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Case Study: Branding the Google IPO

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This Case Study discusses the branding impact of the Google IPO. In a longer, Article-length version of this paper which appears in the Michigan Law Review, I argue that branding is an unappreciated element of contract design. Corporate finance scholars generally assume that consumers focus on product attributes like price, quality, durability, and resale value. But consumers choose brands, not just attributes. The legal infrastructure of deals sometimes affects the brand image of the company.

This Case Study explores the link between deal structure and brand image in one specific but noteworthy deal, the Google IPO. It is an extreme example of the branding impact of deal structure, but one that helpfully demonstrates the branding implications that exist, to a lesser degree, in other deals. The primary goal of structuring an IPO is to lower the cost of capital by managing the information asymmetry between the issuer and investors. From this perspective, the success of the Google deal is questionable. Few would call the deal elegant or efficient. But the auction structure allowed Google to do more than raise money. Google also reinforced its image as an innovative, egalitarian, playful, trustworthy company.

I. INTRODUCTION

The legal infrastructure of a deal can have a *branding effect*: the design of the deal may alter the brand image of the company. The structure of the deal affects not only the relationship between the firm and its investors, but the relationship between the firm and its customers.

In an Article in the *Michigan Law Review*, I use a series of case studies to explore more completely this idea that deal structure can affect the brand image of the company. The Google IPO is an extreme example of the branding impact of deal structure, but one that helpfully demonstrates the branding implications that exist, to a lesser degree, in other deals. The structure of the Google IPO, I argue here, cannot be properly evaluated using the traditional tools of corporate finance alone. The deal appears to be inefficient, at least if one thinks about efficiency in the usual way.[1] But if one also considers the impact of the deal on brand image, the deal is a success story.

The concept of branding rarely appears in academic debates about corporate finance and corporate governance. Finance scholars focus their attention on the relationship between the firm and its investors and creditors, who supply financial capital, and its managers, who supply human capital.[2] Contracts are efficient when they properly align incentives; a good contract design is one that allows managers to raise capital cheaply and deploy it effectively. Consumers enter the discussion only as the emotionless buyers who make up the product markets, which serve as a potential indirect check against agency costs.[3]

The functionality-oriented consumer. The implicit assumption in these debates is that consumers have no

rational reason to care about the internal corporate governance of a firm whose products they buy. Most consumers, after all, have only the haziest notion of how firms interact with the capital markets and executive labor markets. Finance scholars, then, act like the editors of Consumer Reports. They assume that consumers only value basic product attributes like price, durability, resale value, and quality. Contract design, after all, would seem to have little effect on the absorbency of a paper towel, the sound quality of an mp3 player, or the creaminess of a pint of frozen yogurt. From this perspective, the best managerial structure is whatever structure produces the best products while keeping production costs and transaction costs low. Corporate governance is a matter for shareholders and managers and creditors to work out amongst themselves. By focusing on the functionality of products, however, we mask any link between products and contract design.

The brand-oriented consumer. Focusing only on functionality is problematic. Consumers choose brands, not just product attributes. Getting directions from Google Maps is not the same experience as getting directions from MapQuest, even if the product is similar. Brand image reflects the values of the people who create the product, and contract design contributes to the atmospherics of the brand. An innovative deal structure may cost the company something in short-term efficiency, but it may pay dividends in the form of increased demand from consumers in the long run.

Deal structure, then, is not just a method of managing transaction costs. It is also an advertising medium. Unlike direct marketing tactics, however, the process is more subtle. Whatever its content, the "message" of the deal structure reaches consumers indirectly through early adopters or other opinion leaders – knowledgeable, sophisticated consumers who experiment with new products and are particularly sensitive to the trustworthiness of the manufacturer. Just the sort of consumer, in other words, who might pay attention to deal structure.

From a traditional corporate finance perspective, the goal of a properly-structured IPO is to manage the information asymmetry between the issuer and potential buyers in order to raise the most amount of money possible per share of stock sold. From this perspective, the success of the Google deal is questionable. Few would call the deal elegant or efficient. But this is not really what the Google IPO structure was about, or at least it is not the full story. When Google structured its IPO as an auction, it reinforced Google's identity as an innovative, egalitarian, playful, trustworthy company. Talking about Google's IPO makes you want to use Google's products.

The true innovation of the Google IPO was not the auction structure itself. Auctions have been used to sell stock before. The true innovation was how the structure of the deal was employed as a marketing tactic, enhancing Google's image. The structure allowed us to peer through the corporate veil and spy the values of the company's founders. Like the Empire penguins stoically waddling in single file to their breeding ground,[4] unusual deal structures anthropomorphize the firm in the eyes of consumers. Innovative deal structures are striking, and they can marginally affect the set of mental associations that make up brand image. Google is not just a network of connected contracts;[5] it is playful and innovative.

I do not wish to overstate the importance of branding. I certainly do not mean to suggest that the idea for an auction originated in Google's marketing department. Rather, this Article claims that the Google deal had branding implications (whether by design or accident), and that lawyers ignore the implications at their peril. The ethereal link between product markets and capital markets is what makes the branding effects of deal structures both challenging and promising as a new avenue of research.

II. UNDERSTANDING THE LEGAL INFRASTRUCTURE OF DEALS

What determines the legal infrastructure of deals? In *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, Ronald Gilson argued that the defining activity of the corporate lawyer is minimizing transaction costs.[6] Transaction costs do not refer simply to the costs associated with "papering" the deal. Transaction costs include the costs of searching for an appropriate exchange partner, negotiating the terms of the deal, producing information, policing strategic behavior, and enforcing the contract. Gilson focused on deal hurdles that lawyers commonly address, like asymmetric information and moral hazard. These problems can require costly monitoring by deal participants, cause buyers to discount the projected value of assets, or can even suffocate deals altogether under a blanket of suspicion. Drawing on the work of economists and finance theorists like Ronald Coase, Oliver Williamson, and Michael Jensen,[7] Gilson argued that when lawyers structure deals, they increase efficiency. Lawyers add value to the deal by designing contracts that facilitate the flow of information and properly align incentives. When the buyer and seller disagree about the value of an asset, for example, lawyers might draft an earnout agreement that links the price of the asset to the actual earnings it generates.[8]

Asymmetric information and strategic behavior are not the only costs that transactional lawyers consider.

Regulatory costs also affect deal structure.[9] Accounting treatment, tax incentives, antitrust concerns, and financial intermediation rules may all come into play.

Ron Gilson, Victor Goldberg, David Schizer and others at Columbia Law School have developed an empirical case study approach to examine how deal lawyers create value when they engineer the legal infrastructure of transactions.[10] I agree with the basic premise of the Columbia School that the primary purpose of the legal infrastructure of deals is to minimize transaction costs and regulatory costs.[11] But I argue here that deal structure may also affect a company's brand image. Contract design helps form the identity of the firm and consumers' perception of the firm.

The link between corporate finance and branding may change the professional responsibilities of transactional lawyers. Branding has received scant attention from the legal academy outside of trademark scholars.[12] Corporate lawyers traditionally draw a line, albeit a fuzzy one, between legal issues and business issues.[13] If Gilson is right that lawyers are transaction cost engineers, then the distinction between legal issues and business issues begins to break down. Designing the structure of a deal is an endeavor that must be pursued jointly between lawyers and other professionals. Lawyers add value to transactions by allocating risks properly through contract, and their negotiations and decisions affect incentives and change how businesses run operations moving forward.[14] And if I am right that deal structures have branding effects, then the legal/business distinction breaks down even further. Lawyers can and should include the deal's effect on brand equity in their back-of-the-envelope cost-benefit analysis of different deal structures, in addition to the effect on managers, shareholders, employees and creditors.

Consider the predicament of Google's outside counsel. Should Wilson Sonsini have permitted the founders to include a "letter" to shareholders in the prospectus, even though it was likely to complicate and delay the SEC approval process? Should the founders have been permitted to indulge in math humor when they chose the number of shares to be issued? Some lawyers would articulate a professional responsibility to fight with the founders and managers on these points. After all, if the actions merely reflect the idiosyncratic preferences of quirky founders, then company counsel has a duty to step in and protect the shareholders. But if I am right that deal structures have branding implications, it follows that lawyers have a responsibility to help the founders consider the risks (and rewards) of the unusual contract design. That the deal may tarnish or enhance a firm's brand image becomes yet another factor for the lawyers to consider, not unlike accounting risk, tax risk, or counterparty credit risk. Indeed, lawyers may be especially well-suited to advise their clients about the non-legal effects of legal decisions, including branding effects.[15]

III. GOOGLE

Last summer, Google went public in a highly public manner. Rather than use the traditional underwriter-led book-building process, Google instead sold its stock to the public using an Internet auction. Wall Street watched the deal closely and criticized it extensively. After several delays, the auction closed successfully with an offering price of $85. The stock closed its first day of trading at $100 for a first-day pop of 18%. The stock then began its steady climb towards $400. The numerous problems Google faced in executing the deal suggest it was hardly a model of efficiency. Nor was it a model of egalitarianism.[16] But, I argue here, the deal was a success on its own terms. There was more than short-term efficiency at stake. Google used the IPO as a branding event, and the auction structure created branding effects in a way the traditional IPO structure would not have.

A. The Timing of the Deal

Sergey Brin and Larry Page met as computer science graduate students in 1995. The two founded Google and developed a search technology based on the "back links" to websites. By 1999, the company began to grow, and it received $25 million in financing from Sequoia Capital and Kleiner Perkins, two leading venture capital firms. The company could have gone public earlier, when the equity markets were hungry for any technology company, let alone one with Google's strong track record and promising future. Eric Schmidt (the CEO), Brin, and Page held off.[17] They enjoyed the freedom of remaining a private company, and they had no pressing need for cash..[18]

Google went public in the summer of 2004. The timing was a bit puzzling. Companies normally go public because they need additional equity capital. Google had no pressing need for cash, and so in theory it could have remained a private company. For several reasons, it made sense for Google to go public when it did. None of these reasons, however, required Google to maximize its short-term share price.

Back-door public company. The precipitating event was somewhat unusual. One advantage Google enjoyed as a private company is that it could hold its business strategy close to the vest. Its growth, however, eventually made this strategy impossible. Like most start-ups, Google had given stock to employees. As it recruited programmers and engineers, more and more employees became

stockholders. Under the securities laws, any company with 300 stockholders has to make certain public filings. These public filings would have required some disclosure of Google's business plan and prospects, making Google a "back door" public company.[19] And because Google would have had to make aspects of its business strategy public under the required filings, the founders lost a key reason for remaining privately-owned.

Liquidity. Going public made sense for other reasons as well. Employees who receive stock and options expect to sell at some point.[20] Without a liquid market for shares, employees could not capture the full value of their options. Going public allowed the founders, employees and investors to sell and thereby diversify their portfolios.[21]

Because excessive insider selling would have depressed the stock price (which would have been self-defeating), selling was limited by contract. The founders, VCs and employees sold some shares in the IPO and in secondary offerings in the months following the IPO, but most of their equity would remain locked up in Google for a relatively long time.

Acquisition currency. A third reason for going public was to facilitate acquisitions. Companies often use their own stock as acquisition currency. Google was eyeing some potentially large acquisitions, and having a liquid market for its stock would facilitate tax-free acquisitions. After announcing the IPO, Google acquired Picasa, a digital photo management company,[22] Keyhole, a digital mapping company,[23] Urchin, a web analytics company,[24] and Dodgeball, a social networking site.[25]

But there was no pressing need for cash. A higher share price would make any stock-for-stock acquisitions cheaper. At the same time, Google's advertising products were generating sufficient cash flow to meet the company's operating needs. Google had some desire to build a war chest for future acquisitions, but had no immediate big targets. Moreover, the IPO would not be Google's last chance to raise money in the equity markets, as evidenced by their recent follow-on offering.

In sum, Google had to go public, but it was less concerned about short-term share price than many other companies. Maximizing the offering price (so as to maximize the amount of capital raised) was not as important as building long-term value. The IPO presented itself as a perfect branding moment.

Despite Google's enviable position, it faced a few challenges. The timing of the IPO was not ideal. The dot com bubble was over. Few companies went public in 2004, and it was hard to imagine an Internet technology company, even Google, receiving a warm reception from gun-shy investors. But with the threat of becoming a "back door" public company looming and increasing pressure to provide liquidity for employees and the VCs, the IPO had to be executed one way or another. It was a treacherous situation. The way out was to think creatively, or, as Apple-lovers might say, to "think different" about the IPO process.[26]

B. The Appeal of the Auction Structure

IPOs have an image problem. Before the dot com bubble burst, tech IPOs were associated with severe underpricing and huge first day pops. Insiders got rich; companies left money on the table; retail investors got hurt when the bubble eventually burst.[27] The challenge for Google was to turn a process associated with greed into something positive. Structuring its IPO as an auction did the trick.

It may be useful here to briefly review the traditional IPO process. In a traditional IPO, a company that needs capital approaches the underwriters who will help take the company public. The underwriters set up a road show where managers talk with potential investors. The underwriters also meet with institutional investors and discuss the company behind closed doors, setting the price through a process known as "bookbuilding." Underwriters then follow up with investors, who express indications of interest and the price at which they would be willing to buy the stock. Based on these indications of interest, the underwriters and the company agree on a price.

Critics of the traditional IPO process focus on two controversial aspects: pricing and allocation. Pricing an IPO is more art than science. For reasons that remain controversial, the company and its underwriters typically set the price somewhat lower than the anticipated market price. During the dot com bubble, Internet stocks debuted with first-day pops of 100% or more, creating opportunities for abusive practices that benefited Wall Street insiders and corporate executives.[28]

Underpricing has received a great deal of academic attention.[29] Historically, IPOs are underpriced by an average of 18%. Most financial economists believe that the traditional book-building process is efficient, despite (or because of) underpricing. Underpricing may be necessary to compensate institutional investors for investing in price discovery activities, or to compensate them for the risk of investing in bad deals. Bruce Johnsen and others argue that syndicates, along with underpricing, improve the efficiency of the system by discouraging overinvestment in information-seeking behavior by potential investors.[30] In their model, underpricing allows the investors to "buy blind" rather than compete against each other trying to unearth more information about the company to more accurately price the issue.[31]

Whatever its efficiency, the book-building process still smells fishy to legal scholars, who tend to focus more on egalitarian considerations than economists do.[32] The SEC's mission is to protect the small investor.[33] In recent years legal scholars have become more interested in the "Dutch Auction" model of selling stock in IPOs. The investment bank Hambrecht has developed and refined an "Auction IPO" model in the United States.[34]

An auction uses a different price-revealing mechanism than the traditional book-building process. In an auction, investors bid on the Internet for the issuer's stock. The clearing price—that is, the price at which the company sells the stock to the underwriters—is set at the highest price at which the company can sell the number of shares it wants to sell. Anyone who has placed a bid higher than the clearing price receives an allocation of shares at the clearing price, even if they bid higher. Bidders thus may go ahead and disclose their reservation price. If they guess too high, they will not be punished, but instead will receive stock at the clearing price, like everyone else.[35] Because the bids of investors correlate closely with the bids that arise in the secondary market after trading begins, underpricing the stock may be unnecessary.[36]

The differences between auctions and book-building go beyond the technological leap from the telephone to the Internet. Using an auction affects not only the price mechanism, but also the allocation mechanism. Unlike a traditional IPO, anyone with a computer can participate.[37] Auctions are more democratic and egalitarian. Because the allocation process eliminates favoritism, it also eliminates the possibility of using underpriced IPO shares to benefit insiders or curry favor with clients. Christine Hurt has advocated a move towards auction IPOs to reduce moral hazard. Other legal scholars remain skeptical. Anita Indira Anand argues that auction structures may not reduce underpricing and that fairness in allocation may not lead to an improvement in market efficiency.[38] Peter Oh argues that Dutch auctions are risky, susceptible to fraud, and shows that the benefits are unproven.[39]

When Google announced its intentions to conduct an IPO by auction, the financial press took notice. Google would become by far the largest and most prominent company to sell IPO stock by auction. The financial press pitched the story as Silicon Valley populism versus Wall Street capitalism, making it the deal to watch during an otherwise sleepy summer for the capital markets. Google scored some early PR victories. It strong-armed the white-shoe underwriters into cutting their usual hefty fees, and it forced them to accept a more democratic IPO process. No more Friends of Frank;[40] Google would conduct its auction according to its company mantra, Don't Be Evil.

C. Execution of the Deal

Conducting an Internet auction forced Google into the role of regulatory entrepreneur.[41] Securities laws prohibit offers to sell securities until a registration statement is effective; the registration statement cannot become effective until the final price is determined. In an auction, however, the final price cannot be determined until offers to buy the stock have been received, creating a Catch-22. The SEC had previously issued no-action letters concerning online auctions to Wit Capital, Hambrecht, and Bear Stearns.[42] Working closely with the SEC to establish a system for setting the price through indications of interest and later confirming bids after the registration statement was declared effective, Google moved forward with the auction.

The size of Google's offering forced a difficult decision early on. Most companies that conduct auctions do so through Hambrecht, the auction pioneer. Hambrecht has an infrastructure in place to handle auction IPOs. Google was concerned, however, that their offering needed more assistance from traditional underwriters, who can reach out to institutional investors. Google retained Hambrecht to advise on the offering but chose the more traditional investment banks Morgan Stanley and CSFB to lead the syndicate. Some viewed the choice of investment banks as a missed opportunity to further egalitarian reform of the IPO process.[43]

PR for the deal took a hit when the investment banks made access to the deal somewhat difficult for individual investors. To ensure that bids were serious, the banks required that investors have high minimum account balances to make a bid. Rumors circulated that some banks required minimum account balances of half a million dollars. The auction would not be as egalitarian as initially promised. Google responded by expanding the syndicate to include smaller firms, including E-Trade, some of which required minimum balances as low as $2000.[44]

The next hurdle concerned the issue of insider selling. Traditionally, underwriters ask insiders to agree not to sell any stock within 180 days of the initial offering. Google had no such agreement in place, and analysts began to question whether insider selling would put excessive pressure on the stock price immediately following the offering. Eventually, the founders and VCs cut back on the number of shares they would sell in the initial offering, and management agreed to a waterfall-style lockup agreement, with increasing numbers of shares sold after 15, 90, 120, 150 and 180 days.

Google's road show brought acrimony from analysts as well. Investors complained that they disclosed little information about the company's plans. Mary Meeker, a

high profile analyst, complained that she had never dealt with a company as unhelpful as Google. Institutional investors accustomed to receiving favored treatment had little advantage over any small investor with a computer.

The deal was delayed into August, bringing yet more trouble. The buzz started to fade; August is a slow month on Wall Street, as bankers and traders depart for Nantucket, Martha's Vineyard, or the Hamptons. Things got even worse on August 12, when an issue of Playboy magazine reached the newsstands; the timing could not have been worse. The magazine had printed an interview with Brin and Page talking about the company. Publication of the article arguably violated the gun-jumping rules, which companies often address by halting the IPO process and "cooling off." Google managed to keep the process moving by filing yet another amendment to the registration statement reprinting the article in full and disclosing the risk in the prospectus.[45] Google then disclosed that it had failed to register certain shares and options received by service providers, potentially violating SEC rules. The bidding process finally began on August 13. Demand appeared soft, and Google lowered its price target from $108-135 to $85-$95 a share. To Wall Street insiders, Google was beginning to look amateurish, not innovative.

The auction finally closed, and Google sold the stock to the underwriters at $85 per share, who then distributed it to the bidders. Successful bidders (i.e. anyone who bid over $85) were allocated 75% of their requested shares, suggesting that Google intentionally left some money on the table to ensure a positive first day close and compensate those bidders who had stuck it out. The stock closed its first day of trading at $100, in line with the historical underpricing average of 18%.

In sum, the deal did not go altogether swimmingly. Wall Street resented having to accept an innovative deal structure that weakened the control and importance of the underwriters. Institutional investors may have invested less effort in investigating the company, resulting in lower bids. Stock market pundit Jim Cramer explained,

> The "go it alone" method that Google used was a total fiasco, just ridiculous. The arrogance, the incompetence was beyond belief. Their own missteps and misbehavior have brought *much lower* prices than they ever would have gotten for the deal. Institutions, mutual funds and hedge funds all are boycotting the deal. So the price will be artificially *low*. These guys will have totally messed it up for themselves.[46]

It is hard to disagree with Cramer's conclusion that Google left money on the table. But in hindsight, with Google now trading near $400, and having successfully completed a $4 billion follow on offering, I am not sure it is fair to say that the Google guys "totally messed it up for themselves." Whether the deal was successful depends on the matrix one uses to measure success.

D. Evaluating the Deal: Efficiency

Few would characterize the Google IPO as efficient. It is difficult to know what would have happened if Google had instead used the traditional book-building method. The unusual deal structure certainly drove up legal fees. Google paid its underwriters a 3% commission, well below the industry standard 7-8%, but its ability to drive down investment banking fees was came primarily from its market power, not its selection of an auction process. It seems likely the company could have raised more money had it used the traditional IPO process. Following the IPO, institutional investors rushed to buy the stock, pushing the price higher and higher.

Jim Cramer is not alone in thinking that the offering price would have been higher if Google had done a traditional IPO. The central problem faced by IPO issuers is the information asymmetry between the issuer and potential buyers. Issuers overcome this problem by disclosing information and by renting the reputation of financial intermediaries.[47] Google did a poor job on both counts. They were tight-lipped about the company, disclosing little information other than the basic financial information and risk factors required by the SEC. The founders' letter, while entertaining, was short on useful insight about the company's plans. As far as renting reputation, Google hired Morgan Stanley and CSDB to lead the syndicate. But even here, Google showed little interest in gathering up the support of intermediaries. After they slashed fees, Merrill Lynch walked away from the deal. While Google did receive the implicit endorsement of the many banks who remained in the syndicate, the ill will they generated by slashing fees may have reduced selling efforts. Moreover, auctions are associated with lower underpricing, removing an incentive for institutional investors who might otherwise have gotten involved. And without the firm promise of underpriced shares, the underwriters had little financial incentive to push the stock on their favored clients.

In sum, the post-IPO run up in Google's stock price suggests that the deal structure may indeed have left money on the table. Without a clear promise of underpricing and no possibility of a favorable allocation even if they did participate, institutional investors had little reason to investigate the company. It cost them very little to wait until the stock began trading on the secondary market. The run up in the stock price thus may

have been caused by the inability of the auction process to reduce the information asymmetry between Google and its potential investors. Post-IPO events and announcements may have contributed to the run up in the stock price, but it is hard to imagine such events accounting for the full increase.[48]

E. Evaluating the Deal: Branding Effects

Despite these apparent flaws in both design and execution, the Google IPO should be considered a success. The IPO was not just a financing transaction; it was a branding moment. It generated benefits for Google outside the four corners of the prospectus.[49] Each story in the business press was a love letter to customers who value corporate integrity. From a corporate finance perspective, the deal was at best mediocre. From a marketing perspective, it was simply brilliant.

Google, more than most, needs a good brand image to ensure long-term success. Marketing theory helps explain why this is so. Products may be categorized as search goods, experience goods, and credence goods.[50] Search goods are goods where consumers may easily assess quality before purchase, like clothing or furniture. Experience goods are goods where consumers may easily assess quality after purchase, like a haircut or a lawnmower. Credence goods are goods where quality is difficult to assess even after purchase, like financial advice, auto repair, or education.

Branding is especially important for experience goods and credence goods. Google's search engine is an experience good.[51] For such goods, branding is a way for a seller to commit to product attributes that are difficult for third parties (such as courts) to verify.[52] The search engine and other Google products might even be considered credence goods. Consumers would find it difficult to verify the quality of search results, even after examining the results, unless they also sampled other search engines. In theory, consumers could spend a few hours running experiments, trying out different searches on each site and comparing results. Few consumers, however, are so diligent. Comparing results, moreover, is not so easy. Only with careful inspection can one figure out which sites, deep in the results, one search engine discovered and another did not. Often the relevance of results are not apparent without clicking through. Rather than experiment with different products, consumers rely on word-of-mouth and brand image.

Other search engines and internet portals, like Ask.com, Yahoo! and AOL spend lavishly on advertising to convey a sense of relevance or usefulness to consumers. Google's branding strategy, on the other hand, is subtle. It relies on the diffusion of buzz through informal networks. It has a blog targeted at early adopters[53] that introduces and discusses new products. Because Google relies on advertising revenue, it can give away most of its products for free, relying on users to pass along knowledge to friends, family and colleagues.

Google is well aware of both the importance of its brand and the challenges it faces in enhancing and protecting the brand. The risk factor section of the S-3 to their recent follow-on offering explains that the business "depends on a strong brand." Google notes that its management of information raises privacy concerns, making the integrity of the brand that much more important.[54] Litigation involving Google is high profile, and as the legal issues get resolved, Google must also win in the court of public opinion.[55]

The IPO structure enhanced Google's brand image in several ways.

Playfulness and Geek Humor. The name Google derives from a mathematical term, Googol, which means the numeral one followed by 100 zeros.[56] From a branding perspective, Google appears at first glance to be an arbitrary word, like Apple or BlackBerry, with no obvious tie-in to the company. It also conveys playfulness, however, and tells an inside joke known to mathematicians. The mathematics tie-in is not deeply hidden, however. Instead, it's just hidden enough to trigger questions from business reporters, who then convey the clue to the public, letting them in on the joke. The name also conveys a functional meaning: Google can search large numbers of sites – a googol sites, perhaps – and offer the user the most relevant hits.[57]

The playfulness extended to the IPO. A story in *Wired* entitled "More Reasons to Love Google" explained that the amount of money that Google sought to raise, $2,718,281,828, was a bit of "geek humor."[58] 2.718281828 is the mathematical constant e, or Euler's number, which is the base of the natural logarithm function.[59] Google continued winking at the nerds in its follow-on offering in August 2005, selling 14,159,265 shares. The number represents the first eight digits after the decimal in the mathematical constant pi.[60]

And the auction process itself, of course, is interesting, fun, and intriguing. It is a technologically-savvy way to gather and manage information. Instead of web sites or maps, the information gathered and managed in the IPO was the price and allocation preferences of thousands of investors. Google IPO, like Google Search, Google Maps and Google Talk, became not just a transaction but a technologically-appealing method of managing information.

It would be quite a struggle to explain these choices – particularly the number of shares – with an unbranded, pure efficiency rationale. Like a monkey typing the

collected works of Shakespeare, an investment banking analyst given an infinite number of hours could eventually come up with a model that generates the eight digits of pi after the decimal point as the optimal number of shares. But the real story, of course, is about branding. The founders, it seems, recognize that the amount of money raised in an offering is somewhat arbitrary (at least within a range – notice that Google did not offer 31.4 million or 3.1 million shares). Instead of picking a round number, Google seized the moment to show the world how nerds conduct an IPO.

Integrity. Most search engines and internet portals are cluttered with links, ads, and promotions. The main Google search page, on the other hand, is mostly white space. Other than a few barebones links and the playful "I'm Feeling Lucky" button, the site concentrates on helping the user. The search results page is similarly clean. There are no pop up ads or banner advertising.

Google does not distort its search results, instead setting aside its Sponsored Links in a separate sidebar. It does not engage in "search engine payola."[61] Google's website explains,

> Advertising on Google is always clearly identified as a "Sponsored Link." It is a core value for Google that there be no compromising of the integrity of our results. We never manipulate rankings to put our partners higher in our search results. No one can buy better PageRank. Our users trust Google's objectivity and no short-term gain could ever justify breaching that trust.[62]

Many consumers may not care about payola, but for those who do, Google's approach is refreshing. Google's consistency with respect to integrity issues makes PageRank credible despite its relative lack of transparency.[63]

The Auction IPO enhanced Google's brand image by solidifying its reputation as being more concerned with integrity than insider profits. Dot com founders became millionaires by cashing in on IPOs.[64] Google's founders are billionaires, but their choice of deal structure reflects little desire to cash in quickly at the expense of long-term shareholders.

Egalitarianism. Google presents an image of being democratic and non-elitist. Google Search is freely available without a fee or even registration. Basic versions of fancier applications like Google Maps, Google Print and Google Earth are free. Even on the revenue-producing side, Google maintains an egalitarian bent. The cost of creating an account for Google's Adwords service is only $5, and there is no minimum ad spend required.[65]

The prospectus materials suggest that this egalitarian image was important to Google. The founders' letter, originally planned to go at the front of the prospectus, raised a predictable objection from the SEC. The founders felt it was worth the battle. Google fought the SEC over whether it could refer to the founders and the CEO on a first-name basis, even as it conceded other issues.[66]

The auction pricing mechanism played into this image. Rather than having underwriters set the price using the traditional book-building method, investors set the price for shares over the Internet. The voice of the people, not Wall Street insiders, set the price. The deal structure eliminated the favoritism problems that accompany the traditional process and gathered information in an even-handed manner.

The press ate it up. A Wall Street Journal article, *Google's Dutch Treat*, noted the fit between the IPO and Google's business model.

> "In a sense, this auction is the perfect IPO expression of Google's own business model. The company's success has derived from its ability to democratize access to information via the Internet, and its auction will likewise open its shares to a wide spectrum of investors."[67]

That sort of PR is hard to buy.

Internal Branding. Internal branding is the process of ensuring that employees embrace the brand and what it represents.[68] Branding can have an effect not just on customers, but on employees. Branding, in other words, is more than marketing.[69]

For a company that relies on intellectual capital, internal branding is especially important.[70] The auction structure fed into Google's nonconformist style.[71] The company calls its headquarters the Googleplex, and it is described as an open, informal space. Employees can bring their dogs to work. Google touts its corporate culture as collegial, flexible and collaborative. Google's website highlights the use of rubber exercise balls as office chairs and the hiring of Charlie Ayers, former chef to the Grateful Dead, as company chef.

F. The Branding Power of Auctions

Google is not alone in using the auction structure as a branding opportunity.[72] Other companies that have completed auctions include redEnvelope, Peet's, Salon.com, Overstock.com, Morningstar, and Ravenswood. The pattern suggests that companies that brand themselves as contrarian, egalitarian, and user-oriented are more likely to conduct Auction IPOs.[73] The

auction structure appears to be useful for cult brands (those seeking a devoted customer base and quirky or counterculture brand association) and integrity brands (companies whose business model depends on transparency or trust).[74]

Peet's Coffee and Tea and Ravenswood Winery are examples of cult brands.[75] Cult companies often position themselves in opposition to the market leaders. Google is anti-Microsoft. Apple is anti-Microsoft. Whole Foods[76] and Trader Joe's are cult brands positioning themselves opposite legacy supermarkets like Albertson's, Kroger, Safeway and Ralph's. Peet's Coffee and Tea is the anti-Starbucks.[77] Ravenswood Winery, with its motto "No Wimpy Wines," pushed red zinfandel and cultivates a contrarian brand image.[78] Other examples of specialty companies using an auction process to distribute stock include Salon.com (a non-traditional media outlet) and redEnvelope (an online gift retailer).

Overstock.com is an example of a company that seeks a savvy, knowledgeable consumer base. The company is an online outlet shopping site that specializes in liquidating excess inventory through direct internet sales. It also has an on-line auction branch. Its founder, Patrick Byrne, reported that he received little interest from venture capitalists, and he viewed the traditional IPO process with skepticism. The Overstock website includes an unusual letter to stockholders that stresses transparency and integrity and explains Overstock's conservative accounting.[79]

Morningstar is an example of an "integrity" company providing a credence good to savvy consumers. Morningstar is a financial services company that provides services to individuals, advisors, and institutions. The brand is one of the most recognized and respected in the investment industry. A traditional IPO – with its associations with underpricing, favored allocations and insider profiteering – could have undermined the Morningstar brand image. Morningstar emphasized its commitment to integrity in its IPO prospectus: it noted that it would not provide guidance to analysts (because of the inherent conflict it presents to management's personal financial interest) and that it voluntarily expensed its stock options on the income statement.[80]

Conclusion. It is difficult to measure the effect the deal structure had on Google's brand equity. But the evidence suggests that from a branding perspective, the deal was successful. Google's CEO has publicly speculated that publicity surrounding the IPO – no doubt attributable in part to the unusual deal structure – may have boosted revenues in that quarter.[81] By boosting revenues and increasing brand equity, the apparent dichotomy between branding and efficiency disappears. While the auction IPO may not have produced the maximum share price possible, it may have helped boost revenue, which in turn supports Google's current share price.

IV. CONCLUSION: THE MECHANISMS OF BRANDING DEALS

Google is just one case study. In the longer version of this Article, I discuss other examples where deal structure affected the brand image of a company. Finding the common thread, though, is a challenge. Is the branding effect accidental and unexpected, or can it be predicted? How does a decision about legal structure filter down to the point where it has an effect on consumers? Does branding a deal make sense for all companies, or only some?

The branding implications of deal structure are most important for companies that target early adopters or other opinion leaders, such as technology companies, firms that produce trendy or fashionable consumer goods, cult brands, and socially-responsible companies.[82] Deal structure is not likely to be an effective advertising medium for reaching large numbers of consumers. A typical ice cream purchaser or computer user doesn't know anything about IPOs. One particular class of consumers, however, is better educated, wealthier, smarter, more open-minded, more adventurous, and has a higher social status than your average consumer: early adopters.[83] And that is exactly who marketers try to reach to establish a brand image. Early adopters are sophisticated consumers who experiment with new products and, by word-of-mouth, spread the message to other consumers. Early adopters seek information about innovations more actively than later adopters and have higher degrees of opinion leadership.[84]

Using deal structure as a branding device thus seems especially well-suited for companies reaching out to early adopters to build a brand. These include technology brands, integrity brands, cult brands, and socially-responsible brands.

Technology brands. Technology products demand trust from consumers. Consumers must invest their time in learning how to use the technology on top of the financial cost. Many consumers, then, wait to adopt a new technology until a critical mass has already done so. This process – documented in detail in Everett Rogers' *Diffusion of Innovations* and more recently in Malcolm Gladwell's *Tipping Point* – shows the importance of early adopters, who act as a bridge between innovators and the majority of consumers.

Before an innovation can cross the chasm into widespread adoption, the manufacturer must win over the early adopters. When commercializing a product for wider distribution, companies sometimes make changes

to the product that produce short-term profits but weaken the technology. Unusual deal structures may allow technology companies to signal to consumers that notwithstanding the presence of all the bankers and lawyers, the nerds are still in charge.

Integrity brands and socially-responsible brands. Credence goods have qualities that the consumer cannot fully evaluate even after purchase and consumption.[85] Integrity brands are brands that generate a sense of trust where the integrity or social responsibility of the firm is an important product attribute. Examples include health care, financial services, education, environmentally-sensitive products, and organic foods.[86] With these products, the quality of the goods is difficult to measure even after purchase. A shareholder in a mutual fund can easily observe cash, but not opportunities for managerial rent-seeking;[87] a fine cup of Peet's coffee does not taste organic. The integrity and values of the managers serve as a proxy for the integrity of the process for producing the product. By signaling the integrity of the managers, deal structure can signal the quality of other attributes that are difficult to observe.

Cult brands. There is no settled meaning to the term cult brand. As I use the term here, I refer to products that have a strong expressive value. Ritual products – products that consumers buy through small, regular purchases lend themselves to this category. Companies that become part of a social routine, such as Coldstone Ice Cream, Starbucks and Peet's Coffee, and Krispy Kreme, may work well. Similarly, many entertainment products become a regular part of a consumer's day. ESPN, the sports network, brought a sense of journalistic integrity to sports coverage. KCRW, a public radio station in Los Angeles, rejects payola and instead offers "hand-picked" music from knowledgeable deejays.

Other cult brands include technology firms who aim to disrupt product markets by changing the user's relationship with the product. Examples include Apple (including not just the Mac but the iPod and iTunes), TiVo, NetFlix, Flickr (an online photo management site) and Facebook (a social networking site). Using such products tends not just to improve a consumers' functional relationship with the product but also to express identification as a contrarian. Apple is the anti-Microsoft, TiVo is anti-commercial television, NetFlix is anti-Blockbuster, and so on. For these products, the early adopter strategy is an obvious fit.

If this all sounds rather trendy, that's because it is. Cult brands rely on information specialists – fashion leaders or mavens – to convey the information to a broad consumer base. These fashion leaders, in order to maintain their status as leaders, must continually be on the lookout for new insights.[88] This also leads them to consume at the upper end of the merchandise spectrum.[89] Recall that consumers are not seeking (just) functionality, but rather seek to satisfy other social needs when they buy products.[90] Quality matters. But when a consumer's assessment of the quality of a product depends not just on intrinsic value but on what someone else thinks, strange things start to happen to demand curves and equilibrium prices. A few good (or bad) words from the right person can cause an avalanche.[91] With these fads and fashions, demand is unstable, exploding up or down in response even to small shocks.[92]

In sum, the structure of the Google IPO affected how consumers think about the company. Having staked its claim as a playful, innovative, trustworthy company – through the IPO structure and other strategic moves – Google is now held to a higher standard in the court of public opinion. Its ability to maintain its lofty image will be tested as it faces regulatory challenges and privacy concerns. One thing seems clear, though: the auction structure may have left some money on the table in the short run, but pre-IPO shareholders would hardly complain now.

ENDNOTES

[*] Acting Professor, UCLA School of Law. This Article draws heavily on a longer article, *Brand New Deal*, which appears in volume 104 of the Michigan Law Review. I thank the editors of the Michigan Law Review for their permission to publish this version in the Financier.

[1] Deal structures with positive branding effects that appear to be inefficient in the short term (e.g. by increasing the cost of capital) may be efficient in the long run by increasing revenue from product markets. In theory, if the capital markets recognize the positive revenue implications, there may not in fact be an increase in the cost of capital. This would make the deals efficient in both the short term and the long term.

[2] *See generally* Richard A. Brealey & Stewart C. Myers, Principles of Corporate Finance, (7th ed. 2002); Bernard S. Black & Ronald J. Gilson, The Law and Finance of Corporate Acquisitions (2d ed. 1995).

[3] If management shirks or lacks the talent to lead the company effectively, the firm will produce lower quality products, and customers will turn to competitors. In turn, this may turn the company into a takeover target or may lead shareholders to press the board to make a change in personnel. *See* D. Gordon Smith, *Corporate Governance and Managerial Incompetence: Lessons from Kmart*, 74 N.C. L. Rev. 1037 (1996).

[4] *See* La Marche de L'empereur (March of the Penguins) (2005).

[5] *See* G. Mitu Gulati, William A. Klein & Eric M. Zolt, *Connected Contracts*, 47 UCLA L. Rev. 887 (2000).

[6] *See* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Lawyers as Transaction Cost Engineers*, 94 Yale L. J. 239 (1984). Another important strand of the literature emphasizes the decision-making process and long-term contracts. See Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 Va. L. Rev. 1089 (1981); Oliver Hart, *Financial Contracting*, 34 J. Econ. Lit. 1079, 1083-98 (2001).

[7] *See, e.g.*, Michael C. Jensen, *Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers*, 76 Am. Econ. Rev. 323; Michael Jensen

& William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, 309-10 (1976) (discussing how agency problems can affect firm structure); Stewart C. Myers & Nicholas S. Majluf, *Corporate Financing and Investment Decisions When Firms Have Information That Investors Do Not Have*, 13 J. FIN. ECON. 187, 195-98 (1984) (examining effect of information asymmetry on firm structure).

[8] *See* Gilson, supra note 13, at 262-65 (explaining how an earnout agreement manages information asymmetry).

[9] See Gilson, supra note 13, at 246. *But see* Merton Miller, *Debt and Taxes*, 32 J. FIN. 261, 263 (1977) ("I will argue here that even in a world in which interest payments are fully deductible in computing corporate income taxes, the value of the firm, in equilibrium will still be independent of its capital structure.").

[10] For a discussion of the Columbia approach, *see* Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475.

[11] *See also* Manuel A. Utset, *Producing Information: Initial Public Offerings, Production Costs, and the Producing Lawyer*, 74 OREGON L. REV. 275 (1995) (drawing a distinction between the lawyer's role in managing transaction costs and the lawyer's role in producing information).

[12] For an overview of the legal framework that protects investments in reputation, *see* William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J. L. & ECON. 265 (1987).

[13] *But see* Jill Schachner Chanen, *The Strategic Lawyer*, ABA JOURNAL, July 2005, at 43, 45-47 (discussing increasing pressure for lawyers to think strategically about the business implications of legal decisions).

[14] The view of the lawyer-as-hired-gun is more of a straw man than an accurate depiction of how many transactional lawyers spend their time advising clients. *See* Ian Ayres, *Never Confuse Efficiency With a Liver Complaint*, 1997 WISC. L. REV. 503, 513. Most scholars and practitioners recognize that the line between business and legal issues is not so clear. *See* Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 407 (discussing dominant image of lawyer as independent counselor in connection with James Stewart's THE PARTNERS). They can "fill a managerial void with the uncommitted resources of intellect, energy, and experience that only large law firms have on tap, thus bolstering the corporation's adaptive capacities." *Id*. *See also id*. at 410 (describing aspects of dominant image of lawyers as counselors).

[15] Kagan and Rosen explain:

> More detached and independent than a corporate chief executive's subordinates, the lawyer can feel free to warn business executives that even if proposed actions do not violate the law per se, they might nevertheless be ethically questionable or might lead to popular or political attacks, adverse reactions by customers or competitors, or intensified governmental scrutiny."

> Kagan & Rosen, supra note 30, at 410. We are use to giving this lawyerly role the more dignified name of counseling. But when we talk about "popular or political attacks" or "adverse reactions by customers" we are already talking about branding. Kagan & Rosen believe, however, that the dominant image was in decline even as they wrote the article twenty years ago. *See id*. at 422-31.

[16] *See* Christine Hurt, *What Google Can't Tell Us About Internet Auctions (And What It Can)*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=753625.

[17] *See* John Battelle, THE SEARCH: HOW GOOGLE AND ITS RIVALS REWROTE THE RULES OF BUSINESS AND TRANSFORMED OUR CULTURE 213 (2005) ("In an interview with the San Francisco Chronicle in the fall of 2001, Eric Schmidt laid down what would become the triumvirate's standard answer to the IPO question. 'The IPO question we've debated internally, but frankly, we're profitable,' Schmidt said. 'We're generating cash. We don't ever need to go public.'").

[18] The company was already profitable by 2001. *See* http://www.sec.gov/Archives/edgar/data/1288776/000119312504073639/ds1.htm#toc16167_11.

[19] Becoming a back door public company also refers to a process where a larger privately held company mergers with a shell company that is publicly traded. I use the term here to refer to the accidental method of becoming a company required to make public filings simply by accumulating at least 300 stockholders.

[20] Another liquidity option is to borrow against the stock. Without a public market, however, lenders would have difficulty valuing the stock.

[21] Schmidt has acknowledged that the presence of venture investors (and their demands for liquidity) made an IPO inevitable. *See* Battelle, supra note xx, at 214.

[22] http://www.google.com/press/pressrel/picasa.html.

[23] http://www.google.com/press/pressrel/keyhole.html.

[24] http://www.google.com/intl/en/press/pressrel/urchin.html.

[25] *See* John Markoff, *14,159,265 New Slices of Rich Technology*, New York Times, August 19, 2005.

[26] Apple's "Think Different" ad campaign featured pictures of creative thinkers like Einstein, Jim Henson, John Lennon, [others]. Apple received some flak for the apparent grammatical error, although some have pointed out that different may not be an adverb modifying think, but instead as an acceptable vernacular use as an object of the verb think, like "think big" or "think playful." See http://www.bu.edu/celop/mll/call/TechNote-think_different.html; http://www.inventionconvention.com/grammar.html.

[27] *See* Christine Hurt, *Moral Hazard and the Initial Public Offering*, 25 CARDOZO L. REV. (2004).

[28] *See id*.

[29] *See* Janet Cooper Alexander, *The Lawsuit Avoidance Theory of Why Initial Public Offerings are Underpriced*, 41 UCLA L REV. 17 (1993); Sean J. Griffith, *Spinning and Underpricing: A Legal and Economic Analysis of the Preferential Allocation of Shares in Initial Public Offerings*, 69 BROOK. L. REV. 583, 658-661 (2004) (arguing that IPO allocation practices harm issuers, and proposing that individuals should be barred from participating in IPOs); Richard A. Booth, *Discounts and Other Mysteries of Corporate Finance*, 79 CALIF. L. REV. 1055, 1095 (1991) (noting growth in popularity of Dutch Auctions); Richard A. Booth, *The Efficient Market, Portfolio Theory, and the Downward Sloping Demand Hypotheses*, 68 N.Y.U. L. REV. 1187, pin (1993) (arguing that downward sloping demand curve explains underpricing phenomenon)

[30] *See* Yoram Barzel, Michel A. Habib & D. Bruce Johnsen, *Prevention is Better than Cure: The Role of IPO Syndicates in Precluding Information Acquisition* (Oct 2004 SSRN draft on file with the author).

[31] *See id*. at 1.

[32] A few legal scholars believe that egalitarian concerns have no place in the IPO regulatory landscape. *See* Ely R. Levy, *The Law and Economics of IPO Favoritism and Regulatory Spin*, 33 SW. U. L. REV. 185, 216 (2004) (arguing that pro rata allocations are harmful because they interfere with the price-revealing mechanism that institutional investors provide as part of the book-building process). Most legal scholars, however, believe that transparency and democratic access are important values to be protected by regulation. *See, e.g.,* Sean J. Griffith, *The Puzzling Persistence of the Fixed Price Offering: Implicit Price Discrimination in IPOs*, manuscript on file with the author, at 17 ("The loser in this bargain is the issuer and, of course, the transparency and efficiency of the primary market.").

[33] See http://www.sec.gov/about/whatwedo.shtml.

[34] Selling stock through auctions has historically been more common overseas.

[35] In a pure dutch auction, bidders pay the price they bid, not the clearing price.

[36] Even in a Dutch Auction, some underpricing may be necessary to avoid the winner's curse phenomenon or to compensate investors for risk.

[37] Ironically, this may lead institutional investors to react like Groucho Marx: because anyone can participate, it's not clear why anyone would want to participate. Without underpricing, investors have no incentive to bid on the IPO stock, since they can wait and acquire the stock in the secondary market at the same price.

[38] *See* Anita Indira Anand, *Is the Dutch Auction IPO a Good Idea?* (working paper, Sept. 1, 2005 draft, on file with the author). Anand points to institutional considerations that make price discovery more efficient in book-built offerings, *id*. at 11-18; analyzing the IPO process as a public good, she argues that the results of allowing unimpeded access to retail investors may be undesirable from a market efficiency standpoint, *id*. at 22-30. Anand notes that larger, more widely-known issuers may benefit from an auction mechanism (particularly for seasoned offerings); perhaps somewhat generously, she describes Google's IPO as successful from an efficiency standpoint. *Id*. at 33.

[39] *See* Peter B. Oh, *The Dutch Auction Myth* (manuscript on file with the author).

[40] Friends of Frank refer to friends and clients of CSFB's Frank Quattrone, who led many of the high profile tech IPOs. Friends of Frank received allocations of underpriced IPO shares in return for the promise of future investment banking business.

[41] *See* Victor Fleischer, *Google as Regulatory Entrepreneur*, A Taxing Blog (April 26, 2005), available at http://vic.typepad.com/taxingblog/2005/04/google_as_regul.html.

[42] *See* Hurt, supra note xx, at 8; Wit Capital Corp. SEC No-Action Letter, 1999 WL 49854 (July 14, 1999); W.R. Hambrecht & Co., SEC No-Action Letter, 2000 WL 987735 (July 12, 2000); Bear, Stearns & Co., Inc., SEC No Action Letter, 2000 WL 1013584 (July 20, 2000); Wit Capital Corp., SEC No-Action Letter, 2000 WL 1013585 (July 20, 2000).

[43] *See* Hurt, supra note xx.

[44] *See id*. at 14.

[45] If the magazine article violated the gun-jumping rules, investors would constructively acquire a put option along with the Google shares. This may help explain the underpricing of the deal, as the underpricing moves the strike price of this constructive put option out of the money.

[46] James J. Cramer, *How to Buy Google:* After *the Deal*, RealMoney.com, Aug. 18, 2004, quoted in Hurt, supra note xx, at 23.

[47] *See* Ronald J. Gilson & Reinier Kraakman, *The Mechanisms of Market Efficiency*, 70 Va. L. Rev. 549 (1984).

[48] The auction structure may also have encouraged a post-IPO increase in revenue by spreading ownership of the stock out more broadly. Search engines have network effects, and broad-based stock ownership may nudge investors to use Google. I am indebted to Bruce Johnsen for identifying this point.

[49] A more formal way of stating this idea is to consider the positive externalities of the IPO. Some economists have noted the effect. *See, e.g.*, Alexander Ljungqvist, *IPO Underpricing*, in Handbook in Corporate Finance: Empirical Corporate Finance (B. Espen Eckbo ed.) at 1 ("The act of going public itself shines a spotlight on the company, and the attendant publicity may bring indirect benefits, such as attracting a different caliber of manager.")

[50] *See* Victor Fleischer, *Law Porn and the Branding of Legal Education*, Conglomerate, August 12, 2005, available at http://www.theconglomerate.org/2005/08/branding_legal_.html.

[51] *See* I.P.L. Png & David Reitman, *Why are Some Products Branded and Others Not?*, 38 J. Law & Econ. 207, 209 (1995) ('[S]ellers are more likely to brand when consumers find personal search and experimentation relatively unattractive.")

[52] *See* Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. Pol. Econ. 615 (1981).

[53] On early adopters, *see generally* Everett M. Rogers, Diffusion of Innovations (5th ed. 2003); Malcolm Gladwell, Tipping Point: How Little Things Can Make a Big Difference (paperback ed. 2002).

[54] Google explains, "For example, people have raised privacy concerns relating to the ability of our Gmail email service to match relevant ads to the content of email messages. In addition, some individuals and organizations have raised objections to our scanning of copyrighted materials from library collections for use in our Google Print product." See http://sec.gov/Archives/edgar/data/1288776/000119312505170553/ds3.htm.

[55] *See* Brad Hill, *Perfect 10 vs. Google,* The Unofficial Google Weblog, Aug. 29, 2005, available at http://google.weblogsinc.com/entry/1234000483056531/; Victor Fleischer, *Google's Copyright Problem and Dr. Evil*, A Taxing Blog, June 30, 2005, available at http://vic.typepad.com/taxingblog/2005/06/googles_copyrig.html.

[56] See http://www.google.com/intl/en/corporate/history.html.

> The company website explains,Google is a play on the word **googol**, which was coined by Milton Sirotta, nephew of American mathematician Edward Kasner, and was popularized in the book, "Mathematics and the Imagination" by Kasner and James Newman. It refers to the number represented by the numeral 1 followed by 100 zeros. Google's use of the term reflects the company's mission to organize the immense, seemingly infinite amount of information available on the web.
>
> Id.

[57] *See* Google Corporate Information: Company Overview, available at http://www.google.com/corporate/index.html.

[58] *Cf. Top ln(e^10) reasons why e is better than pi*, http://www.mu.org/~doug/exp/etop10.html

[59] *See* Battelle, supra note xx, at 217 ("By manipulating the actual offering to provide this knowing wink to nerd humor, Google was in effect declaring: *the geeks are in control.*")

[60] Word of mouth spread the math joke quickly around Wall Street. Interview with Scott Pintoff, General Counsel, GFI Group, Inc., August 18, 2005 (notes on file with the author).

[61] *Compare* Victor Fleischer, *Search Engine Payola*, Conglomerate, August 9, 2005, available at http://www.theconglomerate.org/2005/08/search_engine_p.html, with Joshua Wright, *Google and Search Engine Payola*, Conglomerate, August 8, 2005, available at http://www.theconglomerate.org/2005/08/google_and_sear.html. *See generally* Ronald Coase, *Payola in Radio and Television Broadcasting*, 22 J. L. & Econ. 269 (1979).

[62] *See* http://www.google.com/corporate/tenthings.html.

[63] Integrity is especially important for Google as it grows. Market research shows that a corporate image strategy can affect corporate credibility and increase the acceptance of brand extensions. *See* Kevin L. Keller, Strategic Brand Management: Building, Measuring, and Managing Brand Equity (2d ed. 2003) 546; Kevin L. Keller & David A. Aaker, *The Effects of Sequential Introduction of Brand Extensions*, J. Marketing Research 29, 35-50 (1992). A company with an innovative corporate image is viewed as an expert in the area. Research also shows that innovative companies are also seen as trustworthy and likable. A brand image of credibility may be especially important for high-tech companies, because the products themselves change quickly over time. A leading marketing professor explains, "In a high-tech setting, trustworthiness also relates to consumers' perceptions of the firm's longevity and staying power. With technology companies, the president or CEO often is a key component of the brand and performs an important brand-building and communication function, in some

cases as an advocate of the technology involved." *See* Keller, Strategic Brand Management, supra, at 741.

[64] The self-satisfied greed of the era was captured in the documentary STARTUP.COM, where one manager refers to himself as a "lowly millionaire," as contrasted with the company's founders, who would become billionaires.

[65] *See* Google Corporate Information: Quick Profile, available at http://www.google.com/corporate/facts.html.

[66] *See* Verne Kopytoff, *How SEC Held Search Engine's Feet to the Fire in its IPO Filing: Lengthy Give-and-take Unfolds in Letters with Regulators*, S.F. CHRONICLE, August 14, 2005, available at http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2005/08/14/BUG5NE7E7U1.DTL&type=business.

[67] *See* WALL ST. J., May 3, 2004, at A20.

[68] *See* Keller, STRATEGIC BRAND MANAGEMENT, supra note xx, at 156.

[69] *See* Lynn B. Upshaw & Earl L. Taylor, THE MASTERBRAND MANDATE: THE MANAGEMENT STRATEGY THAT UNIFIES COMPANIES AND MULTIPLIES VALUE ix (2000) (noting that branding tends to be compartmentalized as solely a marketing tool).

[70] *See* Nicholas Ind, LIVING THE BRAND: HOW TO TRANSFORM EVERY MEMBER OF YOUR ORGANIZATION INTO A BRAND CHAMPION (2d ed. 2004), ch. 4 (discussing the importance of values to organizations).

[71] *See* Battelle, supra note xx, at 215.

[72] Finance scholars have noted the possibility that underpricing may enhance branding. Evidence is mixed. *See* Larry L. DuCharme, Shivaram Rajgopal & Stephan E. Sefcik, *Lowballing for "Pop": The Case of Internet IPO Underpricing*, at 5 (January 2001 draft on file with the author) (finding a strong association between media hype and underpricing, but also finding "mixed" evidence of a branding effect, specifically finding that although underpricing is higher for B2C firms, sales increases post IPO are not significantly related to the extent of underpricing).

[73] A complete list is available at http://www.openipo.com/ind/auctions/index.html

[74] *See* Michael Levine, A BRANDED WORLD: ADVENTURES IN PUBLIC RELATIONS AND THE CREATION OF SUPERBRANDS 107 (2003) (discussing "soul branding," or the notion that companies that appeal to the soul will eventually dominate the market, as a growing contingency of consumers are willing to pay a bit more for a product if it helps a worthy cause).

[75] Peet's used the auction process for a follow-on offering, not its IPO. The company went public in 2001, before Hambrecht had tried out the OpenIPO system.

[76] Whole Foods did a traditional IPO. Other deals, however, reflect sensitivity to branding concerns. For example, it refuses to accept slotting fees.

[77] *Cf.* AUSTIN POWERS: THE SPY WHO SHAGGED ME (1999). Peet's, ironically enough, was the original owner of the Starbucks brand. It started as the "Starbuck's Coffee Company" in 1971 before acquiring Peet's Coffee and Tea in 1984. It sold its Seattle-based assets, including the Starbucks brand, to Il Giornale coffee company in 1987. See http://www.openipo.com/tradfo/peet/20020419.pdf at 30-31.

[78] Ravenswood does not go so far as to push white zin. No one is that daring.

[79] http://www.shareholder.com/overstock/owners.cfm

[80] See http://www.openipo.com/ind/auctions/openipo/morn/morn20050502.pdf at 27.

[81] *See* Paul Kedrosky, *Google Needs Guidance Guidance*, INFECTIOUS GREED, July 21, 2005, available at http://paul.kedrosky.com/archives/001570.html (quoting Google CEO Eric Schmidt as noting that Q3 2004 was particularly strong for Google "because of improvements in our ability to monetize traffic and perhaps because of the publicity surrounding our IPO approximately a year ago.")

[82] For a discussion of innovators, early adopters, and the diffusion of innovation, see Everett M. Rogers, Diffusion of Innovation (5th ed. Year); Geoffrey A. Moore, Crossing the Chasm: Marketing and Selling High-Tech Products to Mainstream Customers 9-25 (rev. ed. 2002).

[83] See Everett M. Rogers, Diffusion of Innovations 288-90 (5th ed. 2003).

[84] See id. at 292. Particularly for deals with subtle branding implications, like an auction IPO or a policy against slotting allowances, branding is only relevant to the extent PR about the deal reaches financially sophisticated consumers. The socioeconomic status of early adopters makes them a natural fit.

[85] *See* Michael Darby & Edi Karny, *Free Competition and the Optimal Amount of Fraud*, 16 J. L & ECON. 67 (1973). *See also* George Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961); Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311 (1970).

[86] See Jason Scott Johnson, Signaling Social Responsibility: On the Law and Economics of Market Incentives for Corporate Environmental Performance, at 70 (working paper on file with the author) (describing CSR as a credence good); see id. ("The things that SR consumers and investors care about – the environmental, health and safety effects of a company's operations – are what economists call credence goods, goods that the consumer (or investor) never actually learns about fully, even after buying and consuming the good (or investing in the stock).") See also Timothy J. Feddersen & Thomas W. Gilligan, Saints and Markets: Activists and the Supply of Credence Goods, 10 J. Econ. & Manage. Strat. 149 (2001) [VF to check cite].

[87] See William Birdthistle, SSRN draft.

[88] *See* Gary S. Becker & Kevin M. Murphy, Social Economics: Market Behavior in a Social Environment 140 (2000) ("Alert leaders recognize that their distinctive behavior is only temporary, and are on the lookout for new ways to be distinguished from the followers who are closing the gap in behavior.")

[89] *See id.* at 97 ("Leaders end up consuming excessively high quality merchandise in competitive markets in order to be separated from other consumers.")

[90] *See id.* at 97 ("Consumers are largely paying for image, prestige, and distinctiveness, which are social rather than material characteristics of certain products.")

[91] *See id.* at 79 ("The general conclusion is that competition in social markets may magnify small differences in perceived quality among classes of objects into very large differences in equilibrium prices."

[92] *See id.* at 136 ("The positive slope … does not mean that demand in that interval rises as the price of the good increases, but rather that each household's willingness to pay for this good increases greatly as other households are consuming more of the good . … In other words, demand is unstable in this interval, and explodes up or down in response even to small shocks.")

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