



## Kicking and screaming?

It remains to be seen whether patent owners will need to be dragged kicking and screaming into the 21st century

Most patent portfolio owners fear patents being transacted like tangible assets. The reasons are complex, cultural as well as financial. But it is the lack of information about reliability and transaction specifics that they fear most.

Many companies still view patents as little more than necessary legal documents. However, developments such as patent auctions and other approaches that serve to mark-to-market worthwhile IP have caused some to view a lack of financial IP strategy as short-sighted. Informed shareholders already are putting pressure on managements to view strategic IP for the assets they are (and are not), and active IP management as a core business competency.

No other asset class rivals patents' lack of certainty and patent transactions' lack of what the financial markets call transparency. Further complicating matters are inconsistent rulings and high costs associated with patent infringement. Companies with significant product revenues cannot always tell when they will be slapped with a patent suit or injunction. For many, patents as investments are a recipe for anxiety. But those who dare to squeeze more profit from the rights to practise inventions are a growing and increasingly vocal presence.

### Sophisticated sportsmen

When it comes to deal scrutiny IP is where venture capital was maybe 30 years ago. Largely the preserve of a few investor-sportsmen, such as the Whitneys and Rockefellerers, transactions took place under the radar. Few cared to change it. Success of this asset class, accompanied by greater awareness, led to higher multiples for all. The genius of the early VCs was that rather than hide from scrutiny, they quietly embraced it. These investors, financial engineers in many ways, learned quickly that not only is limited self-disclosure more palatable than government regulation, it is also good business.

The impact was to create a comfortably unregulated market with disclosed pricing and structure. The inevitable demystifying of venture capital investing created more opportunities for different types of investors and more capital for emerging companies. Today, venture capital still is principally an unregulated industry. There are many types of venture investors and dozens of periodicals and newsletters that cover private equity and portfolio company performance. The news is surprisingly detailed about buyers, sellers, prices and terms. None of this disclosure is required.

Transparency is no guarantee of success. Venture investments still lead to far more failures than successes. But limited disclosure of IP licences, asset sales and financial transactions helps to make more accessible a complex and difficult asset class. It affirms that some assets clearly are more worthy than others, and that many are taking innovation rights as seriously as tangible corporate assets. It also allows investors to make better informed decisions. More information will not prevent investors from making mistakes, but it can provide the background for intelligent decision making.

Joseph R. Flicek is managing director of Amphion Innovations plc (New York and London, LSE: AMP), which develops and finances innovative companies. He believes that understanding a company's intellectual property position is essential. "Public companies are required to convey great detail about the status of tangible assets that they develop or acquire," he says, "but little or nothing about what are often their most important assets, their IP. This can understate, or overstate, the real progress of a company and its value to investors."

### Make markets, not war

Fewer than 3% of the patents in most high tech portfolios have any value. Identifying which ones do is daunting. Short of patent litigation it is difficult to know what a valid patent or family of patents is worth at a given time. While litigation can help put a number on the table, it is painfully inefficient as pricing mechanism.

"Compared with other assets classes, IP is more difficult for investors to value, but that

doesn't mean it should not be," says Robert Kramer, managing partner of Altitude Capital Partners, a private investment fund that focuses on IP that recently closed a US\$200 million round of financing. "IP transactions require more complex and costly due diligence and developments in the courts need to be interpreted for their financial impact."

Some say that IP transactions, by nature, cannot be too broadly disclosed; that anonymity and strategy go hand in hand. I don't buy that. As with venture deals, a lot of information can be shared without compromising competitive advantage. Doing so serves the interests of companies, shareholders and inventors alike.

Companies with significant IP holdings, which are confident about their value, should encourage others to bring on the competition. If they have the goods, it can only improve valuations. Companies that maintain stockpiles of patents that do not read on the right products run the risk of seeing their IP strategy tumble like a house of cards. Today, they can do something about it.

In increasing numbers, well capitalised patent owners, by whatever name they are called, are refusing to cower before patent stacks that they believe may be flawed. Portfolio owners should welcome this new found confidence in the emerging IP markets as a wake up call; an opportunity to quietly improve their position and possibly avoid costly disputes.

Whether through public or private auction, or one-on-one trade, or through private equity investment, IP transactions are here to stay. Most companies eventually will engage in them. IP asset transfers have the ability to enhance shareholder value, improve returns on R&D and foster innovation. Some will no doubt be keys to unlock future profits. Let the deal making begin.

*Bruce Berman is president of Brody Berman Associates in New York, where he works closely with IP owners and advisers. His latest book is Making Innovation Pay – Turning IP Into Shareholder Value (Wiley 2006). The views expressed above are Bruce Berman's and do not necessarily reflect those of Brody Berman Associates  
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