



State of the IP Industry Survey 2009



in association with **IP**REVIEW magazine

The state of the IP industry today

A growing awareness of the importance of intellectual property (IP) Rights to the success of a business has led to unprecedented growth and transformation in the IP sector in the past two decades, but where does the industry go now?

In the inaugural State of the IP Industry Survey, we invited readers of *IP Review* magazine to share their views on the sector and its future, and their own management approach to IP and associated IP Rights. More than 200 readers responded, of whom around half were based in corporate legal departments and the other half in law firms.

Their responses paint a picture of tighter corporate IP budgets, reduced volumes of IP work for law firms and severe pressure on IP resources, both in corporate legal departments and in law firms. But, over and above the financial challenges they are facing, survey respondents also highlighted a number of ways in which they felt the IP system was failing them, as well as suggestions for how it could be improved.

The need for better planning
Corporate responses showed that, while in some cases there is greater awareness at board level of the value of IP as an asset, in-house professionals are increasingly concerned that they are being faced with 'too many patents and not enough time', particularly in light of reduced numbers of staff. In addition, they believe that the high expectations from top management on what they are able to patent, combined with a reduced budget, is compromising the quality of their IP

portfolios. They counselled against a 'file now, review later' approach, saying that it was resulting in a loss of clarity and focus in their IP strategies.

For many, this lack of clarity and focus is further aggravated by the absence of a regular and thorough IP auditing process. Most in-house IP professionals realise that, if they are to retain strategic focus, they must first understand the true value and extent of their existing IP Rights. However, many companies do not have the resources nor discipline in place when it comes to regularly assessing the value of their IP assets, and don't always appreciate how proactive IP portfolio management can benefit them. Results from the survey show that, while 20% of companies say they conduct quarterly IP audits, by far the largest proportion (41%) audit only on an annual basis, 10% audit every two years, and 4% say they don't audit at all.

However, corporate respondents did not feel that they alone were to blame. Many suggested that the odds were stacked against them due to the expensive and often convoluted processes necessary to register and prosecute IP at national and international levels. They also felt that a gradual lowering of standards at international patent offices was leading to too much low-quality IP being granted, saying that the global patent

process needed to be better harmonised and the distinction between what could and what couldn't be patented needed to be revisited.

The need for education
Law firms, for their part, highlighted client education as key to IP business retention. With companies under pressure to cut back on IP budgets, they said that educating existing clients on the value of their IP assets was critical to safeguarding work and revenue streams. This approach seems sensible given that more than one third (37%) of the in-house IP professionals surveyed said that they plan to spend less in 2009 on protecting their IP assets than they did in the previous year.

And yet, while law firms agreed that much needed to be done at policy level to simplify IP procedures, most laid the responsibility for finding a solution firmly at the feet of companies. 'They need to change the focus from simply generating or registering IP Rights to using them to generate value,' wrote one law firm respondent, echoing the fears of corporate respondents who felt under pressure to register by volume, rather than value. The question now is whether both groups can work together to find a solution or whether change can be introduced only at a higher level. Turn to page 6 to find out their predictions for the future in this area.

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Further information about the State of the IP Industry Survey is at www.ipreview.com or you can email realisingvalue@cpaglobal.com

What has been the impact of the financial crisis on the IP strategies of law firms and companies? What are the biggest challenges that IP specialists are facing in their work and what do they think should be done about it? How do they see the industry developing in the next five to 10 years?

These are just some of the questions that were posed to law firms and companies in the inaugural State of the IP Industry Survey 2009, commissioned by CPA Global in association with *IP Review* magazine. This is what the respondents had to say:

The effects of the credit crunch

Unsurprisingly, the majority of survey respondents said that the **financial climate** had had a negative impact with 51.9% of corporate respondents saying that the credit crunch was having a detrimental effect on their IP strategies. The picture was more pessimistic among law firms with 67.8% saying that it had had a negative impact on their clients' and, by association, their own workloads.

All respondents, both law firms and companies, said they were under increased pressure to control costs, had **smaller budgets** for IP procurement and protection, for overheads such as staff or expenses and travel, or were told to be cautious about spending, even where no actual reduction had been enforced. Worryingly, many said that the direct result of less money to protect IP was that there was less of a desire to undertake long-term strategic activities, that there was less 'focus and clarity' in IP-related initiatives or that the IP department had had no choice but to reduce the range of countries in which it registered patents, with potentially disastrous consequences.

However, a small number of companies testified to the **positive impact** of the economic climate on their business, particularly in comparison with competitors. One respondent said, 'Due to large amounts of "money in the bank" we find ourselves in a stronger position when attempting to purchase patent portfolios/companies.' Another said that there was now an increased awareness within the company around IP as an asset, which had actually led to an increase in the budget for protection.

Companies

What impact has the financial climate had on your IP strategy?

A positive impact	9.6%
No impact	38.5%
A negative impact	51.9%

How do you think this compares to your competitors?

'We are in a stronger position than our competitors'	43.1%
'We are all in the same boat'	51.0%
'We are in a weaker position than our competitors'	5.9%

However, when asked about their clients' IP strategies, most law firms said clients were reporting a reduction in budgets for acquiring and developing IP, that they were processing **fewer foreign filings** and that clients were focusing more on selling or licensing IP than acquiring IP or litigating to protect it. They also said that clients were increasingly choosing to put work 'on hold' or to carefully review disclosures before making decisions, as well as prioritising out-licensing and/or divestiture over acquisition.

Law firms What impact has the financial climate had on your clients' IP strategies?	
A positive impact	11.9%
No impact	20.3%
A negative impact	67.8%

What did law firms think were the **biggest challenges** facing their clients? Loss of income from sales, funding or capital issues; financial problems 'of various types' following on from loss of faith in banks and the banks calling in loans; pressure on cost cutting to ride out the financial downturn; the uncertain economic future; the struggle to prioritise IP spending, difficulties generating income from existing IP or identifying valuable IP sufficiently early to develop strategies for cost-effective protection; and simply 'staying afloat' were all mentioned.

What did law firms think their clients needed to do about these challenges? Responses varied considerably: some wrote of the need for their clients to invest in staff training programmes or to **improve market share** by developing better products. Others said that clients needed to expand their IP portfolios in order to diversify and place themselves in a strong position to thrive as the economic climate improves, but some law firms said that clients needed to consolidate their core business by identifying what they were good at and investing in that area alone.

The need for **government intervention** was also a popular response, both in terms of the amount of funding available to small- to medium-size enterprises and of the importance of returning interest rates 'to sensible levels' in order to encourage investment spending.

Business priorities

When it came to the challenges that law firms were facing, many said that **business development** 'in a tight market' was their top priority at present, whether that was 'attracting new clients' or 'getting new work from existing clients', as well as managing the resulting workload with a smaller staff base. But many also testified to a re-evaluation of the way that they charged and serviced their clients. 'We need to find a way to add value in respect to IP advice without having to increase the costs to the client,' said one respondent; others said that the challenge was to be 'cost effective', to 'provide a good service in the face of clients' restricted legal budgets' and to 'keep existing clients fully supported with quality staff', although others pointed out that recruitment for the IP market was increasingly difficult. 'Good IP attorneys are hard to find, which is why some firms are offering "silly money" to attract new people, which spoils the recruitment market for the rest of us by pushing up salary expectancy when a more reasonable level of remuneration would be more sensible in the current climate,' said one managing partner. Another reported that the economic climate made it very difficult to predict future staffing needs.

Other law firms were more focused on the impact of IP **policies and practices** at national and international levels. 'We need to find a way to obtain enforceable patents in the new hostile environment in the US,' said one respondent; another wrote of the need to manage the law firm and its clients 'through the changing environment following from the financial crisis and regulatory changes, such as the London Agreement [for patents]'.

Client education was also a top priority. 'We need to help clients understand why they need to continue to invest in IP,' was a common

response. Others spoke of the need to ensure that clients made 'rational decisions, instead of panicked ones'.

How did the law firms plan to meet the particular challenges they were facing? Simply 'by working harder', said many; others spoke of their intention to invest in marketing and business development, in order to attract new clients, and **client services**, in order to retain those clients they already had. The majority of respondents also mentioned the need to focus on improving client knowledge of IP, as well as generally spending more time counselling clients. But what about the need to reduce client fees? Some said they were looking for ways to provide their advice more economically, for example, in electronic form, while others said they were in the process of developing discount schemes for regular work, looking to delegate lower-end tasks to cheaper cost centres or **outsourcing routine work** to specialist legal process outsourcing providers. Others said they had simply resigned themselves to losing revenue in the short term, but were concentrating instead on 'maintaining their strategic focus, while adapting to the changing environment'.

Changing times

When asked about challenges, companies said that they were finding themselves faced with 'too many patents and not enough time', 'high expectations of top management of what we may be able to patent' and 'the difficulty of keeping up with the changing structure or direction of the company or the market in which it operates', as well as the often impossible task of 'setting and meeting budgets'. In light of the downward **pressure on budgets**, many said that they were struggling to meet a higher level of work with a decreased budget and to sidestep the 'trivial patents' that were blocking their business goals.

Law firms Has the level of work your firm is taking on changed in the last year?				
	Increase	Decrease	No change	Don't know
IP litigation	25%	10%	40%	25%
IP transactions	12%	27%	34%	27%
Filing	7%	48%	33%	12%
Renewals	3%	28%	41%	28%
Licensing	10%	10%	49%	31%

RESULTS

Companies

In 2009, what are your company's spending intentions for the following areas?

	Less than 2008	Same as 2008	More than 2008
General IP services	47%	41%	12%
Patent protection	36%	50%	14%
Trademark protection	39%	50%	11%
Domain name protection	35%	49%	16%
External legal support	52%	38%	10%
IP monetisation	30%	60%	10%

Companies

Compared to last year, how is the level of infringement on your IP Rights changing?

	Increase	No change	Decrease	Don't know
Patents	20%	45%	4%	31%
Trademarks	8%	49%	6%	27%
Designs	6%	58%	4%	32%
Domain names	17%	46%	7%	30%

Companies

How often do you conduct audits on your IP portfolio?

Monthly	14.3%
Quarterly	20.4%
Six-monthly	10.2%
Annually	40.8%
Every two years	10.2%
Never	4.1%

What were the respondents intending to do to meet these challenges? Again, 'work harder with fewer staff' was often cited, but many said that they were actually recruiting more attorneys in order to better manage the business's needs. Others spoke of the **need to consolidate** their IP portfolios through 'aggressive auditing' in order to create a more realistic, and therefore more effective, protection strategy or to modernise their departments with new IP systems. Many said that they were reviewing options for certain outsourced services, taking more work in-house to save on costs, or working with outside counsel on discounts for IP services and disbursements.

Industry awareness

When asked what they considered to be the biggest challenges facing the industry (over and above the credit crunch), respondents from companies and law firms were split.

Companies

Corporate respondents said there was a need to **simplify procedures** and minimise costs so that IP is not prohibitive to 'smaller players', that

Client education was a top priority: 'We need to help clients understand why they need to continue to invest in IP,' was a common response. Others spoke of the need to ensure that clients made 'rational decisions, instead of panicked ones'

poor-quality examination from international patent offices was leading to too much low-quality IP being granted ('We are adrift in a sea of junk,' said one respondent), and that national strategies were necessary to keep up with developing countries where the market was growing extremely quickly.

Others despaired of the international patent system, saying that 'patents are very expensive but only a low percent seem to bring back financial returns' or that 'it is overly expensive to prosecute patent rights, particularly when so many fail during product development when the exploitation risks are high'. Many agreed that the global patent process needed to be **better harmonised** or that the distinction between what could and what couldn't be patented should be revisited. 'The anti-software patenting

mood on the part of the EPO, USPTO/CAFC is contrary to good science,' said one, adding, 'Data is a physical entity and so should be protected.'

While, in general, most were happy to discuss the IP profession as an industry, one respondent pointed out that 'the fact that [the IP profession] thinks it is an industry, rather than a service to other areas of the economy' was a problem in itself, saying, 'There is too much **navel-gazing** for anything constructive to be done.'

The survey asked what should be done about the perceived problems. Respondents said that 'more **international collaboration**' was necessary, as was the need for patent offices to reduce their fees or at least 'focus on objective quality from an industry point of view'. Others specified the need to 'develop systems that enable quick prosecution', saying that 'policymakers should compromise more in order to help facilitate innovation in the current global economy' or 'look to find ways to prevent the entrenchment of present ways of working into the future'.

Law firms

What did law firms think needed to be done? 'Change the laws to simplify procedure', said many, quoting patent prosecution highways as well as competition from cheap service providers as ideal ways to start doing that. Others agreed with corporate respondents that the patent offices, particularly the EPO and the USPTO, needed to reduce the current **backlog in patent registrations**, and quickly.

However, many said that the solution for change lay firmly with companies. 'They need to change the focus from simply generating or registering IP Rights to using them to generate value,' wrote one. 'We need stronger rights not more rights,' said another. Others said it would be helpful if clients understood that **expert assistance** was crucial whether for a multinational corporation or a lone inventor. 'More companies need to hire attorneys from the beginning instead of messing things up trying to file stuff themselves,' said one attorney. 'Clients need to carefully consider the value of their IP and prioritise their spending to get the most out of it,' said another.

Predictions for the future

Finally, we asked the survey respondents to share three predictions for the next five to 10 years. Here is a selection of their responses:

Companies:

- There will be more attacks from those who think the whole system is immoral or wrong, or from the politically motivated who simply dislike the perceived power of business
- Major restructuring of some patent offices to cope with backlogs and to improve quality (although this is rather a hope than a prediction)
- US legislation will become more complex, but the European system will become cheaper
- A substantial increase in outsourcing of services
- The US will come to the table finally and help push patent process harmonisation in the right direction for a change
- Much more electronic filing of all IP-related prosecution worldwide
- Less value in patents due to increases in the numbers that are awarded
- Large IP growth in developing countries such as China and India
- More merging of companies to ensure survival in this new economy
- More limitations on claim scope; more limitations on damages; the bar of quality will rise
- A European central litigation court will emerge
- More domain names; more online infringements; more internet cases
- Copyright reform will tighten restrictions on the illegal use of artistic works in the EU – this will flow on to affect the rest of the world's copyright legislation
- An increase in open source, open innovation and patent pooling
- A treaty that will be as useful as the Patent Cooperation Treaty will be developed and implemented by the US
- Pharmaceutical companies will begin to suffer as bad policy decisions made in the realm of software patents begin to affect pharmaceutical patents

■ Towards the end of the next 10 years some sanity will return to the system, and the pendulum will begin to swing back

■ Key jurisdictions will be selected by companies, and others will decrease in importance

■ Digital branding awareness will increase, leading to greater use of domain names, Twitter, Facebook and other digital marketing strategies.

Law firms:

- Costs will be driven down, of both official and professional fees
- Devaluation of US patents as the efficiency/ quality of the USPTO continues to fall
- Introduction of the Community Patent in Europe
- More small firms selling up to larger firms (or simply disappearing)
- More countries joining international systems, cutting down the numbers of filings needed
- Reduction of corporate R&D spend, which will also reduce the number of filings
- The loss of many positions, but an improvement in the quality of job applicants
- Increased cost pressure on basic IP services
- Professional staff becoming more responsive to client needs, especially in the area of timely and cost-effective advice
- Biotech will decline on the back of the *Bilski* decision in the US
- Telecommunications clients will come to the fore as business looks to IT to reduce costs further
- China will continue to rise as a major player
- New business models in entertainment, eg web runtime (wrt), online music and video copyright
- Reduction in patent application filings due to increased costs

About this survey

The State of the IP Industry Survey 2009 was commissioned by CPA Global in association with *IP Review* magazine and carried out in April-May 2009. The results were collated from 216 responses, evenly divided between law firms (92 responses) and companies (93 responses) with 31 respondents preferring not to specify.

Roles

Of the corporate respondents, 63.6% are heads of IP or senior managers within the department, the remainder are general counsel, CEOs or general directors (9.2%) and IP support (27.3%). Of the respondents within law firms, 41.5% are managing partners or senior partners in the firm, 41.5% are attorneys or associates and the remainder (16.9%) are paralegals or legal support.

Geographical coverage

Of all respondents, 36.1% are based in the UK, 27.9% in North America, 23.1% in Continental Europe/Scandinavia, 7.45% in Asia and 5.45% in the rest of the world. Of corporate respondents, 88.9% described their companies as 'multinational'.

Industry specialism

Of all respondents, 28% are from companies – or from law firms working with companies – in the pharmaceutical/biotech sector; 28% in electronics, IT or telecommunications; 18.5% in the mechanical/automotive sector and 8.7% in chemicals. The remainder are split between companies trading in fast-moving consumer goods (FMCG) and law firms specialising in trademarks, patents or litigation.

IP holdings and cases

The average number of IP holdings, including applications, per company that took part is: 12,644 patents, 13,564 designs, 13,564 trademarks and 12,822 domain names. In each IP branch, the average number of IP cases handled per law firm that took part is: patents – 444, designs – 67, trademarks – 1,076 and domain names – 25.

- More cautious portfolio development
- A swing back to in-house departments
- Clients are much more cost sensitive and so driving hard bargains
- Less speculative filings; more focused IP strategies; more in-house IP work
- Commoditisation of some IP services at a lower, fixed price
- A greater number of smaller specialised firms
- Clients avoiding, rather than seeking, litigation opportunities
- An increase overall in the market for IP services
- Update to copyright law to reflect use of digital media
- A move towards making software patents more difficult to obtain
- Value of patents may plummet as the decisions in *eBay*, *KSR* and *Bilski* redefine what is patentable, and the licensing value of patents
- The USPTO may finally find its stride with a new administration and a new set of rules
- Legal liability (particularly of ISPs) surrounding file-sharing will be clarified
- The issue of using trademarks as keywords and website metatags will be clarified.