



Dumb & dumber

Outlawing broad patents on unusual inventions is a bad idea. It is more likely to destroy innovation than fuel it

There is a movement afoot advocating that stupid patents should not see the light of day. Proponents believe that this spares business and society the cost of ludicrous inventions. I think these watchdogs are the silly ones – a case of dumb and dumber.

“A Patent on Foolishness” typifies the how these misguided reformers see things. The article was published in July in *What We Now Know*, by Casey Research (www.caseyresearch.com), a publication that describes itself as “a bi-weekly newsletter for the investor-freethinker that keeps you in the loop on the economy, politics, health, science, technology, and more”. It details some of the many colourful and apparently ludicrous patents that have been issued by the US and other patent offices, presumably at the behest of vain inventors and zealous attorneys.

“Have you ever used a laser pointer to drive your pet crazy?” the article asks. “You may soon have your day in court because you infringed on (US) Patent No 5443036, ‘Method of Exercising a Cat,’ including ‘any other animals with the chase instinct.’ And if you, after reading this, think you better go back to having your dog fetch a plain old stick, beware. There’s a patent for that, too. (No. 6360693, ‘Animal Toy.’)... In Australia, John Keogh, a freelance patent lawyer striving to expose the faulty system, managed in 2001 to patent a ‘Circular Transportation Facilitation Device,’ aka the wheel... Patent laws were originally designed to protect truly innovative ideas from being stolen by others...”

The whole story

As evidence that the system is broken, the unnamed author cites the Electronic Frontier Foundation and Professors Lerner (Harvard) and Jaffe (Brandeis), co-authors of the misguided *Innovation and its Discontents*. (My review of this book, “Creative Thinking,” can be found at www.brodyberman.com.) Says *WWNK*: “...All kinds of non-innovative items and simple methods have been granted patents, and litigation – often involving tens of millions of dollars – is going

rampant. Some patents might indeed threaten not only the uninhibited development of new technologies but the very fabric of modern society.”

Having a laugh at the expense of what appear to be outlandish patents may make for good copy, but it does not tell the whole story.

My guess is that more large portfolio owners than independent inventors are filing ridiculous, system-clogging patents that should never have issued. Indeed, some of the most incredible ones may not be so outrageous after all. The idea of the “one-click” internet purchase decision promulgated by Amazon.com, while irksome to some, was eventually licensed to Apple in 2000. Some large filers would have you believe that it is everyone but they who are soiling the system. Good ideas that are readily accepted can appear to be generic. At some point, the alphabet was probably patentable: “Great idea. Why didn’t I think of it first?” Actually, someone probably did. The problem was they failed to file on it in a timely manner and to raise the capital necessary to enforce their rights.

The patent system does not prohibit the use of an invention. It allows patent owners to prevent others from doing so. This is an important distinction. In the US, it is the district courts and CAFC who are responsible for understanding the practice of an invention. Until recently, few patentees had the resources to oppose infringers and many patentees were content to cross-license. Patent offices are in no position to judge what is important or “truly innovative”. They should stick to the business of assessing patentability and leave relevance to the marketplace and, if necessary, the courts.

We live in a distinctly idea-driven economy. If the sanctity of an invention that meets the tests of patentability is not respected, no matter how absurd it may seem, innovation will suffer. Like free-speech, the right to secure a limited period of exclusivity for an invention in exchange for disclosing it is the bed rock of a civilized society. Of course, there will be those who abuse these rights and sometimes blatantly so. But shutting them up is far more costly than tuning them out. It is the price we pay for freedom. Encouraging freedom of thought is no less

important than freedom of speech.

While the patent system could certainly use some fixing, I would prefer it favour the patent holder to a fault than make stealing good ideas easier.

Value judgments

There are many overly broad patents. If the PTO refused to allow patents unless they met very narrow criteria, pretty soon, the invention stream would flow to a trickle. Placing a value judgment on what is innovation and who are serious inventors is more dangerous that it appears. I can understand people’s impatience with overly broad patents. They can be abusive and frustrating. But narrowing issuance criteria too much would not be a step in the right direction.

Many patents are easy targets; broad ones are easier still. Taking cheap shots at otherwise acceptable inventions only proves that we need better dispute alternatives. When it comes to young industries – like the internet, software and biotech – innovations at first can be sweeping. When Edison was inventing, the fear was that he would control electricity. People thought Bell would dominate the telephone industry and undermine its development.

History shows that while the barriers to entry presented by some patents can be daunting, frequently they facilitate prosperity. While difficult to enforce, a peanut butter and jelly spreading invention may be just what a five-year old needs in the morning and what his sleepy parents are willing to pay for.

Next issue: what innovators and lawyers say about “dumb” patents.

Bruce Berman is president of Brody Berman Associates in New York, where he works closely with IP owners and advisers. His latest book is *Making Innovation Pay – Turning IP Into Shareholder Value* (Wiley 2006). The views expressed above are Bruce Berman’s and do not necessarily reflect those of Brody Berman Associates
BBerman@BrodyBerman.com