

The intangible investor

Written by
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If it ain't broke, fix it anyway

Patent suits are down relative to a 29% increase in grants over the past decade; median damage awards are at a 16-year low. So how come everyone and his cat wants to fix the patent system?

The frequency and cost of patent disputes are wrecking business and slowing innovation. At least, that's the belief of an increasing number of technology companies, publications and academicians. The facts, however, show that disputes are way down relative to the dramatic increases in patent filings and grants between 2000 and 2010, and the median award for 2010 was down to just \$2m.

While patent litigation is more prominent in the media, it is less frequent and impactful than popularly believed. It is not entirely clear whether patent doubters are merely parroting what they hear from infringers and what they read in the press, or promoting an agenda of their own. However, the net effect is the same.

As the playing field has levelled, making it easier but more costly for infringed patent holders to be heard, many businesses that rely on innovation but don't always properly secure it are seeking a more favourable 'incline' – closer to what they are used to historically. Some believe that the America Invents Act is intended to readjust the scales and has made questioning patent quality too easy and legitimate enforcement more arduous.

What is broken in the current patent system is the unbridled detractors who, without presenting all of the facts, depict patent enforcement as inherently unfair and detrimental. Lest we forget, in the eyes of the law, infringing someone's patent – knowingly or not – is stealing.

Headlines such as "Tech Giants Slug it Out Over \$2b 4G Patents" excite readers. If patent battles between Davids and Goliaths make for good copy, those between evil Davids and good Goliaths serve a broader readership. It is amazing how many people still buy into the troll myth – a view which is promoted by those with an economic interest as much as by those who think that patents provide too much power.

Patents are confusing and simplifying matters is attractive. Few holders enforce questionable patents for nuisance value because the cost and time of resolution have made doing so much less attractive than in the past. That patent enforcement is inherently dubious and financially devastating is not the first lie that confused and frightened people have been asked to swallow. It will not be the last.

There is no argument that patents, the inventions they protect and the related disputes that arise are complex. Determining what is truly innovative and who controls it is not a simple matter. Some honest confusion plays a role in why most people regard patent enforcement as wrong, and royalty payments as an unfair tax. But feedback from the CIPOs, lawyers, asserters, investors and IP professionals whom I talk to suggests that both vested interest and lack of awareness play a part in anti-IP thinking. (If I am preaching to the choir, forgive me. You might forward this column to a journalist or investment banker.)

Patent exclusivity still strikes fear in the hearts of many otherwise intelligent people who do not understand what it means or how it can be applied. It sounds worse than it is in practice. This makes it surprisingly easy to rally public opinion against patents and other IP rights, such as copyrights, which the general public believe are the province of wealthy businesses and smart attorneys, and something they could never benefit from.

Even those who may know better are starting to believe the rhetoric. It has become more fashionable to trash intellectual property than to respect legitimate innovation and innovators. (This is also true of content or copyrights.) Technology publications such as *TechCrunch* and the *Huffington Post* (both now owned by AOL) have been most strident in their anti-patent rhetoric. A sample headline: "Apple Made a Deal with the Devil, No, Worse: a Patent Troll." (You couldn't make this stuff up.)

Surprisingly little is conveyed about the unauthorised use of inventions – something that goes on routinely. Businesses get away

with it largely because they know that SMEs and inventors are unable to handle the cost and complexity of resolving disputes. In a sign of the maturing market for invention rights, investors today are willing to provide acquisition or litigation capital. Thus, infringers have more to worry Still, do not expect defendants to roll over and pay hefty settlements on their watch if they do not have to – or without a long and proper fight and some whining.

Infringement that is successfully identified and penalised is a win for innovation and businesses. If infringers do not want to pay the going rate for using the invention rights of others, they can come up with a legal design-around or a better alternative. Building a better mousetrap is what capitalism is all about. However, non-infringing alternatives are easier imagined than created, and are quite costly. For many businesses, the answer is to 'borrow' inventions, especially if they are unlikely to get caught or to have to pay much if they do. More scrutiny is needed where the patent system is legitimately the weakest: examination; pendency; the difficulty to value infringement; and the cost and time to resolve disputes.

Is it really that difficult to track what claims a product may be infringing before it goes to market?

In the not too distant future I believe that technology will better serve innovators by automatically connecting products sold to the claims that they may infringe, placing the burden of proof on sellers. This will enable earlier detection and less contentious licensing agreements. It will save R&D dollars and render the ignorance defence obsolete. It also will result in new businesses and higher returns – not a bad thing.

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