

# Power of Attorney

by Cynthia Scanlon  
photography by  
Jim Marshall

# Property Rights

## Horizon changes intellectual property scene

**S**amuel Johnson, considered one of the greatest writers of the 18th century, once said, "Knowledge is of two kinds. We know a subject ourselves, or we know where we can find information upon it." Johnson, of course, spoke these words in a simpler time, long before the dawn of the information age, long before the birth of computers, television, technological wizardry and futuristic research and development.

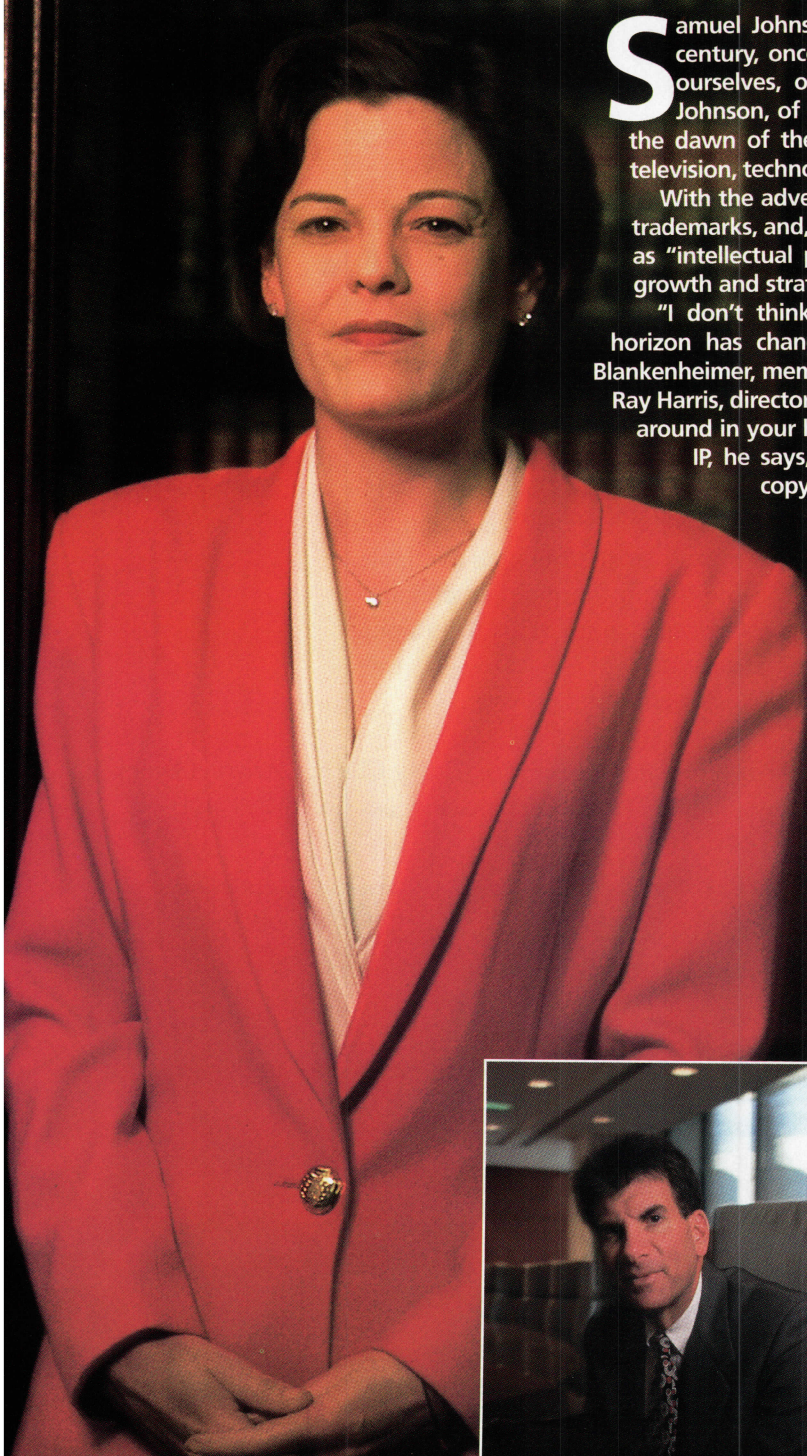
With the advent of computer software, thousands of new patents and trademarks, and, of course, the Internet, today's knowledge, better known as "intellectual property" has now become vital to a company's future growth and strategic plan in the marketplace.

"I don't think it's possible to overestimate how fundamentally the horizon has changed in the last few years in terms of IP," says Alan Blankenheimer, member of Brown & Bain, P.A. "It's been quite dramatic."

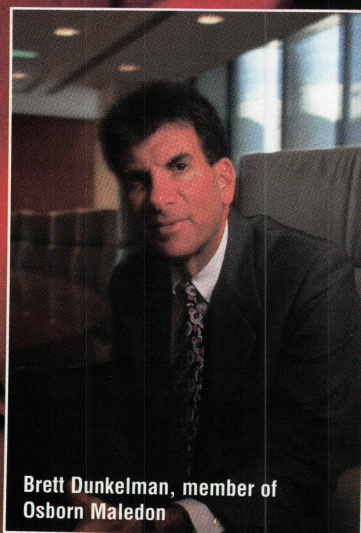
Ray Harris, director at Fennemore Craig, defines IP as "anything you can carry around in your head." That definition is not as fuzzy as it may first seem.

IP, he says, encompasses, for the most part, patents, trademarks, copyright and trade secrets (something developed in your business and used as a competitive advantage). What is getting harder to define is just exactly what companies own and how best to go about protecting their sometimes intangible assets.

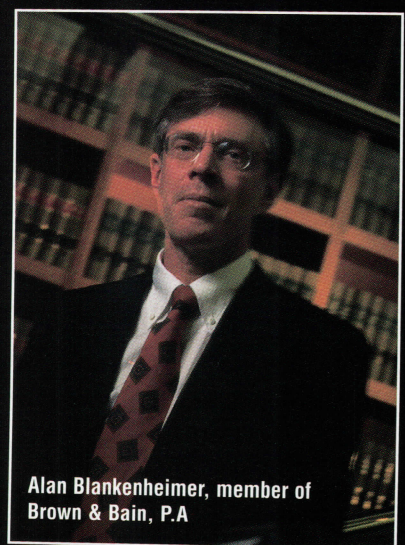
Karen Liepmann, senior member of O'Connor Cavanagh, Anderson, Killingsworth & Beshears finds the first mistake many businesses make is in failing to protect their intellectual property assets from the beginning. "You have a lot of start-up companies with really wonderful ideas and concepts, and many times they don't have the money or experience to know how to best protect their IP assets," Liepmann says. "So they don't enter into the proper non disclosure and confidentiality agreements with employees and they don't file patent applications early enough."



Karen Liepmann, senior member of O'Connor Cavanagh, Anderson, Killingsworth & Beshears



Brett Dunkelmann, member of Osborn Maledon



Alan Blankenheimer, member of Brown & Bain, P.A.

These mistakes, she says, can be deadly to a company. "Once in hot water, some companies have never recovered," she warns. Liepmann cites examples of companies who are designing or developing a new product or service, then searching for venture capital to fund the project and disclosing the new innovation to all kinds of people before it has been properly protected. Once these companies discover their mistake, many times, it is too late.

"With patents there are certain windows during which you can file," she says. "Once you've publicly disclosed it or published it, or if you've sold it more than a year before you file, you don't own the rights to file anymore."

Businesses need to be telling their development people to be mindful that patents are issuing, maybe even on a weekly basis, suggests Michael Kelly, partner and patent attorney for Snell & Wilmer. "We are anticipating thousands of new software patents issuing this year and they should check to see if the patents that are issuing are implicated by their new products, services and technologies."

Just where employees fit into the IP equation can be tricky as well. According to Harris, if an employee has general experience in a field, the fact that they did that work for you doesn't mean that you can prevent them from doing that work for others. But where they have acquired knowledge that is specific to your company, such as who your customers are, what months you reorder supplies, in what volume and other things specifically pertinent to your products and services, those might well be protected.

"You need to make it clear to the employee what you claim you own," says Harris. "That doesn't mean that the employee can't dispute it, but if you make it clear to the employee, it's going to get addressed."

Harris warns that as people start trying to maximize the salary they can get for their brain power, there will be more and more concern that employees will take intellectual property with them to use with their new employer.

"If you've made [your rights] clear to the employee and the employee goes out and does something that you think infringes on those rights, then you need to put that employee on notice again that your rights are being infringed," he says. "If the employee is doing it for someone else, you need to let the new employer know as well."

The Internet is now proving to be one of the most interesting and confusing areas for those involved in intellectual

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Michael Kelly, partner and patent attorney for Snell & Wilmer



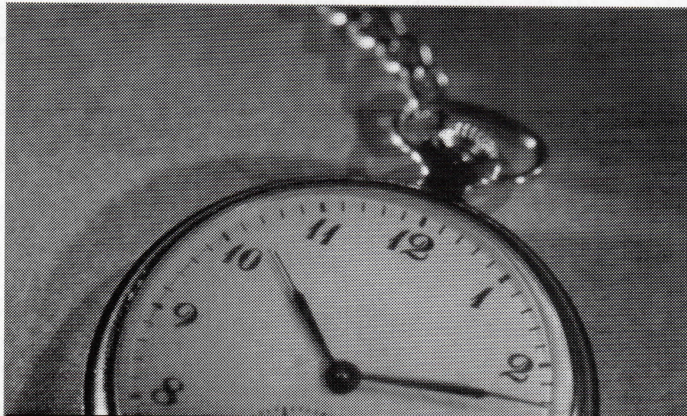
property. "The Internet is the battlefield where IP wars will be fought," says Paul E. Burns, senior member of the technology and IP group at O'Connor Cavanagh. He likens the Internet to a giant copy machine with the world scanning in photographs, printing screens and screens of material and downloading software, sometimes with little regard for the legal ramifications of doing so. "We are going to see a growing amount of involvement in protecting intellectual property on the Internet, which can include the content, screens, images, graphics, video, audio as well as all the software that make Web sites work," says Burns.

Kelly points out a definitive protocol has not yet been established for doing business on the Internet, especially where credit card transactions and the exchanging of money are concerned. When those protocols have been put in place, the waters, he believes, will be clearer.

And let's not forget the newest piece to the intellectual property puzzle: the cybersquatter—people who register domain brand names and trade names of usually large corporations and then demand large sums of money to sell the name back to the company. Cybersquatters are registering hundreds of domain names of well-known companies (i.e., www.ibm.com), hoping to cash in. The courts are still wrestling with all the implications.

Also of note, last year the courts made it legal to patent business methods as a form of intellectual property. Now, the way a company runs its operations can be considered an asset to protect. One company that has taken advantage of this is Price.com. When you visit their Web site (www.priceline.com), you can type in how much money you are willing to pay for a national or international plane ticket or hotel room in a particular city and it will match your bid with someone who is willing to give you that ticket or room for your price. "The Patent and Trademark Office has recently issued a patent to Priceline.com for that technology," says Burns.

What all of this means for business is the absolute necessity to work the intellectual property equation into a company's bottom line, making



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sure everything is covered from the start. "It can be a sad story when a start-up company launches a new product and spends a lot of sweat equity and whatever cash its investors have put in only to get a cease and desist letter stating that it infringes on a competitor's patent," says Brett Dunkelmann, member of Osborn Maledon. "There may not be much [the start up company's] patent lawyer can do at that point."

Clearly, those companies who decide not to pay attention to protecting their IP rights in the beginning may be setting themselves up for heartache down the road, says Blankenheimer. "Many of these young companies do things in an ad hoc manner that comes back to haunt them 15 years down the road when they are a big and successful company," he says.

All are in agreement that intellectual property is only going to get more competitive and sometimes more confusing as the economic stakes get higher. "The value of intellectual property is going to continue to grow," says Harris. "[Companies'] valuation will more and more depend upon the value of their patents, trademarks and intellectual property and will be less and less a function of their plant and equipment."

According to Kelly, a company today has three options to protect its interests: design your service or product so it avoids infringement, take a license onto the patent, or do nothing and risk getting sued. The smart companies are taking action and taking it early.

For the future, the value of intellectual property and the field as a whole shows signs of continued growth. Four years ago, Snell & Wilmer had four patent lawyers in their IP group. Today they have 25. "I'd hire 10 more patent lawyers for this group if we had them," he says, "but they're just not out there. To see a practice group grow from a handful to several dozen in just a few years is unprecedented."

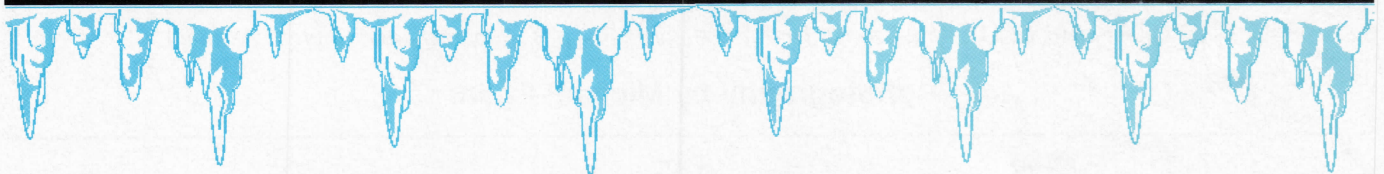
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Ray Harris, director at Fenemore Craig

*Cynthia Scanlon is a Tempe free-lance writer.*

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