

The intangible investor

Written by
Bruce Berman



What's in *their* wallet?

Companies that are adverse to strong patents must be careful not to put all of the blame for bad behaviour on non-practising entities. What goes around comes around

Many significant patent holders still refuse to differentiate between various types of non-practising entity (NPEs) and continue to stockpile questionable rights. These businesses believe that they should never have to pay for a licence or for infringement damages because there are no legitimate patents that read on their products – only bad ones.

Complaining about how and by whom patents are used is starting to set off alarm bells. This is because some of the largest patent holders, and most vocal opponents of NPEs, are the most active abusers of the patent system. Like other business behaviours, patent management is associated with a kind of karma, and what goes around tends to come around. Blaming patents and certain holders for all of the system's ills, instead of acknowledging weaknesses in R&D, filing practices and examination, is raising a red flag. In *The Mousetrap*, Hamlet's play within a play, Queen Gertrude put it best: "Methinks the lady doth protest too much."

What is in large tech companies' wallet when it comes to patents is revealing. More often than not, it is tens of thousands of patents which, if subjected to scrutiny, would likely be found invalid. Portfolios that are based more on quantity than quality do not promote innovation. Instead, they promote mediocrity, the kind that the US auto industry came to symbolise in the 1970s. Bad patents are a disease which cannot be eradicated without first acknowledging their primary source. Bulking up on questionable patents to impede competition or to dissuade enforcement may still work for companies in some sectors. However, it clogs the already overburdened system and makes it more difficult for genuinely innovative ideas to be heard. Stockpiling patents may not be illegal, but it is often ethically suspect.

Social costs

"Is [undermining] innovation a harbinger of things to come?" asks Cheryl Milone, a patent attorney and business executive. "Good patents deserve legal protection because they promote innovation and create economic value. Bad patents, on the other hand, undermine the innovation benefits of the system and increase its social costs, regardless of the identity or business model of those that own them. This is why legislative proposals that target legitimate NPEs which invent, along with patent trolls which merely employ strike suits based on poor-quality patents, will end up harming US innovation and may even hamstring the next generation of start-ups" ("The real problem is patent quality, not NPEs", *IAM* 61).

Strong words from the founder of Article One Partners, a business which initially targeted patent trolls on the basis of prior art. Those affected by patents need to look beyond who might own them and how they are used, and determine to the best of their ability which rights are meaningful. Are the rights likely to hold up under scrutiny or are they merely pieces of paper? Even those with a trained eye can never be certain about a patent or portfolio's value until the claims can be painstakingly mapped. New research tools and services are doing a better job of sorting out which rights are likely to be important and which may have been issued hastily.

Until recently, it was unthinkable for a business to be forthcoming about its patent strategy. Today, as stakeholders continue to ascend a steep learning curve, a lack of IP transparency has become increasingly suspicious. High patent counts are frequently a tactic rather than a solution and are an unreliable measure of success. They are no more an indication of efficiency or innovation than a frivolous suit is of infringement. The quality of a patent holder's portfolio matters, regardless of whether there is an intention to enforce it. Securing questionable patents is not a crime (although perhaps it should be), while enforcing them borders on one. This double standard will not exist forever. Decrying frivolous litigation loses meaning when the most vocal detractors of the

current system are responsible for some of its worst patents.

A delicate balance

Tech companies should be at least somewhat embarrassed by the ratio of bad patents to good in their portfolios and an almost universal refusal to otherwise acquire and pay for what they need to practise. In many sectors companies have done a poor job of securing the rights that they may need to conduct business through internal R&D or acquisition, and have professed an unwillingness to take a licence even when circumstances require them to. Pharma companies have not been so obstinate. Why should tech companies pay for something if they do not have to? Some have become the inverse of trolls – serial infringers – using the inventions they need and taking their chances with the consequences. Perpetuating the myth of the patent bogeyman displays the opposite of strength; it shows fear and weakness, conveying an inability to innovate effectively and an unwillingness to participate on a level playing field. It is important for competitors to accept that the patent system and its product, invention rights, depend on a delicate balance of relationships, resources and diverse strategies to thrive.

Is it acceptable for businesses to hold tens of thousands of questionable rights if they have no intention of enforcing them? I don't think so. More importantly, I do not think that the USPTO, honest lawmakers and shareholders believe that this behaviour is conducive to commerce. If patent holders are truly the stewards of innovation, they must be willing to accept the challenge of competing responsibly for better ideas and procuring and managing the rights associated with them. Good patent behaviours cannot be effectively legislated. They must begin at home and build on the belief that what a business does is more important than what it says.

Bruce Berman is a principal at Brody Berman Associates, New York. His latest book, *The Intangible Investor: Profiting from Companies Most Elusive Assets*, is a collection of more than 60 columns