

The perils of privilege

Patent exclusivity has never been more misunderstood or feared. Rights holders need to do a better job of explaining what patents are and whom they benefit

By Bruce Berman

The invention story no longer resonates as it once did. The image of the garage inventor has been supplanted with that of the patent troll hoping for an easy payday. Is it any wonder why patents are hated?

Invention rights have never effectively surmounted the exclusivity barrier. Since the Middle Ages, when the English monarchy granted patents in exchange for a piece of the action, patents have been associated with words such as 'monopoly' and 'privilege'. Invention rights have come to imply special favours, similar to royal land grants. Uncertain in the best of circumstances, and difficult to explain, patents remain in the minds of many rational people insurmountable barriers to entrance that are erected with government sanction and controlled by an elite class of corporations, lawyers and speculators acting on their own behalf.

Educators are ill equipped to answer the most fundamental questions about patents: why do they exist and whom do they benefit?

In a digital world, the line between ownership and fair use has become blurred. Snatching other people's output is as reflexive as going to the tap for a drink of water. Violating IP rights is widely regarded as acceptable. Theft of this nature is not only illegal but unethical, although many would be hard pressed to realise it. Copyright holders have suffered at the hands of record labels and music streaming services such as Pandora, Sirius, YouTube and Spotify, which only recently began to treat artists better.

If there is anything worse than power, it is the abuse of it. Patent licensing has been reframed by some businesses as the epitome of abuse. Patent trolls are the perfect villains for our time: visually grotesque, they make it easy to belittle complex ideas and direct collective anger away from serial infringers towards individuals and organisations which rely more directly on IP rights. Demonising rights holders undermines the nuance that patents demand and pre-empts discussion that they might otherwise facilitate – and it enables infringers to deflect blame for disputes that they may ultimately encourage.

That is why public education about IP rights is so important.

A history of misunderstanding

Misunderstanding about the rights conferred by patents dates back to the 18th century and the first head of US patents, Thomas Jefferson.

In "Who Cares What Thomas Jefferson Thought About Patents?" (*Cornell Law Review*), Adam Mossoff, professor

of law at George Mason University School of Law, explains why patents and other IP rights are not privileges granted by the state, but fundamental property rights, 'natural' rights, which should be secured to their owners and legally protected as commercial assets in the marketplace.

"In reviewing primary historical sources in the eighteenth and nineteenth centuries, it is apparent that the Jeffersonian story of patent law is a historical myth," writes Mossoff. "Judge Rich once criticized labeling patents as monopolies due to the negative 'emotional' baggage that the term 'monopoly' carries with it. He recognized that 'talk of the patent monopoly weds patents to prejudice, which is not conducive to clear thinking.'

"The same must be said about the Jeffersonian story of patent law," he continues, "which weds American patents to English royal monopoly privileges, and thus masks the development of early American patent law under the meaningful guidance of the social contract doctrine and the labor theory of property of natural rights philosophy."

Zeitgeist

Misrepresentation of IP exclusivity discourages creation. It affects many patent holders and stakeholders, including the public, and is fuelled by a pervasive anger that continues to grow – call it the zeitgeist or "spirit of the time".

This spirit spawned Republican presidential candidate Donald Trump and inspired the Brexit; it also facilitated hostile responses to the Syrian refugee crisis, the Occupy Movement which raged against the 'one percenters', and widespread distaste for hedge fund billionaires who pay no income tax. Patents have been caught in the perfect storm of anger towards government, the entitled and ideas too complex to fathom on Instagram.

Patents are not a privilege, but an opportunity for the holder, under rare circumstances, to profit for a limited period in exchange for sharing information. This facilitates new ideas and encourages commerce and investment. The patent story needs to be told, in context, clearly and plainly for all to understand. It must begin early, at home and in school, with participation from teachers, parents and youth organisations.

I have written – somewhat facetiously – that Silicon Valley in the 2010s is starting to resemble Detroit in the 1970s: fearful of change and obsessed with self-preservation. Silicon Valley was built on disruptive innovation and although it is loath to admit it, requires the right combination of bold new ideas it cannot control to survive.

IP professionals are already aware of the role that IP rights play in society and commerce, but many stakeholders are not, especially journalists, educators, students and parents. In a digital, ideas-driven economy, the broad benefits provided by IP rights – not the medieval privileges associated with them – need to be part of a basic education, along with what are acceptable IP behaviours. **iam**

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