

# How to build a world-class licensing programme

New business models and a growing anti-patent trend are changing the business of licensing. The challenge for licensing programme managers in this evolving landscape is to find ways of delivering greater value to customers

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At least two ‘megatrends’ – large-scale shifts in the landscape – have the potential to change most of what we have come to learn about the business of licensing over the past several decades.

## Empowerment of the patent pirates

One of these megatrends is anti-patent legislation and anti-patent judicial activism that has created an increasingly hostile environment for individual patent owners in favour of a nurturing environment for big company interests. For example, the principal advocates of the recently enacted America Invents Act are a relatively small group of big technology companies (working with the so-called Coalition for Patent Fairness) that account for a remarkably disproportionate (by some estimates over half) share of dollars paid out in patent infringement settlements in the United States. That such a small group of very powerful serial infringers – or patent pirates – has been able to exert such influence is alarming, and is inherently harmful to entrepreneurial innovators.

In considering the America Invents Act prior to its passage, Yongshun Cheng, senior judge and deputy director of the IP Division of the Beijing High People’s Court, made the following observations in the *China Intellectual Property News*:

“From the analysis above, we can see that

the bill will weaken the right of patentees greatly, increase their burden, and reduce the remedies for infringement... The reason for this is partly because it was supported by some of America’s largest and most influential companies... For these companies, a weaker patent system, or one that benefits companies that do not rely on patent protection to obtain market dominance serves their interests... It is friendlier to the infringers than to the patentees in general as it will make the patent less reliable, easier to be challenged and cheaper to be infringed... This bill will give the companies from developing countries more freedom and flexibility to challenge the relative US patent for doing business in US and make it less costly to infringe.”

The purpose here, however, is not to debate the alleged merits of the America Invents Act, or to examine the litany of cases (including the Supreme Court’s *eBay* decision) that have dramatically diminished the risks (from injunctions to damages) to the patent pirates. It is rather to note the sea change away from the US ‘innovation incubator’ model, which promotes competition, towards a European model that protects the already dominant. The upshot for the patent owner is that anti-patent legislation and anti-patent judge-made law have made patent rights more expensive to enforce – and therefore less valuable.

## Crowding the channel

Another megatrend is the proliferation of new licensing-related business models. Licensing is no longer the province of technology companies (most of which focus on technology development and productisation, but a few of which focus on technology development and licensing) and universities (where some

technology development and licensing also occurs). Due to heightened awareness of the value of intellectual property, and patents in particular, today the patent IP ecosystem is awash with new entrants, promising new ways to turn patent intellectual property into gold.

The market for patent IP commercialisation has become populated by organisations representing a spectrum of IP strategies.

### Mass patent aggregators

Patent aggregators aim to benefit their membership by taking intellectual property off the market and thereby providing a kind of insurance against a nuisance of unspecified value.

### IP brokerages

Offering extensive catalogues of patents, IP brokerages aim to achieve a quick sale and to minimise their investment in the patents themselves. Generally, the serious research and analysis that inform perception of value are avoided and left to bargain-hunting buyers.

### Litigation-centric organisations

The allure is a network of contingency relationships that enables a patent owner to feel empowered via quick litigation. Ultimately, these firms are playing a numbers game in which patents that they undertook no risk to develop are subjected to all-or-nothing litigation as soon as possible.

### Patent pools

Patent pools offer the opportunity for a patent owner to 'pool' its patents along with numerous others, and thereby be relieved of the burdens of creating evidence of use or of communicating in detail about the advantages and importance of the individual innovations.

### The perfect storm

The strategies noted above are all popular paths that might be appropriate in certain circumstances. However, they each reflect two-dimensional thinking born from a 'Licensing is

Plan B' mindset, in which short-term considerations prevail.

Remarkably, despite their widespread use, the big-picture effect of these strategies on the IP marketplace is a tendency to devalue individual patent portfolio estates. It is not difficult to understand why. The interests of promoting the stories of risk, investment, dedication and market vision behind the individual innovations are being subordinated to more collective, abstract and short-term interests such as:

- The interest in having all patents deemed 'essential' to the practice of a standard.
- The interest in the rapid and mass deployment the legal system's enforcement mechanisms.
- The interest in 'cashing out'.
- The interest in being 'insured' against a large volume of patents of unspecified value.

Each of these strategies has its own vogue – but the pendulum in the United States is swinging away from the protection of the individual, and legislative and judicial attitudes continue to diminish the inherent value of patents.

Whatever interests they serve, none of these strategies is an effective substitute for what generations of product managers have learned and practised with respect to products of all types – that maximum return is stimulated only by the maximum perception of value.

### Some things never go out of style

In the end, the time-honoured maxim holds true: you reap only what you sow. If awe-inspiring gems littered the ground, they would not command the value that they do. It is only the investments made in their mining, refinement and presentation that stimulate demand and unlock their value. The building of a world-class licensing programme begins with embracing the principle that the marketplace for intellectual properties is no different.

Therefore, if the inherent value of patents has been diminished by legislation and judge-made law, as noted, then the appropriate response is to rely less on inherent value and to focus more on building it. Similarly, if new go-to-market strategies de-emphasise the value of individual patent assets, or create unreasonable

risk to those assets, then the appropriate response is to rely less on such strategies.

The licensing programme manager must find ways to deliver higher value to customers.

### Customer service

Remarkably, many licensing organisations fail to appreciate their own licensees or prospective licensees as customers, and therefore fail to serve their customers' needs. The increasing litigiousness of the licensing business has aggravated this issue substantially. The effective licensing programme manager will appreciate and respond to the needs of licensees – and will 'walk a mile in their shoes'.

The in-house licensing executive has an increasingly difficult job. As products become more sophisticated, the links between the end-user product managers on the one hand, and the technology and component suppliers on the other hand, become both more remote and more numerous. The result is that the in-house licensing executive has increasingly more issues to manage and a diminishing amount of direct knowledge about how best to manage them. Moreover, the purchase of a licence is often a sophisticated business decision, involving careful management of a variety of technical, economic and business issues. Therefore, the effective licensing programme manager:

- Develops an array of services aimed at supporting the efforts of customers (eg, in-house licensing executives).
- Is readily available – in person and often – for direct communication between business decision makers in the customer's native language.

An effective set of technical services should include the ability to provide informative engineering data and analysis. Depending on the stage of adoption of the licensed technology (eg, forward-licensing versus enforcement) and the type of technology being licensed, customers may require technical services such as technology demonstrations, assistance with technology integration (and certification), assistance with sourcing of components, assistance with sourcing of manufacturing capacity, product

test and measurement feedback, assistance with understanding the detailed technical relationship between the licensed intellectual property and the customer's products, and competitive technical intelligence.

An effective set of business analysis services should include the ability to provide informative financial data and analysis. Customers may require, for example, detailed cost/benefit analysis of participation in the licensing programme, analysis of the extent of their usage of the licensed technology (past and future, by region and by product line), analysis of customers' usage of the licensed technology, assistance with timely and accurate royalty reporting, cost/benefit analysis of alternative designs and even perhaps litigation risk analysis.

What the customer needs to execute good decision making is high-quality deliverables on all fronts. An effective licensing programme manager will hone all of these capabilities, and will understand and appreciate how to help provide prospective customers with the sorts of information required to assign high priority to the licensing programme and to properly assess the matter from technical, economic and business perspectives.

### Taking the long view

Building value in a licensing programme should also involve protecting the investments of programme licensees. This can take any number of forms, but continual focus and execution are required. In addition to delivering improvements to the licensed technology, the licensed intellectual property should also continuously be improved to the maximum extent practicable.

For patent portfolios, this means ongoing investment in the R&D required to pursue more related intellectual property (eg, applications and continuations in relation to the licensed patents). It also means the ongoing search for, and investment in, other intellectual property that would fit naturally in the already-licensed portfolio and would deliver additional value – in particular, if such investment would lengthen the life of the licensing programme.

Another source of significant long-term value is the inclusion and management of a trademark licensing programme linked tightly to an otherwise technology-only licence. An

overview of how to make trademarks part of a technology-based licensing programme is a fascinating topic that demands separate treatment; however, doing so can result in substantial long-term value and numerous intangible benefits, such as standardisation, communication of benefits of the licensed intellectual property to end users, identification of goods and services for compliance and a platform for long-term relationships.

Protecting the investment of licensees can also require the legal enforcement of the licensed intellectual property against non-licensees. The licensing programme manager is seeking the broadest possible interpretations of patented intellectual property in order to be relevant to the greatest total available market (royalty base). However, history suggests that the most valuable property can be complex and costly to defend. The effective licensing programme manager must remain tightly connected to any enforcement and prosecution activity, serving as a highly centralised and expert data collection, data analysis and data redistribution nerve centre. Such initiative enables the capability to lead (not follow) negotiation, prosecution and litigation strategies.

### People

A world-class licensing programme is unachievable without a world-class, multi-disciplinary team organised in a highly structured environment, with a common understanding of effective process, working together to create the value of participating in the licensing programme.

As effective licensing executives already know, successful sales and marketing is as much art as it is science – and that means more than just good translation between the engineers on the one hand and the business decision makers on the other hand, and the lawyers on the third hand.

The reflection of a world-class licensing programme is a channel desired by customers because they perceive present and future value from participating in it. The people behind such a programme:

- Appreciate the decreasing inherent value of patent intellectual property (caused by the political and economic climate), and therefore strive to and do create value

above and beyond the mere IP assets themselves, in the form of an array of high-quality technical, economic and business deliverables that support the in-house licensing executives in overcoming the difficult challenges they face.

- Appreciate the differences between the IP business models *de jour*, versus the initiative and commitment required to research, develop, market, sell and support the valuable suite of products and services that make up a world-class licensing programme.
- Place high value on long-term relationships and therefore stay connected to their customers rather than outsourcing important relationships.
- Have the drive and creativity to become ‘this quarter’s business’ by enhancing the ability and incentive for prospective licensees to act. **iam**



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