

The intangible investor

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The imperfect storm

A new wave of anti-IP rhetoric is angrier and uglier than ever. Figuring out who is fuelling it and why is not that difficult. Overcoming the negative impact is

Patent and copyright holders that enforce their rights are making a lot of people angry. The convergence of increased competition, blighted economies and misinformation is unleashing a new wave of vitriol directed towards IP rights and owners which is more dangerous than it may appear. Holders and managers who are focused on maintaining their IP rights many also want to think about exercising their First Amendment ones.

The perfect IP storm is about to make landfall. Those already dubious about the use of patents and other rights see an opportunity to cut them down further. Inducing broad audiences to see IP as casually issued monopolies in the best interests of a few is getting easier and, worse still, somewhat fashionable.

Technology and business media are joining with political organisations, some tech businesses, law makers and an increasing number of academicians to challenge IP. Disdain for patents and copyrights is not new. Its political correctness is. Nurtured by half-truths about IP abusers locking out competitors and shaking down businesses, many people believe that intellectual assets impede innovation and represent privilege; they are akin to bank bailouts and inflated CEO compensation. Having been dealt stiff body blows by the courts and recent legislation, IP is on the ropes. Of greater concern than naysayers are IP managers and attorneys who know better, but remain silent.

Occupy Wall Street, the Arab spring, Russian unrest at the election polls and the ascendance of multiple Pirate Parties have raised suspicions about power and control. Faster access to more information has changed the way that people view ownership. You turn on the tap and water comes out. Only expensive restaurants have the audacity to charge for it. You turn on your computer and data streams emerge, embodied by content, such as music and images. Ease of access and broad adoption

have made collecting tolls appear inherently unfair, like taxing the air.

Not in decades have people felt so removed from those in government and business. Frustration is growing about economic control and IP rights, never beloved, are in the middle of a bloody battle in which millions believe that their personal freedom is at stake.

From an anti-IP perspective, there is plenty to complain about: the high cost of obtaining and defending patents; trolls which are often depicted as blood-sucking parasites; patent sales, such as Nortel's US\$4.5 billion auction dominated by cash-laden tech giants; and IP doubters including economists and law professors such as James Bessen, Michael Meurer, Josh Lerner, Michael Lerner and Lawrence Lessig, who don't believe that intellectual assets should be treated like other property. They would sooner see patents seriously weakened, if not eliminated, and invention licensing compulsory.

The wide and generally blind acceptance (*Washington Post, et al*) of Bessen's, Ford and Meurer's working paper, "The Private and Social Costs of Patent Trolls", is particularly troubling. In this study they argue that non-practising entities (NPEs) are really patent trolls "who opportunistically litigate over software patents with unpredictable boundaries"; and are responsible for serious social and economic damage. Using stock market "event studies" around patent lawsuit filings, the authors claim that NPEs were associated with half a trillion dollars of lost wealth from 1990 through 2010.

Bessen, *et al* acknowledge that their work received support from the (ironically named) Coalition for Patent Fairness and research assistance from PatentFreedom. Both of these groups are in turn supported by significant patent holders, fearful of more assertive ones.

Another serious concern is the rapid rise of self-proclaimed Pirate Parties, which in just a few years have been established in more than 40 countries.

The first Pirate Party was the Swedish *Piratpartiet*, founded in 2006. Other parties and groups have been formed in Austria, Denmark, Finland, Germany, Ireland and the Netherlands. In 2009 the original Pirate

Party won 7.1% of the vote in Sweden's European Parliament elections and won two of Sweden's 18 European Parliament seats. In 2010 the Pirate Parties International was founded in Brussels at the PPI Conference. In September 2011 in the Berlin state elections The Pirate Party won 8.9% of the vote and 15 seats in a state parliament.

As James Naughton in *The Guardian* reported: "It isn't often that a political party takes a relaxed view of file sharing, advocates radical reform of intellectual property laws, opposes state surveillance in all its forms, evangelises about open source, and then has electoral success in the real world."

Managers and technology investors cannot afford to be complacent about IP rights. They were hard won and, if recent events are any indication, they will be difficult to retain. Those who believe that IP continues to contribute positively to society need to be more explicit about where and how. An increasing number of people want to see IP rights and their enforcement demonised. They believe they are by-products of government control and special interests, and limit freedom and social welfare. Unheard are the voices of those who know that the IP system, while imperfect is inclusive and effective.

Driving a silver stake through the heart of IP rights will not put innovation disputes to rest or give file sharers what they desire. However, with numbers on their side and the world economy in turmoil, IP naysayers are in a good position to gain a foothold. Any one of these developments – the passage of the America Invents Act and weakening of patents, the growth of Pirate Parties, anti-troll trash talk and the global Occupy movement – would not have so much impact. Taken collectively, they are a force to be reckoned with.

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