

# Should you Auction your IP Rights?

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*Ocean Tomo's first live [patent](#) auction in April 2006 courted much controversy in recent months with many critics questioning the worth of the [patents](#) at auction. Here **Raymond Millien**, general counsel at Ocean Tomo, LLC, argues that companies can only truly measure the value of their [IP](#) Rights when a marketplace exists for them to be bought and sold.*

In the last 30 years, intangible assets (including IP Rights) have emerged as the most powerful asset class, overtaking more traditional capital assets such as real property, plant and equipment. Today, as much as 75%, some say 85%, of the value of a US publicly traded company comes from intangible assets, and it's a pattern that is common throughout the world.

But intangibles, such as patents (and IP in general), are highly illiquid assets, and companies cannot quickly and easily convert a large portion of their assets to cash. This illiquidity is a result of the absence of an efficient IP marketplace to exchange unused or underutilised IP Rights. Only after a marketplace is established to render IP more liquid, can companies hope to extract maximum value from their IP assets.

### **A marketplace for IP**

Economic theory holds that auctions are one of the most sensible methods for determining the value of a commodity that has an undetermined price. That being the case, Ocean Tomo held a live patent auction on 6 April 2006, in San Francisco. The goal was to establish evidence that an auction can create a viable market for the sale of historically illiquid patent assets. Seventy eight lots were offered, of which 26 were sold on the floor for approximately US\$3 million. The remaining lots continue to be offered in post-auction private trading, and, to date, additional lots have reached terms off the bidding floor with an additional value of approximately US \$5.4 million. Over 51% of the sellers who participated in the auction successfully transacted their patents.

Not surprisingly, there were many vocal critics of the auction – both before and after. Targets of criticism included not only the auction process itself, but also the perceived low prices paid by the winning bidders.

Traditionally, IP transactions are characterized by difficult acquirer identification, long periods of negotiations and endless [due diligence](#) activities – all contributing to high transaction costs

(and thus, illiquidity). The auction process, however, has the potential to nullify these negative characteristics. This is because sellers of IP Rights know their IP will be publicised, and that on a certain date, and for a certain fixed listing fee, the transaction will close. In addition, price discounts to buyers are always associated with illiquid markets (for example, the private equity market). This accounts for the perceived low average winning bid at the auction. The public nature of the auction process, however, will allow for a comparable valuation methodology to be employed for later IP asset transactions much in the way they are now employed for other more liquid assets such as real estate. The emergence of a significant data set of comparable patent transactions will also aid inventors, IP practitioners, companies and governmental agencies in pricing and valuing patents in the future.

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### **A new generation of IP models**

The auctioning of IP assets is just one of the many new business models and activities being attempted by a new class of IP players known as 'IP intermediaries'. Such intermediaries include IP outsourcing companies, licensing agents, IP merchant banks, on-line IP exchange operators and the like, who seek to make IP a more liquid asset class. Thus, the obtaining, licensing, enforcing, selling and trading of IP Rights will no longer be confined to a few international conglomerates that use such IP Rights defensively or offensively at their convenience. IP intermediaries are here to stay because, as IP assets become more liquid, there is too much economic Justification for such entities not to exist.

It is not controversial to say that inventors, investors and the companies for whom they work all share the same goal of making IP a more liquid asset class. Therefore, those who do not believe that holding IP auctions is the way to achieve such liquidity may offer alternatives. Ocean Tomo, however, should be commended for its initiative. After all, it is much more difficult to innovate than it is to criticise.

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