

WINTER/SPRING 2005

# ipbusiness

MANAGING INTELLECTUAL PROPERTY AS A STRATEGIC ASSET

**The benefits  
of Bioshield**

**When antitrust  
and IP meet**

**Avoiding willful  
infringement**

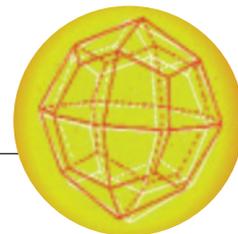
**Internet piracy:  
Who's to blame?**

**Can effective counseling make patents less risky?**

**Armed for the  
Road Ahead**



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## Complicating Factors

It's not that IP was ever easy. But it sure seemed easier. Maybe that was because worrying about a company's intellectual property was someone else's job. The lawyers—both in-house and outside counsel—took care of prosecuting patents and figured out what to do about infringement.

But now, as we demonstrate in every issue of *IP Business*, patents are big business, with corporate involvement stretching well beyond the legal department. Part of that, as Jeff Heilman points out in this issue's cover story (page 2), may be because there are so many more patents being prosecuted; the US PTO reports that nearly as many patents were granted between 1990 and 2003 as between 1963 and 1989.

It's not just the volume, however; it's how the patents are used. Heilman explains that with patents increasingly used to harass, invade and even eliminate the competition, the patent world's vernacular has become antagonistic, invoking words like "shakedown" and "crusade."

Making this even trickier are the regulations and enforcement efforts (page 8) that question certain software patents and point to the nexus between IP and antitrust. Add to this the ways in which new technologies make it easy to trip into infringement (pages 14 and 20) and it's clear that, as Heilman notes, the difference between success and failure, between striking gold with your patents and entering an increasingly dangerous minefield, rests with the quality of the counseling you receive—from lawyers who are truly embracing your patents as part of your company's business.



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**WEAPONS. SHAKEDOWNS. CRUSADES.** These words have become part of the vernacular used to describe the ways in which patents are being used to harass, invade and even eliminate the competition. In this environment, top management needs to make sure that—from the start—they are soundly armed for the road ahead. Good counseling is the first step. **By Jeffrey A. Heilman**

## ALL BUTTONED UP

Illustration by Ken Orvidas

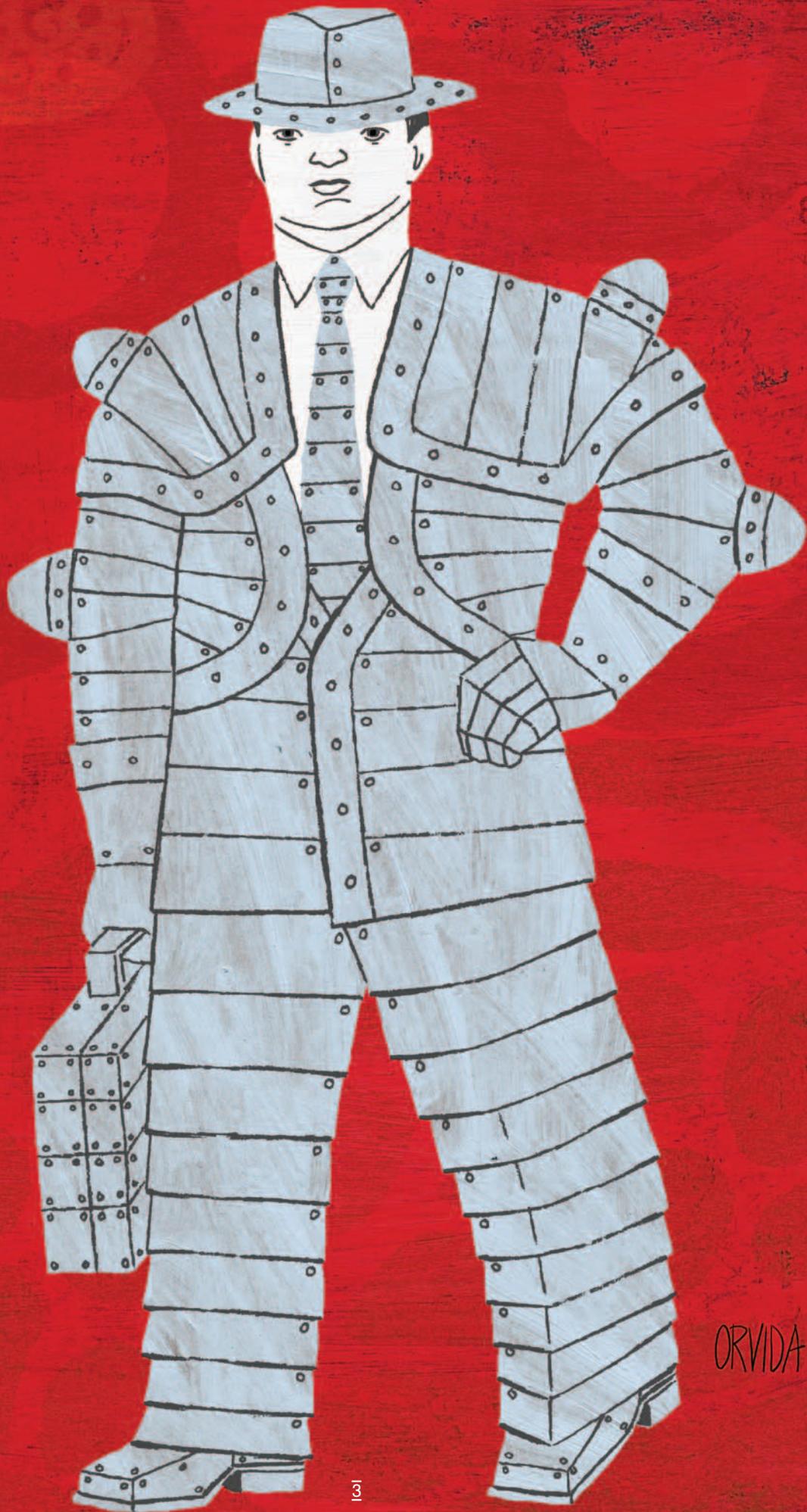
In their new book, *Innovation and Its Discontents*, patent experts Adam B. Jaffe, professor of economics and dean of Arts and Sciences at Brandeis University, and Josh Lerner, professor of investment banking at Harvard Business School, point to two Congressional actions that fostered and then institutionalized a continuing trend of patent aggression over innovation. Created in 1982 as a specialized appellate court for patent cases, the US Court of Appeals for the Federal Circuit systematically eased the enforcement of issued patents; in the early 1990s, the US Patent and Trademark Office (PTO) was recast as a quota-driven body, leading to a rise in the number of issued patents.

The subsequent changes in the patent arena were dramatic. Litigations escalated, along with prohibitive judgments and damage awards, such as the 1985 patent infringement case in which Polaroid won an injunction locking Eastman Kodak out of the US instant photography market as well as nearly \$1 billion in damages. According to the PTO, almost as many patents were granted between 1990 and 2003 as between 1963 and 1989.

Today's patent vernacular describes an antagonistic world of

“shakedowns,” “crusades” and “weapons.” A November 2004 *New York Times* article cited “patent terrorism” in connection with a patent auction by Commerce One, a bankrupt software company. The article centered on concerns that purchasers of the patents—which describe core e-commerce functions—could bring “...infringement lawsuits against companies [already] engaged in online commerce...impede other companies...or press competitors to pay licensing fees for practices already common in Internet commerce.”

Patents today are increasingly used to harass, invade and often, as in the highly litigious medical devices industry, eliminate the competition. In this environment, management must ensure that, from the start, they are soundly armed for the road ahead. How a company advances under the power of its patent “engines,” or resists those of its competitors, is a measure of the counseling it receives from its patent lawyers; indeed, the strength of this “counseling connection” can spell the difference not only between success and failure and profit and loss, but also between striking gold or entering a minefield.



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ORVIDAS

## What companies need in this archly competitive environment, is a close collaborator who embraces the patent as part of the company's business.

### A Collaborative Relationship

Good counseling is hard to come by and hard to identify in the arcane world of patents. While almost any counselor can prosecute and maintain patents, what companies need in this archly competitive environment is a close collaborator who embraces the patent as part of the company's business.

"As soon as the existence of gold becomes apparent," says James Lampert, partner and chair of Wilmer Cutler Pickering Hale and Dorr's Intellectual Property Department, "the counseling connection becomes indispensable in securing the site, figuring out how much gold there is and then unearthing the ore."



Counsel helps management make informed decisions about a patent's viability and whether to enter markets occupied by the competition. Determining the existence of potentially dominating patents is critical. "Not all companies think about potentially dominating patent rights," says Matthew Langer, who holds a doctorate from Yale in organic chemistry and is a partner in the Intellectual Property Department at Wilmer Cutler Pickering Hale and Dorr. "When potential third-party rights exist, counsel may be able to provide a 'freedom to operate' opinion, which can expose a patent's invalidity or show that it is not infringed and can both guide business judgments and serve to demonstrate good faith in the event of litigation."

"Good counseling also helps focus management on why a company wants its own patent rights," says Lampert. "Asking objective questions establishes a collaborative, strategically focused relationship. What do you think the patent will do for you? What do you want it to do for you?" What a patent can do, notes Lampert, depends not only on the patent's scope and strength, but also on the company's size, maturity and market. All of these should influence the company's patent strategy.

"The general themes are developing, protecting or expanding your business free from third-party claims and often—but not always—within the exclusionary rights of your own patent," Lampert continues. "The gold is typically found at the nexus where legal and business considerations converge."

Patents can be used to protect markets or access external technologies, or they can be licensed to generate revenue or in

exchange for a needed license under someone else's patent; a strong patent can provide market domination.

"Every situation has its own nuances," says Lampert, "but the point is, you have options, and good counseling helps you maximize those options. And remember, the plot only thickens in the international arena [see chart, page 6], which introduces differing prosecution and litigation factors."

### Adding Value to the Business Plan

In the information and knowledge economy, patents increasingly *are* the business. Before acquiring patent rights, a company must ensure that the patent has real value. Finding the gold is one thing, but unearthing it or preventing others from doing so is another. A weak patent will not protect the company from infringement claims or provide strength in the event of litigation.

As a long-term investment, patents must be precisely engineered, durably built and vigilantly monitored. Patent prosecution is an essential element of patent strategy, and managing risk is a tenet of successful prosecution. For one thing, Langer recommends tight lips and prudent record-keeping. "Be guided by Miranda: 'anything you say may be used against you in a court of law.' Start marketing an idea to the outside world before you file and you risk compromising or even forfeiting your rights," he adds. Filing provisional patent applications before any disclosure can afford a company valuable time to establish market footing and better defend patents once they are issued.

"Counsel's insight into the complexities of patent strategy adds significant value to the business plan," says Langer. This includes pacing the patent budget and anticipating how evolving legal and market conditions will affect patent rights. More than a guiding hand, though, the good counselor is a guardian of management's interests. "The focus," Langer adds, "is less about valuating a patent than it is about designing patent applications and obtaining patents that will stand up commercially and legally."

A patent must be novel and non-obvious, and this is where counsel's skill in examining prior art—past patents and relevant technical literature—is essential. In the vast body of prior art, no search can be conclusive; one instance of previously published art can render a new invention old, obvious and thus unpatentable.

An issued patent is therefore only presumptively valid—but

“Start marketing an idea to the **outside world** before you file,” notes Matthew Langer, “and you risk compromising or even **forfeiting your rights**” to the patent.

counsel’s skill in formulating search criteria can increase the strength of that presumption or provide the facts needed to overcome it. “Facts make or break an application,” says Langer. The skilled counselor conceives of all possible search criteria, analyzes the prior art and determines whether particular claims are valid or infringed. Prior art searches also provide insight into the competition that might influence a redirection of strategy.

The words used in the patent’s claims count most. Precise claim drafting and definitions are imperative—one wrong word, even a preposition, can be a patent’s future undoing.

“You want to invest your patents with integrity and expose any Achilles Heels in your competitors’ patents,” says Langer. “The goal is to minimize the strength of your competitors’ infringement claims, establish a superior bargaining position for settlement discussions if you’re sued and fortify advocacy standing in the courtroom.”

### Protecting the Business

In addition to spending substantial sums preparing and filing patent applications, companies spend millions of dollars litigating and settling patent infringement cases. The ghost of *Polaroid v. Kodak* continues to roam the patent universe. In 2003, Microsoft was ordered to pay \$521 million to Eolas Technologies for patent infringement relating to Internet Explorer. The jury was influenced by internal Microsoft documents acknowledging the Eolas patent. In 2002, Amazon.com secured an injunction against barnesandnoble.com for infringing its “one-click ordering” patent covering online shopping. This controversial case was settled for undisclosed terms. In a 2001 medical devices case, Guidant won \$140 million in damages from St. Jude Medical over its competing defibrillator. The case was upheld on appeal in 2004 and returned to the trial court for a new finding of infringement and damages.

But patent litigation is expensive. Even a mod-

est litigation can cost upwards of \$1 million in fees and expenses, and during a protracted trial, market value typically suffers, the competition can gain momentum, and damages can sink the ship. More critical strategically, litigation can derail a company by diverting attention away from development and marketing.

“Cost is typically the most persuasive incentive to settle,” says Lampert. “Costs quickly escalate during discovery early in

## CONNECTING WITH COUNSEL

**Management should interview counsel in order to learn how they will handle patent strategy in the company’s area of invention. Some key questions include:**

- ✓ How familiar are you with my business and my competition? Reliable advice and guidance depend on counsel’s solid understanding of the pertinent business landscape.
- ✓ Do you have a degree and have you ever drafted a patent application in my subject area of invention? A skilled counselor contributes industry as well as legal experience.
- ✓ What kinds of companies have you represented in the past? Good counsel has experience working with a range of businesses, from start-ups to large corporations.
- ✓ Can you provide examples of patents that you have guided to issuance? How do you handle opinions? How do you staff and handle patent litigation? Patent prosecution, and litigation especially, require specialized attention, and a strong track record is important.
- ✓ How do you handle international patent work? While US counsel does not prosecute or litigate foreign patents, they typically work with a trusted network of foreign attorneys.
- ✓ How will future legal developments affect my patents? Good counsel constantly monitors the patent landscape, including staying abreast of the law.

the suit, and again shortly before trial, which is when most settlements—typically cross-licensing or patent sharing agreements—occur.” Settlement is often dictated by the uncertainty of litigation outcomes and is appropriate for both sides.

“Good counseling strives to anticipate the court’s ruling, but facts and perceptions change throughout a trial, and you may not

wish to risk an unpredictable result,” he continues. “By settling, you hope to realize as much of the patent’s value as possible.” For the patent owner, this may mean obtaining substantial payments while avoiding the possibility of defeat; for the defendant, settlement avoids the risk of losing its ongoing business.

The more lucrative the market, however, the higher the

## LOST IN TRANSLATION?

In the US, once an invention is publicly used or disclosed, its inventor has one year to file a patent application. But in most of the world, rights to an invention are forfeited with any disclosure prior to the filing of an application. This is just the

start of critical differences in the way patents are prosecuted, maintained, litigated—and translated—around the world. Some others, which counsel generally navigate with the help of a network of foreign counterparts, are detailed below.

CATEGORY	US	INTERNATIONAL
<b>Patent Rights</b>	Patent granted to “first to invent”  Effective only throughout the territory of the United States	Patent granted to “first to file”  Although applicants in Europe can file in a centralized patent office, patents are granted on a per country basis and are effective only in the country of issuance
<b>Maintenance Fees</b>	Relatively inexpensive fees, due at 3.5, 7.5 and 11.5 years on an upwardly sliding scale	Generally more expensive and typically due annually on an upwardly sliding scale—in each country where a patent is held
<b>Litigation</b>	Often used as an offensive weapon  Lengthy, burdensome and expensive  Adjudicated by judge and jury in Federal Court	Primarily defensive strategy, due, in part, to availability of “opposition proceedings”  Generally less costly and expedient, with minimal use of depositions and witnesses  Adjudicated by specialist courts, without juries
<b>Use</b>	No obligation to use	Compulsory use; under the “working requirement” rule, if a patent is not commercialized within three years, it can be subjected to compulsory licensing
<b>Business Methods and Software</b>	Patentable	Nonpatentable, unless bundled with another invention

“When the **fight is on**,” says Jim Lampert, “the biggest mistake a company can make is **separating the patent from the business**. The goal for both sides is to **protect the business**.”

stakes, and when companies believe that a patent can give them exclusivity in a lucrative market, settlement may be unlikely. “When the fight is on,” says Lampert, “the biggest mistake a company can make is separating the patent from the business. The goal for both sides is not simply to win the case—it is to protect the business—and the counseling connection is invaluable in maintaining legal, strategic and financial perspective. Again, it is about asking the right questions. How will litigation impact business? Am I prepared to risk losing or, perhaps, losing the company itself? How far you choose to proceed into litigation—with costs escalating after the early motions phase—is a business decision based on knowing your legal risks and options.”

Asking the PTO to reexamine the patent may be an alternative. Reexaminations—either *ex parte* in which only one side is heard, or *inter parte* in which a third party is involved in addition to the PTO—concentrate exclusively on the validity of the patent’s claims over published and patented prior art and can quicken the process and save money. “For the patent owner,” says Langer, “reexamination is a worthwhile strategy for disabling your opponents’ prior art without significantly amending the patent claims. Most defendants, however, feel that presenting their prior art to the PTO rather than a court is risky.”

Patent mediation allows companies, through their lawyers, to discuss the issues outside of court and work toward a voluntary resolution. “Mediation can work,” says Lampert, “although less frequently at the outset of a lawsuit, since one of the litigants has usually entered the fray with guns blazing.”

### Shields and Arms

Consider the recent legal battles of Canada-based Research In Motion Ltd. (RIM) relating to its BlackBerry mobile messaging device. While busy suing competitors over issues of infringement, royalties and trade secrets, RIM also has been fending off NTP Inc., a Virginia-based intellectual property holding company that owns patents on wireless technology. In August of 2003—claiming that RIM had infringed NTP patents—NTP won nearly \$54 million in damages and fees from RIM, as well as an injunction barring the BlackBerry from the US market. The court stayed the injunction pending an appeal, which was partially affirmed and

partially vacated by a three-judge Federal Circuit panel in December 2004 before being sent back to a lower court.

The implications of the case resonate with the concerns expressed in *Innovation and Its Discontents*. Litigation costs are passed on to the consumer, whose confidence in the product ebbs; competitors are afforded time to catch up; and innovation, such as third-party development of complementary products, is stifled. With BlackBerry as its core product, RIM itself is threatened. While admittedly broad—generally describing wireless email messaging—the NTP patents have not been found invalid, and NTP has sued other wireless email companies as well. NTP’s strategy appears to be to compel royalty payments from the industry. NTP itself is not in the business; injunctions against RIM and its competitors would eliminate the market.

Unwilling to settle, RIM is determined to fight NTP all the way to the US Supreme Court, if necessary, and will do so with the support of the Canadian government. Concerned with the “chilling effect” the case could have on innovation by Canadian companies, Canada’s Department of Justice submitted a brief in support of RIM’s request that the Federal Circuit rehear the case. The court was expected to hear arguments from both sides in February; the PTO is reexamining the patents in question.

Echoing the concerns of the Supreme Court in its 1882 opinion in *Atlantic v. Brady* (which frowned upon patents awarded for “trifling devices” and the embarrassment of the “honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities lawsuits and vexatious accountings for profits made in good faith”), authoritative observers, such as Jaffe and Lerner, are decrying a patent system that has become “sand rather than lubricant in the wheels of American progress.”

In this light, the BlackBerry case asks an important question: Will the business of patenting be anticompetitive or will it enhance innovation and the advancement of knowledge? Mining for gold can be treacherous; management cannot afford to proceed without the shields and arms of the counseling connection.

*Brooklyn-based journalist Jeffrey Heilman has written about client management issues as well as military history.*



# competition



# The End Of the Age of Innocence

**As IP becomes more of a strategic business asset, it's also coming under tougher scrutiny—on both sides of the Atlantic. Officials are looking carefully at IP's antitrust implications. Open-source code, which fueled so much innovation, may be undermining the patent potential of the software it helped write. Patent harmonization, once touted as the next step toward globalization, may be slipping further away. And business methods patents are still not within the European playbook. Are these positive developments or setbacks? Following is an assessment—and a guide.**

**Illustrations by Milan Trenc**

## Antitrust: Everybody Out of the Pool

**Evolving views of the intersection of IP and antitrust are bringing complexity and uncertainty to some industries.**

**By Peter Haapaniemi**

Three years ago, the US Federal Trade Commission and the US Justice Department's Antitrust Division conducted an unusual set of joint hearings that featured testimony from an array of lawyers, academics and business executives. The goal, said then-Assistant Attorney General Charles James in kicking off the hearings, was to enhance understanding of the interaction of antitrust and IP law and policy. "Together," he told the assembled group, "we are about to delve deeply into an intellectually exciting topic."

But those discussions were more than an exercise in abstract thinking. The interaction of IP and antitrust is both complicated and evolving—and for IP owners, the risks of running afoul of antitrust authorities may be growing. "I think antitrust is becoming a bit more concerned about anticompetitive practices involving IP rights," says Herbert Hovenkamp, professor of law at the University of Iowa College of Law. "We're seeing an increasing number of decisions applying antitrust principles so as to strike down or condemn some IP practices."

"There has been a lot of antitrust enforcement activity directed at IP, both in the US and Europe," agrees William Kolasky, co-chair of the Antitrust and Competition Department at Wilmer Cutler Pickering Hale and Dorr. In the US, for example, companies such as Bristol-Myers Squibb, Unocal and Schering-Plough—not to mention Microsoft—have come under fire from the FTC in IP-related antitrust cases. In Europe, the intersection of IP and antitrust is symbolized by the on-again-off-again effort to adapt the EC Software Directive, which aims to clarify ambiguities around the patenting of software. The directive has run into keen opposition from groups that say it would open the door to the extensive patenting of software in Europe and ultimately give large companies power to stifle competition from small developers.

In short, the issue of how IP and antitrust law should relate is heating up. As IP comes under increased scrutiny from various antitrust authorities, IP owners need to understand how those authorities view IP, how the laws around IP and antitrust are evolving and, especially, what kinds of IP practices are likely to get them into trouble.

## The Basic Antitrust Pitfalls

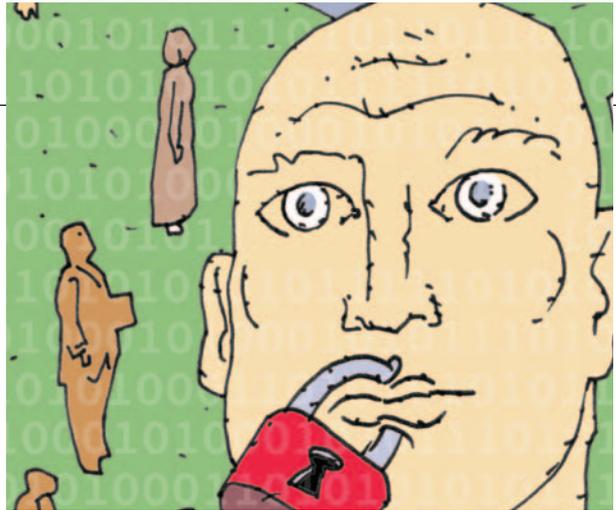
The increasing interplay of antitrust and IP stems from several factors. To some extent, it can be seen as a sort of correction, says Iowa's Hovenkamp. "This is a pendulum that has swung back and forth for as long as we have had antitrust," he explains. "We have gone through a period of some 20 or so years of very considerable expansion of both patent and copyright. The term of protection has been lengthened in both cases. It's easier to enforce patents. License agreements have become more aggressive and restrictive. So the antitrust courts are starting to sense that there are numerous anticompetitive opportunities in licensing and various IP practices. As a result, they are being a little bit more aggressive."

At the same time, new ideas and innovations have become vitally important competitive assets in many industries. "IP is much more important in the economy than it used to be and much more important to the creation of market power," says Douglas Melamed, co-chair of the Antitrust and Competition Department at Wilmer Cutler Pickering Hale and Dorr. As a result, it is naturally attracting the attention of authorities charged with making sure that companies don't use market power to limit competition. "Antitrust has begun to take IP very seriously," says Melamed.

There are several key areas where companies need to be cautious, observers say. These include:

**Patent pooling.** In some industries, it's common for groups of companies to bundle their respective patents into a given product—such as a CD player or a computer hard drive—to simplify the integration and licensing of the complete collection of technologies. "They put their patents into the pool and basically agree to license them to any manufacturers on nondiscriminatory terms, making it easier for manufacturers to produce the product," says Kolasky. Such arrangements have traditionally been regarded as competition-enhancing. In the late 1990s, says Kolasky, the US Department of Justice reviewed the practice "and issued a business review letter basically saying that patent pools were not anti-competitive, and that the department had no intention of bringing enforcement actions against them."

More recently, however, there have been a number of suits claiming that patent pooling can indeed violate antitrust laws. "There is a growing amount of litigation over these pools, based on the theory that it's per se unlawful to include in a package any patents that are not essential," says Kolasky. He notes the International Trade Commission recently ruled against Phillips Electronics in a CD-related patent-pooling case, which is now being appealed. In addition, a similar patent-pool-related class-



action suit has been filed against Phillips and Sony in US District Court. "This all illustrates the kinds of dangerous shoals that companies can encounter in this area," Kolasky says.

**Standards setting.** When companies in a given industry work together to set standards for various technologies, the idea is to enhance interoperability and innovation by allowing everyone to work from a consistent foundation. But antitrust agencies are concerned that an organization may work to make its technology part of the standard, without disclosing to other participants that it actually has a patent on that technology. "The FTC has brought significant enforcement actions in what they call 'standards ambush,'" says Kolasky. For example, the agency has pursued companies such as Union Oil, Intel and Rambus for their standards-setting efforts in clean-burning gasoline, data transfer technology and computer memory, respectively.

In theory, companies can avoid such problems by disclosing that they have patents or patent applications for technologies being considered by a standards group. But doing so is not always as simple as it sounds. A patent, says Melamed, is "a probabilistic property right." That is, a patent's validity and value are determined in the marketplace and in the courts—and the company that owns a patent may be fairly uncertain of what rights it actually has. With patent applications, of course, that uncertainty is even greater. In addition, "the theory fails to consider that these unrealized patent interests are trade secrets—and there are real costs, to the applicant and to competition, from disclosing them prematurely," says Melamed.

**Settlement of patent disputes.** When patent cases are settled out of court, regulators are now likely to take a closer look to make sure that an agreement isn't actually limiting competition. For example, says Kolasky, "there have been a number of enforcement actions arising from circumstances in which a branded pharmaceutical company settles a patent infringement action with a generic manufacturer, with the generic manufacturer basically agreeing to stay off the market in exchange for payments from the branded company."

In one notable case, notes Hovenkamp, the FTC ruled that

Schering-Plough's settlement with a generic drug company was anticompetitive. That case is now on appeal and is seen as something of a bellwether about the future of such cases in general. In the meantime, some courts and the FTC are regarding these settlements as being anticompetitive by definition—that is, they begin with the assumption that the company holding a patent has market power. At the same time, however, other US courts apply the “full rule of reason,” meaning that they take into consideration the competitive effects of a specific agreement, rather than assume that settlements are anticompetitive. “There really is no consistency at all in the court decisions,” says Hovenkamp. “We don't quite know what the final answer is going to be on allegedly anticompetitive settlements.”

### Living with Uncertainty

Overall, companies face a changing landscape that is rife with legal gray areas. In that uncertain environment, says Iowa's

Hovenkamp, it may often be best to err on the side of caution. Unless the law is very clear that a certain use of IP is allowed, “I think the best opening premise ought to be that the practice will be challenged under the antitrust laws,” he says.

Fortunately, however, some developments are making this landscape a little easier to navigate. “On the positive side, the courts and enforcement authorities in both the US and the EU are increasingly recognizing that licensing generally is pro-competitive, and the EU is moving away from a formalistic approach to more of a rule of reason approach like the one used in the US,” says Kolasky. In addition, a new EU Technology Transfer Block Exemption Regulation—which went into effect in May 2004—simplifies and clarifies the antitrust considerations around licensing, and brings licensing regimes on both sides of the Atlantic closer together. As Mario Monti, then-commissioner in charge of EU competition policy, pointed out last year, the agreement should lead to “a happy marriage in Europe of innovation and competition policy and to further convergence between us and the United States.”

## EU Harmonization: Not Ready for Prime Time

In a continuation of discussions dating back to the 1970s, the EU launched an effort in 2000 to establish a Community Patent that would let inventors get a single, legally valid patent for the entire EU. Without this, inventors have to deal with each country separately, which drives up costs and introduces legal uncertainty. “It is about three or four times as expensive to get a patent for the major European countries as it is to get a Japanese or US patent,” says Christian Breuer, a partner at Wilmer Cutler Pickering Hale and Dorr. “The Community Patent was designed to reduce such costs, unify the patent system, and create more consistency and transparency.”

While EU officials agreed on the general principles of the Community Patent, the effort ran aground on the details. The original plan allowed filings in German, French or English, but nations that spoke other languages balked. “There was a strong feeling that you cannot have legally enforceable pieces of paper in a language that is not an official language of the country in question,” says Miles Gaythwaite, a consultant in Wilmer Cutler Pickering Hale and Dorr's London office. The plan was modified to include more languages, to the point where “16 or 17 different translations of

the claims of each patent would be needed,” says Gaythwaite. The new approach wasn't much of an improvement, and in March 2004, the proposal was shelved, probably indefinitely.

Meanwhile, an old idea—the “torpedo”—appears to be making a comeback. Across Europe, the various legal jurisdictions handle patent cases with differing levels of speed. However, EU rules dictate that once a case has been started in one jurisdiction, later cases in others have to be put on hold until the initial case is resolved. Potential patent-infringement defendants have quickly learned to take advantage of this by preemptively asking courts in a “slower” jurisdiction to affirm their right to use the technology in question—thus forestalling any potential action by the patent holder in other courts. “That can often freeze the case for seven or eight years,” says Breuer.

While courts in some countries began to regard that practice as unfair and started moving ahead with cases without waiting for the slower jurisdictions, the European Court of Justice recently reaffirmed the original rule. At this point, says Breuer, companies with infringed patents may have to move quickly to file their cases first—or face frustrating delays. —PH.



Nevertheless, the intersection of IP and antitrust promises to remain a complicated place for some time to come. “This is an area where the law is going to be evolving,” says Melamed. “So there’s no simple rule to keep it in mind to avoid trouble. You can’t just do things in a rote way—it’s an environment where you have to think hard and think creatively.”

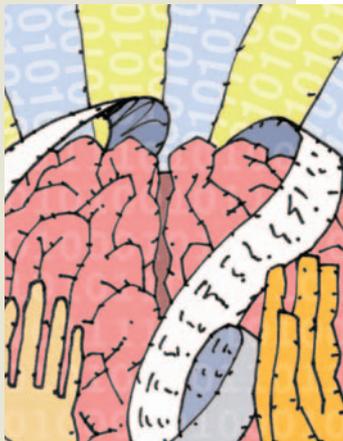
## BUSINESS METHODS PATENTS:

### On Again, Off Again

In IP harmonization efforts, discussions quickly turn to the patenting of software and, more broadly, business methods. And that can be difficult territory, as proponents of an EU software directive recently discovered.

Unlike the US, the EU does not allow the patenting of software alone—that is, when it is not part of a technical invention. But in practice, the approaches used across EU jurisdictions have varied. The software directive, which was intended to clarify that situation, ended up taking a “somewhat Kafkaesque” path, says Robert Barry, a partner at Wilmer Cutler Pickering Hale and Dorr.

An initial draft of the directive—produced by an EU committee—was designed to provide a unified set of rules for software patents in the EU. In spring 2004, that version seemed close to being adopted. But the effort quickly became a high-profile political issue, with open-source software groups and others mounting an emotional effort to kill the proposal. “The European parliament neutered the directive,” says Barry. “Then it went back to the Commission, which overturned many of the amendments and effectively reinstated the original proposals,” says Barry. The EP Legal Affairs Committee has voted to request that the Commission shelve it and restart the process. Approved by the Conference of Presidents, this looks sure to place the Directive back in its box.—*P.H.*



## Open-Source Code: The Midas Touch?

**While the easy accessibility of open-source software has made for hassle-free product development, a recent verdict in Munich suggests that what open-source code touches may not, in fact, be gold.**

By James Morrow

Open-source code is considered by many to be the holy grail of the software world. With it, backers say, developers can develop better software for consumers while steering clear of the dangers posed by clunky and expensive licensing agreements and the threat of monopolistic behavior by major intellectual property holders: after all, if two heads are better than one, then an unlimited number of heads working around the world to improve a product is even better, as witnessed by the legions of independent programmers who work tirelessly (and often for free) to improve such products as the Linux operating system and Mozilla’s Firefox web browser.

“Like any other piece of software, open-source software is distributed under a licensing agreement,” explains Wilmer Cutler Pickering Hale and Dorr Partner Jorge Contreras. “But with open-source code, the agreement is very often the Free Software Foundation’s General Public License (GPL). According to the GPL, software distributed under it has to be made available in source-code form to anyone who wants it; they are allowed to play with it and modify it as much as they like. This makes it very different than licenses for proprietary software.”

While this scheme encourages developers to do their best to modify, improve and tinker with code to make it do any number of things, it also has the potential to create some legal headaches—as highlighted by a recent German court decision. In that verdict, handed down last July in the Munich District Court (making it applicable only within Germany, as well as subject to appeal), a company was forced to hand over source code covered by the GPL against its wishes. This was a major milestone as it was both the first time this had happened and the first time anywhere in the world that GPL had been given the force of law by a court.

“The danger the case represents for software developers is that the GPL has a very viral character,” explains Contreras, who adds that the case involved a larger piece of proprietary software that was distributed with a piece of GPL-licensed code in it. “If,

as a developer, you have a piece of open-source code nestled somewhere in your proprietary code, then under the GPL, you may have to distribute the entire proprietary program as open-source, in addition to the original piece of open-source code.”

### Debate in Europe

Even more important than the Munich case was a battle fought recently in the European Court of Justice, which, in the eyes of many Europeans, threatened the future of open-source software across the EU’s ever-increasing number of member states. Under a legislative regime pushed by Microsoft’s Bill Gates—and fiercely lobbied against by an army of open-source advocates, including Linus Torvalds, who called it “deceptive, dangerous and democratically illegitimate”—patents would have been able to be applied to just about any piece of software. This legislation would have brought to Europe the type of software patents that have been broadly criticized by the open-source community in the US.



**“One has to be concerned that there will not always be the same incentive to keep open-source software up to date as there is with the proprietary software,” Bevilacqua warns.**

For the moment, though, the concerns of European open-source advocates have been allayed; early in February, the Parliament’s Legislative Affairs Committee sent the whole matter back to the drawing board.

All this means that there is going to be more open-source software out there in the future. “It’s pretty good, it’s fairly robust and, with all the people working on it and fixing bugs, it becomes very tempting to use,” says Contreras. Many state governments in the US and governments in other countries are requiring the use of open-source code in software developed for them, he points out. “Initially, this was the sort of thing that was just confined to university research labs,” Contreras notes. “But now it has become part of the mainstream software market worldwide.”

### Strings Attached

While using open-source software is often tempting from a financial point of view and has a host of other advantages, Wilmer Cutler Pickering Hale and Dorr Partner Michael Bevilacqua points out that companies that use it—whether in code they plan on turning around and selling or simply for in-house systems—need to be aware of some potentially tricky issues.

“Too many companies are using open-source software thinking that it has no strings attached,” says Bevilacqua. “But in fact, there are often lots of strings attached. If a company uses something that is covered by the GPL, then all modifications and code it is bundled with needs to be made subject to the GPL as well. This is a real issue when one company acquires another: they have to know where all the software of the new company came from. Companies need to be careful to segregate their open-source software from their proprietary software.”

Furthermore, while there are many first-rate open-source programs available on the market today, Bevilacqua cautions that sometimes GPL-licensed programs suffer from the lack of support that a big, proprietary licensee can provide. “There are plenty of companies like Red Hat who have done an extensive job vetting their software for problems,” Bevilacqua notes. “But there are also open-source developers who have not taken that level of care, and one has to be concerned that there will not always be the same incentive to fix bugs and keep the open-source software up to

date as there is with the proprietary software. The danger is that there may not be a company with the financial interest to stand behind the product.”

The challenge for companies then, whether they are developing software or simply using it, is to decide how far down the open-source road they are willing to go. Companies that are considering using open-source code in their business operations—i.e., not to develop larger, commercially viable software suites—need to weigh the risks of the support, development and upgrade possibilities provided by the open-source developer (a consideration that applies just as much when choosing proprietary software).

But for those creating and selling software, the danger is that a bit of GPL code could put the proprietary rights to an entire software package in jeopardy; a \$5 billion lawsuit playing out between IBM and SCO Group involving allegations that SCO’s code was improperly distributed under an open-source agreement highlights just the sort of thorny and expensive issues involved. Bevilacqua cautions that open-source code covered by the GPL or similar licenses should never be used as part of a commercially critical property. “Make sure that if you’re using open-source code as part of a larger software package, you don’t care if you need to release the source code for the entire package,” he says.

## FAQ: Willful Infringement

**A new decision highlights a key step companies need to take in order to avoid infringing—willfully—on existing patents.**

**By Donna Cornachio**

Increasingly, new research asserts, patent infringement cases that make it to court are being tried by juries. And these juries appear more likely to find that infringement has taken place—and to call the infringement “willful,” potentially subjecting defendants to multiple damages and attorneys’ fees. A recent decision changed some key assumptions—and put the question of willful infringement under a more powerful microscope. *IP Business* asked some experts what this really means.

**Q: What are the findings of the Knorr-Bremse decision, and how do they affect businesses in terms of both IP and the outcome of infringement cases?**

Companies used to face almost a Hobson’s choice when it came to disclosing legal opinions they’d received in infringement cases. If they were to disclose the “exculpatory opinion” they’d received from counsel, an opinion that in essence indicated that counsel felt there was no infringement, they would then be forced to reveal sensitive information within the opinion that might otherwise be considered protected by attorney-client privilege. If, on the other hand, they didn’t disclose the exculpatory opinion, the judge was able to instruct the jury that this nondisclo-

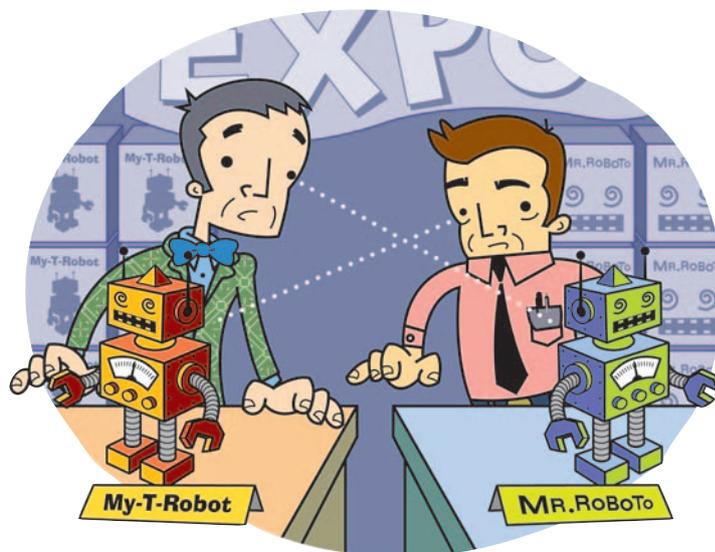
sure could be considered to imply that either the company didn’t get an opinion or the opinion was negative. Hearing this, the jury was more likely to determine that infringement was willful. The *Knorr-Bremse* decision says that such an adverse inference is unjustified and that judges can no longer instruct juries that they may draw this adverse inference when an opinion was not disclosed or obtained.

**Q: Does this mean that it’s no longer necessary for companies to get an “exculpatory opinion,” especially if they’re sure they haven’t infringed?**

“In certain circumstances *Knorr-Bremse* may diminish the need to get legal advice,” notes Scott Alter, a partner in Wilmer Cutler Pickering Hale and Dorr’s Intellectual

Property Department. After all, if not having obtained an opinion can no longer be held against a defendant in an infringement proceeding, a company could decide to take its chances, rather than spend the \$25,000 to \$100,000 that a typical opinion costs. However, Alter cautions, “we can’t stick our heads in the sand over an infringement claim.” There is still, he notes, what’s known as a “duty of care,” which requires that companies take steps to avoid impinging on the known patent rights of others to avoid charges of willful infringement. Moreover, adds Peter Dichiaro, a partner in Wilmer Cutler Pickering Hale and

Dorr’s Intellectual Property Department and chair of the firm’s Nanotechnology Practice Group, in many ways the *Knorr-Bremse* decision may work to strengthen the substance of the opinions that companies get. Because companies—and their attorneys—feared the breach of attorney-client privilege that assumptions of adverse inference fostered, exculpatory opinions had become increasingly sanitized and watered down, stripped of the level of detail that, while valuable to the company, was also potentially harmful if released in court. If companies no longer need to worry about sharing the contents of their opinions with a



broader audience, those opinions, Dichiara notes, are more likely to be more thorough, meaningful and analytical, something companies can use as a decision-making tool in developing and marketing a product.

**Q: Without the exculpatory opinion to hang their hats on, what else will judges and juries look at to determine that an infringement was willful, rather than unintentional?**

Of course, even after *Knorr-Bremse*, notes Alter, “A trial lawyer may still get up there and ask, ‘Did you get a legal opinion?’ and then say, accusingly and incredulously, ‘No? You didn’t?’ They can still play those games.” However, adds Dichiara, “there will probably be a more balanced viewing of the factors that are considered willful instead of gravitating to the idea that people are hiding something.” Among those factors, he notes, are such questions as whether there appears to have been deliberate copying as well as whether the defendant, based on the evidence, clearly tried to conceal its activities. In addition, juries pay close attention to “litigation conduct.” Is the defendant taking the patent holder’s rights seriously or simply brushing off the issue? Does the defendant appear open about its activities or, as Dichiara puts it, “like they’re hiding the ball.” And there’s also the question of how

long the alleged infringement went on—and what remedial action the defendant took once it found out that infringement may have taken place.

**Q: What kind of damages can result from a finding of willful infringement?**

If a company is found guilty of willful infringement (rather than guilty of just basic infringement), it could be liable for up to three times the amount of damages otherwise assessed as well as the plaintiff’s attorney fees—which can add tens of millions of dollars to the cost of defeat.

**Q: How common are findings of willful infringement—and how can a company decrease the odds of such a verdict?**

Findings of willful infringement are increasingly common. Recent studies have shown that while a smaller percentage of infringement cases are going to trial (they’re being settled out of court), those that do are more likely to be tried by juries. And when those juries decide there has been infringement, more than 70 percent of the time the verdict is that the infringement was willful. The key to avoiding such a verdict is proving that, if there was infringement, due care was taken to avoid it. An exculpatory opinion, especially post *Knorr-Bremse*, may prove critical in this effort.



## COPYRIGHT INFRINGEMENT: NEW TRAPS TO AVOID

As vigorously as companies work to ensure that their own copyrights aren’t being infringed, today’s easy access to electronic information makes it increasingly important that they also be wary that they aren’t—inadvertently or not—infringing on other companies’ copyrights.

One frequent mistake is sending copies of subscription-based email newsletters from employee to employee when a company has only one or a handful of subscriptions. A copyright case filed by a financial newsletter publisher against a major securities firm resulted in a nearly \$20 million jury verdict against the firm for copyright infringement in 2003—one of the largest amounts awarded in a copyright case.

“There’s a widely held misconception that everything published on the web is free and not protected by copyright,” says Robert S. Weiner, senior vice president at the Massachusetts-based Copyright Clearance Center, a nonprofit organization that was founded in 1978 to facilitate the exchange of copyrighted information. “In reality, the opposite is closer to the truth—although it’s not helped by the ‘printer-friendly format’ and ‘email to a friend’ options that can be found on many content providers’ websites.”

Legal experts agree. “As easy as it is to press the ‘forward’ button that you’ve got on email, it’s also important to respect the rights of the publishers,” says Thomas Olson, a partner in the Washington, DC, office of Wilmer Cutler Pickering Hale and Dorr, who has represented numerous clients in copyright infringement matters. “Employees need to be educated that forwarding a costly subscription-only newsletter without permission is wrong and can have serious consequences.”

Electronic infringement is easy to trace and track. “If there is evidence or allegation of copyright infringement, the fact that something’s been sent electronically makes it that much more easily recorded and discoverable,” Weiner explains.

“People infringe on copyrights all the time without even realizing it,” adds Nels Lippert, co-vice chair of the Intellectual Property Department of Wilmer Cutler Pickering Hale and Dorr. “Whether or not inadvertent, copyright holders are now enforcing their rights against small companies as well as against large institutions.” —Donna Cornachio

## A Sputnik for the 21st Century

**With the government taking aim at bioterrorism, new laws may prove a boon for American innovation—and business.**

**By Meryl Davids Landau**

**Illustrations by Francisco Caceres**

When the nation's attention was riveted in fall 2001 to who might be sending the anthrax spores that had been mailed like so many Christmas cards, Congressional legislators were focusing on a different aspect of the problem: the dearth of options then available for preventing or treating future bioterrorism attacks.

After all, anthrax is not a common condition; only 18 cases of the fatal inhalation type had occurred in the US in the past hundred years. Other bioterrorism threats, like botulism or bubonic plague, have been even more rare—hardly inspiring pharmaceutical companies to spend the millions of dollars necessary to develop cutting-edge treatments. And preventing these deadly agents has been even more neglected than the search for treatment; not only are vaccines not available for many bioterrorism threats, but the slow, laborious technology used to develop and manufacture vaccines hasn't been updated in decades; the currently licensed smallpox vaccine, for example, is the same as that used in the 1960s. So when the Defense Science Board, an advisor to the Department of Defense, examined the nation's readiness to address bioterrorism threats, it was not surprising that of the 57 diagnostics, drugs and vaccines determined necessary for an adequate response, the nation had only one.

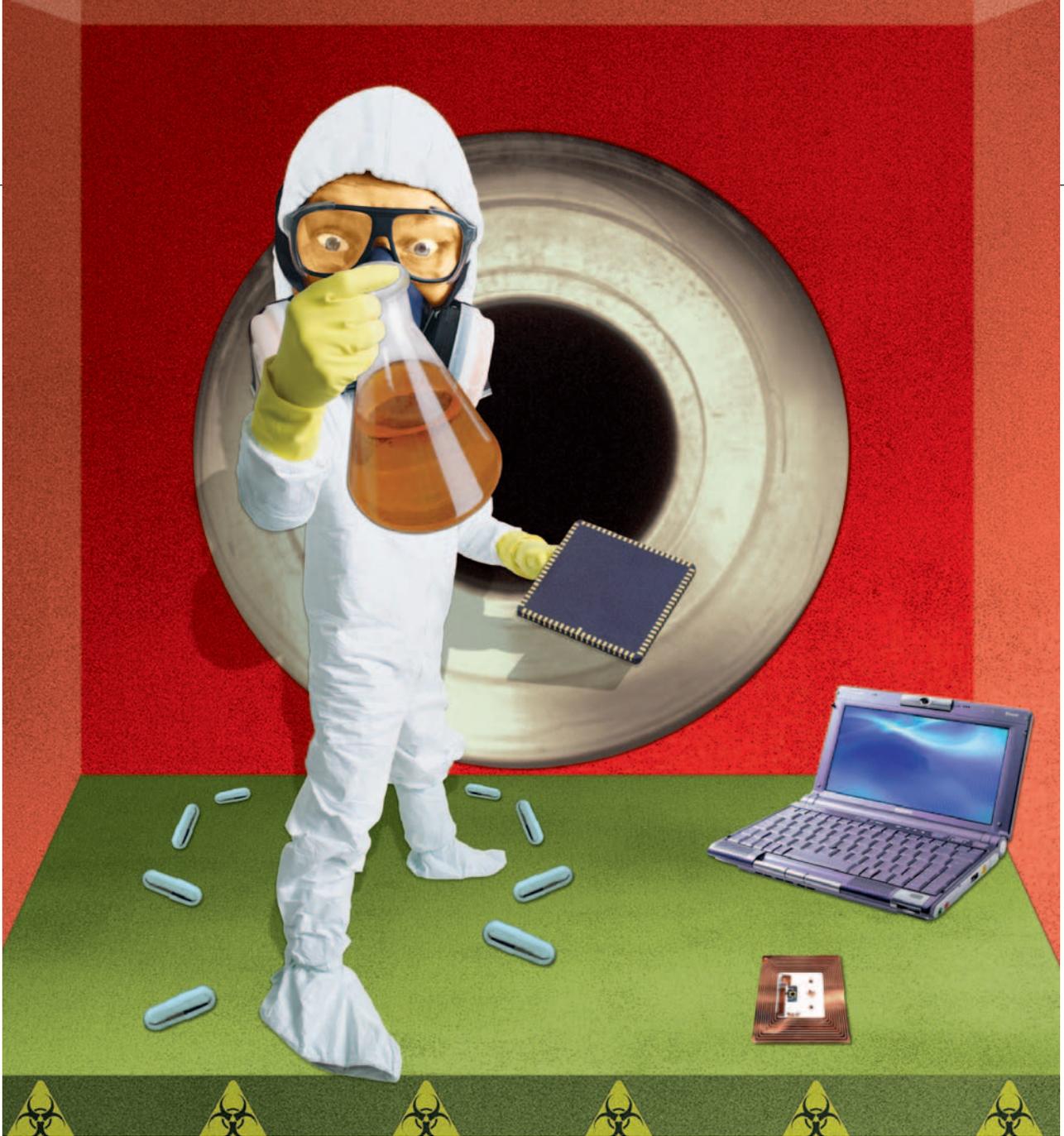
As in the past, when the government realized it needed to push an industry towards inventions that help America's defense, Congress has begun to act, pass-

ing the Bioshield Act last July and currently working on Bioshield II. While questions and concerns remain about those acts, many see the government's new attention on pharmaceuticals as a trend that could benefit both the industry and the nation in ways that go well beyond even its current important objective. "Simply by focusing on a given area, the government has long proved that it is able to spur wide-ranging innovation in that area," observes Donald Steinberg, co-vice chair of the Intellectual Property Department at Wilmer Cutler Pickering Hale and Dorr. The "space race" with Russia is one obvious example—money spent there is credited with developing a whole host of new materials and technologies applicable for numerous consumer products.

With the war on terror, software to enable identity recognition or data mining has already begun to see a similar boost. Now the pharmaceutical industry is poised to gain from this push for innovation. Moreover, thanks to discussions under way with legislators about additional ways to sweeten the pot—perhaps by extending patents on unrelated drugs for companies that develop products the government desires—the benefits could be substantial, indeed.

### **The Birth of Bioshield**

"After the September 11th attacks, research-based companies felt that the



government was asking them to make major advances in the medical countermeasures against possible biological agents, but there was little economic incentive for them to do so," says Henry Wixon, co-vice chair of Wilmer Cutler Pickering Hale and Dorr's Intellectual Property Department.

The Project Bioshield Act of 2004, which President Bush signed into law last summer, was an effort by Congress to put its dollars where its desire is. The act guarantees a ready market for pharmaceu-

tical companies that invent products to defend against the biological horrors that could be unleashed by enemy terrorists. It does so largely by appropriating some \$5.6 billion over 10 years for the federal government to buy and stockpile these products.

The act consists of three major components. It establishes a permanent funding source for the federal government to buy bioterrorism-related medical products from private companies. It provides additional money to support research through

the National Institute of Allergy and Infectious Diseases at the NIH, along with slicing the grant process from an average of two years to six months. And it gives the FDA the ability, in emergencies, to make unapproved drugs or devices immediately available.

The Bioshield Act recognizes, however, that, unlike the defense industry, independent- and profit-minded pharmaceutical firms would not agree to be engaged as a cost-plus government partner. As Senator Joe Lieberman stated during a

hearing following the passage of the legislation, “If the government funds the research, as it does with defense contractors, the industry can expect to receive [only] the operating margins typical of defense contractors.... Our goal...should be to engage some of the successful biopharma companies in this research—companies that have successfully brought products to the market. They are not now and will never agree to serve as defense contractors working on a cost-plus basis. They can only be engaged as entrepreneurs.”

### Law Still Needs Strengthening

Not wanting to appear ungrateful or unpatriotic by not supporting the law, the pharmaceutical industry has applauded the government’s willingness to put money behind the rhetoric. But at least so far, the applause hasn’t turned into action. Indeed, most of the large, research-based pharmaceutical companies have been holding back from undertaking the massive effort required of such entrepreneurs. The reason: major limitations of the Bioshield Act that industry leaders had noted even as the ink was drying at the Rose Garden ceremony—not enough incentives to justify the risk and too much potential liability.

While the 2004 Bioshield Act “took an important step forward in protecting Americans from bioterrorism,” notes Court Rosen, a spokesperson for the Pharmaceutical Research and Manufacturers of America (PhRMA), “there remain significant scientific and other challenges shared by the public and private sectors and inherent in the research and development of bioterrorism countermeasures. We have therefore urged, and still hope for, the enactment of additional measures.”

Liability is one key concern. As a statement from the Biotechnology Industry Organization, a group represent-



“When the government declared war on AIDS, and made money available, massive progress in treatment resulted.”

ing more than a thousand companies and institutions nationwide, put it, “Because of the deadly nature of bio-weapons, human efficacy data cannot ordinarily be obtained in advance of an attack. Thus, preclinical and clinical testing data for biomedical countermeasures will necessarily be less complete than for drugs and vaccines targeting other diseases.” Moreover, the group observes, unlike most pharmaceuticals, which are administered to very targeted groups, biological countermeasures are likely to be given to all or most Americans. Because of the wider distribu-

tion, the number of adverse reactions will likely be high, reactions the group fears will invariably be tagged as side effects of the countermeasure, even though they may not be. The group points to the Department of Defense’s anthrax vaccine inoculation effort begun in the last decade, which has attracted significant litigation against the vaccine’s manufacturer by soldiers claiming they were harmed by the shots.

“Most companies are looking for a government compensation system, similar to the no-fault Vaccine Injury

Compensation Program used for childhood vaccinations,” says Wixon, who suspects such a program will ultimately be enacted.

### **Additional Patent Protection?**

More controversial is a key incentive being discussed as a possible lure for reticent companies to invest in a process that remains risky and expensive, even if the government is now a willing buyer of the

secure pediatric indications for their drugs. This is a new application of an existing policy and practice.”

Not surprisingly, the Generic Pharmaceutical Association is strongly opposed. Such a patent bonus, it claims, “would impose a penalty on those who most need prescription drugs, threatening their access to affordable medications. It could easily result in increases of hundreds of billions of dollars in the costs confronting all purchasers, including

diseases resulted.”

Indeed, some doctors are hoping to build such wide-ranging advantages into the Bioshield II legislation. The Infectious Diseases Society of America, a group comprised of thousands of physicians and scientists in the field, wants to see Bioshield expanded to include research into next-generation antibiotics, which it believes will not only protect the public during a terrorist event but in everyday life. “The decline of private investments into antimi-

**“If the government decides fighting terrorism is that important, it must commit to ways of drawing in major companies. The prospect of a patent bonus will get their attention.”**

final product: a patent provision that could give a firm additional exclusivity for an unrelated drug in its portfolio in exchange for developing one to combat bioterrorism. For example, the FDA could extend a pharma company’s patent for a blockbuster drug for two years if the company committed to developing, say, a treatment for bubonic plague.

“If the government decides that fighting bioterrorism is that important, it must commit to ways of drawing in major companies,” says Hollie Baker, a partner specializing in life sciences patent law in Wilmer Cutler Pickering Hale and Dorr’s Intellectual Property Department. “Most drug companies have a few products that are the engine for their whole company, so the prospect of a patent bonus will definitely get their attention.”

At a hearing on Bioshield II last fall, Senator Lieberman supported this approach. “I think it is necessary to enact the bonus,” he said. “I do not think our strategy to create a biodefense industry will work if we do not. The Congress already has established a policy to grant patent bonuses to persuade biopharma companies to conduct clinical trials to

Medicare and Medicaid.”

Other enticements being proposed are also drawing heated exchanges: One provision would double the period of market exclusivity from five to 10 years for any new molecular entity having at least one identified use as a countermeasure. Another would extend the market exclusivity of a countermeasure drug with a new use or dosage form to 10 years from three.

### **Technological Leaps Ahead?**

No one knows whether these measures will ultimately be adopted in an updated bill. But should the final provisions of Bioshield II address the original act’s shortcomings enough to bring large players into the research, major pharmaceutical companies could come out big winners. Importantly, however, so might the American healthcare consumer. “When the government declared war on AIDS or cancer decades ago, for instance, and made money available, numerous research efforts were swiftly undertaken,” observes Wixon. “While not all of it was good, massive progress in the treatment of these

crobial research and development and the increasing development of highly resistant infectious strains, coupled with the emergence of new infectious diseases, create a crisis situation that cries out for a similar immediate and long-term solution,” an IDSA spokesperson noted at a government committee hearing. “Amending the Project Bioshield Act to include incentives to motivate the production of new tools to address this public health crisis can positively change market dynamics that presently are on a downward spiral.”

As with the gains generated for consumer products by research for the space program, observers are confident that the government’s new focus on bioterrorism will ultimately result in a great leap forward for the pharmaceutical industry—and perhaps for other industries as well. As Wixon observes, “Money coming into this field can move the whole industry into new research and production modes, which may well yield huge benefits that aid drug companies and consumers alike.”

*Florida-based journalist Meryl Davids Landau writes about legal, medical, business, political and lifestyle topics.*

## Don't Shoot the Messenger!

**Who's at fault when IP is pirated electronically? One pornographer's little list holds some important lessons for other victims of Internet theft.**

**By James Morrow**

The valiant efforts of former Vice President Al Gore aside, it's safe to say that the Internet would not be anywhere as big a phenomenon as it is today were it not for the driving force of pornography. But while the multi-billion-dollar smut industry may have helped push the growth of the web, it is also leading to some tricky intellectual property problems with implications for anyone who posts material online—from the most salacious to the most technical.

Take the case of California pornographer Norm Zada. Zada, whose "Perfect 10" website claims to offer subscribers the chance to peek at "the world's most beautiful natural women," believes that he is the victim of other website operators who steal his material and post it as their own—and has, for the past several years, been on a legal crusade to stop them. The only problem is, porn plagiarists are not always easy to track down and collect judgments from, so Zada and his attorneys have had to look elsewhere for compensation.

"Zada has been suing lots of people, including just about every intermediary he can think of, from search engines to credit card companies," says Wilmer Cutler Pickering Hale and Dorr Partner Thomas Olson. "And lately, he's been suing the big search engines such as Google and Yahoo, saying they should alter their search engines so that people

won't get any information about the sites to which he objects."

While Zada's problem may seem obscure, the rulings that are coming out of California courts could have a major ripple effect across the Internet, says Olson. "The whole question here is one of blaming the messenger—a search engine—rather than the person doing the infringing" says the Washington, DC-based Olson, "And there's a big unresolved issue in the law about what you can do to intermediaries who touch an infringement and whether you can blame them for it."

The Supreme Court will soon be deciding a related question: Should a company that offers "peer-to-peer" software—Grokster—be held liable for the massive downloading of copyrighted material by users of the software? Of course, unlike search engines, which are designed for a vast range of entirely lawful uses,

peer-to-peer software—starting with Napster—has a more checkered history.

Although Olson says that "from the proprietor's perspective, finding intermediaries is logical," when it comes to search engines, he draws an analogy to newspapers. "A search engine is just reporting what is going on out there," he says. "If a newspaper had a listing of all the movies playing in a town and some of them turned out to be pirated, well, it's not really their fault, is it?"

Of course, one can sympathize on some level with Zada, since data of any sort—whether it's images of movie stars, feature films or subscriber-only newsletters—is notoriously tough to guard on the Internet. "What you can do to protect your property really varies so much from industry to industry," notes Olson, who says that often there are software solutions that can protect copyright holders. "But if your copyright is infringed," he says, "go after the infringers or the intermediaries who are morally at fault—not at the neutral messengers."

*James Morrow writes about technology, business and law from Sydney, Australia.*

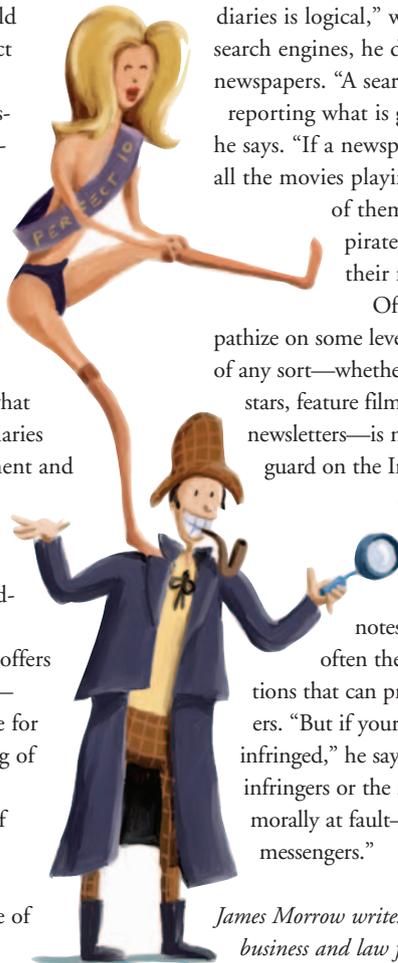


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