

Introduction

We wrote *Fundamentals of Intellectual Property Valuation: A Primer for Identifying and Determining Value* in 2005; since then, the world of intellectual property (IP) has grown more complex, and the world of IP valuation has grown more sophisticated. Standards of valuation have changed, methodologies have changed, the context in which valuation takes place has changed, and the range of contexts has expanded. Also, the types of IP are growing, morphing and melding together.

There are underlying trends and issues that didn't even exist a decade ago. At the same time that we see new forms of IP, there's also a trend that brings together different types of IP: the merging of technology and trademarks into so-called branded technologies.

There's greater awareness of IP and its value at all levels today—less naiveté, more skepticism. Today, when one thinks about IP portfolios and the management thereof, one thinks “professionalism,” which wasn't necessarily true a decade ago. There's greater scrutiny in the boardrooms of America. Corporate directors and officers are increasingly providing tighter oversight of corporate IP portfolios. Ten years ago many boards were not even aware of the potential financial impact of a company's IP holdings on a balance sheet. Today those same corporate directors are not only aware of value but aware of potential liability from shareholder lawsuits and disgruntled investors if they should mismanage that IP portfolio. In general, there's also increased scrutiny by shareholders, both large and small.

Valuation techniques and methodologies have changed. Standards for valuation are certainly tighter today than they were a decade ago, and simple methods of valuation have been dismissed in favor of more sophisticated thinking and analysis. For example, valuation professionals no longer use the 25% rule (calculating an appropriate royalty as 25% of gross profits). Instead, we deal with the smallest saleable patent practicing unit (SSPPU), a concept that was born out of litigation but which is now increasingly being used as a basis for establishing royalty rates and value both within and outside of litigation.

This is the background against which this book is being presented: millennial changes in IP and its valuation. The issues and case studies included in this book present this new world as clearly as possible to the reader. Other factors are increasingly playing a much larger role in the IP world. One is the expanding world of digital assets and social media, another is our legislative and court systems.

In the first case, social media has blossomed over the last decade to generate new and different ways to use IP, both in its primary form as a medium for concepts and ideas as well as a delivery vehicle, e.g., Amazon Prime and YouTube. Over the last decade, the world of

litigation and an increasingly active court have brought a new awareness of IP to corporate boardrooms, financial houses, and private citizens alike.

Context: Who Is The Audience for This Book?

This book is intended as a valuation overview for attorneys who need a basic grounding in the principles and financial standards of IP valuation and who can also benefit from a basic review of the core attributes, categories, and permutations of various IP. In addition, it is also intended for bankers, financial professionals, venture capitalists, and other Wall Street professionals. It is also useful for litigation funders who want a better understanding of the basic legal framework and current trends that affect IP, not just valuation trends but trends in terms of litigation, legislation, and categorization of new forms of IP and related intangible assets.

In addition, this book is meant to serve as a resource and quick reference guide for terms and terminology on valuation issues as well as an in-depth analysis and resource on royalty rates, discount rates, and the calculation of actual valuations in transactions and cases. This piece of work is also aimed at a community of IP professionals who engage in licensing, valuation, and evaluation analyses in IP litigation. Hopefully, all of these professionals will be served by having a single volume they can turn to as a quick reference on all matters related to IP value, whether the value is in a transaction, litigation, or other context.

For the last 30 years, my focus has been as a professional IP consultant in licensing and monetization of all IP assets, as well as the evaluation and valuation of the same assets. For many years, I served as a partner and president of a licensing agency, acting as a marketing and sales agent for a number of large corporations. Beginning in the 1980s and into the 1990s, I represented the portfolios of trademarks and brands to extend the reach of those trademarks and brands into new product categories and new geographies both here and abroad. For the last 25 years, my personal focus and the focus of CONSOR, the firm of which I am chair, has been heavily in the area of valuation. During that period, we have written a number of monographs and books on the topics of value and valuation, both in the construct of transactional values as well as value when used in litigation as an expression of damages. As a firm, we lead the way in establishing many of the definitions and refinements in determining today's construct for the standard methodologies used in IP valuation, including what are now some of the more accepted methodologies, such the relief-from-royalty and price premium approaches. In addition, during that time, we developed several proprietary valuation techniques and methodologies, including the VALMATRIX approach and the Brand Value Equation, and we were early adopters and developers of the Technology Matrix approach and others.

With a decades-long background in both monetization and valuation of IP, it must be remembered, however, that we are not speaking from the viewpoint of attorneys. I am not a lawyer by training, nor does our firm practice law. On the other hand, the vast majority

of our clients are attorneys in a transactional environment and for litigation. Thus, we have more than a passing familiarity with the legal issues involved in IP, both here and in overseas markets.

Therefore, I must be clear in the following disclaimer: this book is not intended to offer legal advice on any aspect of IP. Instead, it offers very strong and well-reasoned opinions and advice on those aspects of IP that involve monetization, or valuation, regardless of how tangential it may be. The reader will note that wherever possible, we have cited legal cases and legal precedents. The legal discussion is presented as background for the overall topic of valuation. The cites, citing, and footnotes are referrals to more specific discussions of the law, legal precedent, case citing, and more authoritative legal resources. However, chapters 2 and 3 recognize the increasing role of the courts, landmark litigation events, legislation on the valuation process, standards of valuation, methodologies, and new valuation definitions established by the court such as the SSPPU. We recognize the role of the courts and understand how our valuation work must fit within the confines of legal precedent and constraints.

Organization

This book is organized into three sections. The first section, chapters 1 through 3, tracks the IP environment, not just valuation. Although we do have a particular emphasis on the changing world of valuation, we look at the methodologies and the standards of value both inside the courtroom and in transactions. These three chapters focus on the external forces that exact pressure on the world of IP and all forms of IP valuation. Chapters 2 and 3 recognize the increasing role of the courts, the increasing amount of IP litigation, and the fact that legislation at the federal level has been exerting pressure on IP valuation issues and standards in all of its newly expanding forms as well as both the process and product of IP valuation.

The second part of the book, chapters 4 through 6, is quite practical and specific and is a descriptive knowledge-transfer section. It provides the most updated commentary on valuation methodologies to be found anywhere in the market today. For example, chapters 4 and 5 are the most complete current summary of the primary methodologies being used, not only in the United States but in most overseas markets. Chapter 5 discusses alternative valuation methodologies and provides a brief description of 15 of the most important and interesting alternative valuation methodologies. These range from various option pricing models to the competitive advantage technique. These new and alternative methodologies provide approaches to enable the valuation of both new and expanded characterizations of IP classes, trademarks, copyrights, technology, and digital-based ventures. Chapter 6 is one of the most thorough analyses of royalty rates to be found in one condensed format anywhere. We view licensing royalty rates as the ultimate objective valuation context. We not only provide an historical overview going back more than 100 years but, more importantly, we dig into the analysis of royalty rate trends going back 30 years or more for each of the primary IP classes: patents, trade secrets, copyrights, trademarks, and right of publicity. This analysis is perhaps the best summary of royalty rate statistics to be found in one source anywhere today.

The third part, which is the heart of the book, consists of seven chapters. These chapters cover valuation and the trends, techniques, issues, and market forces specific to IP types and valuation environments that are most critical today on:

- Patents,
- Trade secrets,
- Copyrights,
- Trademarks,
- Rights of publicity,
- Application-based ventures/digital platforms, and
- Assets in international arbitration.

Each chapter is devoted to analyzing the uniqueness of the IP as well as to focusing on unique situations that apply to the evaluation and valuation of each class of assets.

Perhaps one of the most important benefits is that each chapter, as well as throughout the book, includes case studies. The case study method, which formed a good part of my professional training at the Harvard Business School, is obviously still embedded in my psyche (I use it for this reason, and because I truly believe that it is the most effective way to learn). We have included two or three case studies in each of the core chapters. Each case study is a *real* case, not something made up from whole cloth. Instead, the case studies feature transactions, litigation, initial public offerings, or consultations that we have been asked to consult on or to analyze on behalf of the courts, clients, or their financial advisors. Real firsthand knowledge of each case was a requirement for inclusion in the book.

We conclude the book with a look at the future of IP developments. This task could be and should be a book in and of itself. Instead, we only have room to treat it briefly given the constraints of space. Nonetheless, we believe much of what will happen in the next decade is going to be influenced by today's Internet-based/application-based giants. This model is being built by Apple, Microsoft, Alphabet, and Facebook, Netflix and others, and is going to dominate much of the future horizon—and dialogue about—IP formation and valuation.