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## **GUIDELINE 6.1 OF 2019**

### **INTELLECTUAL PROPERTY ENFORCEMENT FUND**

#### **1. OVERVIEW**

The Intellectual Property Rights from Publicly Financed Research and Development Act (IPR Act) No. 51 of 2008 came into effect on 2 August 2010.

Guideline 6.1 of 2019 titled “Intellectual Property Enforcement Fund” (Guideline) provides a framework for an model to mitigate or resolve an infringement of one’s intellectual property (IP) rights by an unauthorised third party. More specifically, this Guideline provides for a framework for support to institutions (namely higher education institutions and schedule 1 institutions in terms of the IPR Act; Annexure A) to insure their IP portfolio or aspects of their IP portfolio such that litigation funding is available in the event of an infringement by a third party.

Please do not hesitate to contact Ms Paballo Phiri ([paballo.phiri@nipmo.org.za](mailto:paballo.phiri@nipmo.org.za); 012 844 0266) should you have any questions with regards to any matter in this Guideline.

**DR KERRY FAUL**

**HEAD: NIPMO**

**DATE:** 20 March 2019

Lefapha la Saense le Thekenoloji • uMnyango wezeSayensi neTheknoloji • Muhasho wa Saints na Thekinoodzhi • Departement van Wetenskap en Tegnologie • Kgoro ya Saense le Theknolotši • Ndzawulo ya Sayense na Theknoloji • LiTiko leTesayensi ne Theknoloji • iSebe lezeNzululwazi neTeknoloji • UmNyango wezeSayensi neTheknoloji  
Batho Pele - putting people first

## TABLE OF CONTENTS

1.	OVERVIEW .....	1
2.	GLOSSARY OF TERMS .....	2
3.	CONTEXT – THE IMPORTANCE OF INTELLECTUAL PROPERTY ENFORCEMENT .....	4
4.	USE OF AN INSURANCE METHODOLOGY TO PROTECT AGAINST INTELLECTUAL PROPERTY INFRINGEMENT .....	5
5.	SCOPE.....	6
6.	AWARD CONDITIONS.....	6
7.	FUNDING REQUIREMENTS .....	6
8.	IMPLEMENTATION PLAN .....	7
9.	ANNEXURE A: INSTITUTIONS.....	8
10.	ANNEXURE B: INTELLECTUAL PROPERTY VALUATION METHODS PER SECTORS ....	10
11.	ANNEXURE C: EXAMPLES OF EXISTING LAW FIRMS AND THE PACKAGES PROVIDED .....	17

## 2. GLOSSARY OF TERMS

### 2.1 List of acronyms used

<b>HEI</b>	Higher Education Institution
<b>ICT</b>	Information and Communications Technology
<b>IP</b>	Intellectual Property (see IPR Act and Guideline 1 for the definition)
<b>IP Fund</b>	Intellectual Property Fund
<b>IPR</b>	Intellectual Property Rights (see Guideline 1.2 of 2018 for the definition)
<b>IPR Act</b>	Intellectual Property Rights from Publicly Financed Research and Development Act No. 51 of 2008
<b>NIPMO</b>	National Intellectual Property Management Office
<b>OTT</b>	Office of Technology Transfer
<b>R&amp;D</b>	Research and Development (see Guideline 1.2 of 2018 for the definition)
<b>SBIF</b>	Small Business and Innovation Fund
<b>SMME</b>	Small Medium and Micro Enterprise

### 2.2 Definitions

<b>Commencement of the IPR Act</b>	Means the date the IPR Act came into force with the Proclamation of its commencement on 2 August 2010
<b>Form IP7</b>	Intellectual Property Status and Commercialisation Report
<b>Guideline 1.2</b>	Means Guideline 1.2 of 2018: Interpretation of the Scope of the Intellectual Property Rights from Publicly Financed Research and Development Act (No. 51 of 2008): Setting The Scene
<b>Guideline 2.6</b>	Means Guideline 2.6 of 2018: Guidelines for Operation of the Intellectual Property Fund
<b>Guideline 7.1</b>	Guideline 7.1 of 2019: Guidelines for Operation of the OTT Support

	Fund
<b>Institution</b>	Means any (a) higher education institution contemplated in the definition of "higher education institution" contained in section I of the Higher Education Act, 997 (Act No. 101 of 1997) <sup>1</sup> ; (b) any statutory institution listed in Schedule 1 <sup>2</sup> ; and (c) any institution identified as such by the Minister under section 3(2).
<b>IPR holders</b>	Means (in the context of this Guideline) the Institution who is the holder of the IPR including all patents, trade marks, designs, copyright, plant breeders' rights etc.
<b>IP Valuation</b>	Means the process of determining or measuring reliably the value or worth of an asset in certain circumstances, the cost or price of an asset may be a good indicator of its value <sup>3</sup> .
<b>Plaintiff</b>	Means a person who brings a case against another in a court of law <sup>4</sup>
<b>Practice Note 5.1</b>	Means Practice Note 5.1 of 2018 IP Status and Commercialisation Reports reported to NIPMO on an IP7 Form

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<sup>1</sup> See Annexure A for complete list

<sup>2</sup> See Annexure A for complete list

<sup>3</sup> [https://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip\\_panorama\\_11\\_learning\\_points.pdf](https://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_panorama_11_learning_points.pdf)

<sup>4</sup> <https://en.wikipedia.org/wiki/Plaintiff>

### 3. CONTEXT – THE IMPORTANCE OF INTELLECTUAL PROPERTY ENFORCEMENT

A growing ability, and hence an increased activity, to identify and protect intellectual property (IP) necessitates a greater than before need to ensure that this IP ends up in “*products, processes or services*” with socio-economic impact. The commercialisation or utilisation of IP is often critically dependent on the exclusionary right that an IP right grants to the rights holder. For example, a patentee for a patent granted for an invention, or a breeder for a plant breeders’ right granted for a new plant variety.

The National Intellectual Property Management Office (NIPMO) has an array of instruments to support the identification and protection of IP including the Intellectual Property Fund.

It has thus emerged that although institutions are spending a lot of money on protection and maintenance of their IP rights, institutions are typically unable to protect themselves against unauthorised use of their IP by third parties. This inability may be due to a myriad of factors including lack of access to the correct technology/ intelligence to know when a third party is infringing on one or more of your rights. However, it is also due to the high costs of litigation due to fact that enforcement of IP rights is a complex process requiring costly attorneys and lengthy court time.

With government placing increasing emphasis of securing IP rights for socio-economic impact, there is a need to ensure that unauthorised use of this IP by third parties is prohibited. However, the magnitude of the litigation “pockets” required generally far exceeds the allowable budget for any institution and for government. In addition, government funding cycles do not allow for sums of money to be set aside year on year in the event that funding may be required for litigation. This “gap” necessitates an intervention on a strategic level and as such an IP Enforcement model is a cross-cutting initiative as part of government’s 9-point plan. NIPMO carried out a detailed study of all means to guard ones IP against third part infringement from mediation/ arbitration/ to an array of litigation models including contingency-fee litigation to voluntary licensing to cross-licensing. In addition, an international benchmarking analysis was done to assess the frequency of use of these various options from the information that is available as most matters are concluded “beyond closed doors” so to speak.

Currently, there is no form of funding accessible for institutions (and indeed SMMEs or any other party that received public funding for research and development) to assist them to enforce their IP rights. NIPMO as the custodian of the Intellectual Property Rights from Publicly Financed Research and Development Act (NO. 51 of 2008; IPR Act) deemed it necessary to investigate and as far as possible support the implementation of an insurance-based IP enforcement model. This Guideline thus sets out the framework for such an insurance model and provides some recommended valuation methodologies for three (3) specific technology sectors namely energy, pharmaceutical and information and communications technology (ICT).

## 4. USE OF AN INSURANCE METHODOLOGY TO PROTECT AGAINST INTELLECTUAL PROPERTY INFRINGEMENT

### 4.1 WHAT IS INTELLECTUAL PROPERTY INSURANCE

IP Insurance effectively protects IPR holders if they are sued for infringement of their IPR or if they detect infringement of their IPR(s) by an unauthorised third party.<sup>5</sup> IP insurance is thus “*designed to help fund the high cost of IP litigation and level the playing field.*” This modality of insurance is relevant for any IPR holder to ensure that the exclusionary monopoly that an IPR grants to make, use, sell, offer for sale or import a product, process or service is protected from third party usage without express prior permission.

In the context of this Guideline IPR holders are institutions namely higher education and schedule 1 institutions.

### 4.2 DIFFERENT IP INSURANCE OPTIONS

There are a large number of options available including:

- (a) **Intellectual property insurance** that provides institutions with the funds necessary to get through a case on the merits;
- (b) An **IP enforcement policy** is a plaintiff’s policy, which reimburses the litigation expenses to enforce IP against alleged infringers;
- (c) An **IP defence policy** reimburses the litigation expenses to defend against charges of infringing another’s IP rights by the products or services that they are selling and may cover potential damages or settlements; and
- (d) A **‘pursuit’ policy** which assists to pay the legal expenses of suing an alleged infringer.

### 4.3 PREPARING FOR IP VALUATION

In order to insure one’s IP portfolio or aspects thereof, it is critical to be able to value the IP and, where appropriate, assign a monetary value. IP valuation is thus the process to determine the monetary value of the subject IP. As IP is, by its very nature unique, its valuation requires thorough investigation rather than a valuation which is calculated automatically.

IP valuation is further complicated by the fact that no two IP assets are the same. In order to conduct valuation, the following minimum factors/parameters would have to first be defined:

- (a) The type of IP that is to be valued;
- (b) The reasons/purpose of the valuation;
- (c) Time or date of the valuation;
- (d) Valuation methods that are applicable; and

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<sup>5</sup> <https://www.upcounsel.com/intellectual-property-insurance>

- (e) Access to and reliability of relevant data and information

As IP valuation is not the topic of this Guideline, but instead forms part of the integral processes involved in arriving at a value for an institution's IP Portfolio or aspects thereof, a brief overview of the methods that may be applied for IP valuation are set out in Annexure B. In addition, Annexure B sets out some "default" methodologies that the literature indicates are more frequently used for IP valuation in specific technology areas. These areas are energy, pharmaceuticals and ICT. However, these serve merely as a guide.

## **5. SCOPE**

The IP Enforcement Fund will only be accessible for IP and IP rights of institutions which IP and rights have been previously reported to NIPMO in terms of the biannual reporting requirements (Form IP7 – IP Status and Commercialisation Report). The reporting requirements are set out in detail in Practice Note 5.1 of 2018 titled "*Intellectual Property Status and Commercialisation Reports reported to NIPMO on an IP7 Form*".

## **6. AWARD CONDITIONS**

The proposed funding model will be in a form of an IP insurance coverage that protects institutions for IP and IP rights infringement claims arising out of the institutions' operations.

The insurance pays the defence costs and any judgment up to the policy limits. The process for applying for funding through the NIPMO Enforcement Fund includes the following steps:

- (a) Institutions are to have their IP rights proposed for insurance to be valued, at a cost borne by the institution;
- (b) Insurance premiums by the insurance company can then be calculated based on the value of the IP;
- (c) NIPMO and the institutions are to decide whether to proceed with the premiums or not;
- (d) The premium costs for the IPR rights that are to be insured will be shared by NIPMO and the institution on an up to 50/50 basis; and
- (e) Upon infringement, institutions can claim litigation fees of the protected value from their insurer.

## **7. FUNDING REQUIREMENTS**

The applicant must be the institution directly or through its Office of Technology Transfer (OTT).

The application must be submitted on the template provided by NIPMO, which template may be amended from time to time as deemed necessary by NIPMO with due notice, and should include the following details:

- a) Portfolio of IP rights or aspects thereof that are intended to be insured with corresponding IP7 reference numbers;

- b) Valuation report (see section 6(a) above) indicating the value of the IP portfolio or aspects thereof that are to be insured;
- c) An annual quotation from an insurance company of the monthly premiums payable; and
- d) For continued support, the institution should provide NIPMO with an up-to-date contractual relationship with the insurance company indicating what the institution is insured for and the projected annual increase percentage.

## **8. IMPLEMENTATION PLAN**

### **Phased implementation: YEAR 1 and 2**

For the financial year 2019/20 and 2020/21:

- a) NIPMO will assist institutions with workshop(s)/training aimed at capacitating them with skills to actively monitor any acts of infringement against their protected IP rights
- b) NIPMO will assist, through the OTT Support Fund with tools for active monitoring of IP rights. The usage of such tools will be monitored on a quarterly basis to indicate whether continued support by NIPMO is justified.
- c) Institutions may apply to the OTT Support Fund (Guideline 7.1 of 2019) to funding to conduct an IP audit to determine what aspects of their portfolio should be insured.
- d) NIPMO may further assist through various partnerships (with local law firms) for institutions to conduct valuation of their IP.
- e) Once valuations are done, premium quotations can be sought by interested institutions from insurance companies of their choice to be submitted to NIPMO at least by 31 December 2020 for budget purposes.

### **Phased implementation: YEAR 3**

For the financial year 2021/2022 going forward:

- (a) Proposals for funding under the Enforcement Fund will be received on the template developed by NIPMO with the twelve (12) previous months expenditure indicated. This application will form part of the IP Fund application process as IP enforcement falls within the broad scope of ensuring maintenance of IP rights.
- (b) Proposals will then be evaluated and approved in line with NIPMO's internal processes.
- (c) Payment for the premiums will be transferred as a rebate as part of the IP Fund payment.
- (d) Under exceptional circumstances, the support will form part of the OTT Support Fund and the up to 50% contribution by NIPMO paid in advance biannually.

NIPMO reserves the right to assess progress in implementing this Enforcement Fund and adjusting the time lines as appropriate.

## 9. ANNEXURE A: INSTITUTIONS

### HIGHER EDUCATION INSTITUTIONS AS PER SECTION 1 OF THE IPR ACT

<b>NO.</b>	<b>INSTITUTION</b>
1	Cape Peninsula University of Technology (CPUT)
2	Central University of Technology (CUT)
3	Durban University of Technology (DUT)
4	Mangosuthu University of Technology (MUT)
5	Nelson Mandela University (NMU)
6	North-West University (NWU)
7	Rhodes University (RU)
8	Sefako Makgatho Health Sciences University (SMU)
9	Sol Plaaie University (SPU)
10	Stellenbosch University (SU)
11	Tshwane University of Technology (TUT)
12	University of Cape Town (UCT)
13	University of Fort Hare (UFH)
14	University of Johannesburg (UJ)
15	University of KwaZulu-Natal (UKZN)
16	University of Limpopo (UL)
17	University of Mpumalanga (UM)
18	University of Pretoria (UP)
19	University of South Africa (UNISA)
20	University of the Free State (UFS)
21	University of the Western Cape (UWC)
22	University of the Witwatersrand (WITS)
23	University of Venda for Science and Technology (UV)
24	University of Zululand (UZ)
25	Vaal University of Technology (VUT)
26	Walter Sisulu University (WSU)

**TABLE 2: STATUTORY INSTITUTIONS AS PER SCHEDULE 1 OF THE IPR ACT**

<b>NO.</b>	<b>INSTITUTION</b>
1	Agricultural Research Council (ARC)
2	Council for Geoscience (CG)
3	MINTEK
4	Council for Scientific and Industrial Research (CSIR)
5	Human Science Research Council (HSRC)
6	National Health Laboratory Service (NHLS)
7	National Research Foundation (NRF)

8	South African Bureau of Standards (SABS)
9	South African Medical Research Council (MRC)
10	South African Nuclear Energy Corporation (NECSA)
11	Water Research Commission (WRC)

## **10. ANNEXURE B: INTELLECTUAL PROPERTY VALUATION METHODS PER SECTORS**

### **10.1 IP VALUATION METHODOLOGIES**

The value of the IP is frequently difficult to arrive at and in the end is most frequently a compromise between the amount that the IP holder and, in this instance, the insurer, is prepared to accept.

This section provides a brief overview of the three most common quantitative valuation methods; namely the cost, market and income methods. In addition, and as set out in section 4.3 above “default” methodologies are proposed for IP valuation in specific sectors, specifically the energy, pharmaceutical and ICT.

### **10.2 COMMON VALUATION METHODS**

There are basically two groups for IP valuations, namely the qualitative and the quantitative methods. The qualitative method on the other hand provides a value guide through the rating and scoring of IP based on factors which can influence its value. It examines at a micro level the quality of intangible assets themselves; their position and importance, relative to other business drivers; the broad industry within which the business operates; and The potential value for business 'competitors and potential competitors. The qualitative study is used to formulate (and justify) assumptions on which the financial models used to determine a numerical value to the subject IP will be based.

The quantitative method calculates the monetary value of the IP and includes the following approaches; the cost, market and income approaches and are described briefly below.

#### **10.2.1 Quantitative Methods**

##### **10.2.1.1 The Cost Method<sup>6</sup>**

The cost method is based on the intention of establishing the value of an IP asset by calculating the cost of developing a similar or exact IP asset either internally or externally. This method seeks to determine the value of an IP asset at a particular point in time by aggregating the direct expenditures and opportunity costs involved in its development and considering deterioration of that particular IP asset.

This method is generally used in situations where the subject IP is not currently generating any income.

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<sup>6</sup> [https://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip\\_panorama\\_11\\_learning\\_points.pdf](https://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_panorama_11_learning_points.pdf)

There are two variants of the cost method, namely the reproduction cost method and the replacement cost method.

<b>Reproduction cost method</b>	<b>Replacement cost method</b>
<p>This method looks at the construction of an exact replica of the subject IP.</p> <ul style="list-style-type: none"> <li>• It is the total cost, at current prices, to develop an exact replica of the subject IP.</li> <li>• This duplicate asset would be created using the same or similar materials, standards, design, layout and quality used to create the original IP asset.</li> <li>• The reproduction cost method does not account for changes in technology, higher utility from other materials and other factors</li> </ul>	<p>This method looks the cost to recreate the functionality or utility of the subject IP, but in a form or appearance that may be quite different from the subject IP.</p> <ul style="list-style-type: none"> <li>• It is the total cost, at current prices, to create an asset having equal functionality or equal utility to the subject IP.</li> <li>• The replacement IP may however have greater functionality and/or utility than the subject IP.</li> <li>• The replacement IP may be created with modern methods and developed according to current standards, state-of-art-design and layout and newer technology.</li> <li>• If the replacement IP asset is better in some way than the subject IP asset, it may yield more satisfaction than the subject IP asset.</li> </ul>

An important requirement for both these methods is that the costs must be determined as of the valuation date and not the historical expenditures that took place.

The advantages and disadvantages are set out below:

<b>Advantages</b>	<b>Disadvantages</b>
<ul style="list-style-type: none"> <li>• The subject IP can be easily reproduced;</li> <li>• The income stream or other economic benefits associated with the asset being valued cannot be reasonably and/or accurately quantified</li> <li>• There is no economic activity to review, such as early stage technology that is not yet producing revenue</li> <li>• There is no direct cash flow being generated from use of the subject IP assets</li> </ul>	<ul style="list-style-type: none"> <li>• Cost method does not account for wasted costs</li> <li>• The method does not consider the unique or novel characteristics of IP; thus it fails to incorporate the expected economic benefits or the income generating potential of the IP asset</li> <li>• It does not take into account the factors of risk and uncertainty associated with realizing the economic benefits associated with the IP.</li> <li>• The method does not consider the duration over which the economic</li> </ul>

	benefits will be enjoyed during the remaining useful life of the IP.
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### 10.2.1.2 Market-based method<sup>7</sup>

The market-based method relies on the estimation of value based on similar market transactions of comparable IP rights. This method provides a reasonable indication of value if an active market exists that can provide examples of recent arm's length transactions, with adequate information regarding the terms and conditions. The following are the basic steps of the market method of evaluation:

1. Research the appropriate market to obtain information on sale transactions, listings and offers to purchase, sell or license IP assets that are similar subject IP
2. Verify the information by confirming that the data obtained are factually accurate and that the market transactions reflect arm's length market considerations.
3. Select relevant units of comparison and develop a comparative analysis for each unit of comparison
4. Compare guideline IP asset transactions with the subject IP asset using the variables or factors for comparison and make adjustments to the price of each guideline IP asset transaction.
5. Reconcile the various value indications produced from the analysis of the guideline transactions into a single value indication or range of values

Advantages and disadvantages are set out below:

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>• Ease of use</li> <li>• Use of market based information</li> <li>• Can be very useful if exact comparables are available (such as license agreements related to the same technology)</li> </ul>	<ul style="list-style-type: none"> <li>• IP assets are unique by nature, which makes it difficult to find an exactly alike, similar or comparable IP asset. It is thus also difficult to find readily available information which could be used for valuing the subject IP asset.</li> <li>• Time factor might affect the usefulness of historical databases</li> <li>• The method in some instances compares general information available in the market without necessarily considering specific factors that lead to a specific transaction</li> </ul>

<sup>7</sup> [https://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip\\_panorama\\_11\\_learning\\_points.pdf](https://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_panorama_11_learning_points.pdf)

### 10.2.1.3 Income-based method<sup>8</sup>

The income-based method is based on the principle of valuing the IP asset on the basis of the amount of economic income that the IP asset is expected to generate, adjusted to its present day value. The following steps can be followed to determine the economic income of the IP asset:

1. Estimate the revenue flow (or cost savings) generated by the IP asset over the remaining useful life of the asset;
2. Offset the revenues/savings from (1) above by costs related directly to the IP asset. The various costs may be labour, materials, capital investment and any other capital charges; and
3. Take account of the risk to discount the amount of income to a present day value by using the discount rate or the capitalization rate

Different measures of economic income may be relevant to the various income methods such as gross or net revenues, gross profit, cash flow, incremental income and cost savings.

Income-based methods may be grouped into two broad categories namely; direct capitalization and discounted cash flow (DCF):

#### **Direct capitalization:**

In this method, the valuer estimates the appropriate measure of economic income for one period (i.e. one period future to the valuation date) and divides that measure by an appropriate investment rate of return. The capitalisation rate may be derived for a perpetual period of time or a specified finite period, depending on the valuer's expectations of the duration of the economic income.

#### **Discounted cash flow:**

In this method, the valuer projects the appropriate measure of economic income (cash flows) for several discrete time periods into the future. This projection of prospective economic income is then converted into a present value discount rate. The present value discount rate is the investor's required rate of return over the expected term of the economic income projection period.

Advantages	Disadvantages
<ul style="list-style-type: none"><li>• It captures the expected future returns without the need for comparable market transactions.</li></ul>	<ul style="list-style-type: none"><li>• It requires subjective cash flow allocation</li><li>• Translation of theory into practice requires assumptions which can be limiting.</li></ul>

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<sup>8</sup> [https://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip\\_panorama\\_11\\_learning\\_points.pdf](https://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_panorama_11_learning_points.pdf)

<ul style="list-style-type: none"> <li>• It is based on cash flows or earnings generated by the technology, or based on the costs saved by the technology</li> <li>• It calculates the present value of cash flows from an IP asset, on the basis of discount rate which takes into account the systematic risk</li> <li>• It shows the relationship between returns on investment on a security and the returns on overall market portfolio.</li> <li>•</li> </ul>	<ul style="list-style-type: none"> <li>• Relevant information is not always readily accessible from internal reporting systems</li> <li>•</li> </ul>
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### 10.3 APPLYING THE METHODOLOGIES TO SPECIFIC SECTORS<sup>9</sup>

#### 10.3.1 ENERGY SECTOR<sup>10</sup>

The energy sector is generally cyclic in nature, driven by commodity and economic price. The complication of this sector is further fuelled by the shift to develop and produce green energy.

The IP valuation in this sector is not based on one specific method but a combination of two methods; namely market-based and income-based methods.

##### 10.3.1.1 Market-based method

The market approach in this sector is based on paid prices as an indicator for the value of an asset. The underlying principle is that under certain conditions, supply and demand lead to equilibrium in competitive markets. The direct market value method seeks to use directly regarded transaction prices for the subject asset. This method requires an active market for the good estimated value, which means that the traded assets have to be homogenous.

The biggest difficulty with this method is the ability to compare transactions and suitable multipliers. Information about market transactions can only be retrieved by using specialised database, however this can roughly reach completeness because the transaction conditions often are not available.

##### 10.3.1.2 Income-based method

The underlying theory of the use of the income approach is that the value of the intangible asset, which is IP, can be measured by the present value of the net economic benefit to be received over its life. Thus the value of IP will be a result of its ability to generate cash flows and can be measured by the valuation of these cash flows.

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<sup>9</sup> BAXTER, J.L. and CHISHOLM, J.M. Valuation reflections. *The AusIMM Bulletin*, vol. 3, 1990. pp. 22–26.

<sup>10</sup> Shi-Jie Deng, Blake Johnson, Aram Sogomonian, *Exotic electricity options and the valuation of electricity generation and transmission assets*. Elsevier 2001.

Within the income approach different methods can be differentiated according to the way of determining the income flow:

- Relief from royalty method

The idea of this method is that income resulting from the ownership of the IP can be measured by saved license fees which would have to be paid, if the IP would be licensed from another owner.

- Multi period excess earnings method

The multi period excess earnings method tries to isolate the cash flows attributable to the IP by deducting fictive fees (contributing asset charges)

### **10.3.2 THE PHARMACEUTICAL SECTOR<sup>11</sup>**

Research and development within the pharmaceutical sector is usually long, more expensive and as such risky to invest in. Based on these factors, pharmaceutical companies usually hope to benefit more from IP that has been created for as long as it takes before the IP rights expires.

There is no one single preferred method of valuation in this sector, however, the most common methods used are the cost and income methods.

With the cost method, it is easier to make assumptions regarding the R&D costs and infrastructure needed to produce or replace a similar product over a certain time frame. It is, however, difficult to determine the costs or value related to uniqueness or novelty of the product as well as the risks associated with producing such IP. In exercises of this nature, the valuation would then make assumptions on previous almost similar products.

Due to the risky nature of the pharmaceutical sector, when conducting valuation using the income method, attention is usually paid to five main parameters: revenue associated with the use of the IP; expected growth characteristics of the identified revenue; expected duration of the revenue; risk associated with generating the estimated revenue; and the proportion of revenue that is attributable to the subject IP. These parameters are observed based on relevant markets, including size, growth trends, market share dynamics and overall market risk characteristics. The drawback for this method is that it requires translation of theory into practice which needs assumptions and those assumptions are usually limiting.

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<sup>11</sup> <http://plg-group.com/wp-content/uploads/2014/03/IP-Valuation-in-pharmaceuticals-and-biotech-Jo-Pisani-PLG-.pdf>

### **10.3.3 THE ICT SECTOR**

The sector is very dynamic in nature such that technologies are developed in a shorter time frame and the lifespan in the market is usually shorter.

The market-based valuation method is the most common method used in this sector as well as income method. With the market-based valuation method, the concept of a “comparable technology” used in the same industry performing an almost or closely similar service or function is used to determine the value of the IP that is being valued. The data which is gathered normally includes sales transactions and royalties paid for that comparable technology. The drawback with regards to this method is that licensing transactions are not usually in the public domain making it difficult to understand the royalties and other terms and conditions that are included in the license agreement. To get a clear market value, it is advisable to use another method to compare and balance the different values.

The income method of valuation is the most relevant and widely used method of valuing IP in this sector. The main challenge is that it involved using assumptions about the future use of the IP. Input data must be available and accurate for the valuation result to be correct. A good due diligence is required for quantifying the remaining useful life of the IP.

**11. ANNEXURE C: EXAMPLES OF EXISTING LAW FIRMS AND THE PACKAGES PROVIDED**

<http://safeguardip.com/>

<http://www.opusunderwriting.com/>

<http://www.patentinsurance.com>

<https://www.upcounsel.com/intellectual-property-insurance>

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