



Buy low, sell higher

Rather than complain about so-called patent trolls, companies would be better advised to wake up to the reality of the patent system and use it to maximise corporate value

"These [patent trolls] are lawyers and investors who buy cheaply or assume control over paper patents, mistakenly granted largely to failed companies," David Simon, computer firm Intel's chief patent counsel told BBC News recently.

Simon cites one case where a patent troll claimed a patent they had bought for about US\$50,000 was infringed by all of Intel's microprocessors from the Pentium II onwards and that they were seeking US\$7 billion in damages. In the end, the case was thrown out by the court, but it still cost Intel US\$3million to fight, Simon says.

"The only thing the trolls have to lose is their patent," which, Simon says, "typically they have a very low investment in."

Easier said than done

To fund serious enforcement activity, independent plaintiffs need to conduct intensive technical, market and legal due diligence, replete with claims charts. They need to secure a financial partner and a good law firm, and convey to a defendant that they are in for the long haul and will not fold. They may have to wait years to see even a small return. This is not an easy way to make money, and players tend to be serious and knowledgeable about the IP in question. Inventors seldom have the funds necessary to identify or enforce infringement on their inventions.

Trolls are more likely to send out infringement letters, sometimes thousands of them, and wait to see what sticks. Defending them does not interest me. What does is the whining of companies with substantial portfolios who feel there should be a double standard regarding rights ownership: patentees who practise or commercialise an invention have the right to defend as well as profit from it; patent holders who otherwise acquire and deploy their rights do not.

Apparently, Intel asserting its IP rights against AMD or TI is legitimate enforcement; a speculator taking action against Intel is not.

Counterproductive, wasteful, distracting, even painful, nuisance patent suits are a product of imprecise grants and overburdened, under-trained examiners. Still, even 100 US\$100,000 settlements are barely a dot on many companies' balance sheets. It's hard to believe that this should be driving costs up as to impact consumers and thwart innovation.

eBay, too, has come to think of the patent trolls as "an unfortunate cost of doing business", says the company's litigation and intellectual property professional, deputy general counsel Jay Monahan. "It's driven eBay's costs up and it diverts time and resources from building the world's greatest ecommerce platform [sic]. There are dollars spent on lawyers," he says. "There's also an impact on diverting in-house legal staff, engineers, people at all levels to produce documents and sit for depositions. Our approach to this point has been to vigorously defend ourselves against these claims and not to pay ransom money, if you will."

Hmm. Sounds like eBay is refusing to negotiate with "terrorists". Perhaps the company's patent portfolio is more vulnerable than it may at first appear? It would be shameful if management refused to enforce the company's patents, on principle. As an eBay shareholder, I would be more concerned about ROI than finger pointing. Failure to collect patent damages or to generate licensing royalties on the company's infringed inventions would be a costly and embarrassing lesson in financial dynamics.

Responsible IP management

It's not at all easy to determine where patent trolling ends and responsible IP management begins. But it's a question that ought to keep senior management and their IP advisers up at night. Corporate officers and directors have a fiduciary responsibility to manage assets for maximum shareholder value – that is, to act strategically to exact a return on innovation. This means that if they possess – through internal development, assignment, acquisition or otherwise – patent rights that can be deployed for ROI, they must do so. Often, this mandate goes unfulfilled. The somewhat puritanical notion that there are acceptable and unacceptable ways of making innovation pay speaks more to a lack of understanding of IP market dynamics than to higher ethics. In

the early 1990s, Texas Instruments busted open this myth with a series of aggressive and lucrative patent assertions.

Perhaps more dangerous than trolls is validating the notion that it is wrong to use patents and knowledge of the patent system for financial gain. Companies employ tax strategies to the benefit of shareholders, so why not patent strategies? It's difficult to condone the deployment of patents that should have not been issued or are taking too long to issue. However, they exist in every patentee's portfolio and we have various levels of dispute resolution to sort things out. The last time I looked, it is still not a crime to buy low and sell higher.

Patent enforcement is a high-stakes poker game. Sometimes it costs money to call a bluff. The inequities of the patent office are applied democratically. No matter how they are acquired, enforced or otherwise monetised, the same rights exist for all patent owners, regardless of their business strategy or capital investment. Some patent holders, however, are better prepared to profit from companies' weaknesses than others. Similar to First Amendment and free-trade rights, it is potentially dangerous to apply patent protections selectively. Assuring primary and secondary IP owners their due, while painful for some, typically leads to higher asset values for all.

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