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### *Dot.Coms In Bankruptcy Valuations Under Title 11*

*or www.Snipehunt in the Dark.noreorg/noassets.com*<sup>1</sup>

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#### Introduction

This article examines the rising tide of dot.coms in bankruptcy on a prospective basis. The first part of the article reviews the financial and economic environment in which dot.coms fail. The second part reviews the various methodologies for valuing dot.coms. Part Three evaluates the expected assets of failed dot.coms applying the methodologies discussed in Part Three. Part Four concludes that traditional valuation methods do in fact apply to dot.coms, however, the methods must be performed quickly in order to get value back to creditors.

#### I. The Current and Future Financial and Economic Environment for Dot.coms

Speed is the password of the "New Economy." It took radio 38 years to capture 50 million listeners. Personal Computers took 16 years to obtain 50 million users. Thirteen years passed before Television had 50 million viewers. Furthermore, the Internet achieved 50 million users mark four times faster than the personal computer.<sup>3</sup> It was estimated that the growth of e-Enabled Businesses<sup>4</sup> grew by 2000% from 1997 to 2000, and that by the year 2002, there will be 875,000 new e-Enabled Businesses. As for Business to Business Internet commerce ("B2B"), estimates show that it is already a 200 billion dollar industry, and by the year 2003, it is expected to reach \$525 billion,<sup>5</sup> a 262 percent increase. The B2B market encompasses areas of agriculture, business retail trade, construction, finance, fishing, forestry, government, insurance, manufacturing, mining and transportation. Additionally, the Business to Consumer ("B2C") Internet commerce is presently a 40 billion dollar a year business. It is expected to increase to \$141 billion by 2003.<sup>6</sup> The B2C areas of e-Enabled retail business are limited only by the imagination of the e-Commerce entrepreneur.

There are new principles driving the "new economy." One of which is finding new and creative ways to save time, and thus, save money. Inexpensive electronic networks have been utilized to slash the time between entry of the lowly purchase order and its receipt by the supplier or vendor,<sup>7</sup> thereby reducing inventories. Although huge marketing and technical costs seem to be barriers to entry, an initial investment of two million dollars will set up a web site that can handle two hundred thousand transactions a month. Therefore, today's economic reality clearly reveals that barriers to entry to operate on the Internet are low and may become even lower.

Established dot.coms can, and are currently in the process of, losing market share. In the beginning of the year 2000, it seemed as though the physical presence of the company was not nearly as important as the concept of the firm or its web site. For example, numerous retail Internet companies had no retail outlets and sold products exclusively over the Internet. After reviewing the results of the 1999 retail selling season, it appears that the companies with significant off-line presence, the "bricks instead of clicks,"<sup>8</sup> had superior sales numbers. The rationale behind this development seems to be that the "bricks" are leveraging their crucial brand names and concomitant brand name trust as a substitute for "touch the goods."<sup>9</sup>

Another principle of interest is distance and its decreasing importance in the "new economy."<sup>10</sup> For example, work is out-sourced off shore<sup>11</sup> to the most efficient providers who engage in transactions that provide customized or niche products and services at wholesale prices. Furthermore, information is replacing the wholesaler or the intermediary. As the Internet cuts costs, increases competition and lowers prices, markets are approaching pure price competition. Every product is available everywhere at the lowest price.<sup>12</sup> Not every "real world market" can reach the equilibrium of pure competition and survive. The Internet is driven, in a very real sense, by the abundance of information available on it twenty-four hours a day, seven days a week.<sup>13</sup> To prevent price from becoming the determining factor in a purchasing decision, sellers use detailed product information to form the basis of Internet relationships. In B2B or B2C, price is important but so are service, product selection, and speed of delivery, information about the product, its uses, and the warranties underlying the product.<sup>14</sup>

In March 2000, the stock markets' confidence in dot.com companies began to weaken, eventually causing the destabilization of the dot.com market.<sup>15</sup> The promise of future profits was not enough to sustain high market valuations. Many high profile dot.coms began to experience deceleration in sales growth rates and some actually saw declines. "Cash burn rate" came to be the "buzz word" as investors grudgingly counted the days to the closing of many dot.coms. and the inevitable loss of their investments.<sup>16</sup> The belief in the power of intellectual property rights to create runaway wealth seemed to die overnight.<sup>17</sup> Sums of money spent to acquire customers no longer seemed to make economic sense. Web site differentiation was becoming more and more difficult with the proliferation of dot.coms. The reasons for failure could go on and on.<sup>18</sup>

The list of failed dot.coms since March has grown quite large; consequently, an article written today listing the closings or hive downs will become outdated by the time tomorrow's paper is delivered.<sup>19</sup> For instance, *Boo.com* has been one of the more visible failures.<sup>20</sup> The company exhausted \$135 million dollars in capital in just over a year. During this time, technology glitches delayed its highly anticipated launch<sup>21</sup> by over six months. According to a study by KPMG, the UK liquidator, the company had a flawed business plan from the beginning. At least it had a business plan.<sup>22</sup> Many dot.coms do not even bother with this fundamental business concept. *Boo.com* was beset by other problems, however, including: logistical problems, lack of a strong management team,<sup>23</sup> no contingency plans, a hard to use web site, failure to attract name brands and full retail price for goods being sold over the net.

With the number of dot.coms failing<sup>24</sup> or closing their doors, bankruptcy practitioners can expect a number of them to attempt to restructure or simply liquidate in a Chapter 7 case.<sup>25</sup> Before discussing the valuation of dot.com assets in bankruptcy, a brief review of valuation methodologies is in order.

## II. Valuation Methodologies in Bankruptcy

Valuation is a financial rather than a legal analysis.<sup>26</sup> The use of valuations within bankruptcy<sup>27</sup> is as varied as the assets or companies being valued or the purposes for which the assets or companies are being valued.<sup>28</sup> The most common valuation methodologies are the following: book value; appraisal value; market value; and revenue multiples, which include discounted cash flows and capitalization of earnings. Book value methods are often referred to as balance sheet methods. Straight book value is the net worth of the debtor presented in the balance sheet. Simply described, it calculates net worth as assets minus liabilities. It is a linear equation. Sometimes, book value is adjusted for the actual value of certain assets. The adjustment of book value to actual value is performed in order to arrive at some fair view of the real worth of the asset or business. For instance, at the time of its leveraged buyout, Macy's Herald Square building was on the books at roughly zero and the land was carried at historical cost. The use of historical cost is mandated under Generally Accepted Accounting Principles ("GAAP"), but such accounting principles do not present the fair market value of many assets.

Another alternative within the book value method is the tangible value method. It is the book value method modified to reflect no value given to intangible assets. Book value is generally not a reliable methodology in bankruptcy. It is a quick and dirty method to capture a quick snapshot of the business, but generally is not helpful in determining the worth of a business or potential recoveries for creditors.

The appraisal methodology is usually a combination of market value through a calculation of replacement cost, "use of the sales" comparison approach, and some income approach. The cost replacement approach typically reflects the

reproduction cost or the replacement cost of the asset being valued. The market approach uses sales comparisons of recent comparable sales with the sales prices of the comparables, adjusted by the degree they may differ from the asset being valued.<sup>29</sup> This approach usually imputes or calculates a value for the asset that is based upon the highest and best use of the asset. The income approach uses revenue multiples that have some capitalization or discount rate applied to them to determine value.

The cost or replacement approach is rarely used because, more often than not, it does not provide an accurate reading of the fair value of an asset. In a typical appraisal presented to the bankruptcy court, the cost method is routinely disregarded or, if used at all, it is mentioned only in passing and used to buttress the other appraisal approaches.

The sales comparisons provided under the market approach and income methods are commonly used in tandem and then adjusted for any differences based upon the skill of the appraiser to arrive at the most accurate result. The reliability and validity of one method is necessarily dependent on the other. The income method will show a precise, and sometimes not so precise, relationship between revenue and sales price. The experts may differ on what is income or how the asset generates revenue. This multiplicity of revenue variables and the unique characteristics of many assets account for several conflicting appraisals. When the conflicting appraisals are presented to a court, it must find one appraisal more persuasive or credible than the other. Often this is not an easy task for a court. Moreover, in many cases, particularly in Chapter 7's, appraisals are often outdated, prepared for purposes other than the one before the court, or do not indicate the methods used to determine the fair market value. Thus, they are not very useful in proving the current value of an asset.

A stand-alone variant of the appraisal method is the Fair Market Value Method. "Fair market value" is generally defined as the price at which assets would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell the subject asset, and both having reasonable knowledge of all relevant facts pertinent to the transaction as of a certain date. The value of a particular asset or form of an asset is not the price that a forced sale of the asset would produce. It is also not its fair market value if the sale takes place in a market that is not the ordinary market that the asset is most commonly sold to the public.<sup>30</sup> Thus, a bankruptcy auction may be a sale but it may not always occur in the market in which the asset is most commonly sold.<sup>31</sup> Valuation of assets should occur within a "realistic framework."<sup>32</sup> Numerous courts have accepted the proposition that "fair [market] value," in the context of a going concern, is determined by the fair market price of the debtor's assets that could be obtained if sold in a prudent manner within a reasonable time to pay the debtor's debts.<sup>33</sup> Thus, fair market value seems to indicate or involve a scenario of some type, in which a "sale" has taken place.

The revenue methods are also known as income statement methods although the data is derived from some use of the income statement, cash flow statement and the balance sheet. The first of these revenue methods, the capitalization method, was a popular method for many years but has since fallen out of favor. This method uses the prior year's earnings, with certain adjustments to project the expected future earnings of a company. Next, a capitalization rate<sup>34</sup> is applied to the projected earnings to arrive at a total value for the entity. The capitalization method is problematic in bankruptcy cases because often the calculated earnings are based upon past performance. These earnings generally do not reflect the value of a company that is emerging from bankruptcy.<sup>35</sup> Another weakness of the capitalization method is that it attempts to assign or use a capitalization rate that is extracted from the financial ratios and statistics of similar companies. However, it is apparent that the valuations of companies that are not in bankruptcy are not similar to companies in and emerging from bankruptcy.

The other revenue or income method is the discounted cash flow method ("DCF"). DCF is based upon the mathematical concept that the value of an asset is equal to the present value of the expected cash flow from the asset. The rationale for using present value is that a dollar received a year from now is not equivalent in value to a dollar received today. In other words, the element of each future stream of income or returns cannot simply be added together to arrive at value. Instead, each payment must be weighed according to when it will be received.

DCF is comprised of three components; however, when used to value the re-organizational value of an entity it has four components. The four components are:

(1) The present value of cash flows from operations or the asset during the period in which cash flows are forecasted. <sup>36</sup>

(2) The terminal or residual value remaining at the end of the forecast period. <sup>37</sup>

(3) The appropriate discount rate. <sup>38</sup>

(4) The present or current value of assets that will or will not be used or available in the future operations of the debtor post-bankruptcy.

With this brief review of the tried and true methods of valuation, I am now in a position to describe how to value the assets of a failed dot.com. <sup>39</sup>

## II. The Expected Assets of Failed Dot.coms <sup>40</sup> and Their Value

When *Craftshop.com*, an online supplier of arts and crafts filed for bankruptcy protection in Delaware this past Spring, it listed \$1.8 million dollars in debt and no assets. <sup>41</sup> No assets were listed because the company was unsure whether it had any assets. <sup>42</sup> *Boo.com*, with over \$135 million in equity, has not managed to attract a buyer willing to offer more than \$372,500 for its assets. <sup>43</sup> What, then, will be the expected assets of a failed dot.com?

In some ways, failed dot.coms are not different from any other failed business. We can expect to find the usual assets in a failed dot.com. For instance, cash (not much), accounts receivable, some inventory, machinery and equipment, real estate, leaseholds and intangibles. There is no need to apply going concern value <sup>44</sup> to the assets because I am assuming the dot.com is in Chapter 7.

A corollary to going concern value that could be used in a dot.com Chapter 7 case is the concept known as an "assembly of assets." There could be some value to assets as a group, either in place or at another location. This assumes that the assets will be employed on a go-forward basis similar to how they were employed in the past. Value, as an assembly of assets, is different from going concern value because it assumes the business is a discontinued operation. Costs associated with a group sale should be considered in determining value.

Another method to valuing assets is the "discrete method." This method isolates each asset or group of related assets and values the asset or group. The discrete method <sup>45</sup> is a variant of the appraisal method because it sometimes presents values in the form of a "shopping cart approach" (cost, income, market).

Additionally, the liquidation value can be used to determine the sales price or value of a failed dot.com's assets. Liquidation value assumes company operations have ceased and assets are sold individually or collectively in-groups. Liquidation assumes an orderly sale over a reasonable time, with proper exposure to the market in order to obtain the highest price for each asset. The valuation should consider the impact of selling costs, costs of holding assets until sale, and other expenses.

Finally, there is the concept of forced liquidation. This concept assumes that the assets will be sold individually. However, it also assumes the marketing period will be short and many times insufficient to obtain a price comparable to what could be obtained in an orderly liquidation. Similar to the previous concepts of liquidation and assembly of assets, costs associated with the forced liquidation must be considered when determining value.

Although the focus of this article is on failed dot.coms and their differences from an "old economy business," <sup>46</sup> there do exist many similarities. The tried and true methods of valuation as they are applied to certain assets will be the same as in any Chapter 7 case, whether we are dealing with a dot.com or an "old economy business."

Accounts receivable will have to be valued and aged using normal industry terms. The individuals who run dot.coms, however, are not only creative in e-commerce but also with sales and sales terms. The appraiser valuing receivables should look for bartering arrangements, cross-claims, and set-offs in accounts payable. In addition, appraisers must be mindful of companies in financial trouble because they will, sometimes, sell on weak credit or to unworthy

customers in order to inflate sales.

It is anticipated that failed dot.coms will not have much in the way of inventory. cursory reviews of the Chapter 7 petitions of a few dot.coms show little or no traditional inventory.<sup>47</sup> This is not surprising considering the typical nature of the business enterprises being operated by dot.coms. Consequently, it should be anticipated that full service dot.coms will present the usual valuation problems because of their lack of traditional inventory. If they do, they should be valued using traditional inventory valuation methods. Again a full physical inventory and appraisal should be taken. Fungible goods, however, should be valued based upon current published market prices. Retail inventory can have wide fluctuations depending upon the type of inventory (food, clothing, and books) but will not necessarily be difficult to sell because of the Internet. Normally, equipment is valued based upon catalog value or recent appraisals. This is acceptable for a functioning business but is practically useless for a liquidation, voluntary or forced. In fact, some high-tech equipment loses value faster than it can be depreciated. Its value "in place" is greater than its value "out of place," and is more likely to be sold at the market for far less than its recent purchase or lease price. Prior to its "Motion for Authority To Sell Assets (Excluding Inventory) by Public Sale Free and Clear of Liens, Claims and Encumbrances," *Toysmart.com* had retained the services of The Recovery Group to assist in assessing the value of some of its assets, including its furniture fixtures and equipment. The equipment included computer equipment leased from Compaq.<sup>48</sup> *Toysmart.com* was unable to sell the computer equipment pre-bankruptcy in June 2000, even though much of it had been acquired under a lease dated October 15, 1999.

Once the traditional assets are inventoried, assessed and valued (a normally straightforward assignment for any Chapter Trustee and her professionals), the next logical step is to value the intangibles. Intangibles can include the following: patents; licenses; copyrights; formulas; trademarks; contract rights; domain name; trade secrets; proprietary technology; customer lists; and software, which are owned or licensed.

The true value of a dot.com's intangible assets will be difficult to determine because of the nature of the Internet. The rate of speed in which dot.coms fail will only be matched by the warp speed of the decline of their assets. The after-market for a dot.com's intangibles may be so low that trustees may have to consider abandoning the assets. The question for many Chapter 7 trustees will be: "How do I turn this Dodo bird into a diamond in order to provide a dividend to creditors."<sup>49</sup> To provide value, the valuation experts will have to value the dot.com's intangibles using traditional valuation methods but at the same time be fully cognizant of the many legal and economic issues affecting the value of the dot.com's assets. Let's turn first to customer lists.

At least three companies that have failed recently, *Boo.com*<sup>50</sup>, *CraftShop.com* and *Toysmart*, have tried to sell their customer lists. I am not aware of whether *Boo.com* or *Craftshop.com* have been successful in this endeavor.<sup>51</sup> However, by now everyone is aware of the situation surrounding *Toysmart*.

In the era<sup>52</sup> before *Toysmart's* story there was an "irrational exuberance"<sup>53</sup> about the value of customer lists. For instance, in an old economy company, such as an oil distributor, there was value in the lists of customers that a company had developed and captured over the years. These customer lists typically had the name, address, telephone number of the customer, perhaps a credit history, and they were readily sold. Using readily available multiples, it was quick calculation to arrive at the value of a customer list for an oil distribution company.

The information that a dot.com has, particularly a dot.com "e-tailer,"<sup>54</sup> is often more sensitive and more valuable than the old economy information. It could include credit card information, personal shopping habits, web surfing habits, information on income, race, health, etc. This type of information is the fuel for the electronic superhighway. The key to selling this asset is to sell it quickly and efficiently before it becomes outdated. *Toysmart*, recognizing the value of its databases, attempted to sell its databases to the market place quickly. What made the sale of *Toysmart's* database customer list a lightning rod was the fact that it contained information on the personal habits of children. This information was collected under the privacy<sup>55</sup> policy of *Toysmart* that the information would never be shared with a third party. Unfortunately for *Toysmart* and its creditors, the proposed sale of its customer lists became notorious because it raised privacy concerns. The uproar, including lawsuits filed by various attorneys generals and the Federal Trade Commission,<sup>56</sup> sufficiently cooled the bidding, such that the customer list has not been sold to date. *Toysmart* and the FTC settled their dispute, resulting in the FTC granting permission to *Toysmart* to sell their lists to any purchaser, subject to a list of restrictions on the use of the database. The settlement was not approved by the

Bankruptcy court because it lacked specifics and there was no intended purchaser at the time the settlement was offered for court approval.

The valuation of the *Toysmart* database was probably thought to be an easy market issue. Place the database up for sale, ensure adequate exposure to the market, and a market price will emerge. What appears to have been forgotten here is that while § 541(a) makes the database an asset of the estate, § 541(c)(1) limits the bundle of rights that can be sold.<sup>57</sup> Simply stated, while the database may be sold, it is subject to restrictions, both self-imposed and arising in non-bankruptcy law. A lesson to be relearned here is that assets, which are thought to have a high market value, may be subject to traditional rights outside of bankruptcy that reduce the value or even strip the asset of any worth, such that it may be abandoned by the Chapter 7 Trustee.

As indicated earlier, § 541(a) legally captures the assets for the dot.com estate. It is up to the Bankruptcy judges to decide who has an interest in the assets and how that might effect their value. An example of an asset that will be difficult to value will be the domain name.<sup>58</sup> A domain name represents a part or all of an Internet identity. Like a trade name, nickname, logo or company name, the domain name conveys an image. It is something customers or viewers can recognize, remember, and associate with a web site<sup>59</sup> or company. It also makes accessing a web page much easier because there is no need to remember an Internet Protocol number.

The question that must be answered before a domain name can be valued is: what is a domain name, a licensee or a contract? The registration system under Network Solutions, Inc. appears to have all the aspects of a license. The effect of registration is that it grants a privilege to use the domain name for a fixed period of time (1–10 years). Thus, it can expire if not renewed. Furthermore, it appears to be no more secure than a telephone number that can be lost if a person who holds a telephone number moves to a different telephone exchange. If the domain name is a license, it presumes some interest existed before the registration of the name. However, this presents a practical problem because the name did not come into existence, at least for domain name purposes, until there was a registration. If it is a contract,<sup>60</sup> what is the consideration and the true agreement of the parties?<sup>61</sup>

The value of a domain name may be the simple arms-length sales price for a similar name. A purchaser may wish to purchase the failed dot.com's domain name so that search engines will seek out the meta-tags<sup>62</sup> within another web site, thus directing the researcher to the purchaser's web site. On the contrary, the valuation may be a more complicated model which estimates the revenue the name can generate, subjected to a capitalization or discount rate. Additionally, to arrive at the estimated revenue, some type of royalty audit should have been performed or should be performed to determine the per click usage.<sup>63</sup>

The process of doing a proper domain valuation can be complex and time consuming. Such valuation is intertwined with the sale of a web site. However, before considering web site valuations, one more issue about domain names needs to be addressed, and that is whether a domain name is a property interest at all. If it is not, then it may not have any value. In a recent case, *NetWork Solutions, Inc. v. Umbro International Inc.*,<sup>64</sup> the Virginia Supreme court seemed to indicate that domain names do not constitute a property interest. The case arose out of a garnishment action against Network Solutions, the domain name registrar. The issue was whether Network Solutions could have its services, which created a contractual right to use a specified domain name, garnished by a judgment holder. The answer the court gave was "no" because the domain name did not constitute a property interest. The problem with the *Umbro* rationale is that it fails to recognize the bundle of property rights that reside in a domain name.

Recently, in *Kremen v. Cohen*<sup>65</sup>, the Federal District Court for the Northern District of California, in refusing to follow *Umbro*, understood the division of property rights when it stated that domain names "exist separate and apart from NSI's various services that make the domain names operational Internet addresses. These services . . . are mere conditions subsequent . . . [to the right to use domain names]." <sup>66</sup> The best conclusion that can be reached from an analysis of cases in this area is that domain names are a property interest that can be sold.

Property interests contained within a web site could include, domain name, data, software, formulas, in-house technology, content (video audio etc.) logos, slogans patents, trademarks, trade secrets, licenses and contract rights, to name a few.<sup>67</sup> The interrelationship of these property rights could impede any transfer of a web site, by a Chapter 7 trustee, to a buyer.<sup>68</sup> The trustee's job will be to "unbundle" these rights in order to effectuate a quick sale. A simple

example from the *Toysmart* case will illustrate the "valuation unbundling" difficulties.

*Toysmart* proposed to sell some of its web content software in its June 29, 2000 motion to sell assets. It proposed to sell its right, title and interest in its order management tracking system, including its right, title and interest as licensee to a software license and maintenance agreement, to Silknet Software, Inc. In return, *Toysmart* would receive Silknet's e-Service that includes, interaction management center, call/case/incident management, web communications, email response management, knowledge manager, personalization and workflow together with any modifications or additions by *Toysmart*. Also mentioned in the sale proposal was the initial license and maintenance fees, but it is not clear from the motion if these were being sold, assigned or just mentioned for the sake of completeness. No sales price was mentioned for the sale of this software. Thus, the items included in this sale were software, trademarks and maybe some patents.

Valuing a web site is a complex and time consuming effort that can cost thousand of dollars. Lack of comparables and the brief history of many dot.coms makes it very difficult to value web sites. In lieu of a comprehensive valuation of an asset or company, I would suggest that there are some easier methods that can be utilized to formulate a quick value for an expedient bankruptcy sale.

For the sale of a simple web site, one method would be to look back at the revenues that the site has generated for the last twelve to eighteen months and apply a mainstream multiple to the revenues.<sup>69</sup> These multiples<sup>70</sup> can be obtained from any number of web sites that sell web enabled property. Another simple method is the Unique Monthly Visitors ("UVM") method espoused by *Webmergers.com*. The UVM measure is a good indicator of a site's ability to grab market share, which in e-Commerce, is one of the overriding goals of any Internet business. Furthermore, it is a number that is comparable and easy to benchmark. Like any other benchmark method it must be tested against the more traditional valuation methods.

Other intellectual property of the dot.com debtor will include patents,<sup>71</sup> trademarks, and copyrights. This area of valuation is not in the same state of flux as the overall valuation of Internet companies, their web sties, and domain names. The usual methods of cost, market and future income flows all apply when valuing these intellectual assets. Similar to most intangible assets, there are a host of non-quantifiable factors, or not readily discernable factors, residing in the asset itself that effect the value of the intangible asset. For instance, under the umbrella of a trademark may be copyrights, graphics and software enhancements. It takes an expert in intellectual property valuation to extract the appropriate data to ascertain the appropriate value of these assets.

### III.Conclusion

There will be no perfect modality to determine the value of dot.com assets. What is clear is that the traditional methods of valuation still apply, but with the "spin" that they are being applied to new kinds of assets. Speed is the word of the moment. Speed, in determining value, and speed, in the disposition of assets that need to go back into commerce before they lose anymore value. An asset is valuable if it provides growth options for future cash flow in a dynamic and uncertain environment. The one thing we can all be assured of is that dot.coms are a growth business for bankruptcy practitioners.

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#### FOOTNOTES:

<sup>1</sup> Editor's Note: This Article was originally scheduled to appear in the Winter 2000 issue regarding e-bankruptcy. [Back To Text](#)

<sup>2</sup> The Honorable Francis G. Conrad is a retired United States Bankruptcy Judge and is a Director in the Financial Advisory Services, Business Regeneration Group of PricewaterhouseCoopers, LLP. He is also Adjunct Professor of Law in the St. John's University LLM program in Bankruptcy. The views expressed herein are those of the author and not necessarily those of PricewaterhouseCoopers, LLP or St. John's University. [Back To Text](#)

<sup>3</sup> See Pricewaterhouse Coopers, LLP E-Commerce Team, June 2000 (on file with author). [Back To Text](#)

<sup>4</sup> Defined by the author as a business that has the means and ability to add value to the enterprise through the use of platforms and technologies that handle back office logistics, transaction processing, stock management, order fulfillment, shipping, customer relationship management and customer and product databases via the Internet or Intranet. The definition is not meant to be all inclusive but merely explanatory of the e-Enabled business. [Back To Text](#)

<sup>5</sup> See The Yankee Group, 1999 (on file with author). Experts differ, however, about the future growth. Kay Booth of Bear Stearns estimates the B2B sales opportunities at \$400 billion by 2003. See Kay Booth, E-Evolve Dot-Com and Beyond, at <http://www.bearsterns.com/evolve/intro.htm>. But see Forrester Research, 1999 (projecting \$2.7 trillion in B2B commerce by 2004) (on file with author). [Back To Text](#)

<sup>6</sup> See Forrester Research, 1999 (on file with author). [Back To Text](#)

<sup>7</sup> Cutting costs is always easier than raising revenue. The Internet reduces overall costs by reducing procurement costs because the vendor who supplies the inventory typically has the lowest price for product delivered. Couple this with better supply chain management, and the result is tighter inventory control or no inventory at all. [Back To Text](#)

<sup>8</sup> See Andrew Edgecliffe-Johnson, E-revolution shelved, Financial Times, Aug. 3, 2000 (discussing why online retailing will not displace traditional shopping). [Back To Text](#)

<sup>9</sup> Fashion is a market where many people want to try before they buy. A classic case of a click retailer that launched and crashed in a little over a year was Boo.com, the first true Internet Retailer of sportswear and fashion wear. It is not only in retail where the bricks are out doing the clicks. Leaders in their industries, General Electric, General Motors, and Charles Schwab are embracing the Internet with their on-line strategies. [Back To Text](#)

<sup>10</sup> And so have seasons for that matter. Weather and seasonality has always been a factor in the fashion industry. Companies such as CloseOutNow.com. have transcended the limitations imposed by nature by linking buyers and sellers throughout the world. "When it's winter in the United States, the ski parkas that no longer sell in Brazil can find a home," says CloseOutNow.com Chairman and CEO Steven Lubinski. Russ Banham, The B-to-B, Journal of Accountancy, July 2000, at 29. [Back To Text](#)

<sup>11</sup> It should not be assumed that offshore is one directional, that is, from the United States to somewhere else. Offshore can mean from another country to the United States. The Internet has changed the flow of commerce. [Back To Text](#)

<sup>12</sup> It is important to understand how this effect supply chains. In the event of catastrophic upheavals due to weather, change in supply or demand, the e-market allows for real time reallocation to other trading venues, customers, and sellers much faster than the traditional market allowed. [Back To Text](#)

<sup>13</sup> Some persons would describe the state of information on the Internet as being so "ubiquitous" that it is really not useful because there is so much of it that people feel overloaded with information such that they suffer from decision paralysis. This demonstrates itself in management decisions of "lets wait and see what happens" or for some business people the inability to make purchase decisions without the use of the many interpersonal relationships that existed in the past to channel information to them about their customers. Delay in entering the e-market will almost always be a mistake because inevitably it will result in loss of market share. [Back To Text](#)

<sup>14</sup> While the hype for B2C has slowed down considerably, the same cannot be said for B2B marketplaces, at least according to the Financial Times. See Rod Newing, Twice-Monthly Review of Information and Technology: Internet Rain Puts a Bloom on the Business-to-Business Marketplace, Financial Times, Oct. 18, 2000, at 1. But see, Jason Anders, E-Commerce: Yesterday's Darling Business-to-Business Sites Replaced Consumer Sites as the Hot Way to go. Things have gotten considerably cooler, Wall St. J., Oct. 23, 2000, at 8. [Back To Text](#)

<sup>15</sup> Many persons have compared the dot.com's rise and fall to the tulip mania that overcame the Dutch in 1636-1637. The Dutch enthusiasm for tulips had "some individual bulbs trading for the price of a house . . . and is (often) regarded as the ultimate fable of mass insanity and greed." See Nancy deWolf Smith, All's Well That Ends Like the Tulip



Mania, Wall St. J., April 4, 2000, at 27. No one who has studied business history should be surprised by the dot.com failures. Two industries, airline and automobile, like the Internet have had a tremendous impact on peoples' lives and the economy. All started out in similar ways. At the beginning of this century there were over 2,000 carmakers. Anyone with a garage and a machine shop could make a car. Today there are only three major automobile manufactures remaining in the United States. For the airlines it was a similar story. No one actually knows how many airline companies there were in the early 1900's but of the 300 known start ups there are only a handful left today. Consolidation and business failures will and are now occurring in the e-commerce industry. [Back To Text](#)

<sup>16</sup> See Jack Willoughby, Burning Up, Warning: Internet companies are running out of cash-fast, Barrons, March 20, 2000. [Back To Text](#)

<sup>17</sup> But not quite yet! In spite of the busting intellectual property bubble, people still believe in intellectual property to create runaway profits. See Holman W. Jenkins Jr., Busting the Intellectual Property Bubble, Wall St. J., March 29, 2000. [Back To Text](#)

<sup>18</sup> See Frank Buckman, Dominic DiNapoli, and Francis Conrad, E-Commerce and E-Business in the New Economy, paper for presentation to the International Bar Association, March 2001, Lisbon, Portugal (on file with author) (analyzing, succinctly and thoughtfully, e-commerce). [Back To Text](#)

<sup>19</sup> An illustrative list would include: CraftShop.com, Reel.com, Toysmart.com and Boo.com. See Dot-Coms in Distress, December 1999 – July 2000, N.Y.L.J., Aug. 29, 2000 (listing, more exhaustively failed dot-coms), available at <http://www.nylj.com/stories/00/08/082900ala.htm>. [Back To Text](#)

<sup>20</sup> See Thorold Baker and Caroline Daniel, Boo.com forced into liquidation as money runs out, Financial Times, May 19, 2000, at 17. [Back To Text](#)

<sup>21</sup> An example of this kind of hype from Boo.com's own web site was: "the outcome—an awesome virtual shopping experience . . . that surpasses anything that currently exists on the web." [Back To Text](#)

<sup>22</sup> See KPMG Study of Boo.com Failure Presented to the International Bar Association, Amsterdam, Netherlands, Sept. 19, 2000 (on file with author). [Back To Text](#)

<sup>23</sup> Many of its management team had departed to other businesses prior to its demise, including one of its founders Peter Hedelin, its merchandising chief Michael Skidmore, who joined LuuLuu.com, and finance director Dean Hawkins, who left for another Internet provider, Chello. [Back To Text](#)

<sup>24</sup> Harry Blodget, Internet analyst at Merrill Lynch predicts that three quarters of Internet companies will never make a profit and will either be taken over by stronger companies or run out of money and file for bankruptcy. See Richard Waters, Crushed by the Internet Kings, Financial Times, March 25, 2000, at 9. Blodget's comment about dot.coms filing for bankruptcy demonstrates a faith that many companies will follow the shutdown with a Chapter 7 filing. If so, that could be several hundred thousand dot.com bankruptcies a year for the United States economy. A number that high is not reflected in current bankruptcy statistics. The more likely scenario is that many, if not most, of the failures will just shut down, move on, and let state laws handle the disintegration. [Back To Text](#)

<sup>25</sup> All references herein to Chapter 7 or 11 are to Title 11 of the United States Code. [Back To Text](#)

<sup>26</sup> See generally [Peter V. Pantaleo & Barry W. Ridings, Reorganization Value, 51 Bus. Law. 419 \(1996\)](#). [Back To Text](#)

<sup>27</sup> The discussion in Part II is based upon a paper and panel discussion entitled "The Valuation of Assets and Enterprises in Bankruptcy," sponsored by the Association of Insolvency Advisors(now the Association of Insolvency and Restructuring Advisors) and presented to bankruptcy practitioners in Rutland, Vermont, September 1997 (on file with author). Members of the panel were: Mark Dayman, Francis Conrad, James Lurie and Michelle Lawrence. [Back To Text](#)

<sup>28</sup> Valuations in Title 11 are used in a variety of situations under the Code, such as to determine the consideration to be distributed under a plan, see 11 U.S.C. § 1129 (b) (1994), to satisfy the best interests test, see 11 U.S.C. § 1129(7), use of a liquidation analysis, to determine feasibility, see § 1129(a)(11), to determine whether a plan is fair and equitable under 11 U.S.C. § 1129(b)(1), to determine whether relief from stay should be granted, see 11 U.S.C. § 362(d), and to determine the value of cash collateral, see 11 U.S.C. § 363. [Back To Text](#)

<sup>29</sup> The sales comparison approach is most often used in real estate appraisals. [Back To Text](#)

<sup>30</sup> The Internal Revenue Service has often had to deal with property valuations. Here is an example from the gift tax area:

#### § 25.2512–1 Valuation of property; in general.

Section 2512 provides that if a gift is made in property, its value at the date of the gift shall be considered the amount of the gift. The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell, and both having reasonable knowledge of relevant facts. The value of a particular form of property is not the price that a forced sale of the property would produce. Nor is the fair market value of an item of property the sale price in a market other than that in which such item is most commonly sold to the public, taking into account the location of the item wherever appropriate. . . . The value is generally to be determined by ascertaining as a basis the fair market value at the time of the gift of each unit of the property. For example, in the case of shares of stocks or bonds, such unit of property is generally a share or a bond. Property shall not be returned at the value at which it is assessed for local tax purposes unless that value represents the fair market value thereof on the date of the gift. All relevant facts and elements of value as of the time of the gift shall be considered. Where the subject of a gift is an interest in a business, the value of items of property in the inventory of the business generally should be reflected in the value of the business.

#### 26 C.F.R. § 25.2512–1 (2000). [Back To Text](#)

<sup>31</sup> Surprisingly, it is sometimes difficult to determine what is the normal market for an asset. For instance, is selling a fleet of used long-haul trucks normally done at a wholesale auction or some other market for used trucks? [Back To Text](#)

<sup>32</sup> See Total Technical Serv., Inc. v. Whitworth, 150 B.R. 893 (Bankr. D. Del. 1993). [Back To Text](#)

<sup>33</sup> See Lawson v. Ford Motor Co. (In re Roblin Industries, Inc.), 78 F.3d 30, 35 (2d Cir. 1996). [Back To Text](#)

<sup>34</sup> The appropriate capitalization rate, like the appropriate discount rate, is always the source of some controversy if there are opposing experts at trial. There is no mathematical certainty about any rate. Like the discount rate used in bankruptcy, many courts agree that the base of a capitalization rate should start with a risk free rate, which is normally based upon U.S. Government paper. See In re Smith, 178 B.R. 946 (Bankr. D. Vt. 1995) (discussing factors that go into a risk free rate). To a risk free rate a premium must be added or some other component considered that reflects the risk inherent in the entity, industry or for some other business and economic factors peculiar to the entity being valued. See GMAC v. Valenti (In re Valenti), 105 F.3d 55, 64 (2d Cir. 1997) (discussing interest rates and risk premiums); [infra note 37](#) (showing example of how discount rate is built). Often times the capitalization rate is derived from a price earnings ratio. Using a price earnings ratio rate is simplistic and easily explained to a court. With dot.coms however, their pre-bankruptcy price earnings ratios are probably so unrealistic that the use of the price earnings ratio type rate in bankruptcy is probably foreclosed. [Back To Text](#)

<sup>35</sup> One court has said: earnings based valuations are "only educated estimates in the absence of one or more buyers, ready and willing and able to purchase the business." In re Pullman Constr. Indus., 107 B.R. 909, 932 (Bankr. N.D. Ill., 1989) (providing, in case specific context, excellent explanation of various valuation methods). [Back To Text](#)

<sup>36</sup> Generally cash flow is the difference between net cash inflows and outflows from operations or from the asset being valued. If it is an entity being valued, cash flow is reduced by taxes actually paid, additional capital expenditure and

working capital investments. The length of the forecasted period depends on the type of asset or the business cycle of the entity and whether it is in a stagnant or growth industry. See Cash Flow.com., Cash Economics in the New Economy, Credit Suisse First Boston, March 2, 1999 (describing practical framework to analyze cash economics of business models in New Economy). [Back To Text](#)

<sup>37</sup> The terminal value or residual value represents the value of the asset or entity from the end of the forecasted period. It is sometimes described as the period into perpetuity. It too is dependent on the competitive position of the company at the end of the forecast period. For example, if a company is stagnant during the forecast period and generates surplus cash, but does not invest in the future, the terminal value will be low and the present value of cash flow will be high. The opposite is true of a entity that uses its cash flow to fund future investment that theoretically should be available at the end of the forecasted period. See 1 Grant W. Newton, Bankruptcy and Insolvency Accounting 464 (6th ed. 2000) (explaining, in more detail residual or terminal value). [Back To Text](#)

<sup>38</sup> An example of a discount rate calculation in the valuation of assets and enterprises in bankruptcy would be as follows: [Back To Text](#)

	Build-up Rate Method
"Risk Free" yields:	
Use US Treasury coupon yields or intermediate (5 Year) bonds or long-term (20) year bonds – for example (Wall Street Journal)	5.8%
Large Cap Equity Risk Premium:	
Use corresponding equity yields over intermediate or long-term US Treasury yields Stocks, Bonds, Bills & Inflation Yearbook, 1977, Ibbotson Associates	7.8%
Small Cap Risk Premium (detail not calculated here)	3.5%
Specific Asset or Company Risk Adjustments:	
<ul style="list-style-type: none"> <li>• Management</li> <li>• Key man or woman</li> <li>• Market position</li> <li>• High capital formation costs(high interest rates)</li> <li>• Higher operational and financial risks (FTC)</li> <li>• Other judgment factors</li> </ul>	Say 5.0%
Total estimated computed discount rate subject to cross examination.	22.1%
Rounding	Say 22%

<sup>39</sup> In a context related to the valuation of operating dot.coms. Warren Buffet was asked how to value Internet companies. His response was: "On the final exam (for a business valuation course), I'd probably take an Internet company and (ask), 'How much is it worth?' And anybody that gave me an answer, I'd flunk." Warren Buffet, Outstanding Investor Digest, Sept. 24, 1998, at 41. My mission with this article is to obtain a pass from Mr. Buffet. [Back To Text](#)

<sup>40</sup> The focus of this article is on failed dot.coms. It is the author's personal belief that few dot.coms will be able to take advantage of Chapter 11, except perhaps as liquidating 11's. Dot.coms faced with liquidity problems, while not unique to any company in bankruptcy, find them more crushing because the burn rate of cash results not only from a lack of additional working capital to fund the business but also from a lack of real revenue and customer procurement. In addition, the average dot.com has been capitalized differently from old economy companies. The dot.com capital structure is based typically upon venture capital and initial public offerings. Old economy companies had forecasted earnings and traditional capital structures comprised of bank debt and equity.

In bankruptcy, banks and other traditional lenders, including Debtor in Possession lenders, are not going to be excited

about lending to a company that has failed, perhaps in its first year of business, and has no historical revenues to predict future success. Couple these aforementioned reasons with the speed with which new startups and competitors can and do enter into the competitive arena of the failed dot.com, and you have the reasons why they do not have the wherewithal to reorganize in Chapter 11.

More than likely, prior to closing down or filing bankruptcy, the company has already looked at its alternatives, namely whether to sell its assets out of court, see generally In re Toysmart.Com, LLC, Chapter 11, Case No. 00-13995-CJK, Debtors Motion for Authority To Sell Assets (Excluding Inventory) by Public Sale Free and Clear of Liens, Claims and Encumbrances, Page 3 (on file with author), selling to a strategic investor, see infra note 41, or simply moving on to another venture because there are no assets of any value to sell. For example, Craftshop.com when it filed did not list any assets in its Chapter 11 petition. An article in the National Law Journal indicated the company did not list any assets because it was not certain if it had any, [assets] even though it had \$1.8 million in debts. See John F. Manser, Dot.com Bankruptcy Filing a Sign? Delaware Sees First of What Could Be Many Chapter 11 Requests, Nat'l L. J., June 26, 2000, at 1. Indeed, the only assets they have may be their employees, who likely have already moved on to other employment. A speaker at a seminar of the International Bar Association, Amsterdam, Netherlands, September 19, 2000 on Internet legal issues indicated that before Boo.com even closed its doors the employment recruiters had signs outside of Boo.com directing employees to local taverns and restaurants where the next employer was ready to meet and hire the Boo.com employee. While the rush to recruit employees of the then failing Boo.com may reflect the state of the Internet labor market in the United Kingdom more than likely it would not be an unusual scenario in the United States either. Back To Text

<sup>41</sup> See In re Craftshop.com, Inc., Case No. 00-2062, District of Delaware. 17.1. Back To Text

<sup>42</sup> See supra note 39. Back To Text

<sup>43</sup> I am not privy to information about whether this price included the customer list. But see Greg Sandoval, Failed Dot-Coms May Be Selling Your Private Information, News.Com (June 29, 2000), available at <http://news.cnet.com/news/0-1007-200-2176430.html> (indicating customer list was acquired by Fashionmall.com). Back To Text

<sup>44</sup> "Going concern value" is understood by most accountants and valuation consultants to be the value of an entity as a whole or group and that the assets contained within the entity or group will be employed on a go-forward basis as they have been employed in the past. Liquidation of the entity is not anticipated. The concept assumes that a capable and diligent seller and an interested buyer exist. It also assumes that the business assets or interest to be sold will receive adequate exposure to the market such that a market price can be obtained. See supra Part II. It is possible that a going concern value could be obtained for a failed dot.com in Chapter 7 but it is highly unlikely because of the speed necessarily required of the purchaser to implement the purchase in order to capture the value in the assets. Back To Text

<sup>45</sup> For a succinct and excellent presentation on the use of the discrete method to value dot.coms See Robert F. Reilly, Valuation of Dot-coms and Intellectual Property-Intensive Companies, Am. Bankr. Inst. J., Oct. 2000, at 30. Back To Text

<sup>46</sup> Some dot.coms are old economy businesses with a "com" after their name.

For example, AppOnline.comInc., which sought bankruptcy protection this summer in the Eastern District of New York was a mortgage broker. In addition to other reasons, AppOnline.comInc. apparently failed when it could not attract sufficient capital after it failed to implement a spin off of its Internet operations through an IPO. Its IPO plans could not have come at worse time as the plans were announced shortly before the March 2000 decline in Internet stocks. Back To Text

<sup>47</sup> Any number of dot.coms, however, provide full a full range of services to their customers, which includes warehousing and inventory. For example, Urbanfetch.com, the online delivery service that started in New York City less than a year ago and had operations in London, announced recently that it was shutting down its web site and

continuing operations only as a courier. It said it would run out its inventory and sell its assets, which include leases on warehouses and its corporate offices. As an aside, it appears prior to the shutdown of the web site, Urbanfetch.com was in negotiations with its competitor Kozomo.com but apparently negotiations broke down over strategy or other financial concerns upon which the parties could not reach agreement. [Back To Text](#)

<sup>48</sup> Several hundred thousand dollars of the equipment was invoiced and supplied by MircoAge, which is in bankruptcy in the District of Arizona and administrated under In re Ecadvantage, Inc, Case no. 00-03833-CGC. [Back To Text](#)

<sup>49</sup> This article does not presuppose to discuss all the valuation issues that valuation of a dot.com's assets entail. One very important matter for a Chapter 7 trustee to consider is the avoidance of security interests, if any, in assets. Commentary assists in understanding some of these perfection and avoidance issues. See Michael A Gerber, "Bankruptcy in a Brave e-World," presentation from the International Bar Association, Amsterdam, Netherlands, Sept. 19, 2000 (on file with author); see also Sylvia Mayer Baker, Uncertainty About Perfection of Security Interest in a Copyright or -Better Safe Than Sorry, Current Issues in Restructuring, Weil, Gotshal and Manges LLP, Bankruptcy Bulletin, May 2000. [Back To Text](#)

<sup>50</sup> It is estimated that in its short life span Boo.com had accumulated a database of over 350,000 customers. Chain Store Age, August 2000. [Back To Text](#)

<sup>51</sup> But see [supra note 42](#). [Back To Text](#)

<sup>52</sup> In the Internet age "era's" can be as short as six months. [Back To Text](#)

<sup>53</sup> This phrase borrowed from Allan Greenspan's description of the stock market a few years ago. [Back To Text](#)

<sup>54</sup> One of many descriptions for a retailer who engages in e-commerce. Lexicographers who compile new words for insertion into dictionaries have indicted that some Internet words come in and out of fashion so fast that they never get mentioned or appear in a lexicographer's notebook. [Back To Text](#)

<sup>55</sup> While privacy has always been an issue in the mind of the public and other civil libertarians, Toysmart has raised public consciousness of the issue. For instance, Sens. Kohl (D-Wis), Leahy (D-Vt), and Torricelli (D-N.J.) have introduced the "Privacy Policy Enforcement in Bankruptcy Act of 2000." The new bill would prohibit the sale of information held by failed businesses if the sale or disclosure would violate a privacy policy of the debtor when it collected the data. At the time of the writing of this article the bill has not passed. [Back To Text](#)

<sup>56</sup> See Federal Trade Commission v. Toysmart.Com, LLC, Civil Action No. 00CCcv11341RGS, District of Massachusetts (complaint filed by FTC). [Back To Text](#)

<sup>57</sup> One solution to create value in a database harvested under a privacy policy is to allow the named customers a chance to opt out of the use of their data. How such an opt out would be presented to a customer is not an easy issue. Privacy advocates want an affirmative opt out while other parties would want a "no response" to the option to opt out to keep the customer in the database. The Network Advertising Initiative, a consortium of Internet companies, have proposed a privacy program that wants customers to be given a chance to OK the "merger" of database of previously collected data with another data base of previously collected data. [Back To Text](#)

<sup>58</sup> Domain names are the familiar names used to substitute for a series of numbers on the Internet. For instance, Optonline, a familiar domain name is known to the computer who reads Internet instructions as 167.206.112.6. The series of later numbers is known as an Internet Protocol (IP). IP numbers route the computer to the domain. Domain names in the United States are the responsibility of the Internet Corporation for Assigned Names and Numbers and Network Solutions, Inc. An Internet search on how to obtain a domain name and to register it produced 4,749,269 hits or directions to other web pages and domains. The cost to obtain and register a domain name from among the few sites visited, ranged from £10 to £30 at a UK site to \$29.99 to \$120, at a U.S. site, the latter including a parking fee to preserve the selected domain name. For information on domain registration go to: <http://www.internic.net/>. Domain names are also called URL's or Uniform Resource Locator (world wide web address). [Back To Text](#)

<sup>59</sup> The valuation of a web site itself is even more problematic because of the different intertwined property rights, including the domain name. [Back To Text](#)

<sup>60</sup> But see Kremen v. Cohen, 99 F. Supp. 2d 1168 (N.D. Cal. 2000) (assuming domain name registration could be contract). [Back To Text](#)

<sup>61</sup> See generally A. Mechele Dickerson, From Jeans to Genes: The Evolving Nature of Property of the Estate, 15 Bankr. Dev. J. 285 (1999). [Back To Text](#)

<sup>62</sup> Imbedded web site tags that seek out content. [Back To Text](#)

<sup>63</sup> Per click usage, also known as "monetising eyeballs," which counts the number of visitors to a web site who purchase is a capricious number. Under old economy valuation modalities a customer could be expected to stay with new company that purchased it for many years. The new economy customer is quite different. Price is what drives many people to consummate transactions on the Internet. Price loyalty people are the most fickle customers a business could have. Indeed, Some of these clicks that are being sold may even result from the use of robots that seek out the lowest price. [Back To Text](#)

<sup>64</sup> 529 S.E.2d 80 (Va. 2000). [Back To Text](#)

<sup>65</sup> Kremen v. Cohen, 99 F. Supp. 2d 1168 (N.D. Cal. 2000). [Back To Text](#)

<sup>66</sup> Id. at 1173. [Back To Text](#)

<sup>67</sup> To be truly apprised of the intellectual property a dot.com may have, the Chapter 7 trust should seek to obtain the intellectual property portfolio maintained by the dot.com. If this is not available, and often times it is not, the trustee should attempt to obtain a listing of the intellectual property the secured creditors think they have a security interest in. [Back To Text](#)

<sup>68</sup> The trustee in his efforts to sell the intellectual property has to be very careful when dealing with perspective buyers. Because of the intangible nature of the assets to be sold, ideas and trade secrets can be easy stolen, thereby reducing the value of the assets even further. To shield against this larceny by unscrupulous buyers the trustee should ensure that all perspective purchasers sign a confidentially and non disclosure agreement which includes a steep liquidated damages clauses. [Back To Text](#)

<sup>69</sup> This assumes, of course, that the revenue picture is reliable. An example of a revenue picture that would have to be adjusted is how Priceline.com records its revenue. When, for instance, a customer purchases a ticket, the entire ticket price is booked even though Priceline.com neither owns or flies any transportation vehicles. This type of revenue recognition along with other accounting practices has received the scrutiny of the SEC and other accounting authorities. [Back To Text](#)

<sup>70</sup> A representative sample of web sites seems to indicate the current multiple for e-Commerce sites is 5–8 and for content sites it is 10–14. These multiples appear to be based upon going concern values, however, and many have to be adjusted downward in a Chapter 7 case. [Back To Text](#)

<sup>71</sup> Prior to 1998 it was generally assumed that there were three types of patents: design, utility and plant. To this threesome must be added the recently approved business method patent. The business method patent was approved in State Street Bank & Trust Co. v. Signature Fin. Group, 149 F.3d 1368 (Fed. Cir. 1998). A Chapter 7 trustee should be alert to the possibility of a potential patent when she takes over a dot.com and seek appropriate professional advice on obtaining a business method patent if that course could potentially increase dividends to unsecured creditors. See generally John F. Delaney et al., "When Dot-Coms Grow Up, Then What?", N.Y.L.J., March 27, 2000, at S5. The European Commission is also moving towards extending patents to software and business methods. See Jean Eaglesham, Using monopolies to protect methodologies, Financial Times, Oct. 26, 2000. [Back To Text](#)

