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Balancing act

Legislative and judicial efforts to rein in patent abuses have deterred legitimate enforcement. It will take a coordinated effort to swing the pendulum back

By Bruce Berman

Many of the best US invention rights have been neutered by what some holders believe has been an era of too strong patents and too large awards. There are some signs that reason is starting to prevail. However, facilitating a counter-correction will require that a range of stakeholders be heard. When the dust settles, patent naysayers – legislative, judicial and commercial – may find themselves in a more adverse position than they were originally, especially if pro-patent proponents can show that reformers' good intentions have resulted in the system being more harmed than improved.

The physics of a pendulum are predictable. A bit too much of force on one side unleashes energy which throws off the balance of the whole, threatening equilibrium. Temporary over-corrections are best responded to rapidly, almost instinctively, to minimise adverse outcomes. Think of children on a see-saw. Now, multiply their weight by megatons.

Difficult issues

"Patent licensing and monetisation are still challenging due to recent court decisions eating away at the 'full market' value rules, the difficulty of obtaining injunctive relief and the current *inter partes* review process," Brian Hinman, chief IP officer of Philips, wrote in an email.

"The outcome of *Cuozzo* [district court versus Patent Trial and Appeal Board litigation standards] and *Halo* and *Stryker* [wilfulness] could certainly change the current patent landscape going forward, and be the start of a more significant pendulum swing, but there are still difficult issues to consider. We may be seeing a bit of a swing in the number of patents being successfully challenged given that the percentage of *inter partes* reviews being initiated has recently dropped somewhat. However, in order to see a more meaningful swing, judicial or legislative involvement will most likely be necessary."

Other signs of a movement back towards the middle include:

- less strident use of language regarding non-practising entities (NPEs);
- an increased desire by some operating companies to secure better-quality patents;
- financial technology and other sectors producing discernibly valuable (software) inventions;
- the rise of automotive patents; and
- an increase in operating company patent purchases and sales.

That said, credible rights holders tell me that it is still virtually impossible to license a good patent that is likely infringed without first filing a lawsuit and probably having to deal with an *inter partes* review. In tech, if not chem-pharma, the era of the licensing discussion is all but over. Uncertainty has never been greater; nor has hostility to those offering an invention for license, no matter how good the patents or how fair the terms. 'Efficient infringement', a term we are hearing more of lately, is really a kind of risk-adjusted theft. Simply put, it is more economically viable today for most businesses to use what they need than to pay for a licence. When the equity markets overcorrect, down or up, it is a matter of time before demand and pricing re-sync and stock prices normalise. This will not be the case with patents, which suits some patent-adverse businesses just fine.

A host of diverse factors affect patent certainty, which in turn affects relative value. If the courts and lawmakers refuse to reassess the impact of their behaviour, otherwise good patents and promising businesses will be damaged and truly disruptive innovation discouraged. It could take a decade or more for inventors and inventions to regain the modest respect they once had. By the time the impact on innovation, investment, jobs and commerce is measurable, it may be too late.

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Getting the balance right

Patent holders can hasten a move back to the middle by showing that weak, uncertain invention rights are less about making enforcement more difficult for NPEs than undermining a once-inclusive system. Reliable patents attract investment and facilitate planning. Making it unrealistic to protect and profit from new ideas discourages competition. The US automobile industry in the 1960s experienced a precipitous decline in product quality in large part because it refused to recognise the innovations of other companies and individuals. It took decades to recover and Chrysler, previously owned by Daimler, is now shepherded by Fiat. There are two remaining US automobile manufacturers and one of them, General Motors, is still recovering from bankruptcy. So much for naval gazing.

Kodak and Polaroid were the state-of-the-art market leaders in photographic technology for decades. Both were hugely profitable and beyond competition, virtual monopolies. They fought each other tooth and nail over patents on the deck of the Titanic, as it were, only to be defeated by the newer, better invention of digital photography. The not-invented-here syndrome is a disease to which the largest, most successful and initially innovative companies are highly susceptible. Unfortunately, scientists have yet to identify the antibody to prevent it.

"The pendulum is swinging back a little bit toward patentees," Ashley Keller, managing director of Gerchen Keller Capital, told me recently. "The signs include positive developments in the courts, but I don't know what balance between the warring camps looks like. Ideally, policy makers – who are interested in a properly functioning republic and getting reelected – will set the balance. Neither side of the industry can be trusted to do so themselves. They all are too self-interested." *iam*

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