures on a piece of paper**
  - **Music notes written on a sheet.**
- **A US copyright exists from the moment the work is created. To provide public notice of copyright, published works must be marked (©, date, and owner). If registered, certain statutory rights are available.**
- **There is no such thing as an "international copyright," but foreign nations that are party to copyright international agreements with the US are afforded rights.**

Copyright protects original and derivative works of authorship fixed in any tangible medium of expression.

COPYRIGHTS – 17 USC §§ 101-122

Duration - Limited per the US Constitution (Art. I, Sec. 8)

- **Exact duration depends on when created, if/when published, if work for hire.**
  - **Today, new works are entitled to life of the author plus 70 years.**
  - **Today, work for hires are entitled to a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first.**

A "work made for hire" is a work prepared by an employee within the scope of his or her employment.

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author, and owns all of the rights comprised in the copyright.

- **Unless the parties have expressly agreed otherwise in a written instrument signed by them.**

COPYRIGHTS – 17 USC §§ 101-122

Examples:

- **Presentations, Advertisements, Marketing brochures, Websites, Scientific articles**
- **BUT NOT patents (see Korzybski v. Underwood & Underwood, 36 F.2d 727, 729 (Cir. 1929))**

The CR owner has the exclusive right to modify, distribute, perform, create, display, and copy the work … except for Fair Use (17 U.S.C. §107)

FAIR USE (defense**):**

- **the purpose and character of the use**
  - **transformative or value added**
  - **merely copied**
- **the nature of the copyrighted work**
  - **factual** or fictional
  - **published** or unpublished
- **the amount and substantiality of the portion taken**
  - **small** or large portion
  - **insignificant portion** or "heart" of the work
- **the effect of the use upon the potential market or value.**
  - **no economic impact to owner**
  - **deprive owner of potential economic gain**

03 TRADEMARKS

TRADEMARKS – 15 U.S.C. §§ 1051-1141

Trade or Service Mark - a distinctive sign, identifies a source for certain products or services, allows the consumer to distinguish them from other suppliers.

A trade/service mark registration - exclusive right to the use of the mark in interstate commerce for the registered class/goods/services.

In order to qualify for protection, the mark must be distinctive and not merely descriptive.

fanciful > arbitrary > suggestive >> descriptive >>>> generic

(EXXON) > (APPLE) > (MICROSOFT) >> (HAIR SALON) >>>> (ASPIRIN)

Marks that are fanciful, arbitrary, or suggestive are considered distinctive enough to function as trademarks.

If a mark is descriptive, the mark may function as a trademark or service mark only if it has obtained secondary meaning.

Generic words or phrases can never be a trademark.

® - denotes a registered mark (US Law)

™ - denotes common law use as a mark (US Law)

Trade/Service mark is a word, phrase, symbol, or design that provides distinctive identification for goods/services.

TRADEMARKS – 15 U.S.C. §§ 1051-1141

Examples:

Classes 1-34 (goods) and 35-45 (services) for US and international (NICE)

Majority of trademark application rejections are based on marks being merely descriptive or "likelihood of confusion" of the source of the goods.

Federal application process based on "use in interstate commerce":

§1a) actual use in commerce, or

§1b) bona fide intent-to-use (ITU) in commerce.

Like other forms of IP, trademark registration must exist in a country to be enforceable.

***** Consider USPTO/WIPO/internet searches prior to naming a research project.**

TRADEMARKS – 15 U.S.C. §§ 1051-1141

Examples:

POWERGRAN CORE®
POWERTOUCH®
MANENCAPS®
POWERBREEZE®
POWERBLOOM®
AQUAL®
SENSE CAPTURE®

MANE

JUNGLE ESSENCE®
POWERGRAN®
GREEN MOTION®
POWERCAPS®
PHYSCOOL®
VMF MANE®
POWERLAST®

N-CAPTURE®
PURE CAPTURE®
WE CAPTURE WHAT MOVES®

MANECAPS™
MADERAL™
C-CAPTURE™

https://www.uspto.gov/sites/default/files/documents/BasicFacts.pdf

04 TRADE SECRETS

TRADE SECRETS - 18 USC §§ 1830-1839

"Trade secret" means:

- **information, including a formula, pattern, compilation, program, device, method, technique, or process, that:**
  - **(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and**
  - **(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.**

Formulas	Design details	Plans
Samples	Drawings	Strategy
Processes	Engineering	Equipment
Know-how	Specifications	Incident reports
Methods	Ingredients	Complaints
Ideas	Recipes	Claims
Concepts	Customer data	Contracts & terms
Techniques	Business records	Reports
Research	Financials	Client lists
Experimental work	Sales data	Origin of products
Developments	Sales analyses	Ingredient suppliers
Inventions	Pricing	Ingredient pricing
Scientific information	Forecasts	Margin

A trade secret is any confidential business information which provides an enterprise a competitive edge.

TRADE SECRETS - 18 USC §§ 1830-1839

Defend Trade Secrets Act (2016):

- **A United States federal law (codified at 18 U.S.C. § 1836) provides a federal CIVIL cause of action for trade secret misappropriation and a civil seizure (in extraordinary circumstances).**
- **No federal preemption. State courts still available under common law unfair competition and/or Uniform Trade Secrets Act (UTSA), if adopted. (E.g., Ohio Revised Code §1333.61-69.)**
- **Broader protection than Uniform Trade Secret Act.**

- **"Misappropriation" means:**
  - **(i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or**
  - **(ii) disclosure or use of a trade secret of another without express or implied consent by a person who (A) used improper means to acquire knowledge of the trade secret; or (B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was**
    - **(I) derived from or through a person who had utilized improper means to acquire it;**
    - **(II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or**
    - **(III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or before a material change of his [or her] position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.**

- **"Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.**

TRADE SECRETS - 18 USC §§ 1830-1839

How does MANE protect its trade secrets?

- **Employee Confidentiality Agreements**
- **Confidential disclosure agreements (CDA's)**
- **Implement business procedures to augment CDA's**
- **Control physical and electronic access**
- **Identify, assess, and take steps to manage risks**
- **Create supply chain procedures and plans**
- **Conduct employee and vendor training**
- **Training and capacity building with employees and third parties**
- **Taking corrective actions and continually improving policies and procedures**

05 PATENTS

PATENTS – 35 U.S.C. §§ 101-390

Once granted, a patent provides, from a legal standpoint, the right to *exclude* others from making, using, selling, offering for sale, or importing the claimed invention for the term of the patent, which is usually 20 years from the filing date, subject to the payment of maintenance fees.

- A patent does **not** give a right to make or use or sell an invention.
- Patents are territorial, and infringement is only possible in a country where a patent is in force.
- The granted claims in the specific country are what defines the scope of enforcement.
- Patent infringement is the commission of a prohibited act with respect to a patented invention without permission from the patent holder.
- Permission may typically be granted in the form of a license.
- Maintenance fees vary from country to country, and when payment is due.

The basic *quid pro quo:*

Written Description, Enablement, Best Mode = Limited Monopoly

A patent is an exclusive right for a limited period of time in exchange for detailed public disclosure of an invention.

PATENTS – 35 U.S.C. §§ 101-390

Requirements for patenting an invention:

Statutory Subject Matter: **Process, Machine, Manufacture, or Composition of Matter**

Written Description/Enablement (35 U.S.C. §112, see also EPC Art. 83)

- ***…a written description of the invention, …, clear, concise, and exact terms as to enable any person skilled in the art … to make and use the same, and shall set forth the best mode … of carrying out the invention.***

Novel and Useful (35 U.S.C. §101/102, see also EPC Art. 54, 57)

- ***Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor….***

Non-Obvious (35 U.S.C. §103, see also EPC Art. 56)

- ***A patent for a claimed invention may not be obtained, … if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains.***

PATENTS – 35 U.S.C. §§ 101-390

What defines an invention?

The CLAIMS, not the specification, provide notice of the scope of patent protection.

- **Neither the specification, which includes the written description of the invention, nor the drawings accompanying the specification, can be infringed.**
- **Claims must first be construed without reference to an accused product before they can be applied, as so construed, to the accused product to determine infringement.**
- **All limitations in a claim must be considered meaningful and cannot be ignored as insignificant or immaterial in determining infringement.**

Claims define the metes and bounds of the patentee's exclusive right.

TRADE SECRETS VERSUS PATENTS

Trade Secrets	Patents
Trade secrets involve no registration costs	Patents may cost tens of thousands of dollars, per jurisdiction
Trade secrets have immediate effect and may last indefinitely	Average time to obtain a patent is five years, and a patent expires up to 20 years* after earliest filing date
Trade secret protection does not require any formalities such as disclosure of the information to a Government authority.	Inventors must disclose the invention to the public, without a guarantee of obtaining a patent*
Some trade secrets are susceptible to reverse engineering	Exclusive rights of patents allows protection from any type of infringement or copying — whether intentional or unintentional.
Once the secret is made public, anyone may have access to it and use it at will	*Quid pro quo* for a limited monopoly to exclude others is public disclosure of the invention
A trade secret may be patented by another "inventor" but prior commercial use defense is available (35 USC 273)	Independent invention is no defense against patent infringement
A trade secret is more difficult to enforce than a patent; must show misappropriation	Patent infringement covers direct and indirect infringement

Patents and trade secrets each have their own inherent advantages and limitations.

07

INFRINGEMENT

INFRINGEMENT

Exclusive Rights of the Intellectual Property Holder

In general terms, IP infringement is any breach of intellectual property rights.

IP rights are infringed when a work protected by IP laws is used, copied or otherwise exploited without having the proper permission from a person who owns those rights.

Examples of an IP infringement are “counterfeiting” and “piracy."

- **Counterfeiting is the practice of imitating genuine goods, often to inferior quality, with the intent to take advantage of the superior value of the imitated product.**
- **Piracy is an unauthorized copying, use, reproduction and/or distribution of materials protected by intellectual property rights.**

  - **17 U.S.C. § 501 - Infringement of Copyright**
  - **15 U.S.C. § 1114 – Infringement of Trademarks**
  - **35 U.S.C. § 271 – Infringement of Patents**

PATENT INFRINGEMENT - 35 U.S.C. § 271

Exclusive Rights of a Patent Holder

An invention is:

- process, machine, manufacture, or composition of matter
- useful, new, and non-obvious
- Defined by the granted claims.

A granted patent gives the patent owner a right to exclude others from:

- making or using
- selling
- offering for sale
- Importing

… the claimed invention.

PATENT INFRINGEMENT - 35 U.S.C. § 271

What is a claim?

- **Preamble**
  - Method, process, composition, article, etc.
- **Transitional phrase.**
  - Open ended – "**comprising**"
    - (A+B+C+D+… anything.)
  - Closed – "**consisting of**"
    - Only A+B+C+D
  - Intermediate – "**consisting essentially of**"
    - limits the scope those that do not materially affect the basic and novel characteristic(s)"
- **Body**
  - **Provides the elements of the claim**

Hypothetical Example:

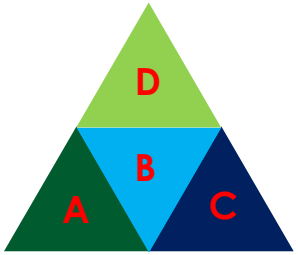
A flavour composition comprising

A. a high-intensity sweetener,

B. a zinc salt of a tricarboxylic acid,

C. a taste modulator selected from pantolactone, dihydroactinidiolide, or both, and

D. monomenthyl succinate.



PATENT INFRINGEMENT - 35 U.S.C. § 271

Steps for assessing infringement of a claim

Step 1: Claim construction:

- Begin with the words of the claim itself.
  - **The words of the claim should be given their ordinary and customary meaning.**
- Review the rest of the patent (specification and drawings).
  - **Claims terms are not interpreted in isolation.**
    - Defined terms
    - Intentional disclaimers
- US
  - **May consult patent prosecution history and/or extrinsic evidence.**

Step 2: Read the claim(s) onto the accused product/process:

- Assess whether each of the recited elements are present (actually or inherently)in the accused product/process.
- Claim charts are useful tools for analyzing and presenting information regarding a patent claim.

Infringement assessment is an element-by-element comparison of the claim vis-à-vis the accused product/process.

DIRECT PATENT INFRINGEMENT

Literal infringement - Statutory

- 35 USC §271(a) or (g)
  - **Accused infringer practices each element of the patent holder's patent claim - "All elements rule"**
  - **Importation of a good manufactured abroad using a patented process**
  - **See Also**
    - Article 64(1) EPC
    - Article 25, Industrial Property Law (Mexico)
    - Section 106, The Patents Act (India)

Nonliteral infringement – Case law

- Called the "Doctrine of Equivalents"
  - **US, CN, JP - "triple identity" or insubstantial differences test … "performs substantially the same function in substantially the same way to obtain the same result" as an element of the patented invention.**
  - **EP – The same function, the same technical effect**
  - **India – similar to US**
  - **Does not exist in Mexico**

DOE *attempts* to combine a fair protection for the patentee with a reasonable degree of certainty for third parties.

DIRECT PATENT INFRINGEMENT

Literal infringement

- Granted Claim
  - **A flavour composition comprising a high-intensity sweetener, an zinc salt of a tricarboxylic acid, a taste modulator selected from pantolactone, dihydroactinidiolide, or both, and monomenthyl succinate.**
- Alleged infringing product
  - **A flavor composition containing rebaudioside A, zinc citrate, pantolactone, Physcool®, menthol, spearmint EO, …..**

Nonliteral infringement

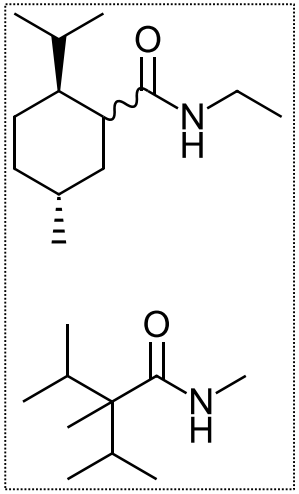
- Granted Claim (Cadbury)
  - **A chewing gum composition capable of providing long-lasting, breath freshening perception without bitterness comprising:**

    a gum base;

    a sweetener; and

    a cooling composition comprising menthol and an N-substituted-p-menthane carboxamide of …

    [a specified formula that included WS-3).
- Alleged infringing product (Wrigley)
  - **A chewing gum made of a gum base; a mixture of sweeteners; and a mixture of N-2,3-trimethyl-2-isopropyl butanamide *(WS-23)* and menthol.**



[Wm. Wrigley Jr. Co. v. Cadbury Adams USA LLC, 103 U.S.P.Q.2d 1130, 683 F.3d 1356 (Cir. 2012)]

INDIRECT PATENT INFRINGEMENT

Indirect infringement

- **Provides a remedy for acts occurring prior to an act of direct infringement.**
- **Generally relates to *supply of or offer to supply* a means relating to an essential element of the invention, with the exception of where the essential means is a staple commercial product.**
- **Some jurisdictions do not require the knowledge of the existence of the patent.**
- **Some jurisdictions have a double territorial requirement, in that both the supply and the end use must occur in the same jurisdiction.**

It is important for MANE to be aware, if possible, of our customer's intended use of the products we supply to them.

INDIRECT PATENT INFRINGEMENT

US law

Inducement [35 USC §271(b)]

- Inducement requires that the alleged infringer knowingly induced infringement and possessed specific intent to encourage another's infringement.
  - The knowledge requirement may be satisfied by either a showing of actual knowledge or willful blindness.
    - (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.
  - Global-Tech Appliances, Inc. v. SEB S. A., 131 S.Ct. 2060 (2011)

Contributory [35 USC §271(c)]

- Selling or offering to sell a component that is a *material part* of a patented invention, where the component does not have *any substantial non-infringing uses*.
- Supplier must have knowledge must know "that the combination for which his component was especially designed was both patented and infringing.
  - Does not encompass sale of a staple article of commerce.
- Customer then proceeds to directly infringe a patent using the supplied material part.
  - Life Techs. Corp. v. Promega Corp.,137 S.Ct. 734 (2017)

It is important for MANE to be aware, if possible, of our customer's intended use of the products we supply to them.

FREEDOM TO OPERATE INVESTIGATIONS

A specific and closed question:

"If I do X, will I risk liability for infringing another's patent?"

The proposed activity must be complete and detailed.

An FTO study is confined to analysis of the claims of enforceable patents. To search claims, specific details must be known.

There is no such thing as a "broad FTO."

If commercial embodiment is not set, consider requesting a patent landscape report (PLR):

1. **Formal request to patent counsel**
2. **Informal request to MANE's documentalist Didier Geraud.**

FREEDOM TO OPERATE INVESTIGATIONS

Freedom to Operate Study Request form

INTERNAL ONLY CONFIDENTIAL

FREEDOM TO OPERATE STUDY REQUEST

FROM (name, Mane entity & department)	**ISSUANCE DATE**	**DEADLINE REQUIRED** *(if urgent please indicate why)*

Please attach the documents relating to the innovation decision making process by the ComInnov or the Scientific Committee on the project:

- ✓ *Innovation project opening*
- ✓ *Project presentation to the Committee*
- ✓ *Extract from the minutes of the Committee*

BRIEF DESCRIPTION OF THE PROJECT: The purpose of a FTO study is to ensure that the commercial production, marketing and use of a new product or process does not infringe third parties' intellectual property rights.

Please describe the project, the applications, its benefits compared to prior art if any, etc...

DETAILED DESCRIPTION OF THE PROJECT: A good patent search may indicate that a new product and/or process is/are unlikely to infringe third party patents, but no patent search is perfect or full proof. There is a practical limit to the time and money that can be spent on a search.

*For example, **for a formulation, please detail all the main components, their percentage of use**... Please specify the planned use of the composition, device etc. Do not hesitate to provide more explicit documents*

GEOGRAPHICAL SCOPE: Patent protection is territorial. In many cases, protection is sought in a company's main markets and left in the public domain in other countries where commercialization is less likely. In the latter countries, no permission (or license) will be needed from the patent owner to commercialize the product.

By default, the FTO will be conducted for the territories of Europe and USA. If the project concerns specific countries, or there is a need to cover any other countries, in addition to or instead of Europe & USA, please specify.

KNOWN PRIOR ART: Patents have limits of scope and limited duration. The most important part of a patent document is probably the claims. The claims determine the scope of t patent, and all aspects of an invention that are not covered by the claims are not considered to be patented. It is important to bear in mind that it is not always easy to determine the scope o patent. Patent protection lasts for a maximum period of 20 years, provided the patent is "maintained" for the entire period by timely payment of maintenance fees to the patent offices. After t expiry of the term of protection, a patent is considered to be in the public domain and may be freely used by anyone.

Please indicate a list of the relevant prior art patent documents.

http://mosscorp.emea.sesam.mane.com/LegalIP/IP/Patents%20study%20forms/Forms/AllItems.aspx

FREEDOM TO OPERATE INVESTIGATIONS

Procedure:

1. Study FTO Request form containing **specific embodiment(s)**.
2. Develop search strategy based on the specified embodiment(s) and known prior art.
3. Collect search results and analyze claims of patent documents to establish relevancy to proposed project.
4. Assess status of any relevant patent documents
2. Render a written opinion providing FTO guidance
    a. The project/invention is free to operate, meaning that no enforceable patents or pending patent applications hinder Mane's right to exploit said specified embodiments.
    b. If enforceable patents or pending patent applications block our FTO
        i. **If available, commercialize in alternative countries.**
        ii. **Monitor problematic patent documents for abandonment, invalidation, etc.**
        iii. **Work with researchers to develop design around strategies, if possible.**

MANE FTO policy is to respect *valid* third party patents and patent applications.

REMEDIES

Potential Patent Infringement Remedies

Monetary Damages

- **Lost profits**
- **Royalties**
  - Attempt to determine what a fair agreement would have been if negotiations had taken place.
- **Enhanced damages**
  - Willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant, or—indeed—characteristic of a pirate (**Up to 3X**!)
- **Attorney's fees**
  - Willful infringement, inequitable conduct, bad actor in litigation

Injunctions

- **Preliminary**
  - (1) that it is likely to succeed on the merits;
  - (2) that it is likely to suffer irreparable harm in the absence of preliminary relief;
  - (3) that the balance of equities tips in its favor; and
  - (4) that an injunction is in the public interest.
- **Permanent**

DEFENSES

Potential Patent Infringement Defenses

- **Non-infringement**
  - Patent Counsel Opinion
- **Invalidity** based on prior art (**anticipation** or obviousness)
  - Patent Counsel Opinion

- A defense of inequitable conduct
- Prior commercial use or offer to sell
- Patent misuse
- Patent Exhaustion
- Estoppel
- Licensing
- Experimental use
- Failure to meet statutory limits (laches)
- Failure to meet the statutory requirements

FINAL REMARKS

Know the patent literature and what you can rightfully use at MANE

- Be aware of what tools belong to former/current employer
  - **Just because you could use "it" before you came to MANE…**

Identify infringement risks

- Core business ≠ patent litigation
  - **New products and processes should be vetted for infringement risks**
    - Identify commercial embodiment
    - Identify customer's intended use, if possible
    - Identify countries into which we will commercialize

Identify contract risks

- No indemnifications … especially for patent infringement
- Limits of Liability
- Warranties


QUESTIONS?

WE
CAPTURE
WHAT
MOVES

MANE

FOR MORE INFORMATION, CONTACT US

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