



# Prickly profits

Last month's IP Investor focused on the double standard applied to persons who deploy intangibles like patents for profit, as opposed to investors who deal in hard assets. The net-net: real estate moguls are capitalists; aggressive exploiters of IP are anti-competitive. The following are insights from prominent patent owners, managers and advisers about the IP double standard and what can be done to mitigate it

"By nature, people resist being controlled," says Harry Gwinnell, Associate General Counsel and Director of IP at Cargill, one of the largest privately owned companies in the US. "Everybody owns property, so they can identify with ownership of objects or things that can be touched. When it comes to intangibles, there is almost no base of experience. The USPTO is very clear that, in exchange for disclosure, a patentee is granted the right to exclude others. The inventor or assignee does not have to commercialise or even develop an invention to exercise his rights. Executives have difficulty accepting that a patent is merely the right to sue others to prevent them from practising an invention." Gwinnell is President-Elect of the Intellectual Property Owners, a leading not-for-profit organisation.

Hon. Bruce A. Lehman, Commissioner of the USPTO, 1993-1998, is President of the International Intellectual Property Institute, a non-profit IP think-tank that seeks to educate governments, businesses and investors about innovation rights. "The confusion about IP is an absolute mystery to me," he says. "It's amazing how little is known about things that are so important. Economists often talk about patents as monopolies when the concept does not apply to patents but to businesses. As to those companies or individuals that may be blocked by certain patents, they are free to come up with a better solution. History shows that they often do. In many cases, a licence may be available. The recent European debate on software patents is a good example of how misguided most people are when it comes to patents. Many in Europe believe that software

development will be brought to a halt as the result of permitting patents. In fact, the US was among the first nations to allow software patents, and it has 80% of the software companies in the world. Not everybody who owns real estate commercialises it. Nor should everybody who owns a patent be forced to bring a product to the marketplace. Demand for the right to practise an invention helps to validate it."

Not everybody agrees with Gwinnell and Lehman. Dan McCurdy is CEO of ThinkFire, Inc, a patent licensing firm that represents companies with large portfolios. McCurdy, former President of the licensing business of Lucent Technologies and an IP strategist at IBM, believes the patent system exists to encourage innovation and invention, not for the personal profit of individuals. "People like Lemmelson are conceptual inventors," he explains. "By tailoring their inventions to surround successful products they don't validate the system, they exploit it. They are doing nothing to advance technology, and are breaching the bargain the government provides to advance science in granting of the patent and allowing those who made the investment to profit in exchange for disclosing their invention. Innovation should not be something that speculators with no interest in technology or science can profit from."

Irv Rapaport has experience as an IP director, inventor and licensee. He was Chief Patent Counsel at National Semiconductor, Medtronic, Data General, Bally and Apple Computer. "Opinions on IP rights have more to do with the haves and the have-nots," he asserts. "When Cypress Semiconductor had no patents, T.J. Ross was going around telling everyone how evil they were. Once Cypress's patents started to issue the idea of having proprietary technology didn't look so bad. Patents can drive industries and stimulate competition. Most patents are pieces of paper, not worth what they're written on. Validating the economic value of an invention, no matter who is exploiting it or how it is being exploited, ultimately rewards the inventor."

"IP may be sold, bought, pledged and traded just like any other asset," says Dr Alexander Poltorak, CEO of General Patent Corporation, which represents independent inventors and smaller patent owners. "In economic terms, a patent is not really a monopoly but rather a

public franchise. It is the single largest incentive for innovation. The patent system is inherently unfair to the small inventors. The right to exclude, ie, to bring a legal action for patent infringement, does not come cheaply. With the average cost of patent litigation in the US in excess of US\$2 million and as high as US\$5 million the right to enforce is a theoretical concept of little value to many inventors."

Contrary to popular belief, says Poltorak, patents do not give the right to practise the patented invention. Instead, he explains, they provide the right to exclude others from practising the patented invention. "As far as the patent law is concerned, there is no difference between paper patents owned by an inventor (those that protect inventions that inventors do not practise themselves), and patents held by large corporations," Poltorak says. "Patents are nothing more than a licence to sue. Enabling small inventors to enforce their patents is the greatest incentive for all innovators. This inspires invention but also forces large companies with significant R&D commitments to pay attention to all patents and either license or design around them. Frequently, this leads to more and better innovation - the intention of the patent system in the first place."

Information is lacking about who most effectively exploits patents and how they do it. For my part, I believe that conferring value on patents supports innovation and prosperity. Patent assertions, despite the time, energy and expense they require, help to validate inventions where they count most - in the marketplace. History shows that innovation's benefits are not always clear-cut. Conferring value on innovation, whether it is the result of exclusive commercialised products or patent royalties sought by warring parties, is integral to fostering scientific research and generating shareholder value.

*Bruce Berman is president of Brody Berman Associates in New York, where he works closely with IP owners and advisors. He is the editor of and contributing author to the book From Ideas to Assets - Investing Wisely in Intellectual Property, published by Wiley in 2002. [bberman@brodyberman.com](mailto:bberman@brodyberman.com)*