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PUBLICATION

Eye on Intellectual Property in Uncertain Times

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If you are thinking of selling your house, before putting up the “for sale sign” you might chat with your neighbours - exercising appropriate social distancing. You might dig through your files to have a look at your deeds, surveys and documentation. And if you are sheltering in place during a pandemic, whether or not you plan to sell, with time on your hands you might spruce things up a bit, to plan ahead. This is equally true for real (tangible) and intellectual (intangible) property rights.

In times of a pandemic, unbundling intellectual property rights from tangible property can unlock hidden value. Intellectual property cannot be seen. But rights can arise automatically. The rights can be registered, conveyed and licensed, described in a schedule of rights attachable to a purchase and sale agreement.

Here are some similarities and differences we have considered when comparing real property with intangible property.

Brand management

Whether you are selling tangible assets, such as residential or commercial real estate, cars, gym equipment on the one hand or declare that your value is intangible, as a tech company - taking stock of what you own makes practical sense. You might note additions to property that have been made since it was acquired - deriving value in both tangible and intangible rights. As a bonus, intangible rights may be identified in tangible goods. This is a strategy used effectively by producers of exercise equipment (Peloton), manufacturers of cars (Tesla), real estate developers (WeWork) and others. By rebranding as “tech” companies dealing in rights management they have effectively enhanced their ability to raise capital and generate recurring royalty revenues from licensing.

Collect and curate

Whether you are in the business of producing and marketing tangible goods or intellectual property, you want to be known as a source of goodwill. If you are running a company or trying to buy or sell one, looking at IP assets early and often is recommended. If, however, you are under pressure to sell though, portfolio planning may have slipped out of your control. Suddenly you are selling rights that cannot be seen, nor identified other than by a schedule of rights (which may be partial) bundled with some clauses in a purchase and sale agreement which highlight risks that could affect value. The line item for “goodwill” on a balance sheet won’t tell very much about the brands, know how, copyright and patents which you own. You might retain advisors to rifle through the various intellectual property registers and to curate a list of rights. Caveat: they will provide best available knowledge but may omit unregistered rights owned by third parties.

Assess the “fair” market

As for valuation, intellectual property is novel, useful and unobvious – i.e. distinctive and not readily comparable to other ownership interests. Intellectual property moves around easily, from one brain to another, and finding it requires a factual investigation, contract review, and a hunt that leads beyond registered rights to identify factors which influence volatility. If you are Softbank Group, WeWork’s largest shareholder, you may be wondering what factors were missed when WeWork was valued. At the end of September 2019, the company was valued at 7.8 billion, down from the initial 47 billion but still more than 2.9 billion, its current valuation.

Manage expertise

IP rights should be reviewed by specialists capable of working seamlessly with different experts from multiple angles. With preparation, and the right information, intellectual property value drivers can be identified and risks anticipated.

By way of example, and based on our experience working with our commercial leasing clients, we have observed a number of very astute retailers reserve the right in their commercial leases to remove the distinctive sign facade attached to the building that by its shape and size is a distinctive part, together with the name and colors, of the brand. By doing so, they prevent the next tenant from indirectly benefiting from key elements of their brand.

IP rights are very much like “real” property rights. The lines between intangible and real property have blurred, although valuation is assessed differently. Each right should be reviewed and updated with assistance so that prospects of commercialization can be maximized, even in times of uncertainty.

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