

# The team player



Horacio Gutierrez has been Microsoft's chief intellectual property officer for three years now. In that time he has built a 200-strong team and dealt with issues fundamental to the company's future

By David Kline

The members of the Intellectual Property and Licensing (IP&L) finance team sat in a conference room on Microsoft's main Redmond, Washington, campus last 9th March, trying to get to grips with a problem that has long confounded corporate IP departments around the world. Interestingly, the issue under discussion was not how to achieve IP&L's ambitious goals despite the recent imposition of a 15% budget cut in response to the current economic crisis. Efficiencies, after all, were already in place that had reduced the cost of a first patent filing by 43%. And new cost-saving initiatives underway would further streamline the cost of building, maintaining and leveraging Microsoft's IP portfolio.

Rather, the question that really stretched the minds of finance team members during its bi-annual Practice Business Review session with corporate vice president and IP&L chief Horacio Gutierrez was how, precisely, to develop quantitative metrics by which to assess the strategic business value of the company's IP strategy.

Taylor Hawes, who was then just 64 days into his job as IP&L's new CFO, summed up the challenge: "How do we develop a common framework and language to understand and measure the benefits and costs of various IP strategies?"

Gutierrez put the issue in even simpler terms: "We know our job is to use our IP

portfolio to support the company's business objectives. But how do we know if we're successful?"

## A question of metrics

During the meeting, team members reported on the work done to date in developing various quantitative metrics to assess the business impact of the company's IP strategies. While many of the specifics of their discussion are confidential, suffice it to say that the objective of this unique IP&L initiative is to be able to determine more reliably the value of, say, a cross-licence with a large company in a market in which Microsoft would like to do business, compared to the costs and benefits of taking a different approach – building a portfolio of its own, for example, or acquiring a third-party portfolio.

It's not just a simple matter of running some net present value scenarios; not when each of the potential IP strategies under consideration involves complexities that would challenge even the most Type A, numbers-driven individual (and Microsoft is famous for filling its employee ranks with such people).

As Gutierrez put it: "When you look at your product and technology road maps, you need to ask which innovations differentiate our offerings from others in the market, and what sort of IP protections will enable greater market success and in turn increase our ability to invest in future innovations? And, what's the best path for securing those rights? Will we have the time and money to build our own portfolio? Or conversely, does it make sense to facilitate collaborative innovation with others through something like a patent cross-licence? What rights would I have to trade for the rights the other company would give me? And what would be the

competitive implications of that bargain?"

At that, one member of the team sighed and said: "My head hurts." Everyone laughed, providing a brief respite from the tension.

This new IP metrics initiative at Microsoft could potentially have relevance for other corporate IP departments. As Gutierrez noted in a later interview: "We've all heard the complaint for years that the kind of work that we do in IP really can't be measured quantitatively since so much of it is strategically oriented. Legal work especially has always been seen as quality driven, not numbers driven. And it's certainly true, you know, that when you get into issues of strategy, numbers really don't tell the full story."

But, he continued, there is always something that can be measured: "Sometimes the best you can do is find proxy measures. But if you combine quantitative measures of the impact of your IP investments with the more strategic business considerations, which are by nature more subjective and qualitative, you're going to get a much more accurate picture of the business value you're generating for the company. Not perfect, but a much better picture."

Of special significance for corporate IP leaders everywhere, he believes, is the possibility that as such metrics continue to be developed, they will help to propel IP strategy issues more forcefully into corporate executive suites, where they rightfully belong. "CEOs understand metrics," Gutierrez notes. "They understand the bottom line. So this allows you to have a conversation with business leadership in terms they can naturally relate to."

### An unlikely path

The strategy metrics effort is just one of a number of innovations in Microsoft's 205-person IP group that the 44-year-old Gutierrez has undertaken since he succeeded Marshall Phelps as Microsoft's chief intellectual property officer three years ago. One might imagine that it has not been easy stepping into the shoes of such an outsized personality as IP Hall of Famer Phelps, who attracted worldwide notice when he came to Microsoft in 2003 and committed the company to a more open and collaborative IP licensing policy. This was in contrast to its previous fortress mentality approach of jealously guarding its technology. But Gutierrez, by nature more reserved and even self-effacing in his manner, appears at least on the surface to be unfazed by the challenge. Perhaps that's because he's so focused on translating Microsoft's collaborative IP



vision into concrete programmes that create tangible business value for the company.

Says chief trademarks, copyrights and trade secrets counsel Tom Rubin: "Marshall came in and tore down the old building and poured a new foundation. Horacio is the guy who rolled up his sleeves and built a very successful IP programme on top of that foundation."

Indeed, Gutierrez has accomplished a good deal during his three-year tenure and his plans for the future suggest more is to come. He led the team during Microsoft's 2006 negotiations with Novell, for example, that came up with the creative work-around to the restrictive patent provisions of the open source General Public License – providing a covenant not to sue to customers rather than licensing patents directly to Novell. This led to the world's first-ever IP collaboration between an open source and proprietary software firm.

Gutierrez also created new IP policy and IP communications teams within IP&L to help Microsoft engage more effectively in the intensifying global debate over patent reform and the role that intellectual property plays in innovation and economic development. In addition, he stepped up efforts to deploy an outside virtual law firm and also started offshoring some technical analysis and other operational tasks to India that have to date reduced the average cost to the company of a first filing of a patent in the US from over US\$14,000 to US\$8,000. Gutierrez has also launched several experimental changes in IP&L's structure that have improved the ability of its various teams to help support innovation strategy within each of Microsoft's five major business groups in order to enable them to meet their market and business objectives more effectively.

### Practice Business Review, Redmond, March 2009

Gutierrez (centre) talks to Tom Rubin (copyrights and trademarks); to his right Taylor Hawes (CFO), then Bart Eppenauer (patents) and David Kaefer (licensing) leaning back

Even the twice-yearly Practice Business Reviews, during which each of IP&L's six practice teams (patents, licensing, IP policy, trademarks and copyrights, customer advocacy and finance) summarises the state of play in its work and the key challenges ahead, are an innovation Gutierrez brought from his previous position in Paris as head of Microsoft's Law and Corporate Affairs Department for Europe, the Middle East and Africa.

"With everyone so geographically dispersed, the only way to really keep my finger on the pulse of the work was to bring people together to talk in person about the challenges they were facing," he explains. "The PBRs also helped break down the inevitable silo mentality of each team. The benefits of these practice reviews were so clear to me that when I later took over the IP&L group, I decided to employ the same process here in Redmond."

Gutierrez came to his current role at the helm of Microsoft IP&L by a rather serendipitous route. Born and raised in Venezuela, he received his bachelor's and then his postgraduate degrees in law from the Catholic University of Venezuela (he would later also earn a master's degree from Harvard Law School and a *juris* doctor degree from the University of Miami). Upon graduating in 1986, he began working for a local law firm that represented a number of international clients. He developed expertise in corporate law and cross-border financing. He was also one of the few attorneys in Venezuela at the time registering copyrights for software.

In the mid-1990s, he came to the US and took a job at Morgan, Lewis and Bockius in Miami, where he specialised in IP issues in Latin America. A few years into his stint at the firm, Gutierrez wrote an article for a law review on how companies should deal with international liability issues in addressing the much-feared (at the time) Year 2000 bug.

"After that article was published," Gutierrez recalls, "I got a call from someone in the Microsoft legal department asking to meet with me in their Fort Lauderdale office. And I was very excited. I thought, 'I'm going to land Microsoft as a client!' So I showed up at the meeting with my suit and tie and a litigator's case full of brochures about the firm."

But the Microsoft representative had other plans. "We're not interested in the firm," he told Gutierrez. "We want to talk to you about joining Microsoft."

Gutierrez says it took him quite a while to make up his mind. "But the more I

thought about it, the more excited I got about the possibility of working with a leading company like Microsoft and dealing with all these cutting-edge legal issues around computer law, intellectual property and competition law that were just gaining prominence at the time."

So he joined Microsoft's Fort Lauderdale office in 1998 as the company's lead commercial lawyer for Latin America and the Caribbean (excepting Brazil, which was the responsibility of a Brazilian attorney hired the same day as Gutierrez). There he continued to focus on software licensing, IP and international competition law. It was an experience which would prove especially valuable when Microsoft asked him two years later to move to Redmond and become the lead lawyer for the company's volume software licensing programmes.

### Competition challenges

What does international competition law have to do with volume software licensing? More than you'd think, actually. But software licensing was merely Gutierrez's day job. Brad Smith — at the time a deputy general counsel for international law and corporate affairs, and now the company's general counsel — asked him to help develop some of the evidence for the European antitrust investigations against Microsoft then getting underway. This required Gutierrez and a colleague to spend a good deal of time travelling around Europe and obtaining written testimony from some 50 customers and partners on Microsoft's IP practices and the level of interoperability offered in the company's products compared to those of other businesses.

So it did not come as a complete surprise when the company asked him in 2002 to relocate to Paris and lead its law and corporate affairs work for Europe, Africa and the Middle East. Four years later, when Phelps shifted to an ambassadorial role as corporate vice president of IP policy and strategy, Gutierrez was called back to Redmond to lead the day-to-day work of IP&L.

The imprint of Gutierrez's efforts at the intersection of international competition law and IP policy is evident in IP&L's work today. Take the IP Policy function, which Gutierrez initiated 15 months ago. The team is led by Richard Wilder, formerly director of the Global Intellectual Property Issues Division of the World Intellectual Property Organization (WIPO). Wilder also previously worked with the Bill and Melinda Gates Foundation on its global health efforts. The IP Policy team's mission is to develop a range of global policy



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**IAM exclusive - Brimelow to quit as EPO President**

Alison Brimelow will not seek reappointment as President of the European Patent Office (EPO) when her current term expires at the end of June 2010, it was announced today. Rosemary Brimelow, Media Relations at the EPO, told IAM this afternoon: "Yes, I can confirm to you that she has informed the EPO staff today that she will not seek an extension of her current term in 2010."

Brimelow became President of the EPO in July 2007. She succeeded French President Catherine Pohl who assumed office in 2004. Pohl and Brimelow have shared the current presidency after member states of the European Patent Organisation were asked to elect a new President who should succeed the German Ingo Kober who had held the Presidency since 2002.

Member states will now face a difficult task in selecting a new President. The job is at a delicate time, when the EPO is seeking to "raise the bar" in the quality of patent applications it receives - something that has the potential to bring it into closer line with the best national patent offices. There is also a growing backlog to deal with and the fallout from the global financial crisis. Internally, the EPO is struggling with a financial deficit; and there is an ongoing restructuring of the unions representing office staff, which shows no signs of going away. The EPO has a big task on their hands.

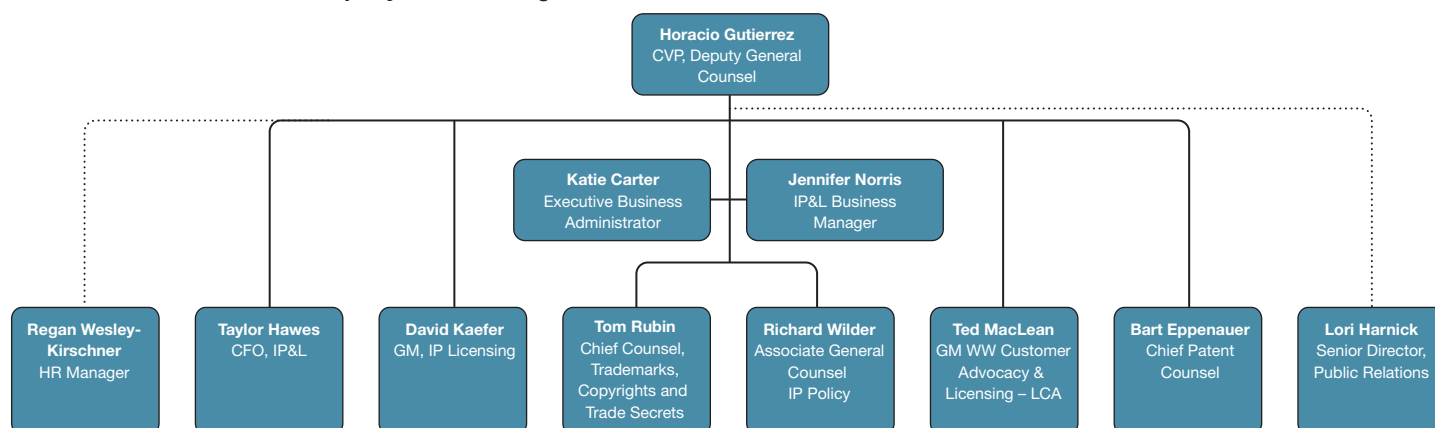
Last week at the European Patent Forum in Prague there were rumours that Brimelow was planning to serve more years in charge at the office than had their predecessors. It was ridiculous at the time, so I did not report it. However, maybe I was wrong.

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## Inside Microsoft Intellectual Property and Licensing



initiatives dealing with everything from patent reform and IP's role in driving R&D in new healthcare and energy technologies, to the steps that governments ought to take to promote small business IP creation and maintain a sustainable, balanced approach to IP protections so that these continue to promote innovation and economic growth around the world.

The challenge here is a big one. The whole world over, debates are raging in government, policy-making, academic and industry circles over whether intellectual property in general, and software patents in particular, continue to serve society by promoting innovation and economic development. Especially as the economic crisis deepens, some argue that governments ought to mandate a preference for supposedly lower-cost open source-only solutions and even abrogate IP rights in order to achieve greater interoperability. They condemn IP as a tool of monopolies and cloak their arguments in the rhetoric of the "common good". But many experts believe that these proposals, if enacted, would cut the heart out of today's vital IT economy.

As Mark Blafkin of the policy group Association for Competitive Technology recently put it: "We haven't seen such intense hostility to IP in many decades, and despite decades of tangible, factual support for IP's benefits, I wonder if we're actually losing the debate. At the very least, we're not winning it – not yet, anyway."

This debate is especially intense in Europe, where Microsoft has long been under fire from European regulators. In the 2004 ruling on its antitrust case, the European Commission ordered the company to unbundle Windows Media Player from its Windows operating system and pay a US\$794 million fine. The company appealed

but in 2007 announced that it would accept the decision. Then in 2008, the EC announced it would investigate the company's support for Microsoft Office's Open XML format. And in January of this year, it decided also to investigate the bundling of Microsoft's Windows Explorer browser with the Windows operating system.

Having spent so many years on the continent working on IP and competition policy issues, Gutierrez certainly recognises that there is a divergence of views between the US and many Europeans on certain aspects of the interplay between intellectual property and competition law and policy – and in particular regarding the circumstances under which a compulsory licence of intellectual property may be warranted.

"At present we don't have a coherent, unified approach to applying antitrust principles to IP-related activities and transactions," Gutierrez says. "While some limitations on abusive practices involving IP are necessary, care must be taken to ensure that antitrust doctrines do not unnecessarily undermine the innovation-enhancing effects of IP by imposing compulsory licensing obligations upon the IP rights that constitute the basis of product differentiation and competition in the technology market."

### Spreading the good news

As if the global IP debate and European antitrust challenges were not difficult enough for Wilder's IP Policy team, Microsoft also faces a special problem in the antipathy that many in the technology community feel for the company. Indeed, in some circles, Microsoft has become the proxy for all things "evil" – big companies, successful companies, software patents, patent trolls and even intellectual property itself. This despite the fact that IBM, for example, receives twice

as many patents as Microsoft, generates 10 times more revenue from patent licensing than Microsoft and litigates its patents far more often than Microsoft.

In fact, Microsoft has filed only three patent infringement suits in its history – the latest being the recently settled case against GPS device maker TomTom, which generated fears in open source circles that Microsoft was preparing to launch a new war against open source even though the company continues to sign partnership deals regularly with companies that run or distribute open source software. On 27th April, the open source group Open Innovation Network announced it would try to invalidate three Microsoft file management patents that were the subject of the TomTom suit, the second time open source groups have attempted to do this.

Given this hostile climate, how does Microsoft's IP Policy team make its case to policy makers in Europe and elsewhere for the maintenance of reasonable and balanced IP protections?

"Our job is to engage in a dialogue with people on all sides of the debate and try to present the facts, which we believe demonstrate that effective IP protections promote innovation, small business growth and economic development wherever they exist," says Wilder. "And so we work now with all kinds of intergovernmental organisations, NGOs, academics and cross-industry organisations hopefully to move the debate forward in a positive way."

Inside Microsoft, the search for that proper balance in IP policy suggests a degree of flexibility and open-mindedness that critics would have considered unimaginable just a few years ago. In a draft paper circulated by the IP policy team at its Practice Business Review in March, for example – entitled *IQ + IP: A New IP Policy Framework* – the group recommended that the company initiate a discussion around whether to undertake a host of new initiatives on the intellectual property front. These include: support for IP generation assistance in the form of reduced patent filing and maintenance fees for SMEs; the encouragement of new IP protections through industrial design rights, in part to cope with cross-border software downloads and software-as-a-service offerings; and support for the passage of Bayh-Dole-style legislation in developing countries to promote the commercialisation of university-sponsored innovations.

The IP Policy team, of course, is not the only group Gutierrez has put to work on cutting-edge intellectual property issues. In October of 2007, Tom Rubin's trademarks,



#### Brothers in arms

Gutierrez flanked by Russ Pangborn (to his right) and Steve Tapia, both of the Trademark and Copyright Group

copyrights and trade secrets group took the lead in developing what the *Wall Street Journal* called an "unusual cross-industry accord" with Disney and a dozen high-profile media and technology companies to stand behind a set of rules – called the User Generated Content Principles – to govern the contentious problem of the posting of copyrighted content on social networking sites. More recently, Rubin's team worked with the Electronic Frontier Foundation to create guidelines that enabled video game aficionados to use animated characters from Microsoft Xbox and other games – known as "Machinima" – for their own creative non-commercial purposes.

"Some of the issues we're working on directly affect Microsoft's businesses and some do not," notes Rubin. "But we strongly believe that while IP protections certainly need to adapt to today's new conditions, society has a fundamental interest in fostering a vibrant and sustainable new media ecosystem that respects copyright because it is the essential engine of continued content creation."

Given the unprecedented pace of technological and media changes in recent years, it is no surprise that Microsoft's IP&L group devotes a good deal of attention to addressing IP policy issues. But Gutierrez still faces the challenge of innovating on a range of other fronts as well.

One of these is Microsoft's IP Ventures Program. This is a rather unique endeavour, operating under an open innovation model that brings together Microsoft IP, entrepreneurs, VCs, technologists and even governmental economic development agencies to help launch new companies and new technologies into the marketplace. In the last 12 months alone, the IP Ventures Program approach has helped launched three new companies, with three new



### “My head hurts”

Hawes, Gutierrez and Rubin at the IP&L finance team's Practice Business Review meeting



products, in three different industries, in three different countries.

And, according to Gutierrez, IP Ventures will continue to look at new and creative ways to use IP to create economic opportunity for Microsoft and others, and to advance innovation in the marketplace.

### A question of patents

But whatever other new initiatives the IP&L group undertakes, a key focus of its effort will probably always lie within the work of the patent team, headed by 44-year-old Chief Patent Counsel Bart Eppenauer.

His mission is twofold: first, to build and maintain a large, high-quality patent portfolio, and to do so evermore cost-effectively; and, second, to provide strategic and tactical counselling to each of Microsoft's five major business groups (as well as its advanced research division) on the ways in which the company's IP portfolio can help support innovation strategy and enable them to meet their technology, market and business objectives as effectively as possible.

On the first challenge, there is no denying the success Eppenauer's team has had in recent years in building one of the world's largest and most valuable high-quality patent portfolios. Ranked 34th in US patent issuances when Phelps came on board in 2003, today Microsoft is among the top five US patentees with over 55,000 issued and pending patents worldwide. On 10th February, Microsoft announced it had received its 10,000th US patent, related to its new Surface technology. This enables users to place real objects such as a mobile phone on the Surface computer's table-like display and automatically receive data or media associated with that object.

What's more, patent quality appears to have improved substantially under Eppenauer's tenure. In November 2007 and

again in December 2008, the Institute of Electrical and Electronic Engineers (IEEE) ranked Microsoft the leader among all technology companies, up from seventh place in 2006. And in its January 2008 quality scorecard, the Patent Board ranked the company's patent portfolio number one in both Technology Strength and Science Strength.

But will a general belt-tightening across the group, due to the current economic crisis, force a retreat in the company's patent position?

“There's no doubt that we're going to have to dial back some of our patent filings,” says Eppenauer. “We're still going to file a substantial number, but it's probably going to be closer to 2,000 filings this year than 3,000. We're also going to re-evaluate some of the patents in the portfolio that aren't as strategically aligned with our business goals, which just makes good business sense.”

Of course, this is precisely where the rubber meets the road in patent work – how to align strategically the company's IP with the needs of its product groups, and use it to help them meet their business objectives. And here, the work appears to be, if anything, getting stronger.

Patent counselling teams are now embedded within the Server and Tools Division, Entertainment and Devices, Online Services, Windows and other platforms, Microsoft Research, and the Business Division which handles Microsoft Office, Exchange and other communications products. Their job, says Eppenauer, is to “deeply understand the technology and the business strategy of each group and help them succeed with their products and services”.

In practical terms, this means working with the leaders of each business group to

focus innovation and IP efforts on the highest-value market needs that can produce the most successful differentiated products and services, and then to prioritise their patent filings and other IP investments where they will be most likely to produce success in the market. Sometimes that entails building a strong portfolio of Microsoft's own in a particular market. On other occasions it means deciding to acquire a portfolio to add strength to Microsoft's own, or even pursuing a cross-licence with another major player in the market to create the possibility of even greater success for both than either could achieve on its own.

"We take both a bottom-up and top-down approach," says Eppenauer. "We work at the front line of the business units. And we also get feedback and guidance from Brad [Smith, the company's general counsel], and now that Bill [Gates] is gone, who used to be deeply involved in IP matters, from Craig [Mundie] and Ray [Ozzie] as well [the chief research and strategy office and chief software architect respectively]."

The input of senior leadership is especially important in guiding the direction of advanced research and the "forward ideation" work led by John Weresh, which seeks to create innovative solutions and associated IP in new technology arenas that may only become crucial five or 10 years down the road.

The effort is also cross-disciplinary, says Eppenauer, because often the patent counselling teams will need to collaborate with Tom Rubin's team on trademark issues, or David Kaefer's licensing group on which patents to license in or out for strategic value, or Taylor Hawes's finance team on metrics for analysing the costs and benefits of various IP options available for achieving the business's objectives.

### Tackling weaknesses

But Gutierrez discovered that even with this cross-disciplinary approach, there were still weaknesses in the effort. "I got feedback from people who felt we were still working in too fragmented a way, attacking problems piecemeal," he explains. "So we recently started a pilot programme with the front-line legal teams supporting the Microsoft Business Division, which produces Microsoft Office, where we put together a single team made up of people from copyrights and trademarks, from patents, from finance and so on, to think across boundaries and work together on developing an IP strategy

that can more effectively support the business strategy."

What were the results of this cross-group trial programme, which was led by outbound senior licensing manager Tanya Moore?

"We got a much better understanding of where the business is going and how they see their IP priorities, and the business got a much better understanding of how to analyse and choose the right mix of IP options that can help them achieve their objectives," says Gutierrez.

And the chief lesson he learned from the pilot programme?

"That this cross-team structure is absolutely the right thing to do. Because the outcome of a process that's designed in this way from the start is going to be better than the outcome of one in which each functional team contributes its own, necessarily more narrow, expertise."

Gutierrez pauses a moment. "And another lesson we learned is that leadership of this kind of structure needs to reside in a single person. Because you're going to face some inevitable resistance from people who feel the new approach undermines their traditional relationship with the leaders of the business group. So it can't be a debating society. One person has to lead."

As for the future direction of IP&L's work within Microsoft, Gutierrez says he will continue to pursue a two-pronged strategy. First, continue expanding Microsoft's collaborations with others in the industry – more than 500 agreements are now in place – to create new business opportunities in today's open innovation environment.

And second, keep building, protecting and leveraging the IP portfolio of what he believes is one of the world's most innovative companies in order to create tangible value both for customers and for the company.

The current economic downturn, not to mention regulatory challenges in Europe, is certainly not making his job any easier. But Gutierrez, ever the pragmatic optimist, prefers to view these as opportunities to keep innovating the work of Microsoft's IP&L group to keep pace with a business and technology world in rapid transition. *iam*

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