



Intellectual Property: A Hot Market?

[Cary Griffith]

During the dotcom boom, every attorney was trying to get into intellectual property. What's the market like now? We talk to recruiters and attorneys to find out how patent attorneys and IP litigators will fare on the job market.

If money talks, right now it's saying *intellectual property litigation*. Review some of the largest cash settlements and verdicts over the past ten years and many of them involve science, technology, licensing and money. Lots of the latter, and plenty of the former, making intellectual property (IP) law and litigation one of the fastest growing segments of the legal marketplace.

University of Minnesota vs. Glaxo Wellcome, Inc. involved litigation over patent licensing of an AIDS drug. The case was settled for cash, and future royalty payments to the University valued at approximately \$300 million. And that 300 million dollar estimate "may be conservative," comments Kenneth Liebman, Chair of Faegre & Benson's IP Group and the lead counsel for the University of Minnesota in the case. Mr. Liebman points out that the estimate was made at the time the case settled (October, 1999), and that the actual dollars received from future royalty payments over the life of the drug may be much higher.

Honeywell v. Minolta was a patent infringement case against Minolta involving patents on autofocus cameras. The jury awarded Honeywell \$96.3 million. The case subsequently settled for \$127.5 million, and additional litigation against other autofocus camera manufacturers resulted in total settlements of approximately \$500 million.

Unocal Corp. v. ARCO, Chevron, Exxon, Mobil, Shell and Texaco was a patent infringement case over Unocal's patent on reformulated gasoline. Unocal won a jury verdict on li-

ability and damages. The final judgment was \$91 million.

Eolas Technologies, Inc. and The Regents of the University of California v. Microsoft Corporation involved an action for patent infringement of web browser technology for the delivery of interactive applications embedded in web pages. The jury verdict in favor of Eolas and the University of California, on issues of infringement, validity, and damages was awarded in August 2003 for \$520.6 million. On January 14, 2004, the court entered judgment for \$565,894,868 which includes the amount of the original verdict plus prejudgment interest. An appeal by Microsoft is likely to follow.

And last, but by no means least, *Tulip Computers Int'l v. Dell Computers, Inc.* was a patent infringement action. The case settled two days before going to the jury with Dell paying Tulip \$49.5 million.

Three of the most obvious things the preceding cases have in common are technology, complexity, and sizeable awards. Less obvious is the fact that several of these cases were litigated by counsel without science degrees. That doesn't mean they all weren't won by heavy reliance on patent lawyers and other scientific experts. But it does illustrate an increasingly important segment of the legal marketplace open to all lawyers, regardless their science background: IP litigation.

The world of intellectual property law can be divided into two parts: IP attorney specialists, like patent lawyers, and IP litigators.

The educational and aptitude requirements for both are very different. But both have in common one very compelling factor: if you become one, the chances you'll be employed and extremely well paid are very high.

What it Takes to be a Patent Lawyer

The educational requirements for patent lawyers are nothing shy of extreme. Next to most patent lawyers' Juris Doctorates hangs one or more advanced science degrees. When James D. Ivey, a patent lawyer at the law offices of Ivey, Smith & Ramirez, was asked about the best undergraduate major for patent law, his advice was, in part: "regarding biochemistry and biotech, most inventions require a PhD in biology, biochemistry, etc. to be able to write the patent. Friends of mine with MS degrees express a feeling of being overwhelmed by the complexity of the technology. If you want to practice in the area of biochemistry or biotechnology, you should be planning on a PhD and be asking about the market 10-13 years from now."

Mr. Ivey points out one of the challenges facing patent lawyers. Advanced science degrees can take years to acquire. Law degrees will take an additional 3-4 years, depending on the school. By the time you acquire both degrees you'll have several years of education under your belt. Rest assured the science degree that was hot when you started, will be entirely different when you finish. Consider the dot com heat of the late 90's. Perhaps the best science degree during that period would have been computer science.

Today, Ivey notes, biotechnology is on the rise, along with computer science specialties.

"The 'hot topics' for the next few years are supposed to include wireless (computer science and digital logic) and nanotechnology (heavy physics)."

And if the science degree requirements don't dissuade you, consider the bar exams. Patent lawyers have to pass the regular bar exam, and the patent bar.

Patent Lawyers Are In Demand

If you're contemplating a patent law practice, should you worry about your science degree? Not necessarily.

"The conventional wisdom is that IP lawyers are always in demand," comments Carey Bertolet, a legal recruiter, and Managing Director of BCG Attorney Search's New York Office. Ms. Bertolet believes that's an oversimplification. But, she points out, "to the extent we're talking about a discrete number of people with the requisite technical background and law degree," there are only so many qualified people to go around.

Ms. Bertolet's opinion was seconded by Susan Robinson, Associate Dean of Career Services at Stanford University. In the September 2002 issue of *The National Jurist*, Ms. Robinson said, "I.P. is definitely still hot - not the high-tech business so much, but pure I.P. - patents and that sort of thing. Students with a technical background or a science degree are in more demand."

That same article quoted Bradley Wright, an intellectual property attorney with Banner and Witcoff in Washington, D.C., and a law professor at George Mason University School of Law. "We have seen the number of patents issued and the number of suits filed regarding those patents increase," Wright commented. "Attorneys who have experience in industry or an engineering background are in very high

demand. It's a very interesting area of the law - in the I.P. world, especially with the Internet, there is new legislation and new technology coming out all the time."

Wright also noted that in 2002 the starting salary for new patent attorney associates in his firm was \$125,000, significantly more than the 2003 median base salary for associates. In its April, 2003 Median Base Salary by Associate Year and Firm Size, the National Association of Law Placement (NALP) cited a median base salary of \$93,190. If salary amount corresponds to supply and demand, the market continues to be stellar for patent attorneys.

But Bradley Wright also commented on another phenomenon taking place in the IP marketplace: increased litigation over intellectual property.

IP Litigation On the Rise

Most analysts believe there are two reasons for the relatively recent (last twenty years) increase in IP litigation. First, more and more businesses are producing more and more products. Many of these products require very complex computer, biotechnology, nanotechnology, or other kinds of significant scientific knowledge to invent and manufacture. The cost of their production and sales is often significant. How can businesses protect their investments? Patents. In fact, in fiscal year 1997, approximately 220,000 patent applications were filed. In fiscal year 2002, there were over 333,000 patent applications filed.

"I think the rate of the growth of technology is accelerating geometrically, not arithmetically," comments Brian Riopelle, a partner with McGuire Woods and head of its IP litigation practice. "There's much more technology that's out there that's the important life blood of companies - biotechnology, pharmaceutical, computer.... And," Riopelle adds, identifying a second reason for increased IP litigation, "many more companies are realizing the value of their intellectual property, and are trying to

turn their intellectual property into sources of revenue."

Jan Conlin, an IP litigator with Robins, Kaplan, Miller & Ciresi, agrees. "Companies have gone from looking at their patent portfolios purely from a defensive standpoint to saying that if I have technology in that portfolio that I could license or otherwise seek recovery on, that's something I need to do because that's an important return for our shareholders."

As further corroboration of Riopelle and Conlin's perspective, more and more companies are creating specialized groups to manage and mine their technology. In January of this year, Hewlett Packard announced the creation of an intellectual property licensing group to leverage its "growing patent portfolio." The Release highlights the fact that HP is the 5th largest recipient of U.S. patents. Their innovation is one of the reasons the company "formed an intellectual property ... licensing organization designed to increase revenue and improve technical collaborations with partners."

James Ivey describes another phenomenon starting to occur in the marketplace. "There are groups that are doing arbitrage, buying up under utilized technology," Ivey explains. "It's like owning a piece of property you don't use. That's more or less what they're doing with patents. They're buying them up and then enforcing them and getting licensing fees."

Demand for IP Litigators Increasing

While Carey Bertolet from BCG Attorney Search describes the market for patent attorneys as relatively constant, the market for IP litigators, she says, "is very hot for us. A lot of firms want to be able to say they have specialized litigators. They want to assure clients" the firm has lawyers with the proper background, experience, and knowledge to "really understand the underlying issues that are different from other forms of litigation." Anecdotal comments from the law offices we



interviewed corroborate Bertolet's perspective. McGuire Woods recently expanded its IP litigation practice. "We're always in the market for IP litigators," explains Brian Riopelle.

"We're always on the lookout for highly talented lawyers," adds Faegre's Kenneth Liebman. "Within the IP group we want IP litigators."

What's it Take to be an IP Litigator?

So if IP litigation is on the rise, what does it take to be an IP litigator? Unlike the educational degree and bar exam requirements of patent law, IP litigation really only requires a JD. Though most IP litigators will tell you other mandatory requirements include aptitude, hard work, and a particular ability to communicate very complex ideas into laymen's terms.

"There are different schools of philosophy on what's required to be an IP litigator, comments Brian Riopelle. "There is definitely a school that thinks an IP litigator-and especially a patent litigator-should have a science or engineering background so they can better understand the technology and present it to a court. I happen to be of the school that thinks what you really need is someone who's smart and has an ability to learn the technology and then explain it in terms that are understandable to the average federal judge and jury."

Most of the IP litigators with whom we spoke agree with Brian Riopelle. Kenneth Liebman comes from a philosophy background. Jan Conlin has a B.A. in Political Science. These IP litigators don't believe you need a deep technical background to understand and try complex technology and licensing cases. What you really need are plenty of smarts, particularly of the variety that enable you to rapidly grasp complex and technical subjects. Most of the firms that do this kind of work also need a deep bench-i.e., patent lawyers and experts on staff, or on retainer, that can assist lay IP litigators with getting up to speed on the technology. Perhaps most of all, you need

to be able to decant complex, multi-faceted technology and licensing issues into terms your jury is going to understand.

Over the last fifty years IP law and litigation has been on the rise. American business is generating more inventions and technologies than ever before. The result, in part, is a massive increase in the number of annual patent filings. Companies, beginning to realize significant dollars from new drugs, better cell phone technology, or genetically enhanced seeds, are rushing to patent, license and better manage their technologies. Increased monitoring of licensed technologies has led to increased IP litigation. And that, in turn, has spawned some very large judgments and settlements, and not coincidentally a new market for very bright attorneys with the gift to understand and communicate very complex subjects.