MOFO TECH

FALL/WINTER 2011

INFORMATION, TREND-SPOTTING, AND ANALYSIS FOR SCIENCE AND TECH-BASED COMPANIES FROM MORRISON & FOERSTER LLP

THE Urge TO Merge

FOUR TRENDS THAT ARE SHAPING TODAY'S M&A MARKET

read all about it in this issue of mofo tech

"About three-quarters of M&A related lawsuits seek a preliminary injunction to prevent the merger, but only about 10 percent of those want that as the outcome. Most simply want to get more money or alter the terms of the deal."

FROM "MAXIMIZING MERGERS AND ACQUISITIONS"
PAGE 7

"The market for energy is by far the world's largest market, and it is undergoing a profound restructuring. That creates significant opportunity for new businesses and new markets to develop."

FROM "CLEANTECH'S HOTHOUSE"
PAGE 2

"[Convertible debt] is an excellent way for startups to take in cash and for investors to get their foot in the door."

FROM "FROM BRIDGE TO SEED"
PAGE 5

"It's when you over-hype the truth that you get a bubble. [However,] the days of going to market based on pure excitement are gone. People understand that tech companies will ultimately be valued based on fundamentals."

FROM "SOCIAL MEDIA: ANSWERING THE HYPE"
PAGE 14

"Companies that overhaul their intellectual property strategies in light of the provisions of the [America Invents Act] will be in a better position to maximize the value of their patent portfolios and to strengthen their options in patent litigation matters."

FROM "THE QUIET REVOLUTION"
PAGE 16

MOFO TECH

INFORMATION, TREND-SPOTTING, AND ANALYSIS FOR SCIENCE AND TECH-BASED COMPANIES FROM MORRISON & FOERSTER LLP

FALL/WINTER 2011

As *MoFo Tech* went to press, many analysts feared the onset of a double-dip recession. Businesses are scared to invest, it's said, given the state of the job and housing markets and the mood of the consumer. But it's clearer than ever that today's businesses must move forward or die, and this issue has plenty of advice for tech and life sciences companies looking to do just that. Some are looking to merge or acquire (page 7). Others are trying to grow their green businesses—or turn their businesses green—and want to know how to engage with California's progressive regulators and legislators to do so (page 2). Still others are looking to fund their startups without forgoing too much equity (page 5), or to convince investors that social media isn't just a bubble (page 14). These companies aren't waiting to see what happens next, because we all know what happens to a deer who gets caught in the headlights.

2 THE 411

7 Maximizing M&A

Cover Story

Behind the headlines

Cross-border transactions, IPO dual-tracking, and other trends that matter now.

Seaweed doesn't compete for the land or fresh water needed for food. It doesn't require harmful fertilizers. And it grows anywhere there's a coastline.

– Yasuo Yoshikuni, cofounder, Bio Architecture Lab, page 11

Visit the enhanced electronic version of *MoFo Tech* by scanning this QR code.

THE 411

[LOG IN] By Richard Sine

Cleantech's Hothouse

Look past the headlines—California remains a bastion of the green economy

It's the sort of visionary idea that California is famous for: A San Francisco company wants to transform a small solar farm outside Davis into a "community solar garden." The company, CleanPath Ventures, would sell "garden plots" to buyers who would own the electricity generated by their patch of panels. The garden would bring solar to renters and others who can't put panels on their roofs.

CleanPath Ventures wants to pilot the idea and eventually take it statewide. But like virtually all cleantech companies, it first had to hack through the thicket of regulations that control the energy industry. The result was a state bill, SB843, which will help open up competition for electricity generation.

The bill is expected to pass next year, says Tom Price, policy director for CleanPath. "The market for energy is by far the world's largest market, and it is undergoing a profound restructuring," Price says. "That creates significant opportunity for new businesses and new markets to develop."

The CleanPath story demonstrates the symbiotic relationship that has grown up between clean energy entrepreneurs and progressive legislators and regulators—a relationship that is key to powering California's green economy.

"Because the energy sector is so highly regulated, you can't just go out to customers and offer products and expect it to be a viable business strategy," says Theresa Cho, Of Counsel in Morrison & Foerster's Environmental and Energy Group in San Francisco, who assisted CleanPath in developing the new bill. Fortunately, Cho says, companies "can have a very direct impact on what their potential market will look like" by working closely with regulators and legislators. For example, legislators often look to companies for help with writing bills, while the California Public Utilities Commission takes public input through public proceedings.

From looking at the headlines, 2011 might seem like a tough year for cleantech. Federal environmental and climate change legislation

TED PITTS FOR MOFO TECH

PATENT POOLING

Just Halfway There

RPX Corp's $160 million IPO this past spring demonstrated the success of its defensive patent pooling strategy. Since its founding in 2008, the San Francisco-based firm has spent $250 million buying up patents to keep them away from entities that might use them to sue its tech-giant clients, which pay as much as $6.6 million a year for RPX's services.

But $250 million is just a fraction of the amounts spent by other companies on acquiring patents. In addition, RPX's own statistics indicate that suits by non-practicing entities increased nearly 70 percent between 2008 and 2010, and they're continuing to rise. "There is no foolproof strategy" against these suits, says Morrison & Foerster partner Brooks Beard. "You really need a range of options."

One strategy is to stand firm against settlements of opportunistic infringement claims, says Morrison & Foerster partner William Schwartz. "That may be expensive in the short term, but sometimes it's important just to stand your ground and project an image that you are not an easy target," Schwartz says.

–Jennifer Pilla Taylor

70%

NON-PRACTICING-ENTITY SUITS INCREASED ABOUT 70% BETWEEN 2008 AND 2010

has been beaten back; a cap-and-trade plan for California was delayed for a year; and a number of prominent solar panel makers have gone bankrupt. But the headlines mask some big positives.

New energy investment in the U.S. in the second quarter of 2011 was nearly twice as high as during the same quarter last year, according to Bloomberg New Energy Finance. It was the third-highest ever quarterly figure, thanks largely to a jump in asset finance of wind and solar projects in California, Bloomberg says.

California passed the country's most ambitious renewable energy standard. The bill requires state utilities to generate 33 percent of their electricity from renewables by 2020.

To support the standard, the state passed six bills to streamline the permitting, environmental review, and judicial review of renewable energy projects.

Moves like these reaffirm California's strong commitment to the long-term development of renewable energy, says Dian Grueneich, a partner in Morrison & Foerster's Environmental and Energy Group in San Francisco who was a commissioner on the CPUC between 2005 and 2010.

California also remains a leader in energy efficiency, Grueneich says, pumping $1.3 billion annually back into the economy through rebates, subsidies, and assistance to businesses developing new power-saving technologies. Grueneich was a leader in developing the CPUC's energy-efficiency plan, which aims for all new residential buildings to be "zero-net energy" by 2020 through a combination of efficiency and self-generation (like solar panels). Such long-term plans "send a signal to the marketplace that energy efficiency is going to be a sustained focus of government policy," she says, "with rebates and incentives and help over a long period of time."

JAMES YANG FOR MOFO TECH

[FOCUS] By Jeff Heilman

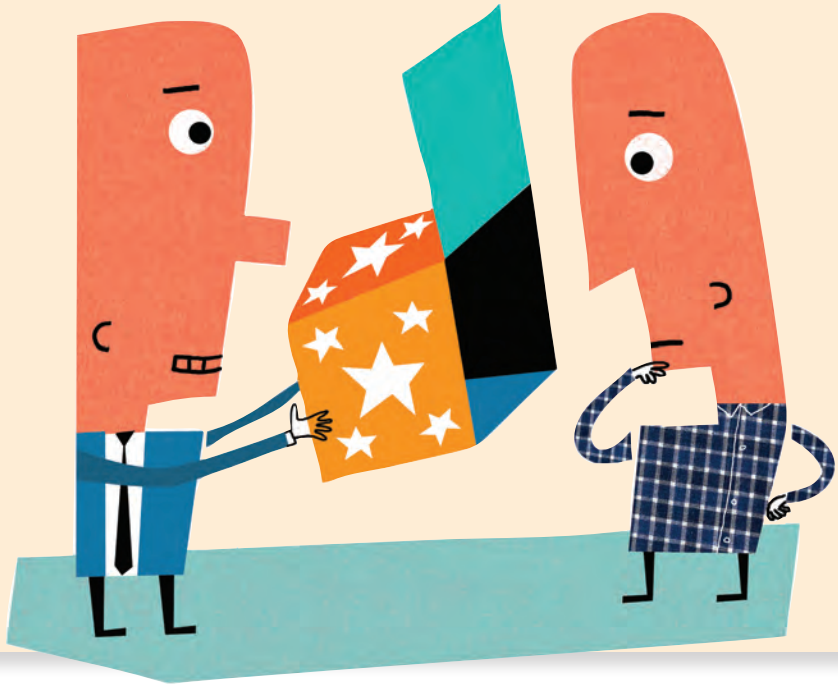
Informed Advertisers

How to disclose information online and on mobile platforms

Issued in 2000, the Federal Trade Commission's "Dot Com Disclosures" document helps online businesses avoid deception with guidance on how to disclose "in a clear and conspicuous way" information material to any form of consumer interaction with its products or services. As D. Reed Freeman, Jr., a Morrison & Foerster partner focused on consumer protection law, explains, this useful document is getting a new look.

"The FTC is reviewing its guidance for the new media universe of mobile devices, apps, and social media," says Freeman. "As before, a disclosure must be unavoidable, but that is challenging in today's 3-D world of shrinking screens and hyperlinks."

With the comment period now closed and press announcements of the new guidelines expected by early 2012, what should online advertisers look for? "Rather than impose hard rules on this dynamic, fast-evolving market, we're expecting the FTC to take a flexible approach," says Freeman. "For some specific situations, the FTC may provide examples that suggest design-based standards such as size, placement, and proximity. Overall, though, the FTC will likely provide 'performance-based' guidelines, with enough flexibility to last through the continued development of advertising media in the mid-term."



[AGGREGATOR] By Eric Schoeniger

When will mobile payments finally make it to the U.S.?

Payments a Go-Go

In some parts of the world, paying for items with your smartphone is old news. But when will mobile payments come stateside? That depends on how broadly you define m-commerce. "Anything you can do online with your laptop"—buy products, check bank accounts—"people will increasingly do over their mobile phones," says Nick Holland, senior analyst with Yankee Group.

More interesting is using a smartphone in place of a credit or debit card:

- Starbucks lets you buy coffee from an iPhone linked to a Starbucks card.
- Institutions such as Charles Schwab and JPMorgan Chase let you use your cellphone to snap a photo of a check to make an electronic deposit.
- Square Inc. makes a tiny device that attaches to a smartphone and allows it to accept credit cards.

But the biggest action may be in near-field communication (NFC), which uses an embedded chip to allow short-range data transmission. Transactions are completed by tapping one device against another. There are few NFC phones today, but Frost & Sullivan anticipates 863 million, or 53 percent of handsets, will be NFC-capable by 2015. Companies are lining up to get in on the action:

- AT&T, Verizon, and T-Mobile have launched an NFC payment system called Isis. The partnership makes the technology available to 200 million consumers.
- Google has announced the NFC-based Google Wallet, which works with Android phones. The app stores multiple credit cards or a prepaid card.
- Apple is reportedly tweaking its EasyPay system to accept NFC payments, fueling speculation that the next-gen iPhone will be NFC-ready.

More transformational could be mobile payments in developing areas such as rural Africa, says Ezra Levine, Senior Of Counsel for Morrison & Foerster. "There aren't bank branches in these locations, and not many people have bank accounts," he explains. "But they have cellphones. So cellphones are emerging as a means of transferring monetary value, and telecoms are replacing the function of banks."

M-commerce observers raise questions about security and privacy. But mobile transactions are about as secure as any secure online transaction. In general, "they use the same infrastructure, and transmissions are encrypted," Holland says. "Smartphones will increasingly be targets of malware. But software companies are already developing security apps."

Privacy could still be a concern, suggests Obrea Poindexter, Of Counsel at Morrison & Foerster. "There's information captured when you use your credit card, and also when you use your cellphone," she notes. "Now that information can be combined."

BRIC: Pushing pharma forward

The BRIC countries all hope to drive the success of their pharmaceutical markets. As a result, laws are changing almost monthly, says Morrison & Foerster partner Julian Thurston:

- Its patent office has such a backlog that Brazil is passing a law to grant patents for at least 10 years from date of issuance. That should extend the effective patent life and represents a change in the government's position, which has favored biosimilars over blockbusters. Many pharmas will shift focus from biosimilar to "biobetter" drugs that promise superior efficacy or safety to existing products.
- Russia is considering state-controlled pricing for most drugs, which would favor domestic makers. The aim: to reverse a trend. In 2009, domestic pharma sales fell 13 percent while those of foreign competitors jumped 50 percent.
- India now requires barcoding on all exported drugs. The move should address ongoing quality concerns and curtail counterfeiting both inside and outside the country.
- China is enforcing new standards for good manufacturing practices in pharma. Up to 900 smaller drugmakers can't afford to upgrade and will cease operations. Expect rapid consolidation, and multinationals will likely scramble to buy product rights. ■

CHRIS LENSCH FOR MOFO TECH

[SUPPORT] By Eric Schoeniger

From Bridge to Seed

Silicon Valley is seeing a resurgence in startup investment, borrowing a deal structure traditionally used in bridge financings: convertible debt

A convertible note is a debt instrument that the holder can later convert into shares of preferred stock at the company's first equity financing. Traditionally, convertible debt was a bridge between rounds of financing. Now it's being used to bring in the first dollars.

The reason? In the past, a typical tech startup required $2 million to $3 million to get going, for which it would exchange a large percentage of ownership. But because of capital-efficiency innovations such as open-source technology and cloud computing, many tech startups today need only $250,000 to $500,000 to build a prototype or beta version of their initial technology offering. Convertible debt lets them get that cash without giving up half the company.

"The key to convertible debt is that it is not equity with an implied valuation," says Morrison & Foerster partner Tim Harris, who heads the Technology Group of the firm's emerging companies and venture capital practice. "Instead, investors agree that the price will be set by market forces, usually after 12 or 24 months. You don't know if the investment will then represent 1 percent or 90 percent of the company's ownership. But it's an excellent way for startups to take in cash and for investors to get their foot in the door."

Investors also benefit in that they can fund startups quickly—usually in just a few days—without the need to write a multimillion-dollar check or negotiate what percentage of the company they'll own. "And because it's debt, it sits atop the capital structure and represents a senior claim if the startup has to liquidate," Harris explains.

For the startup, there's no bank loan to deal with, and there's a shorter timeline and lighter requirement for documentation than with many financing options. What's more, there are no unique or additional securities law issues, compared with raising equity by other means.

Harris recommends that both startup and investor think through all possible scenarios, however. What happens if the company gets acquired before the Series A round of financing? What happens if there's neither a Series A round nor an acquisition? "There should be upfront agreement between the issuer and the investor on how convertible debt will be handled in these cases," Harris advises.

In Search of the Silver Lining

Time was, when we bought music, movies, video games, or software, we got a CD, DVD, or cartridge. Then those formats were digitized, and we started downloading.

Now, even the download is going the way of Betamax. More media are being offered as a service and streamed from the cloud. "Consumers are increasingly comfortable with accessing what they 'own' from the cloud," says Morrison & Foerster partner Rusty Weiss. **"But content producers and distributors face a host of questions." Among them:**

ROYALTIES
How does media as a service affect usage-based fees paid to licensors?

ACCOUNTING
As your content is packaged, bundled, and streamed, are you getting paid your fair share?

FIRST-SALE DOCTRINE
Will consumers be permitted to resell content they've paid for but don't have physical possession of?

PRICING
What are consumers willing to pay for media as a service? And are distributors charging the right price?

MARKETING
Will your content be promoted on the virtual "end cap," or hidden on the bottom shelf?

SECURITY
Is your content safe from theft? Is your customer data?

"There will be a variety of business models" for media as a service, Weiss says. "But all raise new issues and will require skill in negotiating the best deal.

[CRITICAL MASS] By Richard Sine

Biotech's Reprieve

A federal panel rules that isolated DNA really are different

The biotech industry has been built on three decades of gene patenting, so it was thrown for a loop a year ago when a federal judge ruled that DNA isolated from the body were "products of nature" and therefore could not be patented. On July 29 a federal appeals court overturned that ruling against Myriad Genetics, and for now, the status quo isn't threatened. Still, the *Myriad* case has demonstrated just how dependent on IP the industry has become.

In the 1980 case that kick-started the biotech industry, *Diamond v. Chakrabarty*, the Supreme Court ruled that a genetically engineered, oil-eating bacterium was patentable. But Myriad's genes aren't genetically modified. Last year, a federal judge ruled that isolated DNA were not really different from DNA inside the body because the genetic information it contained was the same. In July the majority in the Federal Circuit Court of Appeals disagreed, ruling that isolating the DNA imparts a "distinct chemical identity."

Myriad's patents underlie its tests measuring hereditary risk of ovarian and breast cancer. But the significance of gene patents goes well beyond the diagnostic field, says James Mullen, a Morrison & Foerster partner who focuses on biotech IP. Because biotech firms should always seek to protect the "fundamental building blocks" of their inventions, the ruling has implications throughout the industry.

For example, consider biologics—medicinal products created through biologic processes. For biologics, Mullen says, it's not enough to patent the end product. "To have the firmest possible IP position, one would want to have claims on the isolated genes that encode either the proteins themselves or on the proteins that give rise to these [therapeutic] agents."

The judges did reject all but one of Myriad's business-method claims. The success of the molecular diagnostic market could hinge on whether courts uphold such patents, Mullen says. The *Prometheus* case, which addresses similar issues, was before the Supreme Court as *MoFo Tech* went to press.

The plaintiffs in the Myriad case—a coalition of researchers led by the ACLU—have suggested they will appeal. That case could go to the Supreme Court as well.

Unfair Warning

Different standards for generic drug makers

Since the Supreme Court decided the seminal case of *Pliva* in June, preempting failure-to-warn claims against generic manufacturers, consumer advocates have been trying to reassert liability against them, say Morrison & Foerster partners Erin Bosman and Jim Huston.

After *Pliva*, plaintiffs allegedly injured by generic drugs because of inadequate warnings cannot sue generic makers. Yet if that same patient had taken the branded drug, he or she would be able to sue for the same injuries.

Responses to this decision and the resulting legal fallout have varied widely.

"On the one hand, hundreds of plaintiffs are dismissing their cases in response to our demands," says Bosman. But others have redoubled their efforts with creative theories of liability. For example, in September, a Nevada trial court allowed plaintiffs to argue that a generic maker should have sent a "Dear Doctor" letter to warn against dangerous uses of the drug, despite the fact that the Supreme Court said that generic companies cannot send such letters and liability cannot flow from their having failed to do so.

Another theory is that generic makers took too long to change their labels once the brand-name drug added warnings. Others insist that generic makers must withdraw from the market if their warnings are inadequate, despite growing concerns about drug shortages.

Huston predicts that change is more likely to happen outside the courtroom. There is pressure on the FDA to impose new duties on generic drug makers to warn about risks. This is inconsistent with current regulations, but many consider the status quo unacceptable. In August, the consumer advocate group Public Citizen submitted a petition urging the FDA to do just that. Citing FDA budget restraints, Public Citizen highlighted the need for manufacturers to spearhead drug safety efforts.

However, it's likely that any duties imposed by Congress or the FDA couldn't be applied retroactively to pending lawsuits, and statutory or regulatory change could take months, if not years. ■

RAFAEL RICOY FOR MOFO TECH

MAXIMIZING MERGERS AND ACQUISITIONS

An in-depth look behind the headlines at some important emerging trends

By Eric Schoeniger

Illustrations by Kurt Ketchum

Mergers and acquisitions are back in the headlines. Following two years of sharp decline, deal making increased 12 percent in 2010, according to Bloomberg. Cross-border deals shot up 41 percent. With companies sitting on record cash war chests, the trend looks likely to continue. A small sampling of recent activity:

- Sanofi-Aventis completed its $20.1 billion quest to acquire Genzyme.
- Microsoft nabbed video-call leader Skype for $8.5 billion.
- Intel bought data-security heavyweight McAfee in a $7.7 billion deal.
- HP has acquired enterprise software maker Autonomy Corp. for $10.2 billion.
- Google agreed to acquire Motorola Mobility for $12.5 billion.

Looking beyond the headlines, there are some interesting trends in 2011 that merit further attention, including:

- A spike in auction sales of patents
- An increase in cross-border M&A
- The strategic use of M&A and IPO dual-tracking
- A continued increase in shareholder litigation

PATENTS ON THE AUCTION BLOCK

Patent sales have been hot, especially in technology sectors such as wireless, where new entrants are enjoying great commercial success at the expense of first movers that have developed strong patent portfolios.

MOFOLD-IN:
Fold the opposite page inward so that the arrows meet to see the outcome of a successful M&A.

The $4.5 billion acquisition of Nortel Networks patents by Rockstar Bidco, a consortium led by Apple that includes Microsoft, RIM, Ericsson, and others, sent a strong signal to the market that strategic patents are garnering increasingly high premiums in the current environment. In response, Google agreed to pay $12.5 billion for Motorola Mobility, largely for its wireless technology patents.

While the Nortel and Motorola deals are grabbing the headlines, other strategic patent transactions are in progress as well. The next test of this market's strength will be the auction of the wireless patent-licensing company InterDigital. At press time, the company was running a very public auction. The prize: its 8,800 wireless technology patents and 10,000 patent applications. However, low bids reportedly received by InterDigital may indicate that the Google-Motorola transaction was the beginning of the end of the robust wireless patent auction market and that valuations may revert to pre-Nortel levels. Kodak, likewise, is planning to sell 10 percent of its portfolio, most notably image-previewing patents. Acquisition of the assets could fend off patent-related legal challenges.

The selloffs are being driven by the high premiums expected to be paid in the wake of Nortel for patents that can enable buyers to protect their own product business or compete in new sectors, says Rufus Pichler, Of Counsel for Morrison & Foerster, who advises clients in the IT and life sciences industries on patent sales and acquisitions and complex patent-licensing transactions.

Such deals can take a variety of forms, including traditional patent sales, auction sales of a large portfolio, and auction sales of an entire company, including its patents. While traditional operating companies strongly prefer confidential transactions that limit public awareness of their potential sales, patent licensing entities have little to lose and potentially much to gain from conducting publicly announced auctions, as InterDigital is pursuing. "From a buyer's perspective, an auction sale can be an effective way of acquiring a large patent portfolio to protect its competitive position or to catch up with competitors that already have large home-grown portfolios," Pichler explains. "The challenge is that there's usually only limited time for due diligence to determine the strength and value of those patents."

The risks can be even greater if the transaction is structured as a company sale. "It will be critical for a buyer to analyze the seller's licensing and other commitments to third parties," Pichler notes. "You want to be certain existing licensing agreements and other contracts are carefully drafted and will not encumber the buyer's existing portfolio. You certainly don't want to give up more rights than you're gaining."

AT THE CROSSROADS

Like patent sales, cross-border deals are surging. Cross-border M&A values reached $400 billion at midyear, a 44 percent increase over 2010, according to Thomson Reuters.

U.S. companies are pursuing outbound acquisitions to acquire technology, talent, and customers, says Morrison & Foerster partner Rob Townsend, who has represented clients in more than 200 acquisitions, alliances, and financings. For instance, in January Intel completed its $1.4 billion purchase of the wireless business of Germany's Infineon Technologies. The deal gives Intel a solid foothold in the fast-growing market for smartphone chips. Morrison & Foerster represented Intel in this transaction, as well as in its acquisition of McAfee.

Increasingly, cross-border deals will involve companies in emerging markets, Townsend notes. Visa, for example, acquired South African payment-systems company Fundamo, increasing Visa's access to demand for mobile payments in Africa, Asia, and other markets. Morrison & Foerster represented Visa in the deal.

Much of the emerging-market action is in China, which is expected to account for up to 9 percent of global M&A activity this year, according to JPMorgan Chase. One Chinese market sector with particular potential is pharmaceutical commercialization and distribution, notes Chuck Comey, a Morrison & Foerster partner who previously served as managing partner of the firm's Shanghai office and is co-chair of the firm's China Private Equity Group. That's being driven by China's latest five-year plan, which encourages the expansion of distribution through mergers and IPOs to support anticipated demand for new drugs on the market in light of the plan's stated goal of providing basic medical insurance to all segments of Chinese society by 2015.

As part of this trend, late last year U.S. drug wholesaler Cardinal Health acquired Zuellig Pharma, China's biggest drug importer, for $470 million. "Inbound acquisitions and alliances can enable companies to adapt proven distribution models and commercialize drugs for the Chinese market," Comey says.

But entering foreign markets raises additional legal issues. For example, in August China adopted regulations purportedly modeled after the Committee on Foreign Investment in the United States process. The broadly drafted "Security Review" rules mandate increased scrutiny of transactions deemed to constitute foreign-investor acquisition of control over companies in sensitive sectors that invite national security concerns. U.S. regulators also have become vigilant about enforcing provisions of the Foreign Corrupt Practices Act in connection with cross-border deals. "Companies need to revisit their due-diligence approach and ensure that their contractual language is state-of-the-art in this

Choosing an Investment Bank

One critical player in the execution of your company's strategic plan is your investment banker. But how do you choose the right investment banker?

Experience matters. Expect senior-level attention from a seasoned team. "Any credible investment banker can provide the number-crunching you need," says Spencer Klein, partner and co-head of M&A at Morrison & Foerster. "It's the strategic and tactical advice, borne from experience and judgment, that separates a great banker from a good one."

Look for experience in your sector (or subsector). "Markets like life sciences and high tech change quickly," says George Geis, Ph.D., faculty director of the M&A Executive Program at UCLA Anderson School of Management. "You need a bank attuned not to where markets were, but to where they're going."

Klein agrees: "Industry expertise and visibility can make the bank's valuation work more meaningful. It can provide greater insight into the objectives, capabilities, and tactics of your potential counterparties. And it can result in access to the senior decision makers on the other side."

Relationships matter. You're most likely to get objective advice from a banker who isn't just focused on the short-term fee opportunity.

Finally, understand any actual or potential conflicts of interest. A conflict doesn't necessarily need to be disqualifying, but should be understood and considered.

area," Townsend advises.

Another factor is antitrust law. "There are now merger-control regulations in about 100 countries," says Morrison & Foerster partner Tom McQuail, a Brussels-based member of the Global Antitrust & Competition Law practice group. "So you can end up with antitrust investigations in multiple jurisdictions."

PARALLEL PATHS

One trend specific to companies considering a sale is the use of a possible IPO on a dual track. In these cases, the seller simultaneously files for an IPO while courting interest in a potential sale of the company. For instance, in March Hitachi announced that it would sell its Global Storage Technologies subsidiary to Western Digital in a $4.3 billion deal. The unit had started the IPO process in November 2010. It was reportedly the first time a Japanese company engaged in dual tracking. Morrison & Foerster advised Hitachi on the transaction.

Dual tracking can increase the number of potential buyers, create leverage for the seller, and drive up the sale price. In fact, dual-track sales earned up to 26 percent more than sales of companies that did not file for an IPO, according to a recent Brigham Young University study that examined nearly 700 takeovers in a 10-year period.

Dual tracking can also be an effective risk-management strategy when IPO valuations are unattractive. "Many observers have questioned the sustainability of valuations obtained in recent high-tech IPOs," notes Morrison & Foerster partner Tom Chou, a leader in the firm's China M&A Group. "In such an environment, a sale can be an effective backup plan" if a company cannot achieve a sufficient valuation through an IPO.

There can be challenges, however. As an acquiring company, you need to consider the risk if you reach the final stages of M&A discussions only to lose the deal to an IPO. If the IPO is completed, the target may become difficult to purchase, especially if you entered a "standstill agreement" with the company to forgo pursuit of a hostile takeover.

For example, in early 2009 RIM was enjoined from a hostile takeover of cryptography developer Certicom because of a standstill. RIM eventually outbid VeriSign with a friendly offer to buy Certicom.

To be a good candidate for dual tracking, a company must have a credible path to an IPO, which rules this strategy out for many potential targets. In addition, many well-known technology companies that are active acquirers have made known they will not participate in a dual-track sale process. But there have been numerous dual-track successes. Microsoft's announced acquisition of Skype came a few months after the target filed to register its securities with the Securities and Exchange Commission. In life sciences, Advanced Biohealing was acquired by the British biopharmaceutical Shire for $750 million one day before the U.S. biotech's stock was to begin trading on Nasdaq.

ADDRESSING LITIGATION HEAD ON

M&A increasingly involves litigation, notes Morrison & Foerster securities litigation partner Erik Olson. In fact, 2010 saw more than 350 M&A-related lawsuits, nearly a 60 percent jump from 2009, according to Advisen Ltd., a risk analytics firm. "If you're in an M&A deal involving a public company, you should expect to have to resolve a lawsuit," Olson says.

Most plaintiffs want to gain influence, not stop the transaction. "About three-quarters of M&A-related lawsuits seek a preliminary injunction to prevent the merger, but only about 10 percent of those want that as the outcome," Olson explains. "Most simply want to get more money or alter the terms of the deal."

How do you mitigate the risks? First, especially if you're on the sell side, make sure any potential conflicts of interest are fully disclosed to all board members. When Del Monte agreed to a $5 billion buyout led by Kohlberg Kravis Roberts, its financial advisors didn't fully disclose that they had a financial interest. "The deal closed," Olson notes, "but there was aggressive litigation, and it cost the company a fair amount in legal fees." Second, ascertain whether a buyer might be willing to pay more. You can do that through a financial or legal advisor, by holding an auction, by soliciting interest from other parties, or through other means.

Successful M&As have always proven themselves over the long term. But even the most promising deal starts with careful planning and due diligence. Miss a key issue, and your hard-won acquisition or sale could wind up a wasted opportunity. But with a thoughtful, informed approach, you can maximize shareholder value and business success.

CRAIG LEE FOR MOFO TECH

Savior from the Sea

Could seaweed be the ideal biofuel source?

For decades, biofuel companies have turned to food crops, especially corn, to make the bioethanol that is added to gasoline to power trucks and cars. But the resulting price pressures on food, coupled with the large tracts of land needed to produce the fuel in a meaningful way, has led to a hunt for next-generation alternatives.

Now a promising startup has figured out a way to harvest the seaweed that is the bane of surfers and swimmers alike, and turn it into fuel. A Berkeley, California-based company, Bio Architecture Lab, founded in 2007, has so impressed the industry it has already landed partnership deals with both Norway-based Statoil, the world's largest offshore oil and gas producer, and the government of Chile.

Working with chemical giant DuPont, BAL also received a grant from the U.S. Department of Energy to begin making biobutanol, another fuel and chemical source, from kelp. Demonstration projects are in the works in both Norway and Chile; if all goes well, large-scale commercialization of fuel and chemicals made from seaweed will happen within five to 10 years.

BAL Chief Scientific Officer and cofounder Yasuo Yoshikuni was a high school student in his home country of Japan when he first dreamed of inventing a technology and forming a company around it that would improve the world. As an undergraduate working in a lab at the University of California, Berkeley, a few years later, he realized that biofuels would be his pathway and that finding a sustainable, scalable, and inexpensive source was the key.

After completing graduate school, he and fellow BAL cofounder Yuki Kashiyama quickly settled on brown seaweed, also known as macroalgae, which is found in numerous varieties around the world. "Seaweed doesn't compete for the land or fresh water needed for food," Yoshikuni says. "It doesn't require harmful fertilizers. And it grows anywhere there's a coastline,

YASUO YOSHIKUNI, Ph.D.
BIO ARCHITECTURE LAB, INC.

Seaweed doesn't compete for the land or fresh water needed for food. It doesn't require harmful fertilizers. And it grows anywhere there's a coastline, while products like corn or sugarcane aren't so flexible."

while products like corn or sugarcane aren't so flexible." Mass production might even help the environment by reducing concentrations of troublesome algae and preventing harmful red tides. BAL currently has 50 employees, including Daniel Trunfio, its CEO as of May 2010, who previously worked on biofuels at Royal Dutch Shell Petroleum.

Seaweed farming is economical, since it sprouts quickly and requires little in the way of resources or manpower, says Michael Ward, co-chair of Morrison & Foerster's IP practice and head of the firm's Plant IP practice. "There's no input with seaweed, just output. That's what's so exciting." Seaweed farming could likely get even more economical, because plant-breeding scientists have paid little attention to it until now, Ward adds. BAL is closely watching its pilot programs to ensure the environmental impact of mass culturing of seaweed is positive to neutral.

According to the Energy Information Administration, more than half of all renewable energy consumed in the U.S. in 2010 was biomass-based, which uses technology to break down plants to release the stored energy in their sugars. (By contrast, solar was 1 percent; wind, 11 percent.) The challenge for all biofuels is how to liberate the sugar and convert it into usable ethanol.

Seaweed is largely free of the tough fibers, known as lignins, found in land-based plants, so that procedure is less complex. "Instead of dozens of enzymes needed for other plants, only a few are required to break down raw macroalgae material into fermentable sugars," Yoshikuni says. What's more, BAL has developed several technologies that have improved the efficiency of the process; the company is currently pursuing numerous patents and recently had its first U.S. patent granted.

In working closely with Ward, BAL utilized the Green Technology Pilot Program of the U.S. Patent Office to request accelerated examination of the patent application. The claims of the application were allowed only two and a half months after filing the petition. Under the Green Technology Pilot Program, an application may be advanced out of turn (accorded special status) for examination if it pertains to the development of renewable energy resources and other green technologies.

After the brown macroalgae is grown and harvested, the process of conversion begins. The first step is to mill it, then mix it with an enzyme cocktail created by BAL that digests the plant into fermentable sugars. Because of this invention, BAL can skip the energy-intensive and chemically harsh pretreatment steps needed by some other biofuels. Finally, microbes genetically engineered by BAL digest and subsequently convert these sugars into ethanol and other biofuels. "Our technologies have made the process of converting the macroalgae into biofuels faster and more economical," Yoshikuni explains.

Of course, seaweed will never be the complete answer to the world's fuel needs; the market is so large that a variety of biomass will be needed (see sidebar, right). But, with the technologies that BAL has put into place, and the interest it has already attracted from major energy players, seaweed should command a substantial role—satisfying not only the world's demand for a sustainable fuel, but also the dreams of a high school boy.

OTHER SUSTAINABLE BIOFUEL SOURCES

CORN, SOYBEANS, SUGARCANE

PROS: Technology and infrastructure are already in place.
CONS: Requires substantial land, water, and fertilization; high cost; limited areas suitable for growth; competes with food market.
SOME PLAYERS: Archer Daniels Midland, Pacific Ethanol

PLANT STALKS, HUSKS, SWITCHGRASS

PROS: Not a food source; easily grown and harvested.
CONS: Technologically challenging, because lignins impede sugar breakdown; requires land and fertilizers that could otherwise be used for food.
SOME PLAYERS: Mascoma Corp., Poet

MUNICIPAL WASTE

PROS: Converting garbage keeps it out of landfills; minimal water requirements.
CONS: Still largely experimental (a plant under construction in Nevada will be one of the first in the U.S.).
SOME PLAYERS: Fulcrum Bioenergy, Enerkem

ANIMAL WASTE

PROS: Chicken and pig waste, fat, and the like are leftovers otherwise needing disposal; a largely untapped resource; fast conversion process.
CONS: Still largely experimental.
SOME PLAYERS: Tyson Foods, BioKing

BARK, SAWDUST, FORESTRY RESIDUES

PROS: Already used in paper mills and other timber industries where residues are readily available; doesn't compete with food; keeps waste from landfills.
CONS: Lignins hard to break down; residues are of limited quantity.
SOME PLAYERS: Nippon Paper Industries, Smart Papers ■

CRAIG LEE FOR MOFO TECH

[DATAGRAM] By Jeff Heilman Charts by Linda Eckstein

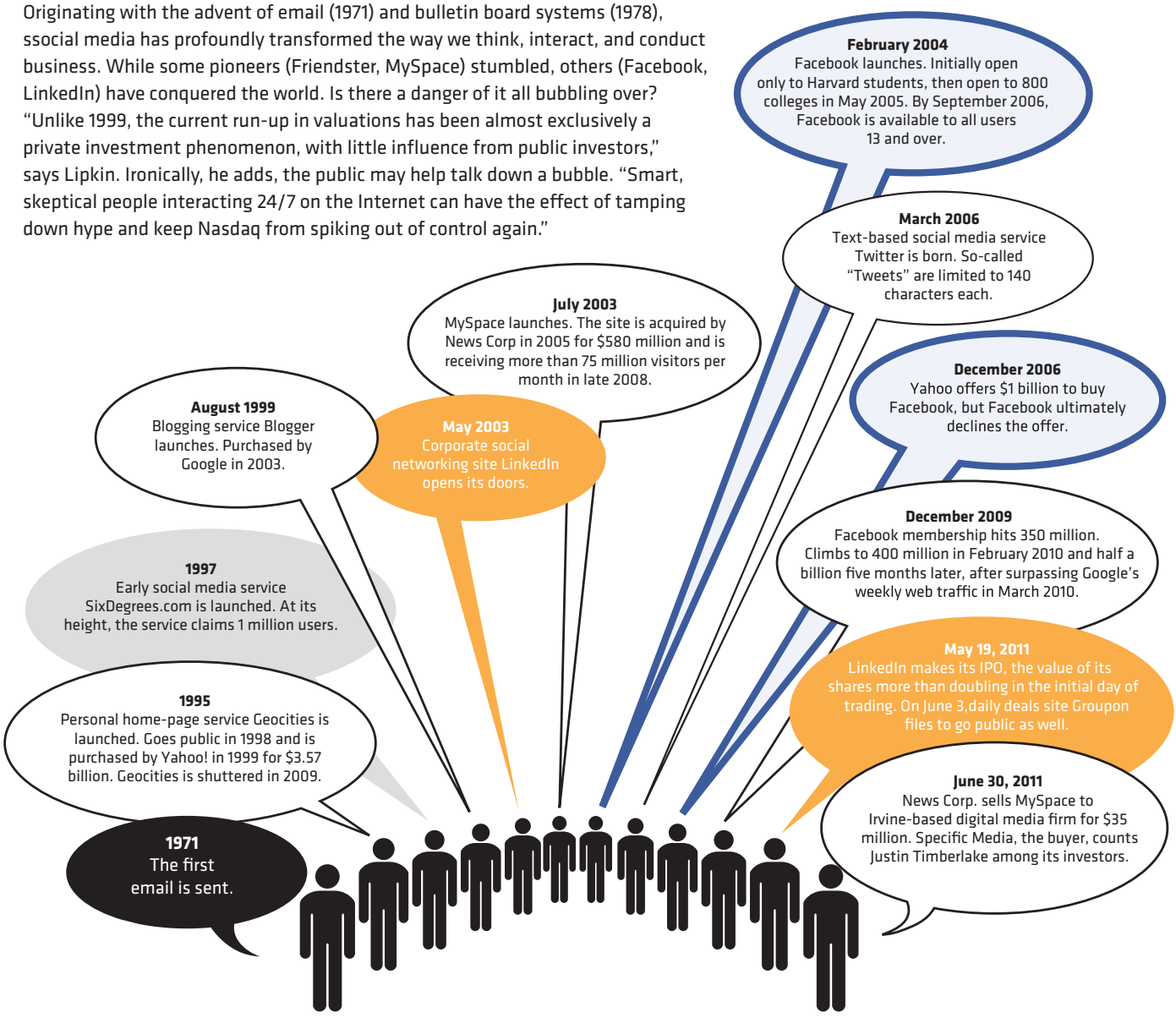
Answering the Hype

With social media, there's viability "beyond the euphoria and disruption."

Inspired by monster-money valuations for social media supernovas like Facebook, LinkedIn, and gaming upstart Zynga, prognosticators inside and outside the venture world are hotly debating whether it's 1999 all over again. Will it be champagne toasts—or another explosive pop? If the Internet bubble taught us anything, it's a question of separating hype from reality. "People tend to overlook the ubiquity of social media and its profound reach, influence, and possibilities away from the hype and headlines," says John Delaney, a partner in Morrison & Foerster's New York office and former co-chair of the firm's Technology Transactions

Short History, Huge Potential

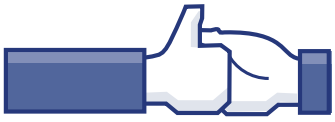
Originating with the advent of email (1971) and bulletin board systems (1978), ssocial media has profoundly transformed the way we think, interact, and conduct business. While some pioneers (Friendster, MySpace) stumbled, others (Facebook, LinkedIn) have conquered the world. Is there a danger of it all bubbling over? "Unlike 1999, the current run-up in valuations has been almost exclusively a private investment phenomenon, with little influence from public investors," says Lipkin. Ironically, he adds, the public may help talk down a bubble. "Smart, skeptical people interacting 24/7 on the Internet can have the effect of tamping down hype and keep Nasdaq from spiking out of control again."



Practice Group. "Fortune 500 and smaller companies alike may still be learning how to generate value in their respective markets using social media—but the value is there."

From an investor standpoint, Delaney points to the "remarkable" lack of public offerings in the current environment as one key difference between now and the bubble-era's frenzied "IPO-a-minute" climate. "Hype is certainly amping up some of these privately backed valuations, but as demonstrated by Amazon and Priceline—tech-boom survivors of precipitous post-money losses—there's lasting viability beyond the euphoria and disruption," he says.

The public window is still open—LinkedIn, Pandora, and Zillow all made strong debuts earlier this year, even with their share prices since pinched by overall stock market pressure—but sobriety is here to stay. "When you consider just how 'socialized' people, products, and services have become across the 24/7 blogosphere, it's pretty clear that hype and social media go hand-in-hand," says David Lipkin, who leads Morrison & Foerster's M&A practice in Palo Alto. "It's when you over-hype the truth that you get a bubble." In terms of the IPO market, Lipkin does not see a repeat of past mistakes. "The days of going to market based on pure excitement are gone," he says. "People understand that tech companies will ultimately be valued based on fundamentals."



PRODUCT SPENDING
IN MILLIONS

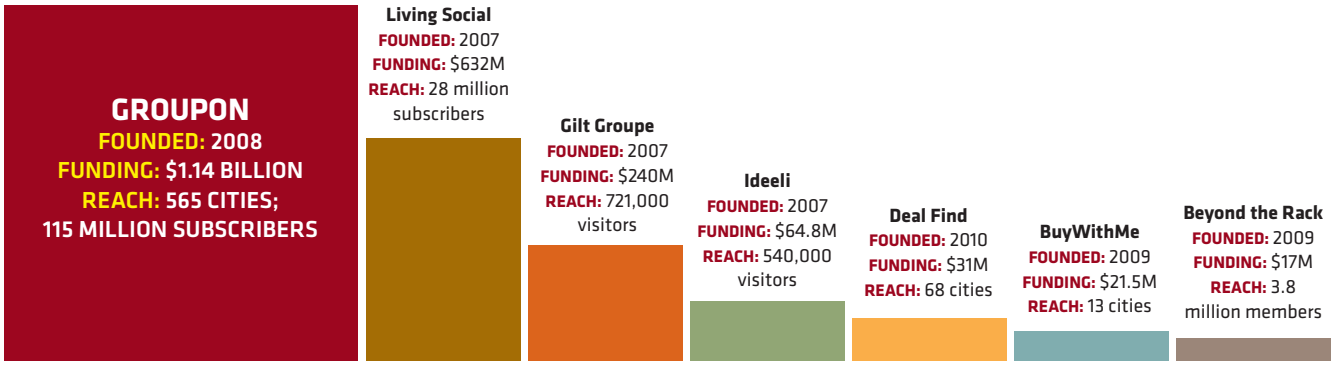
	Facebook Fan	vs.	Non-Fan
McDonald's	$310.18		$150.39
Starbucks	$235.22		$110.95
Victoria's Secret	$229.04		$152.97
Nike	$205.02		$83.69
PlayStation	$188.02		$121.61
Motorola	$160.01		$69.09
Red Bull	$113.38		$60.83

You Gotta Have Friends

Think social media is a vanity play and productivity-killer? Now counting some 800 million users worldwide, social networking phenomenon Facebook's value potential is unquestionable. Contrasting fans and non-fans for 20 top brands including Nike, PlayStation, and Victoria's Secret in its 2010 "Value of a Facebook Fan" study, Syncapse Corp. found significant positive "fan" returns across product spending and four other categories, including loyalty and affinity. "Starbucks has 25 million Facebook followers who have 'friended' a corporation selling them expensive beverages," says Delaney. "How could any company ignore the opportunity to directly interact with 25 million people every day—especially when it doesn't cost a dime to set up shop on Facebook?"

Send in the Clones?

Unlike the more market-dominating Facebook, there are virtually no barriers to entry—or exit—in a "let's make a deal" space. Inspired by Groupon, daily deal or private-sale clones have popped up across numerous industries and micro-niches. According to BIA/Kelsey, deal sites could generate $2.7 billion in revenue in 2011, in a market estimated to reach $4 billion by 2015—but is this area one of endless opportunity for entrepreneurs and investors, or equivalent to a game of Whack-a-mole? "Many social media ideas are instantly copyable," says Lipkin. "It's a crowded field, but you can still find a niche and make money."



By Richard Sine

The Quiet Revolution

Patent reform will reshape American patent law. Will it also reshape American business?

In early September, when the Senate finally passed the most sweeping reform of the U.S. patent system in almost 60 years, the news was buried in the national media. Perhaps the response was so muted because big questions remain about whether the bill will have the intended effects. Will it reduce the frequency and cost of litigation? Will it speed the pace of innovation and spur business expansion? Will it improve the competitiveness of U.S. companies? Only time will tell.

What is certain is that the America Invents Act will revolutionize patent law, with clear impacts on companies that care about their intellectual property. "The AIA will reshape how United States patents are obtained, challenged, and valued in acquisition, licensing, and litigation settlement discussions," wrote John Villasenor of the Brookings Institution. "Companies that overhaul their intellectual property strategies in light of the provisions of the AIA will be in a better position to maximize the value of their patent portfolios and to strengthen their options in patent litigation matters."

The new rules mean that companies will need to focus more time and effort on preparing their inventions for filing with the U.S. Patent and Trademark Office, says Morrison & Foerster partner James Mullen. By moving the U.S. to a "first-to-file" system—in which the right to a patent belongs to the first person to file for the invention, regardless of whether that person is the first inventor—"winning the race to the patent office is now more important than ever," Mullen says.

The AIA also introduces new tools that potentially allow companies to reduce the cost and stress of patent litigation, Mullen says. But taking advantage of tools such as the new post-grant review procedure will require companies to adopt protocols to monitor the patenting activity of their competitors.

Other provisions will change the calculus of whether an inventor should patent an invention or keep it a trade secret, says Morrison & Foerster associate Colette Verkuil. Previously, companies had to choose whether to patent or publish inventions or run the risk of being susceptible to infringement claims should another company subsequently patent the invention. The AIA greatly expands the prior use defense, allowing companies to maintain inventions as trade secrets while preserving defenses to potential patent infringement actions. In such actions, the company's ability to internally document its prior use will be critical to a successful invalidity defense based on prior use. It is therefore now more important than ever to "surface" inventive processes or features—both to make sure they are properly documented and to decide whether to file a patent application quickly in the new first-to-file system.

The final impact will be determined by Congress and by the courts that will be left to resolve the many ambiguities in the bill's language. In any case, Mullen says, "being cognizant of what IP you really need to preserve your advantage in the marketplace has never been more important."

MATT HERRING FOR MOFO TECH

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A LEADER IN TECH M+A

$7.7 Billion
Acquisition of McAfee
Counsel to Intel

$1.4 Billion
Acquisition of the Wireless Solutions Business of Infineon Technologies
Counsel to Intel

$1 Billion
Acquisition of Wind River Systems
Counsel to Intel

Terms Not Disclosed
Acquisition of Virtutech, Inc.
Counsel to Intel

$10.2 Billion
Acquisition of Autonomy by Hewlett Packard
Counsel to Qatalyst Partners, financial advisor to Autonomy

$2.25 Billion
Acquisition of Isilon Systems by EMC Corporation
Counsel to Qatalyst Partners, financial advisor to Isilon Systems

$3.9 Billion
Merger with Renesas Technology
Counsel to NEC Electronics

$3.5 Billion
Acquisition by Western Digital
Counsel to Hitachi, Ltd., & Hitachi GST

$2.4 Billion
Acquisition of IKON Office Solutions
Counsel to Ricoh

$2.3 Billion
Acquisition of Landis+Gyr AG
Counsel to Toshiba

$2 Billion
Joint Venture with SanDisk to Expand NAND Flash Manufacturing Capabilities
Counsel to Toshiba

$1.4 Billion
Acquisition of Keane International, Inc.
Counsel to NTT Data

$200 Million
Acquisition of Intelligroup, Inc.
Counsel to NTT Data

$943 Million
Acquisition by 3M
Counsel to Cogent

$720 Million
Acquisition by Rovi
Counsel to Sonic Solutions

$323 Million
Acquisition of DivX, Inc.
Counsel to Sonic Solutions

$600 Million
Acquisition of Sanyo Semiconductor
Counsel to ON Semiconductor

$233 Million
Acquisition of Kionix
Counsel to Rohm

$229 Million
Acquisition of the Metrology Business of Veeco Instruments by Bruker Corp.
Counsel to Veeco

$180 Million
Acquisition by Semtech Corporation
Counsel to Sierra Monolithics

Terms Not Disclosed
Acquisition of Dynamite VSP and Dynamite SIM Visualization Software Products and Related Assets from 3AM Solutions
Counsel to Autodesk

Terms Not Disclosed
Acquisition of Integrien
Counsel to VMware

Terms Not Disclosed
Acquisition of GemStone Systems
Counsel to VMware

Terms Not Disclosed
Acquisition of Rabbit Technologies
Counsel to SpringSource, a division of VMware

* Selected Recent Transactions

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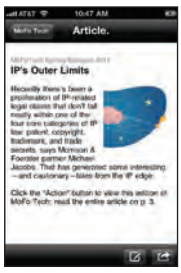
Attorney bios.



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