



## IP Investor Bruce Berman

# Who owns IP?

**As intellectual property moves to the centre stage of business concerns, there is a growing need for senior executives to devise and then implement successful IP management strategies. Investors expect nothing less**

More people have a business interest in intellectual property than appear to. Unfortunately, only some are aware of this fact.

Patents, copyrights, brands and other intangible assets are now too important for IP stakeholders to abdicate a role in their strategy and performance. Business decisions need the guidance of patent counsel, but they also require the input of R&D, licensing executives and investment bankers. Even more important, they need the vision and leadership of informed senior management.

"IP has got to be on the CEOs' radar screen as something worthy of their attention," Nicholas Godici, USPTO Commissioner for Patents, told a diverse group of IP experts at a Washington, DC roundtable recently. "Frankly, what we have not seen in Washington are CEOs stepping up to the plate to show that they are actually aware of intangible assets and the need to identify their importance. Either they are unaware of the problem or are uncomfortable discussing it."

As Godici suggests, an appreciation of the role patents play in attaining overall business objectives currently evades most senior managers. Understanding the subtle interplay between innovation, law and markets only looks like rocket science. Those with a vested interest in IP need to participate in decision-making. Key players should include senior management, especially CEOs and CFOs, as well as company directors and financial advisors.

Two decades ago, if someone waved a patent – strike that, a patent *application* – in front of a venture capitalist, he or she likely would have written a cheque for an interest in the new company. Today, smart bankers are asking questions about claims, prior art, and competitive patent terrain. Some are even funding receivables from patent damages awards. Others are modeling the cashflow

from patent royalties for potential securitisations. These days, financial analysts covering pharmaceutical companies obsess over patent expirations and FTC pronouncements that can dramatically impact stock prices. In a few short years, IP investors will find it increasingly difficult to get by without at least a modicum of patent literacy.

Best practices are beginning to emerge. Savvy shareholders are starting to view suspiciously mishandling of fiduciary obligations associated with IP. In the US, Financial Accounting Standards Board (FASB) rules 141 and 142 have forced managements and, in turn, institutional investors, to focus on intangibles, such as patents and other proprietary rights. Starting in 2002, the FASB began requiring companies that acquire intangible assets to write them down within 12 months should they fail to meet certain impairment tests. This is a wake-up call for managements to get a handle on all their IP whether or not it plays a role in transactions. Previously, non-performing intangibles were swept into goodwill and amortised over a period of years, sometimes decades. Such strategies will no longer be easy to justify.

In future *IP Investor* columns, I plan to discuss those who have learned how to secure significant returns from IP assets. People who talk about IP can be found at almost every conference and courthouse, but those who truly understand what IP assets mean and how to deploy them are few and far between. They include business speculators, licensing executives, technology transfer experts, patent litigators, valuation specialists, and even independent inventors. For the most part, lead players in IP success stories prefer to remain out of the limelight. However, in spite of their low profile, many are emerging as among the leaders of the knowledge economy.

The fact is that IP assets are not that different from real estate. While the market for patent rights is illiquid, transactions rarely transparent, and valuations difficult to calculate, patents are embedded in the economic foundation of what most developed nations now produce. In the *Harvard Business Review* (January 2000), Kevin Rivette and David Kline estimate worldwide licensing royalties at \$120 billion. IBM earned about \$1.7 billion from royalties in 2002, about

\$500 million of which were from patents. Profit margins on patent licensing are well over 90%. Qualcomm generated about \$750 million over the same period and plans to do little if any manufacturing. Its business model relies on the high margin profits generated from patent royalties. Manufacturing products derived from new technology is a risky proposition. By the time a plant gets built and put on line, a couple of years and billions of dollars are likely to have been expended. Without sufficient ROI, it may be a bigger risk *not* to seek patent royalties than to rely on the protection of what appear to be defensive patents.

Former Microsoft Chief Technology Officer and ThinkFire Services Chairman, Nathan Mhyrvold calls the exclusivity afforded to patentees "the illusion of exclusion". Indeed, for Mhyrvold there are few "Rembrandts" in the attic. Mostly, there are moths. The so-called patent masterpieces are where most people think they are: in the museum (or the homes of the wealthy). The real mystery is which patent strategies extract maximum value and help companies fulfill their shareholder obligations?

Future installments of *IP Investor* will explore the expanding role of investors, managers and advisors in securing IP returns.

**Bruce Berman** is editor of "From Ideas to Assets – Investing Wisely in Intellectual Property" (Wiley), an IP bestseller. His previous book was "Hidden Value" (Euromoney Institutional Investor). Bruce is president of Brody Berman Associates in New York, where he works closely with IP owners and advisors. He can be reached at [bberman@brodyberman.com](mailto:bberman@brodyberman.com).