

# Mind over medicine

How can smarter management of intellectual property rights in international healthcare be a win-win situation? **Mark Abell** explains



**P** rivate and state-funded healthcare provider in developed markets could better manage their intellectual property rights. This could be through the exploitation of a new form of international open ended peer-to-peer social franchising. This could form part of the answer to their fiscal problems and help to create robust healthcare infrastructure in developing nations which need to improve their own healthcare systems.

## Lack of access to relevant know-how in developing countries

A lack of know-how as regards successful patient care pathways is having a substantial adverse impact upon the ability the healthcare services of many developing countries to develop adequately. According to the World Health Organization, of the 196 states that have signed up to the International Health Regulations (2005) agreeing to develop 13 core public health capabilities, some 118 states (60%) have requested and obtained extensions to 15 June 2014 to meet the agreed targets. Many of these are currently in the process or applying for a further two-year extension.

## Poor management of IP in developed countries

The healthcare systems in developed countries are the product of years of investment, research and development. They all contain centres of excellence comprised of a wealth of both clinical and care pathway know-how. However, the husbandry of this know-how

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is, in many cases, exceedingly poor leading to significant cost and resource inefficiencies. As a result, many state funded healthcare providers are on the edge of an unprecedented fiscal crisis. The irony is that the success of their clinical excellence delivered through successful care pathways has meant that they are pressed by an ever-increasing demand for healthcare from an ageing population suffering multiple complex conditions. Poor husbandry of their intellectual property has meant that they face mounting funding deficits. One good example of this is the French healthcare system. Once reputedly the best in the world, but this year alone facing €10bn worth of cuts.

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## How can this be achieved?

‘Peer to Peer Social Franchising’ offers a way of enabling health services in developing countries to access relevant know-how while producing ethical and socially appropriate income streams for the health services of developed countries. It also presents a way

through which health services in developed countries such as the UK's NHS can ensure that best practice is used throughout their own service, ensuring increased efficiency and so reducing cost.

Franchising is an organisational model that ensures the successful exploitation of intellectual property rights through the replication of what can be extremely technical formats to a uniform high quality.

Franchising is the licensing of a brand and know-how by one party (the franchisor) to another (the franchisee) in exchange for an on-going periodic financial payment. The franchisee undertakes to comply with qualitative key performance indicators (KPIs), which the franchisor polices to ensure compliance across the network. The know-how involved concerns the way in which the franchisor manages its 'business format'. It amounts to a blue print for (but not a guarantee of) success. It removes the need for the franchisee to develop its own format through trial and error and greatly increases its chances of success.

Each element of the know-how is unlikely to be unique or confidential. However, the matrix of those elements constitutes proprietorial know-how – valuable intellectual property that is owned by the franchisor. It has been proved by the franchisor to be a successful way of doing business and so confers a considerable competitive advantage on the franchisee, such that, even after paying the franchise fees to the franchisor, it is still in a better position than it would have been if it had not entered into the franchise.

The franchisor's obligations are to protect the brand, to continue the further development and improvement of its know-how and to communicate those improvements to its franchisees. The franchisee, freed of the need to itself devote time, effort and money to improving the business format, can focus on the running of its business using the franchisor's ever developing business format.

### How can franchising be used in the healthcare sector?

Franchising is already used in the healthcare sector by a number of private health service providers, including optical chains such as Boots and Specsavers, other examples include dental businesses such as White Cross, geriatric care providers such as Home Instead and Brightcare, chiropractices such as NuSpine, and medical practitioners such as the Appletree Medical Group in Canada, Doctors Express in the US and Apollo Hospitals in India. These all focus on the efficient delivery of healthcare rather than clinical excellence.

This is because franchising cannot

effectively be used to regulate or ensure the provision of technical clinical excellence. That is a matter for the medical profession. It can, however, be used to ensure that medical services are managed and delivered in the most efficient, cost effective and patient service oriented manner possible. It cannot be used to ensure that heart surgery is carried out to an acceptable standard. It can, however, ensure that cardiology units are run to a uniformly high standard and so help to ensure the delivery of healthcare in accord to agreed KPIs.

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### P2P franchising

The unique nature of the healthcare sector suggest an approach and architecture that achieves the 'collaborative mutualisation of best practice' through a form of social franchising that is best described as 'peer-to-peer social franchising' (P2P franchising). In essence, P2P franchising would work as follows. Healthcare providers, which have developed 'best of breed' care pathways based upon patient care, financial management and so on, for the management of, say A&E or paediatric units, would offer other healthcare providers who employ or would like to employ the same care pathway access to its format (together with on-going development of it). The franchisor will license the franchisee to use the franchisor's 'brand' as a badge of the quality of the care pathway being used. It could even be that the healthcare regulators in a particular country, such as the UK's NHS, adopt a certification of best practice scheme, under which they certify the success of certain care pathways for having met certain objective KPIs. These 'certification' marks would increase

the value of the care pathways awarded them.

Franchisor healthcare providers would need to develop the resource to transfer their know-how to their franchisees and regularly monitor compliance with quality standards. This would involve incurring costs and acquiring new skill sets through recruitment, but these would be covered by the income streams generated from franchisees.

### Generating new income streams

Both private and state funded healthcare providers need to 'think out of the box' in their search for new income streams. Exploiting their expertise on the international front has oft been touted as one possible way of securing new sources of income. However, the big, brave schemes often proposed for healthcare services, such as healthcare provider licensing a hospital in the Middle East to operate under its name, are usually ridden with political and reputational, let alone legal and financial risk. Franchising offers a way of generating income streams from intellectual property that can be developed over time and in an incremental manner, in multiple and diverse ways.

### Which providers could generate income streams from abroad?

Franchising would not be used to ensure the provision of technical clinical excellence in a foreign hospital. That is a matter for the local medical profession. It could, however, be used to enable hospitals in developing markets to deliver desired care pathways to the same high standard as an acknowledged centre of excellence in the more developed markets.

A healthcare provider with a care pathway that is recognised as a centre of excellence could become a franchisor and franchise an appropriate foreign hospital to replicate the care pathway. Healthcare providers with centres of excellence would franchise their care pathways to their peers in foreign markets. So, for example Great Ormond Street Hospital could franchise selected paediatric care pathways to suitable foreign hospitals. This strategy would not be limited to the larger better known healthcare providers. While well known teaching hospital care pathways may be much sort after by large prestigious hospitals, the centre of excellence care pathways of more humble regional hospitals could well be very attractive to smaller regional foreign hospitals.

### How should healthcare providers begin international franchising?

A healthcare provider with a care pathway that was regarded as a centre of excellence

would have to develop a training, on-going support and monitoring programme around its know-how. This would entail pulling together an inventory of all relevant procedures in a tangible form and developing an educational programme around it. It would enrol its franchisee hospital's relevant staff into a training programme on the franchisor's hospital premises and then second staff to the franchisee hospital to help them launch the care pathway there. This would then be supported by an on-going education and monitoring programme to ensure the continuing high quality of the care pathway. The franchisor would allow the foreign hospital to advertise the fact that it was using the franchisor's care pathway and so delivering world leading excellence. In return for this training, support and use of the brand, the franchisee would pay the franchisor an agreed fee, comprising both an upfront amount and an on-going regular payment.

### How should healthcare providers prepare to become a franchisor?

The first step is to audit the healthcare provider's various care pathways and identify which of them are 'best of breed' and so likely to be attractive to other healthcare providers. Once identified it will be necessary to clearly identify each of the care pathway's constituent elements and capture them in a tangible and easily communicable form, such as a manual or software package. No matter how valuable a particular care pathway, it cannot be exploited unless it can be communicated to another healthcare provider and then monitored and managed by the franchisor on an on-going basis. The copyright in the manual and/or software package becomes a vital part of the intellectual property rights portfolio of the franchisor. The next step is to develop an appropriate brand strategy and take steps to protect the name and logo of the healthcare provider in target jurisdictions. This is essential as potential franchisee health care providers will want to be able to use the brand as a certification of quality with which to evidence the pedigree of the care pathway they are using.

Next, the healthcare provider will need to design appropriate logistical structures to ensure that it is able to deliver the necessary know-how and support services to its franchisees.

Following that, the structural architecture through which the franchising business is to be operated needs to be determined. In order to ring fence the healthcare provider, a special purpose vehicle (SPV) should be established with appropriate rights licensed to it by the trust.

That SPV will need to employ appropriate staff who will market the opportunity, negotiate the deals and implement the programme on behalf of the trust. Appropriate legal documentation will also need to be drafted by practitioners experienced in the international franchising of social services such as education and healthcare. These will include a franchise agreement for each franchisee hospital and, if the franchise is granted to a healthcare operator with a number of hospitals, a master franchise agreement too. These agreements will contain terms which grant the right to use the intellectual property involved in the care pathway for a set period and, set out the financial terms of the relationship and go into great detail about quality assurance mechanisms.

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It may also be appropriate to draft a 'manchise' agreement to provide for a higher level of initial training and support and, in return for a management fee, to outsource the management of the implementation of the franchised care pathway in the franchisee's hospitals to the franchisor for an initial period. This means that the franchisor is in effect delivering a 'turnkey' package. This documentation is complex and needs a high level of technical expertise to ensure that it deals not just with the contractual issues, but

also the various regulatory regimes that it will encounter.

The franchisor will also have to meet some regulatory challenges. There are some 50 different countries that regulate franchising in a variety of ways, no two of which are exactly the same. These regulations include different combinations of pre-contractual hygiene issues such as set form disclosure, as well as mandatory contractual terms and registration on public registers. The franchisor will need to be prepared to comply with these regulations. A carefully considered roll out strategy, integrated into the brand protection programme will need to be developed.

It is then a matter of marketing the healthcare provider's expertise and its willingness to engage with other hospitals which are in need of the know-how being offered.

### Summary

The effective management and exploitation of intellectual property rights through open ended peer-to-peer social franchising of care pathway formats by healthcare providers may be a step towards solving all of these problems in both developed and developing nations. Better and more creative management of intellectual property will create an international free market in healthcare that will enable the collaborative mutualisation of best practice in a financially responsible and socially appropriate manner. This will ensure that free market forces and socially desirable objectives work in tandem to help guarantee the provision of high quality healthcare, free at the point of delivery for the coming generations.

### Author



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Over the last 30 years he has advised a wide range of household

names, particularly in the retail, food and beverage, education and health care sectors, on the development and implementation of their international expansion strategies and the corresponding re-engineering of their businesses.

Mark has acted as an expert to the World Intellectual Property Organization and World Trade Organisation on franchising.