LAW OPINION

Intellectual property: A cherry on the cake if recognised

ANNACHENLAWYERS

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INTELLECTUAL Property (IP) assets, in today's largely knowledge based economy; have a hefty role to play in a company's overall asset valuation. Unglued from tangible assets and stated into financial reports and balance sheets as intangible assets, IP assets are now contemplated to be a major driving force behind merger and acquisition (M&A) activities especially when such activities encompass knowledge-based enterprises. Conventionally, 'goodwill' of a company, built over several years, dominated the notion of intangible assets but in the past decades with the growing contribution of IP assets in global economy, IP assets are now asserted separately in financial reports and balance sheets as intangible assets. Identification and valuation of IP assets has become an important part of M&A activities as emphasized by the experts. As an anecdote, in 2006 when Google took over YouTube, out of its total valuation for the acquisition, $0.2 billion was allocated to its intangible assets. Furthermore, IP assets contribute not only to large companies but also small or medium business enterprises can also benefit from the same.

Intellectual properties are considered as intangible assets regardless of its type. Such as Trademarks and trade names are marketing related intangible assets, Copyrights are artistic or literary work related intangible assets, Licensing, royalty etc. are contract based intangible assets, Patents are technology based intangible assets and Trade Secrets are knowledge based intangible assets. Before moving on to highlighting the importance of recognizing IP assets for valuation, a brief elaboration of the main methodologies is provided. Amongst many, the following are the main methodologies experts have adopted to ascertain a fair value of intangible assets:

1.Market Method: Through market methods, intangible assets are valued by reference to transactions that occurred recently in similar markets, or benchmarks of comparable assets. This methodology can provide the best evidence of fair values because it relies on evidence from actual market transactions.

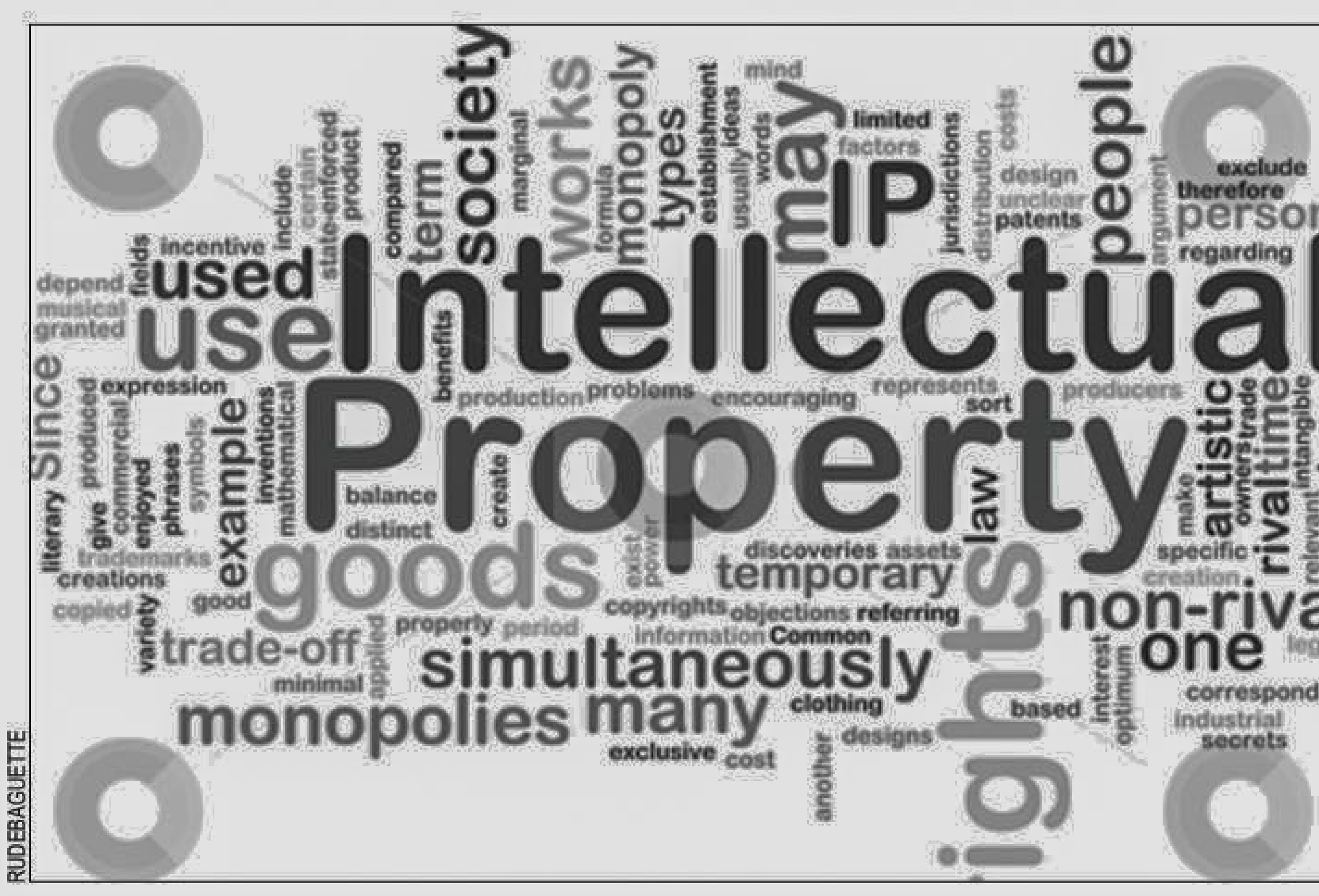
2.Income Method: Valuation done on the basis of the future economic benefits derived from ownership of the asset. The income approach seeks to identify and quantify, in present day terms, the future earning attributable to the asset.

3.Cost Method: Intangible assets are valued by assessing the development or replacement cost of the asset. The cost approach is used for valuing internally developed assets e.g. software. Cost based approaches should be viewed with caution, as the cost of recreating or replacing an asset of this nature is not necessarily an accurate indication of the future value of that asset. However, cost methods can be a useful benchmark for a valuation.

Failing to comprehend the role of IP assets in M&A activities can be compared with missing the Cherry placed on top of the cake. In M&A activities, the onus lies on the lawyers, auditors and valuers involved to identify and recognize the IP assets accurately and ascertain the intrinsic value to reach a fair valuation. For instance, a company being acquired may have a number of patents or software under its belt, but not all will prove to be beneficial for the acquirer or a patent can virtually be worthless without its necessary trade secret. On the other hand the company being acquired needs to identify and recognize its intellectual properties and assert into its financial reports as intangible assets to drop a strong fist on the table of negotiation. A single error may cause a ruinous outcome. A classic illustration of such an outcome would be; in 1998 when Volkswagen purchased the assets of Rolls-Royce and Bentley automobiles, after the deal was closed, Volkswagen realized that though they have acquired all the assets and rights to manufacture the car but left to include the right to use the Rolls-Royce trademark. Therefore lawyers and valuers involved, need to dig deep to avoid a gaffe.

Despite all the hurdles and hindrances Bangladesh is facing due to political unrests and prevailing corruptions, a notable headway in our knowledge and technology oriented industries is observed in the recent times. Technology based developments in different sectors have allured the foreign business corporations to step into our markets. Some are merging with the local companies while many are acquiring entirely. Valuation of intangible assets i.e. intellectual properties can bring a fortune for a company whether it's being merged or acquired once those are identified and recognized for that matter. But it is observed that regarding intangible asset valuation in Bangladesh, people frequently possess a fallacy that other than goodwill a company's intangible assets are comprised of trademark or the brand value of its products. Often the concerned parties fail to recognize that intangible assets are beyond trademarks or patents. Intangible assets on the brink of being generated internally are frequently overlooked and seldom incorporated into financial statements. Lists of customer details, distribution rights, archives of newspapers, a company' research and development wing etc. all are different forms of intangible assets. In the recent times locally owned enterprises in Bangladesh are investing large amount of money and efforts in research and developments especially in pharmaceutical and software industries. Such efforts need to be recognized in M&A activities as another form of intangible asset or else the acquiring company will be largely benefitted from potential R&D outcomes of the acquired company without having to pay its price in instances where after acquisition the R&D wing achieves its goal on any particular project they have been working on. By having to identify these intangible assets, such enterprises if merged with bigger entities, will have a larger portion on their plates to begin the negotiation with.

To ascertain fair value of intangible assets in an M&A activity, be it local or a cross-border one, disclosure of such assets is essential and much emphasized in order to identify the valuable ones. Disclosure requirements are met through a company's financial and balance sheet reports where all intangible assets are listed together with tangible assets. Several accounting standards were introduced and adopted worldwide to include intangible assets in financial reports. Although it is upon the accounting body of the respective country as to which accounting standard shall be followed, a harmonization between these standards is observed. These accounting standards stipulate a greater disclosure requirement in M&A activities concerning intangible asset valuation e.g. IAS 38 introduced by International Accounting Standard Board (IASB). However according to many concerned professionals, disclosures in M&A activities shall be made carefully or else it may jeopardize the confidentiality of a company. E.g. in an acquisition or business combination continuing projects or research work of the R&D wing asserted as intangible assets for valuation, will call for an explanation but potential value of such projects may seem less attractive to the acquirer which consequently will leave the secrets of the company exposed to their entrants if the deal crashes.



RUDEBAGUETTE

With a view of joining the league of harmonization, Bangladesh is gradually yet positively progressing towards adopting accounting standards that are leaning more towards disclosure requirements and recognizing IP assets as intangible assets. The Institute of Chartered Accountants of Bangladesh (ICAB) has adopted International Financial Reporting Standard (IFRS) for SMEs as the Bangladesh Financial Reporting Standard (BFRS) for Small and medium sized entities that will come into effect on 2013. But the setback persists in our legislations as the Companies Act of Bangladesh (1994) lays down only basic requirements for financial reporting by all companies and is silent concerning Bangladesh Accounting Standards or International Accounting Standards.

In the present date IP accounts for a higher percentage for a company. It is about time that for the betterment of our own economy and individual's benefits, the government starts enacting stricter laws and enforcing the existing ones. Valuation of IP assets will contribute to our economy if adequate protections are provided. Due to lack of recognition and stronger IP protection, foreign companies merging with or acquiring local enterprises often overlook or pay significantly lesser value to our intangible assets compared to what is paid in countries like USA or Singapore. Along with government agencies private organizations also need to step forward to raise awareness and educate the people concerned by taking varied measures. And such events shall include lawyers, auditors and valuers, as they are the ones responsible to ensure the cherry on the cake stays in its place. Fortunately the ball has started rolling and among our peer groups I see many standing up to secure their rights and taking initiatives to enlighten others of their rights. Once our IP laws are at par with the global standards and there is reconciliation between our laws regulating M&A activities and financial reporting standards, financial statements will indicate an unyielding image of an entity's intangible assets and subsequently the trend to disregard intellectual properties for valuation will be diminished.

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HUMAN RIGHTS MONITOR

Giving Youth a Voice

National youth policy in South Asian countries

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INDIA so far has had three National Youth Policies undertaken respectively in 1988, 2003 and 2010. The latest NYP 2010 is claimed to be step forward from earlier NYPs. It defines youth as all people within13-30 age brackets. It aims at empowering young people for affirmative and positive action and transforming their life. It is guided by such principles as consistency with overall national goals, full mainstreaming of youth development programs, and, all-encompassing youth development policies and programs. The main target groups of youth of the Indian NYP 2010 are: students, slum dwellers, migrants, rural youth, tribal youth, youth at risk, youth in violent conflicts, out-of-school or drop-outs, groups that suffer from social or moral stigma, and, youth in observation homes, orphanages and prisons. In addition, young women, youth of socially and economically disadvantaged communities and groups, and, differently able youth are the three priority groups. Some of the most important policy interventions planned are in the areas of promotion of national values, social harmony and national unity; empowerment through employment and entrepreneurship opportunities; formal, non-formal and continuing education; health and healthy lifestyle; sports and recreation facilities; and, promotion of gender justice and equality. The Indian NYP stipulates National Coordination Committee chaired by the Prime Minister and State Coordination Committees chaired by the respective Chief Ministers. The above coordination committees may form specialized task forces. The policy outcomes will be evaluated by a 'Youth Development Index'.

The National Youth Policy 2008 of Pakistan defines youth as age group of 15-29 years in line with Commonwealth's definition of youth. Its main goal is to mainstream the youth, harness their talent and energies, and, address the challenges being confronted by them. It lays out plans of action with respect to the following aspects: sense of pride, awareness and motivation, national integration, enabling employment including skill development, vocational training, entrepreneurship and micro-finance, marginalized and vulnerable youth, character building, sports and recreation, academic and intellectual development, health, volunteerism, and, marriage, family and life skills. Some of the youth groups given priority are: young persons with disability, young women and youth in prison. To implement the NYP Pakitan, a National Youth Council chaired by the PM of Pakistan is formed to head implementation of this policy. The Ministry of Youth Affairs is designated to coordinate the policy's implementation.

YOUTHPOLICY

The National Youth Policy 2010 of Nepal defines youth as people of 16-40 years age groups. Its long term vision is to prepare capable, entrepreneur, creative and competent youths so that they can make meaningful contribution to the economic, social, political and cultural spheres of the Nepalese nation. The working policies that constitute NYP are the following areas of Basic rights of livelihood, education, health and family welfare, social security, employment, Youth empowerment and leadership development, participation and mobilization, arts, culture, sports and entertainment, control of narcotics addiction, control of human trafficking, environmental protection and sustainable development, access to science and IT, sustainable peace building and conflict resolution, equitable development, special group priorities, and, partnership. An autonomous and executive National Youth Council is formed by a separate act for the implementation of Nepalese NYP. The Ministry of Youth and Sports is responsible for monitoring and evaluation of the NYP implementation.

It is therefore seen that most of South Asian countries have their own National Youth Policy by now. But the NYPs are not often results of dedicated political will and leadership vision. For example in India who has produced three NYPs so far, it was a nationally owned process that started in the 1980s as a self-driven policy approach.

But in case of many other South Asian countries, multilateral donors specially UNDP and UNICEF were main sources of inspiration.

They were rather instrumented mostly by donor persuasion. According to experts, the NYP has to be both a tool and an exercise of youth empowerment. So, youth has to be part of NYP formulation. That didn't happen with most NYPs discussed above. In most cases, the NYP was formulated by government officials of concerned ministries and departments that were later authorized by the political leadership.

Sometimes, there was civil society participation through consultation with NGOs who work on youth and youth organizations. But large scale youth participation was not incorporated in many cases. There is also lack of necessary budget commitments to materialize the policies and programmes stipulated in NYPs.

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