Model behaviour

In a few years the way in which patent disputes are conducted may have changed dramatically. If this does happen, it is not only rights owners who will be confronted by considerable challenges. Law firms and lawyers will have a lot to think about, too

Intellectual property attorneys and law firms have benefited significantly from the worldwide boom in patents. Emphasis on turning innovation into value has fuelled competition to defend and otherwise monetise patents. But while IP lawyers are well equipped to administer patents, they may not always be in the best position to exploit them. As the business of IP has evolved, so have the economics of IP law.

Intangibles today comprise the bulk of the value of many companies. Between 1982 and 2002 the intangible assets as a percentage of S&P 500 market capitalisation grew from 38% to 85%. The changing emphasis has resulted in new ways of looking at both IP assets and the professionals and organisations that provide them with value. Managing IP is not a simple task; neither is identifying who is best equipped to do the job. There is no question that a grounding in patent law, claim language and product-specific technology is essential. But what about IP market knowledge? What about the ability to price and deploy intangibles like balance sheet assets, such as real estate?

A provocative article by the editor and IP writer Mark Voorhees, "Ethereal Assets", which appeared in the 25th anniversary issue of *The American Lawyer*, speculates about the role that IP law firms play in the IP value equation. "In the 1990s IP practitioners became 'alpha' lawyers by unlocking IP portfolio values," says Voorhees. "Now, can they become true entrepreneurs in the 'concept economy'?"

What hath law firms wrought?

Voorhees suggests at least three scenarios for IP lawyers, all of which potentially impact on IP stakeholders:

1. IP lawyers continue to be at the centre of IP monetisation, litigating big-ticket cases and engaging in major licensing transactions.
2. A variation on the first scenario still is positive for IP lawyers. Companies realise that IP assets are too important to be left in the hands of lawyers and assign them to patent-savvy business professionals who rely upon attorneys for assistance.
3. Here things get more complex. Voorhees suggests that law firms may decide to put their capital at risk the way investment banking firms do. Contingency billing, an occasional occurrence at the top law firms, could increase dramatically, as firms choose (or are required) to shoulder the increasing risk associated with patent litigation.

   Well-organised non-law patent dispute firms – call them IP merchant banks – already have begun to establish themselves as viable alternatives to the costs and complexity of litigation. With experienced licensing experts talking directly to senior managers (not to lawyers) empowered to settle disputes, the emphasis is on business resolution. But resolving patent disputes, in or out of court, is a nasty business.

So compelling is this new but unproven model, some law firms with IP practices have established non-legal subsidiaries, such as Howrey Simon Arnold & White's Maxiam, formerly run by Roger May, past president of Ford Global Technologies, and Todd Dickinson, now chief IP counsel for GE. Foley & Lardner has toyed with the concept via INTX and even venerable IP firm Pennie & Edmonds, before it gently imploded, had established a patent licensing subsidiary. Well-established IP practices and firms have for some time quietly, and selectively, accepted contingency or mixed fee-contingency disputes. It remains to be seen whether senior managements at large companies are ready to enter into business partnerships that endeavour to turn disputes into business opportunities. Aligning various parties' interests can be a difficult matter.

Rainmakers and tribal chiefs

From my perspective, the shifting business model on which patent law firms and practices have been built provides insight into how IP assets are likely to be managed. Because of the increased frequency, cost and return on patent suits, partners who are adept at securing significant patent litigation work are at a greater premium than ever. The professional partnership is well on its way out at IP law firms, just as it was discarded by Wall Street in the 1980s. The few partners who control the flow of business – rainmakers if you will – are more powerful than ever. Supporting important but less essential service partners is clearly not their calling. To double and even triple their annual compensation, client-toting partners today need only walk across the street, as many already have.

Say what you will about the patent disputes, they help to quantify intangible assets, R&D spending and shareholder value. Because of the ever-expanding frequency, cost and pain of patent litigation, patents no longer can be the sole province of IP attorneys. With some traditional patent law firms at their apex, a few are sure to evolve into quasi-investment banks, where licensing commissions, transaction fees and return on well-placed capital are sure to outperform hourly billing.

What Voorhees does not say is that law firms, as we have known them, are optimally configured for patent litigation, not necessarily for maximising return on IP assets in less conventional ways. While complex disputes have made them more essential than ever, the cost and frequency of IP litigation also could price them out of business or, at least, thrust them into a new one. Patents now influence key business decisions that increasingly are coming under the scrutiny of senior management and shareholders. For now, patent litigators remain atop the IP food chain. Evolution may cause them to survive and prosper as they are, or to adapt to a changing environment. Time will tell.

Bruce Berman *is president of Brody Berman Associates in New York, where he works closely with IP owners and advisers. 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