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University Trademarks: Let's Get Down to Business!

By Kevin R. Casey

PART 1

This three-part article focuses on how universities parlay trademarks into several benefits. In this first installment, read about how university trademarks make money.

Trademarks can be a valuable income-generating asset if properly maintained and managed. With reasonable policies and proper trademark oversight procedures in place, opportunities arise to generate a revenue stream as well as to strengthen a university's brand. Revenues generated through a university's trademark program can be used, for example, to support and enhance the quality of campus life.

The very purpose of adopting and using trademarks is to exploit the resulting exclusivity to the university's economic advantage. The trademark "exclusivity" translates into commercial value in one of three ways. The mnemonic "ULE," which comes from the French for "little thing" (as in "molecule" or as in "a little thing like money"), might help to remember them. As the mnemonic suggests, the three basic ways to realize value from a trademark are to use it, license it to others, and enforce it against others. The best approach incorporates all three.

Use the Mark

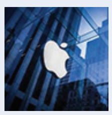
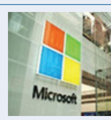
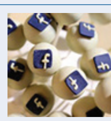
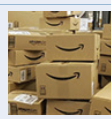
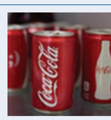
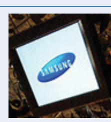
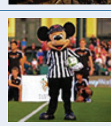
At its core, a trademark identifies for the public a particular source of goods (e.g., clothing such as sweatshirts, sweatpants, socks, ties, polo shirts, T-shirts, shorts, tank tops, uniforms, hats, and jackets) and services (e.g., education services such as providing courses of instruction at the university level and entertainment services such as arranging and conducting intercollegiate athletic competitions) and distinguishes those goods and services from the goods and services provided by others. One option available to the owner of a mark is to use the mark as a tool to advertise and sell its goods and services (i.e., as an important business asset). Use of its trademarks exclusively to distinguish its goods and services from those of competitors creates goodwill and gives a university a competitive advantage over other institutions. In addition, trademarks generally appreciate in value over time, making it easier for the university to differentiate itself from competitors, attract and retain talent, and expand services.

Trademarks support stronger sales volume, permit enhanced margins, and can provide price maintenance legally. It is often difficult to identify significant differences among competing goods and services. Trademarks make it easy for consumers (students, alumni, instructors, collaborators, and others) to find and distinguish universities, and can be the critical factor in driving the consumer's decision about where to attend or teach, which institution to support, or with whom to collaborate. When used properly, trademarks are among the most economically efficient communication tools ever developed, for universities and consumers alike.

Popular trademarks are often inspirational and aspirational, qualities that feed into a university's typical goals.

A number of entities publish annual valuations of famous brands. Among those entities are Interbrand, Brand Finance Global 500, and Forbes. In the latest rankings of Forbes, see the table below, Apple is the world's most valuable brand, achieving a valuation of about $183 billion. Other technology companies in the top-ten list of the world's most valuable brands were Google ($132 billion), Microsoft ($105 billion), Facebook ($95 billion), Amazon ($71 billion), and Samsung ($48 billion). Non-technology companies in the top ten were Coca-Cola (#6 at $67 billion), Disney (#8 at $48 billion), Toyota (#9 at $45 billion), and AT&T (#10 at $42 billion). And these valuations are dynamic: all in the top ten went up in the past year. Apple's brand value represents a rise of 8% over last year's figure; Google, 30%; Microsoft, 21%; Facebook, 29%; and Amazon, 31%.

Value alone is not everything, however, and brand ratings additionally account for other financial metrics, as well as qualitative measures such as brand affection and loyalty. Regardless of the measure, the figures clearly demonstrate the economic impact that a strong brand can generate – with trademarks the central component. Among the lesser known consequences of a valuable brand is the concept of brand mortgaging, a tactic successfully used by Ford to secure the funding that allowed its restructuring. Brand valuation is an important task that assesses the financial value of a brand for a clear picture of how it contributes to economic results. Brand valuations have been used to plan, build, and monitor brand strategies over time, assess acquisitions, or help with investment/trade-off decisions.

	LOGO	BRAND	VALUE	CHANGE	INDUSTRY
1		Apple	$183 B	8%	Technology
2		Google	$132 B	30%	Technology
3		Microsoft	$105 B	21%	Technology
4		Facebook	$95 B	29%	Technology
5		Amazon	$71 B	31%	Technology
6		Coca-Cola	$57 B	2%	Beverages
7		Samsung	$48 B	25%	Technology
8		Disney	$48 B	8%	Leisure
9		Toyota	$45 B	9%	Automotive
10	AT&T	AT&T	$42 B	14%	Telecom

The universities with the best reputations enjoy great rewards. They can enroll the best students, attract the finest talent in instructors, and collaborate with similarly regarded institutions and leading business partners. For students, the value of the "brand" on their degree certificate can set them up for life. And institutional reputation is the number one priority for globally mobile academics looking for jobs – even more important than salary. Finally, it is significant that donors with proverbial "deep pockets" tend to give their money to the institutions with the best reputations.

Although no university is on the Forbes list of the top 100 in terms of brand value, Forbes does provide a list of the most "reputable" universities. According to Forbes, the top two universities are Harvard and the Massachusetts Institute of Technology. Such top-ranked universities might enjoy the greatest rewards from their reputation, as reflected in their trademarks, but other universities also stand to gain from strong trademarks.

License (or Sell) the Mark

The second way for a university to realize value from a trademark is to license (or sell) it to others. As a form of intellectual "property," and akin to real property, trademark rights can be transferred between parties. Such transfers typically include compensation from the party acquiring rights to the original owner of those rights. One type of transfer is to assign (i.e., transfer ownership of) the trademark to generate income. Sale of a trademark may be an attractive option if the university does not have the facilities or the inclination itself to market certain goods or services under a particular trademark. A few universities have become sophisticated and creative in maximizing the profitability of their trademark portfolios through joint ventures and business relationships.

A far more common type of transfer than an assignment is for the university to license its trademark rights to one or more other entities. A trademark license is an agreement between the owner of a trademark (the licensor) and a third party (licensee) to allow the licensee to use the licensor's trademark. Use by a licensee inures to the benefit of the licensor. A license can be limited to a single entity (exclusive) or limited to a specific territory, type of good or service, or time period. A non-exclusive license allows the university to license its trademark to a wide variety of licensees. Generally, the more rights transferred – in decreasing order of assignment, exclusive license, and non-exclusive license – the more money the university should receive in return.

Universities achieve two, main benefits by licensing their trademarks for others to use. First, trademark licensing makes money. Second, the circulation of a university's "brand" as widely as possible can enhance its reputation (which, in turn, will ultimately increase revenue so, perhaps, there is really only one main benefit).

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Once licensing agreements are negotiated and the various goods displaying the university's trademarks are marketed, the university receives royalty fees from the third-party licensees for the right to use the trademarks. Revenues gained from royalty fees, which can amount to millions of dollars per year depending on the strength of the university's trademarks, are then returned to the university and can be dispensed in the form of scholarship funds for academics, support for athletics, faculty hiring and retention, or improvements to facilities. Specifically, universities generate almost $5 billion a year in licensing revenue. *See* C. Nicholson, "Trademarks: Easy money for higher education?", University Business (Oct. 2014). Apparently, that total makes university licensing the second largest category of licensed merchandise in the country, behind only Major League Baseball. More generally, licensing activity is at an all-time high: global revenues attributable to trademark licensing in 2017 alone were over $271 billion, representing a 12.5 percent increase over three years. "Global Revenue From Licensed Goods and Services Grows to US$271.6 Billion," Licensing Industry Merchandiser's Association (May 22, 2018) (posted at www.licensing.org).

And the revenue stream can be cyclical. As one example, the University of Texas, which won the national football championship in 2005, capitalized on its athletic success and translated the rise in popularity of its trademarks into lucrative royalty revenues. The school set the National Collegiate Athletic Association (NCAA) record at the time for licensing revenues with $8.2 million in royalties from 2005 to 2006. "Longhorns knock off Tar Heels to lead nation in merchandising revenue," USA Today.com (August 26, 2006). At least some of that licensing revenue was then available to improve athletic programs.

Direct income from trademark licensing is not the only benefit that universities achieve from trademark licensing. Perhaps even more important, the circulation of a university's "brand" can generate widespread recognition and help portray a positive image to the public. Trademark licensing allows the university to expand the awareness of the university and its products without incurring the costs necessary to do so. Universities negotiate licensing agreements to control the use of their trademarks in the marketplace, by ensuring consistency and quality in the products carrying their marks. The licensees will do the advertising for the licensed trademarks and products. Therefore, the university will expand beyond its core education business without a significant capital investment. This expansion allows the university to engage new customers with new products, which has the overall effect of enhancing the university's image and commercial appeal and ultimately and indirectly raising revenues. Because academic institutions rely on their ability to create and uphold a strong reputation, a widely recognizable and distinctive trademark portfolio complete with adequate protection is essential in today's marketplace.

Not convinced? Read the excellent article by John Jennings, "University Trademark Licensing: Creating Value Through a 'Win-Win' Agreement," World Intellectual Property Organization (available at www.wipo.int). Author Jennings provides a detailed look into the many benefits of university trademark licensing.

Large universities with internationally recognized brands and large alumni bases – such as Notre Dame, Duke University, the University of Virginia, the University of Texas at Austin, and Florida State University – top the list of highest licensing revenue earners. These universities have entire offices dedicated to managing licensee relationships, reviewing merchandise samples and artwork, negotiating contracts, and collecting royalties. Even if the revenue potential is far less for smaller universities than that of such large universities, however, it is worth the time to operate a trademark licensing program.

A licensing program gives a university an opportunity to control how the university's name is used in the marketplace. Many T-shirts, mugs, notebooks, and other merchandise are produced annually bearing university trademarks (because so much of university trademark licensing revenue is directed to apparel, it is no wonder that shifts in popular fashion affect revenue). Without a licensing program, universities do not have a strong mechanism in place to ensure the university's name, logo, and other trademarks are being used appropriately. Further, a licensing program allows the university to diversify its revenue sources. Still further, a robust licensing program increases visibility.

The important components of a profitable trademark licensing program are a strong and protected trademark portfolio, continued academic and athletic success, and a healthy economy. Many universities have realized the need to first-and-foremost protect their valuable trademark assets by registering their names, logos, and other distinguishable symbols as trademarks with the U.S. Patent and Trademark Office (PTO). A program of trademark protection allows the university to develop its brand, which over time will hopefully be associated with the positive legacy, tradition, and reputation of the institution. The primary goal of registering trademarks and developing an effective licensing program is to ensure that the good name of the university, which is the hallmark of a well-respected institution, is affirmed in the public market. This is important for maintaining an emotional connection not only with students, alumni, and faculty, but with the general public as well.

A successful program of creating value from the development of a strong trademark portfolio and favorable reputation includes as a main component trademark licensing agreements. Whatever the specific terms of a license (or assignment), a university would be wise to develop a policy to guide its transfer efforts. Determine what kinds of products the university does and does not want associated with its name. University trademarks for apparel have gone beyond jackets, hats, and sweatshirts to include children's clothing. Most universities have licensed their marks or registered them for entertainment services related to athletic events. Universities sell branded food items including coffee and other soft drinks. All of these are potential revenue sources. But does the university want to allow use of its trademarks on alcohol-related products? Is the university willing to assume the risk associated with licensing its trademarks for consumables? Are there any university symbols, such as the official seal, that will be licensed only on certain items? The answers to such questions should be carefully considered, suitable policies and guidelines developed, and then implemented as part of the university's trademark licensing program.

Because the university owns the rights to its name and other trademarks, the permission to use its trademarks can ultimately only be granted by the university. The mechanism by which universities are able to protect their names and reputations is careful selection of which companies or other entities may legally use the trademarks, followed by negotiation and execution of a trademark licensing agreement. Many universities limit the number of licenses granted each year to maintain selectivity.

In a trademark licensing agreement, the university licenses the right to use one or more of its trademarks to manufacturers, retailers, vendors, or other entities for use on their products or services. The license could include the right to use the university's name, seal, logo, crest, sports mascot, or any other of its exclusive and distinctive source-identifying designations. With a licensing agreement, the licensed entity potentially makes much more money on products or services that bear the university's trademark compared to the same product or service without a university trademark. For example, a clothing manufacturer enters into a licensing agreement to put a well-known university's logo on its T-shirts and sweatshirts, or a notebook manufacturer becomes licensed to put a university's name and crest on its new line of notebooks. This type of arrangement allows the manufacturer to offer a substantially more attractive and marketable product to the consumer. On the other side of the license, the university enjoys a source of revenue in the form of royalty payments from the licensee which it would not receive otherwise. This business practice, which forms the basis of most trademark licensing done by universities, is known as "merchandising."

Payment terms in a trademark license (or sale of a trademark) can be structured in many different ways, including an up-front fee to the university for entry into the license (or sale) with a third party, a running royalty, or a combination of both. The royalty can be a specified amount for each product produced or service provided under the license (or assignment), a percentage of the receipts from the sale of goods or services under the trademark, or other mechanisms. Royalty rates may be scaled such that they are lower in the beginning, while the product or service proves itself, and higher later. They may be tied to the amount of sales in steps. University trademark royalties are generally computed based on a percentage of net sales and generally range from 3 percent to as high as 12 percent.

There are two main options in managing a university trademark licensing program. Some universities reap the advantages of "doing it yourself," and have a department of the university handle the task. Other universities hire an independent licensing company which becomes contractually responsible for the oversight of the licensing program, including the royalty payment process.

Consider first the do-it-yourselfers. Many universities have created offices or departments devoted entirely to trademark policy, protection, and licensing. For example, Harvard University has an independent trademark licensing office. *See* "Harvard Trademark Program," available at www.trademark.harvard.edu. Such offices build a network of experienced licensing professionals. The higher education licensing community, particularly the International Collegiate Licensing Association, is a great resource. Members of the association help answer questions. And university trademark licensing offices should not fail to use peers for help: the heads of licensing programs at other universities may provide invaluable resources. Helpful network meetings might be arranged at the Association of University Technology Managers (AUTM) events. The advantages of an independent trademark licensing office include greater control over third-party use of marks as well as maximizing revenues from licensing arrangements. Some of the most academically respected and well-known universities, such as Princeton, Harvard, and Yale, all still negotiate licensing contracts through their own university trademark licensing offices.

Despite the advantages of "doing it yourself," and although it is certainly possible to manage all aspects of a licensing program in-house through a trademark department, a majority of schools engage an independent licensing firm specializing in licensing agreements. There are firms, such as the Licensing Resource Group Inc.; Learfield Licensing Partners; or the Collegiate Licensing Co. (CLC), that specialize in managing college and university licensing programs in exchange for a share of the royalty revenue. (For more information about these three entities, see www.lrgusa.com for the Licensing Resource Group Inc.; www.learfieldlicensing.com for Learfield Licensing Partners; and www.clc.com for the Collegiate Licensing Co. Of course, the author does not endorse or express any opinion about these companies.) The CLC is the oldest and largest licensing firm in the United States, with nearly two hundred universities and collegiate athletic organizations as clients. Contracting with such companies may give the university access to a broader network of potential licensees and to a team committed to enforcing compliance on its behalf.

A large licensing firm acting as an intermediary between the university and the licensee can offer many advantages. University clients can benefit from the experience and resources that a licensing firm can bring to the table, especially when negotiating agreements with multiple licensees. In the case of universities with wide national recognition and strong athletic programs, the number of licensees in a given year can amount to four to five hundred.

A survey of fifty major U.S. universities, both public and private and located in different regions of the country, indicated that about 70% use the services of a licensing firm to develop licensing programs and negotiate agreements; only 30% managed their licensing agreements through their own in-house departments. And the recent trend has been for universities to use the services of a licensing firm in an attempt to increase revenue and simplify what can be a cumbersome licensing process.

Enforce Rights in the Mark

The third way for a university to realize value from a trademark is to enforce the university's trademark rights against others who infringe those rights. An adversary found guilty of infringing a university's trademark rights may be forced to compensate the university. Enforcement can be viewed as an aspect of managing a trademark licensing program, and usually starts with the university trademark office monitoring the market for infringement of its marks. Such monitoring is usually done on a national scale but may expand to the international level depending on the university's resources and its presence abroad. Regardless, an enforcement plan goes hand-in-hand with a licensing program and both require strong trademarks based on consistent and (hopefully) extensive use by the university.

The initial, and perhaps most important, point about enforcing a trademark is that the trademark owner does not have a choice. Rather, a trademark owner has a duty to enforce, or "police," its marks. "Trademark vigilance is not just a sometime job. It's an every day job." J. McCarthy & C. Pickett, "High-Tech Trademarks: Selection & Use," 21 AIPLA Q.J. 265, 303 (1993); *Nitro Leisure Prods., L.L.C. v. Acushnet Co.*, 341 F.3d 1356 (Fed. Cir. 2003) (Newman, J., dissenting, "the law requires the holder of the trademark to control both the use of the mark and the quality of the goods to which it is affixed, on pain of losing the mark as a trademark") ("Trademark law requires that the trademark owner police the quality of the goods to which the mark is applied, on pain of losing the mark entirely."). Thus, if the university fails to enforce its trademark rights, those rights can be abandoned or lost.

Short of abandonment or lost rights, a university that fails to enforce its rights risks a reduction or lessening of the value of its trademarks. The single-source identifying function of a trademark is reduced and, over time, potentially lost if competitors who offer similar goods and services under the same or confusingly similar marks are permitted to continue. And the goodwill reflected by a trademark may be eroded or "diluted" if third parties are permitted to use the same or very similar marks even on dissimilar goods and services to those offered by the university under its trademarks.

Federal law gives trademark owners a cause of action to protect famous marks from unauthorized users that attempt to trade upon the goodwill and established renown of such marks and, thereby, dilute their distinctive quality. Dilution comes in two forms. Dilution by blurring is the lessening of the capacity of a famous mark to identify and distinguish goods or services regardless of the presence or absence of (a) competition between the parties, or (b) likelihood of confusion, mistake, or deception. Thus, for example, the use of DUPONT shoes, BUICK aspirin, and KODAK pianos would be actionable, as might the use of DUKE breakfast cereal. The second form of dilution is by tarnishment, defined as an association arising from the similarity between a third party's trademark and a famous mark that harms the reputation of the famous mark. Tarnishment undermines the image that consumers hold of a famous mark by using the mark to advertise unsavory products. For example, dilution by tarnishment existed when a cinema promoted its pornographic movie by suggesting that Dallas Cowboys cheerleaders were participants and used actresses whose costumes resembled those of the Dallas Cowboys cheerleaders.

Clearly, unlicensed goods, which often are of inferior quality when compared to the goods offered under a university's trademarks, can damage the desired image and reputation of the university. Trademark infringement in the form of counterfeit merchandise is especially prevalent in the market for collegiate products such as athletic apparel. Given the lost revenue and intangible harm caused by counterfeiting, universities must take the necessary steps to protect their trademarks and preserve their reputation with students, faculty, alumni, and consumers. CLC estimates that on average nearly 5,000 pieces of unlicensed counterfeit merchandise are seized outside of the host stadium during the Bowl Championship Series title game, the biggest game in college football each year. "Bowl Championship Series prepared for counterfeiters at inaugural championship game in Arizona," MarketWatch.com (April 1, 2007). Similar significant efforts to reduce counterfeiting are also taken at the NCAA Final Four basketball tournament, the other major event each year in collegiate athletics.

Trademarks are critical to the integrity of a university's brand. For instance, when an unlicensed vendor uses the university's logo on cheap merchandise or on product produced under environments that do not adhere to the university's codes of conduct, the university's brand value is undermined accordingly. As the owner of a trademark, a university wants to protect the good will of the organization for its students, faculty, alumni, and the general public and maintain its status as the source indicator and the party with exclusive rights to use the mark. Trademark owners and practitioners must tread a fine line, however, between overly zealous "bullying" and lax enforcement efforts that may result in consumer confusion, lost profits and goodwill, and claims of abandonment.

As the university develops and implements its enforcement plan, seeking to police its trademarks consistently, it has a relatively large number of options (or enforcement tools). With respect to strategy when policing a trademark, the following steps define typical options along the continuum from initial contact to actual litigation: (a) contact by the university trademark office or, absent such an office, by the university's office of general counsel, which may be through a demand or "cease-and-desist" letter or even a telephone call (experience teaches that such an initial contact often succeeds in resolving the matter); (b) a "soft" letter from outside trademark counsel advising of the dispute and requesting resolution but not threatening litigation; (c) a "hard" outside counsel letter threatening litigation, perhaps attaching a draft complaint that has neither been served on the infringer nor filed with the court (although the infringer could respond by filing a declaratory judgment action, perhaps in a distant jurisdiction from the university, alleging non-infringement or another defense); (d) an outside counsel letter attaching a complaint that has been filed with the court, but not yet served, and advising that the university plaintiff has 90 days under U.S. rules of federal civil procedure to serve the complaint and begin litigation (although the infringer can decide to trigger the litigation by filing an answer without awaiting service), thereby giving the parties time to negotiate a resolution but pushing them along via the deadline; and (e) simply filing and serving the complaint, officially starting litigation.

The university as a trademark owner can enforce its rights against third party infringers through three basic procedures, in order of increasing involvement by third parties and, commensurately, decreasing control over the outcome by the parties. First, the parties might negotiate toward settlement. Many conflicts involving trademarks are resolved by negotiation and settlement, which can achieve a "win-win" resolution in which the parties completely control the outcome. Second, the parties may consider the possibility of various alternative (to litigation) dispute resolution (ADR) procedures, including mediation and arbitration. These procedures require agreement, of course, by both the university and accused infringer to participate unless they are court-annexed. Thus, if the parties cannot reach their own settlement, they might ask a mediator to help them. Or they might at least avoid the cost and risks of litigation by agreeing to be bound by a neutral party's assessment, perhaps after an arbitration proceeding.

The third enforcement procedure, litigation, is widely perceived as excessively slow, uncertain, costly, and complex. Unfortunately, experience has justified these perceptions all too often. Addressing the costs of U.S. trademark litigation, the American Intellectual Property Law Association (AIPLA) conducts a survey every other year and reports on various economic aspects of intellectual property law practice, including patents, trademarks, copyrights, trade secrets, and related matters. The Report of the Economic Survey 2017 provides the following data to complete trademark litigation (each side) for a case with less than $10 million at risk: $669,000 (75th percentile), $475,000 (median), and $250,000 (25th percentile) with a mean (average) of $626,000. Note that the estimated costs are a bit dated and, therefore, are somewhat conservative. (Such costs might prompt a university to explore "insurance abatement" policies commercially available to fund a trademark enforcement action.) In addition to the expense, trademark infringement litigation is a very involved proceeding that may take several years.

For these reasons, most trademark disputes are settled or decided by procedures other than litigation. A high percentage (well over 90%) of trademark infringement cases are settled short of trial even after they are filed. Nevertheless, litigation is sometimes unavoidable – especially given the requirement that trademark owners police their trademarks.

Absent the settlement of a trademark conflict, or resolution by ADR, litigation may be brought in a court. The objectives are usually an injunction against further infringement and damages (measured either as the defendant's profits or losses suffered by the university), in that order of priority. Remedies that the university trademark plaintiff might seek in court include: (a) an injunction granted in accordance with equitable remedies (ranging from a temporary restraining order granted on an expedited basis in egregious cases, a preliminary injunction granted during the course of the litigation, and a permanent injunction granted as part of the final court judgement); (b) the infringer's past profits will be awarded if the infringement is accompanied by some sort of bad "intent" to reap the harvest of the university's trademark; (c) damages suffered by the university (e.g., lost sales of trademarked merchandise) will be awarded if the university can prove such damages; (d) the court might order corrective advertising as part of its award, perhaps entitling the university to recover advertising costs to correct the damage caused by the infringer; (e) the court has the authority to award the costs of the action; (f) the court also has the power to increase actual damages up to three times if the circumstances warrant (usually, the infringement is willful); (g) statutory damages are available in counterfeiting cases; and (h) the court can award attorney fees to the university in exceptional cases when the university is the prevailing party.

Litigation-like enforcement procedures in the form of petitions to oppose an application seeking to register a mark with the PTO or to cancel a registered mark are also available to the university trademark owner. Oppositions and cancellations are decided by the PTO, rather than the courts, and decide only whether a third party is entitled to a registration for its (allegedly conflicting) trademark. The PTO does not decide whether anyone can use a mark; only courts can enjoin use. Although these PTO procedures are limited in scope, they are an important tool in a university's enforcement plan. Fortunately, opposition and cancellation procedures are much less expensive than court litigation. The Report of the Economic Survey 2017 provides the following data to complete an opposition or cancellation: $178,000 (75th percentile), $80,000 (median), and $40,000 (25th percentile) with a mean (average) of $152,000.

Stay tuned for Part II in the series.