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The business media are doing a better job of covering patent disputes. However, they still have a long way to go if intellectual property is to be taken seriously by non-IP audiences

Publications such as the *Financial Times*, the *Wall Street Journal* and *Bloomberg BusinessWeek* have become increasingly aware of the impact of IP rights. Unfortunately, they may not realise that covering complex and costly patent disputes requires IP perspective as well as journalistic skills.

Most people believe that regarding patents is akin to watching paint dry. Journalists are not much different. The result is that when they report on developments, they may rely too much on what their sources tell them is important, as opposed to determining what really is. It's puzzling to me that otherwise reliable financial news sources often refuse to assign reporters to a regular IP beat.

IP press coverage over the past 20 years has been primarily confined to disputes involving large public companies, significant damages awards and non-practising entities, still often reduced to trolls. A handful of blogs, notably Gene Quinn's IP Watchdog, Joff Wild's *IAM* blog, Dennis Crouch's PatentlyO and my IP Insider, are treading where the mainstream business media typically fear to.

The best blogs attempt to unbundle the issues and sort the facts, where much of the mainstream press is looking at them in broad brush strokes. It's ironic that it has fallen to a handful of legal or tech reporters, few with patent exposure, and a coterie of jaded if dedicated part-time writers to provide perspective about developments that collectively affect tens of millions of people and billions in market value.

Rising interest

Interest in IP transactions, too, is starting to attract media attention. For example, Bankrupt Canadian network company Nortel's 4,000 patent portfolio is expected to generate US$1 billion for creditors. While Apple and Google don't appear to need the patents today to sell their products, they reputedly want them to bolster their portfolios, and possibly to use the patents as dry powder against those networking companies that do. Reuters did an excellent job of explaining the build-up to the private auction.

In fairness, it is not easy to get IP holders to talk about their intentions. For many patent holders, the less people know, the better. This is likely to change as affected parties ask more difficult questions, and publicly held operating companies must learn to manage their IP transparency.

In a recent *Forbes* article, "Going Toe to Toe with Medical Device Giants", the magazine does a credible job of conveying a complex patent dispute involving designer Nova Biomedical, but fails to explain that the business of patent defence is often a more significant problem for large companies than smaller ones. The article details how tiny Nova prevailed against Abbott, Roche and Medtronic regarding the rights to a glucose meter for diabetics. The piece is undermined by over-relying on its resources.

Ropes & Gray describes how difficult it is for players such as Nova to go up against larger competitors that want to bury them. At one point, Nova defended itself against three separate suits which it eventually had to secure loans to finance. The apparent take-away: patent litigation is more expensive for some defendants than others; important cases need large law firms.

Hung-out to dry

It is no surprise that legal battles involving inventions are expensive. Still, the article underestimates the cost. Early on, Nova chose to collaborate with insulin syringe maker Becton Dickinson, which was eager to get into a new product line. Unfortunately, it picked the wrong partner. Becton Dickinson required Nova to cover any potential litigation costs and, when the going got tough, pulled the plug on its nascent glucose monitoring business, leaving Nova without a partner.

Why wouldn't competitors move in for the kill if they could? Perhaps Nova's patent portfolio was not as robust as it had thought and cutting a licensing deal with its adversaries less of an option. The *Forbes* story was curiously bereft of this scepticism. It compiled data from several sources, including Ropes, PwC, Stamford and the USPTO for a sidebar that attempts to illustrate the high costs associated with patent disputes. These facts tell only part of the story. (My addenda in italics.)

Pricey patents

US$10 million – cost to defend a high-stakes patent suit

The average patent suit today costs US$5 million-plus. Significant disputes that go to trial can exceed US$100 million, and it is not unusual for a plaintiff's legal fees to run to US$20 million orUS$30 million, depending on the amount of potential damages involved.

US$3.8 million – median damages awarded in patent infringement cases from 2001-07

Most defendants main worry is large patent awards which can exceed $1b (Karlin v Medtronic, *US$1.4 billion;* J&J v Abbott, *US$1.7 billion), and settlements that can be similarly high* (NTP v RIM, *US$612 million). While* eBay v MerchExchange *may have made them less automatic, the threat of an injunction is still one of a plaintiff's most potent weapons.*

2,700 – Average number of patent-infringement lawsuits filed per year

The average number of patent infringement suits is only about 1.4% of the patents issued annually. They are less rampant than the media would have us believe. Eighty six percent settle before trial (Professor Paul Janicke, Universtiy of Houston).

100 – Average number of patent cases that go to trial each year

Despite the headlines about disputes and worldwide increases in innovation, US patent trials have remained virtually flat for 20 years. The percentage of patent suits that go to trial (3.7%) has actually decreased. The number of defendants may in fact be up.

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