Proskauer

Question of the Week:

What do you expect the biggest impacts of Generative AI (GenAI) to be on M&A in the next 12-18 months?

December 7, 2023

"I expect to see an increased focus on GenAI-specific inquiries in the due diligence process and corresponding representations and warranties in purchase and merger agreements. Governing legal terms and conditions vary greatly from one platform to the next, and determining the implications of GenAI use for a business is a nuanced analysis that requires an understanding of which, and for what purposes, GenAI is being used, as well as the nature of the inputs being fed into the GenAI solution. Although this may seem most relevant to enterprises for which data or IP are core to their business, it actually applies to all industries, given the broadly-relevant confidentiality, cybersecurity, IP and legal compliance considerations that the technology raises."

Wai Choy, Technology, Media & Telecommunications, New York

"While the initial hype around GenAI is over, the tech will continue to be a focus for investors. I expect there to be sustained interest in GenAI start-ups and SMEs that have capitalised upon expanding data availability and inexpensive computing power, and offer fine-tunable, wrappable or sector-specific products. When assessing these targets, it will be important for investors to consider the commercial value, growth potential and due diligence differences between businesses whose products depend on their own proprietary models and businesses whose products depend on paid-for third party models (e.g., OpenAI’s API).

We know, based on previous tech megacycles, that private capital players can see ‘picks and shovels’ transactions as a good way of capitalising on a tech ‘gold rush’. Therefore, I also expect to see an increasing number of investments, acquisitions and combinations involving chip developers, HVAC system manufacturers, synthetic data providers and other GenAI infrastructure businesses."

Oliver Howley, Technology, Media & Telecommunications, London

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"The valuing of GenAI-based businesses will continue to present challenges for the foreseeable future. A GenAI 'bump' in valuations may be appropriate in some cases and will depend on the level of transformation that the particular use cases at issue bring to the table. We have clearly seen in the past expanded valuations for emerging technology companies riding, for example, the dot com bubble or even blockchain hype. Fear of missing out may similarly drive values of 'GenAI companies' to levels that traditional valuation metrics simply do not support. On the other hand, companies that have really found innovative ways to use GenAI to deliver value on a long-term basis to clients and customers will certainly command premium valuations. Looking beyond the 'GenAI' label, and understanding a target's real business and long-term viability in a newly emerged and still rapidly evolving business environment, will be essential for successful transactions in the future."

Jeffrey Neuburger, Technology, Media & Telecommunications, New York

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"GenAI is impacting the breadth and complexity of IP M&A due diligence since there has been an uptick in IP created in whole, or in part, with GenAI. This raises questions concerning inventorship, ownership and infringement. As to the issue of infringement, questions of whether unlicensed content was used as the training data is a key component of our IP M&A due diligence. Similarly, the risks of infringement, direct or unintentional, and how to minimize such risk upon consummation of the deal are key questions that we deal with in the course of M&A diligence. This touches upon all areas of IP, including patents, trademarks, copyrights and trade secrets."

Baldo Vinti, Intellectual Property Litigation, New York

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