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Kinds of Damage Remedies Available by Type of Intellectual Property

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Table 1 summarizes kinds of damage remedies available by type of intellectual property generally allowed. Causes of action for intellectual property claims often relate to infringement. Double counting of these kinds of damages are generally not permitted for compensatory damages when they make an injured party more than whole.

For trade secrets litigation, these matters are generally state actions rather than Federal and, thus, specific application depends on law in a particular state.

Lost profits are an injured party's profits they did not earn because of an infringement. In contrast, unjust enrichment generally means a wrongdoer's profits related to the infringement. In many cases, a wrongdoer's profits may be easier to prove. In certain kinds of causes of action for unjust enrichment damages, the burden of proof shifts compared to traditional civil litigation. For instance, an injured party may need to prove only the wrongdoer's revenues rather than the wrongdoer's profits. Then the burden shifts to the wrongdoer to prove its costs related to these revenues and any apportionment of its profits among multiple intellectual properties.

Damages based on reasonable royalties are monies resulting from a hypothetical negotiation between an injured party and wrongdoer based on the wrongdoer's infringing sales. Put simply, this form of damages is the amount of monies a wrongdoer would have paid to the injured party if it had obtained a license to use the intellectual property. This approach takes the perspective of establishing a royalty usually expressed as a percentage multiplied by a wrongdoer's revenues related to the infringing sales.

Note that statutory damages for trademarks are available only for counterfeiting and statutory damages might apply for mismarking in patent litigation.

Information in Table 1 is derived from American Institute of Certified Public Accountants, Practice Aid 06-1, Calculating Intellectual Property Infringement Damages (2006). ~~

Table 1

Kinds of Damage Measures in intellectual Property Litigation

	Lost Profits	Price Erosion	Corrective Advertising	Unjust Enrichment	Reasonable Royalty	Decrease in Value	Statutory
Patent, utility	X	X			X		
Patent, plant	X	X			X		
Patent, design	X	X		X	X		
Trademark	X	X	X	X	X	X	X
Copyright	X	X		X	X	X	X
Trade secret	X	X		X	X	X	

Heuristic Marketing in Valuation*

By Guest Author

Korey Rubenstein, MBA (May 2014) and Project Manager for Center for the Economic Analysis of Risk (cear.gsu.edu), in the Department of Risk Management & Insurance, J. Mack Robinson College of Business, Georgia State University.

The purpose of this article is to discuss fundamental and intrinsic factors elemental to brand value, namely heuristics. Empirical research forms the core documentation for valuation valuers' written reports. But we valuers are missing large components of identifiable value, especially Brand Value, because grappling with such value requires soft metrics such as heuristics. Heuristics is the opposite of empirical research. Heuristics is more of a rule of thumb and can be thought of as mental shortcuts that humans take in order to arrive at decisions rapidly. Their usage allows the brain to lean on experience and extrapolation in order to try and answer even complex questions or scenarios quickly and without exorbitant mental strain or effort. When subjects are ambiguous or unclear and a decision needs to be made under tight time constraints, the use of a given heuristic can lead to positive results. However, heuristics can be thought of as a source of bias even in the presence of "perfect information". This is particularly fascinating to researchers because it means that while the optimal choice to a decision is available based on the information given, sometimes the influence of previously held beliefs either overwhelm the more pensive cognitive abilities of humans or simply supersede them. The challenge is to evaluate the impact these heuristics have on everyday purchase decisions of consumers and how marketers capitalize on them through brand management while balancing a high ethical standard. Employing the use of heuristics in order to build brand equity is only one weapon of many in the marketer's arsenal, but a very powerful one. Because of the resulting higher earnings, the firms that employ this strategy best actually deserve higher brand valuation.

While there are many well-known heuristics, we'll briefly examine three major types of influence initially proposed by Nobel Laureate Daniel Kahneman and longtime collaborator Daniel Tversky under the frame of common consumer purchase decisions. We will come to see how these heuristics are popularly used in sales and marketing and have contributed to the establishment of highly regarded marquee brands.

Availability Heuristic

Availability boils down to how an individual's ability to recall the vividness of a prior experience translates into their ability to accurately infer the measure of a correlated (at least in perception) occurrence. We can exemplify this in the following way: A college student, John, was randomly selected to participate in a study. John was asked to list his 10 most recent fast food purchases. He quickly wrote down his most recent choices. 5 meals from Burger King, 2 from Chipotle, 2 from McDonalds and 1 from Taco Bell. Then, John was asked to estimate the proportion of meals college students would have purchased from Burger King to all other fast food options. Relying on the availability of his prior experiences and applying them to the overall college campus, John estimated that 50% of the fast food meals college students eat are from Burger King. Is he right? How does this heuristic relate to brands as a component of their valuation?

Think about all of the artful proportions and percentages used in advertisements. Do you know which is the "#1 Ball in Golf" (Titleist also maintains a scoreboard of annual championship wins based on ball brand usage on their website) or that "More guys depend on Ford F150 to get the job done than any other brand"? These companies are leaning on the vividness of their advertising claims to deeply impact the psyche in order to lessen the cognitive dissonance between purchase intention and realization. Researchers and valuers can test this effect in a lab environment by eliciting preferences over comparable products after a battery of marketing messages are presented to a participant, employing those with and those without availability inherent. Hypothetically, participants who'd been conditioned with these claims would rely on (or at least factor in) the availability heuristic in order to come to purchase decision. Companies whose brands master and skillfully employ this ability from those that do not may have higher earnings relative to competitors and thus higher valuation metrics.

Representativeness Heuristic

So, we've seen how a heuristic can be leveraged to enter the consideration set of a consumer, but often brands suffer from overarching sentiment plaguing a vertical that just doesn't represent that particular firm accurately. Based on intuitively lumping stimuli (think more generally, "nouns") into categories, representativeness is a heuristic that can cause an individual to inaccurately come to a conclusion based on the representativeness of particular stimuli to the stimuli's category as a whole. Let's illustrate this with an example about a fictitious "Mrs. Consumer". Say that Mrs.

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Announcements:

Valuation for Financial Reporting

Fair Value Measurement in Business Combinations, Early Stage Entities, Financial Instruments and Advanced Topics, 4th Edition

by James R. Hitchner and Michael J. Mard

Educates preparers, auditors and valuation practitioners and litigators with methodologies for identifying and valuing intangible assets and goodwill. The Book also presents fair value elements for early stage entities and financial instruments.

- Provides specific guidance for determining Fair Value in a Business Combination, including Acquisition Method, Classifying or Designating Assets and Liabilities, Research and Development Assets, and Goodwill.
- Provides guidance for determining Fair Value for Financial Instruments, including option contracts such as derivatives (forwards, swaps) and asset-backed securities such as collateralized debt obligations.
- Gives clear guidance for early stage companies with complex capital structures for stock compensation for both 409A tax compliance and ASC 815-40-15 financial reporting compliance.
- Offers new techniques for applying options methods, including addressing GARCH methodologies in Black Scholes Merton Model and procedures for implementing the probability-weighed expected returns method.
- Presents advanced topics in fair value including
    - measurement of brand value,
    - measurement of intangible assets in ad valorem matters,
    - determining the Discount for Lack of Marketability using empirically tested stochatic processes and
    - analyzing the developmental and reporting standards of all major valuation groups.

Includes a Wiley web site with checklists!

Published 2013 by John Wiley & Sons, Inc.

- Dr. Crain has been invited to speak at the 2014 American Institute of Certified Public Accountants (AICPA) Forensic and Valuation Services Conference.

- Dr. Crain is teaching corporate finance to global MBA students for Manchester Business School and a graduate valuation course for Florida Atlantic University.

- Dr. Crain is co-authoring a text on forensic accounting for practitioners and as a university textbook for graduate students, to be published by AICPA.

Consumer is well informed about cars and manufacturing in general. While Mrs. Consumer is not currently in the market for a new vehicle, she will be soon. So she pays attention to advertisements and likes to feel up to date about the changes in the auto industry. One day Mrs. Consumer sees an advertisement regarding a brand new offering from an unknown (to her) auto manufacturer headquartered in the U.K. As the ad stated, the new model is "Classically British" while being "made from modern high grade military aluminum". Although Mrs. Consumer has no experience with the new marquee from the U.K., she does have strongly held beliefs about British cars. To Mrs. Consumer, British cars are plagued by problems from rusting frames. Mrs. Consumer therefore lumps the new offering in with the rest of her knowledge about British vehicles and will never consider it as a purchase option. To Mrs. Consumer, the representativeness of the new offering being "Classically British" (and made in the U.K.) outweighs the fact that they are fabricated from a rust proof material (aluminum). This is a simple, but all too common example of the manner in which representativeness can enter into everyday purchase decisions. Kahneman may relate the representativeness occurring as a result of the priming statement "Classically British" and its associative

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thinking effects; thus Mrs. Customer immediately rejects the offering from her consideration set. This immediate rejection on the basis of association and representativeness to previously held beliefs is the measurement used to determine the apparent bias. In the absence of such representativeness, Mrs. Customer may have qualified the offering.

What does this mean for brands that stand alone with positive representations in industries that harbor mostly negative ones? How does Virgin America avoid the disdain that most travelers have for major U.S. airlines? Or American Express differentiate its brand from the much maligned credit card industry? A company's ability to differentiate itself will likely reap valuation reward.

Anchoring Heuristic

Anchoring may be the easiest heuristic to illustrate and exemplify, but the most difficult to explain why it actually happens. In lab settings, it occurs when participants are given an arbitrary number or sets or ranges of numbers. Whatever the setup, the number may not have any logical relevance to the decision at hand. That decision is usually posed in the form of question. Generally the answer to that question will not be widely known by the population. Questions like "How old was Gandhi when he died?" or as in Kahneman and Tversky's 1974 paper "Judgment Under Uncertainty: Heuristics and Biases", asked after participants spun and landed on a number from a wheel numbered 1-100, "Is the number of U.N. membership accounted for by African countries, higher or lower than that number?". The crux of anchoring is that as a result of the arbitrary number being present in the minds of participants, the answer they give is affected or biased towards the arbitrary number. For example, let's say that an average participant spun the wheel from 1-100 and landed on 65. As a result of anchoring, their response to the question about U.N. nations from Africa would likely be some percentage higher than if they had landed on any number less than 65 and likely lower than if they had landed on any number higher than 65. Participants fixate on the number and on average it affects their responses compared to when asked the question in the absence of any arbitrary anchor.

But do you think you do this in your everyday life as a consumer? We all are subject to anchoring. Manufacturers' Factory Outlets are treasure chests to deal seekers and gold mines to the manufacturer. Not only are they a method of moving out old or odd merchandise, they are also an excellent opportunity to use anchoring as a means of increasing the margins on dead or dying stock. Walk in to any Cole Haan Outlet and you're likely to see a beautiful Italian leather duffel bag to suit your tastes. The high quality handmade detail and your imaginative idea that with this duffel bag, you will be in the image of a jet setting weekend playboy are too tempting not to turn over the patterned card stock price tag. "Seven hundred and ninety-five dollars!" and you think to yourself, "I would never pay that much for a duffel bag." You look around, almost embarrassed that you'd picked up the duffel in the first place, and you notice Cole Haan products are flying off the shelves. "What gives?" Then you see it. Glimmering, glowing, emblazoned on a second tag you hadn't seen before: "40% off this weekend only". Well, now $795 is a mere memory. Only fools would have paid that much and you reckon a bunch already have. But, not you. Luck smiles on you. So, happily you join the masses in rushing to the register to take home your part of a well-known heuristic that marketers regularly exploit. Yet in this anchoring heuristic exploitation, everyone feels like a winner.

Of course, many more retailers do this masterfully. JCPenney became a dominant clothing and housewares powerhouse pursuing this "markup then discount" strategy for many decades. When it suddenly changed strategy under the direction of then CEO Ron Johnson, the company's earnings plummeted as many loyal customers felt ostracized and simply stopped shopping there. So, does this mean that JCPenney's value as a brand should have been discounted all along? Was their dependence on this exploitation of an anchoring heuristic beneficial or devastating to them over the long term?

Conclusion – Heuristics Should be Considered

If valuation is a metric by which companies are measured and brand equity a component, then the increase or decrease in the heuristic effects of brand measurement should be considered. For more on this topic, see Brand Measurement in our forthcoming book Valuation for Financial Reporting, Fourth Edition: Fair Value Measurement in Business Combinations, Early Stage Entities, Financial Instruments and Advanced Topics, to be published by J. Wiley & Sons, 2014. ~~

Footnote:

* Citations in this article have been omitted for brevity but are available directly from Mr. Rubenstein at Korey.Rubenstein@gmail.com or call (404) 413-7112.

An Analysis of Initial Public Offering Transactions

By LuAnne Anderson

The reasons for going public vary, but for most companies the overriding factor is to gain access to more capital. This additional capital would - in theory - enable growth, increase the value of the business, and provide greater returns to stockholders.

An analysis of initial public offering transactions (IPOs) can be used as a reasonableness test, by examining how a valuation conclusion aligns with market prices of firms in the subject company's industry at the time they first trade on public markets.

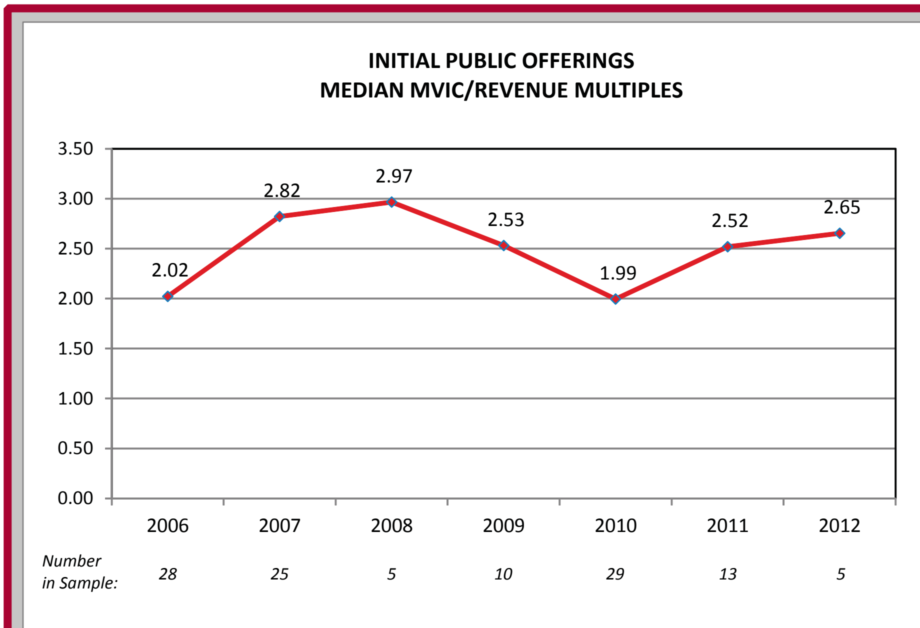
In applying this methodology, we begin with Internet searches of the SEC and finance.yahoo.com websites. In our current study, we identified IPO filings of companies reporting in SIC codes 3000 through 3999 in years 2006 through 2012. The searches returned a total of 167 IPOs. Development stage companies were excluded from our analysis.

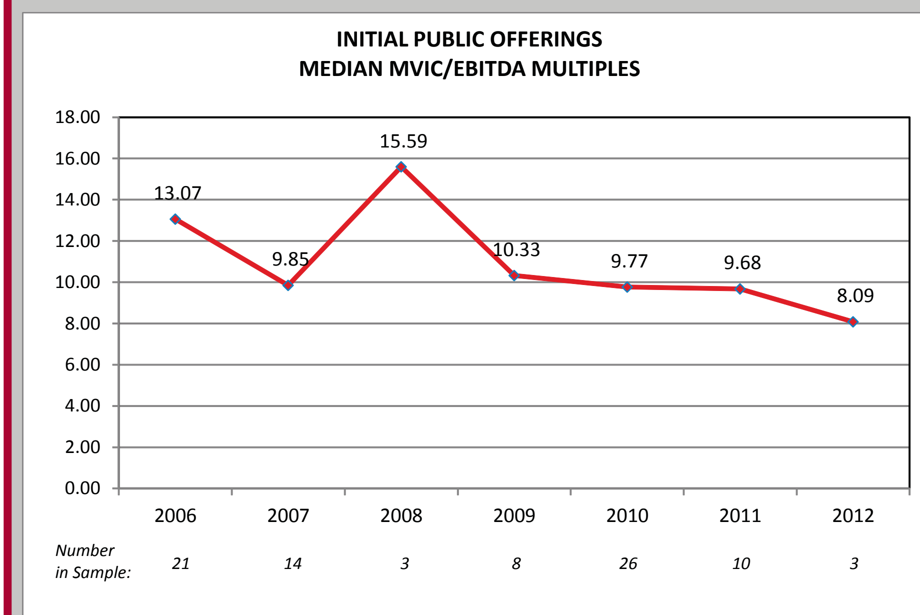
For each IPO transaction, we observed market prices and determined multiples of Market Value of Invested Capital (MVIC)/Revenues and MVIC/EBITDA, for the reporting period immediately following the IPO. Market Value of Invested Capital of each offering company was calculated using:

- The first observed (close) price received by the offering company;
- The number of common shares outstanding as of the reporting period immediately following the offering; and
- Total debt as of the reporting period immediately following the offering.

We used annual or trailing twelve months Revenues and EBITDA as of the reporting period immediately following the IPO to develop the multiples. Outliers were excluded from the sample, as follows: For MVIC/Revenue, multiples less than 0 or greater than 5 were excluded; for MVIC/EBITDA, multiples less than 0 or greater than 30 were excluded. After excluding outliers our samples included 115 MVIC/Revenue multiples and 85 MVIC/EBITDA multiples.

The subject company's value multiples for invested capital were calculated, using the conclusion of value we had derived. We then determined the percent rank of the subject company's value multiples





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Initial Public Offering (Continued from page 5)

within the range of the IPO group's multiples.

In our analysis, the subject company's invested capital multiples fell below or near the median. These results supported our conclusion of value and suggested that our conclusion of value was in the range of values for companies that have been offered to the public market. We determined therefore that the values of the selected companies at the time of their initial public offerings generally supported our value conclusion.

Further, the subject company's value multiples, financial ratios, size, historical and forecasted growth, market share, and managerial strength can be compared to those of the IPO group to determine whether the subject company is a candidate for a public offering. This comparison can help the valuation expert determine the level of marketability of the subject company, thus providing additional information for determining the appropriate discount for lack of marketability to apply. ~~