

The intangible investor

Written by
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Uncertainty rules

Confusion over new patent hurdles and lower damages awards is creating an opportunity for licensees and buyers who can recognise a bargain

Operating companies (Opcos) have overtaken non-practising entities (NPEs) as the leading acquirers of patents. Opcos have seized the opportunity to buy patents and license them on the cheap, betting that what they acquire is good enough and that some rights are safer in their hands than others'.

One prominent rights holder told me recently: "We have to believe that quality IP assets deployed by smart people in a professional manner will lead to positive outcomes. In a down market there are lots of opportunities for those with good ideas and execution."

Current patent values are in part an overreaction to the price inflation caused by the smart phone wars of 2011 and price erosion resulting from new validity hurdles. I do not think that any business believes that all patents are essentially worthless nuisances. (Google's Patent Purchase Promotion experiment attests to this.) It is a matter of finding the point at which a willing buyer and a willing seller (or licensor) are willing to do business. That is called a market and there are robust, relatively transparent, ones for practically every asset class except intellectual property because of the uncertainty surrounding invention rights.

Pervasive cynicism

How will potential buyers know when values have hit bottom? They won't. Those who lack the patents they require will continue to secure them externally as long as it makes economic sense – and often it does. This situation may also benefit some licensors and sellers, which are able to make up in volume what they lose on price. Patents are still very much a numbers game. The greater the volume, the better the results. Determining whether a patent issued by the US Patent and Trademark Office (USPTO) is reliable remains costly and a higher bar has been set for what is patentable and valid. On one level

this seems thorough and progressive. On another it seems somewhat arbitrary, even political, and likely to penalise rights holders who may wish to license inventions rather than commercialise them. For many of those wishing to amass patents (quantity) as opposed to deploy them strategically (quality), a state of uncertainty helps to keep potentially harmful rights and rights holders at bay.

The patent system is rife with cynics because reliable patents remain the exception, not the rule, so no one takes a licence unless they have to. Better patent quality means less cynicism from filers, asserters and alleged infringers alike. For patent quality to be taken seriously it must be present throughout the system, including in the portfolios of rights holders which do not enforce them. For most Opcos patents are not intended for deployment against infringers and only need to be reliable up to a point. Placing the onus on filers to secure patents that will stand up to scrutiny, even if they do not plan to enforce them, will lead to better, more reliable patents which are taken more seriously.

Businesses currently associated with the enlightened use of IP rights include Microsoft, Philips and IBM. They license, buy and sell, and leverage good (and many bad) patents intelligently, while enhancing their core operating businesses. This is no mean feat. It takes vision, guts and the confidence of senior management. Not every operating company or industry is suited to this approach. Opportunities abound for Opcos – or the pools that represent them – to acquire good patents that can help achieve objectives and defray R&D and legal costs. It is one of many ways to mitigate risk. If IP rights evolve and the Patent Trial and Appeal Board (PTAB) finds a respectable number of good patents valid or better still, fixable, it will strengthen the system and make patents more attractive to own, if more costly to acquire.

Data provided by Richardson Oliver Law Group, which tracks brokered patent transactions, indicate that patent deal listings (packages) are down 20% from 4Q 2014 to 1Q 2015, but that packages sold are up a startling 88%. In an article in *IAM*

earlier this year by ROL (see "The brokered patent market 2014", *IAM*), it was shown that corporate buyers have overtaken NPEs in 2013 and 2014, comprising 46% for the market versus 38% for NPEs. Asking prices for US-issued patents monitored have fallen from \$577,000 in 2012 to \$360,000 in 2014, a fall of 37.6%. It appears that buying opportunities abound.

The high cost of uncertainty

There have been fewer large patent damages awards and blockbuster transactions, but no dearth of opportunities for licensors and sellers with realistic expectations. Chipworks' Terry Ludlow wrote in *Corporate Counsel* recently: "More companies will be looking for ways to monetize surplus patent assets (and reduce maintenance costs), and more will offer them for sale or other considerations. However, with the increasing difficulties in enforcement, only valuable patents will be marketable and price pressure will be intense." While the Rockstar sale to RPX of 4,000 patents was only a fraction of the original Nortel purchase price, it still generated almost \$1 billion. Better still, among the 30 RPX licensees of those patents were Google and Cisco, perhaps the most ardent patent cynics. The moral of this tale, if there is one, is that at the right price almost any asset can be attractive, even questionable ones.

With enough bad actors to go around, it is useful to ask: who or what is responsible for the current level of uncertainty? And how is it being exploited? For some, passage of more legislation is less important than continued uncertainty. It has rendered identifying patents on which to bet a daunting task and most patent litigation financially unfeasible. When the dust finally settles, experts will likely figure out how to use new rules to the advantage of their clients. Until then, the only certainty is uncertainty – and for many Opcos and some NPEs, that's good enough.

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