

The use of competitive intelligence in IP monetisation

Extensive due diligence is required for any IP value creation strategy. Intelligence gathering is central to this process – and intellectual property itself can be one of the best sources of intelligence for understanding the competitive landscape

By Raymond Millien

Personnel charged with managing an enterprise's intellectual property are increasingly being asked to show a return for high expenditure on registrations, applications and attorneys' fees. Such returns are possible only by undertaking some form of IP monetisation and, like most corporate efforts, there is a need to have a strategy in place. Yet how can enterprises develop an IP monetisation strategy without first understanding the IP landscape of their industry? More specifically, enterprises must be able to answer the following questions before setting any kind of strategy or embarking on any IP monetisation efforts: who can be sued? What are our best IP assets? Where do we start? What are best practices in the industry? What are the risks? What are the potential rewards? The process of answering these questions in order to form and execute an IP monetisation strategy is called 'competitive intelligence'.

The new IP marketplace

In the last 35 years there has been a shift from a labour economy to a knowledge economy. Intangible assets (and thus IP rights) have emerged as the most powerful asset class, overtaking more traditional capital assets such as real property, plant and equipment. Multiple studies have

shown that the majority of the value of most US publicly traded companies comes from their intangible assets. One study has gone further, stating that 80% of the value of US corporations included in the S&P 500 Index comes from intangibles (see www.oceantomo.com/productsandservices/investments/indexes/ot300). One scholar noted as far back as 1992 that "IP rights – especially those in the form of patents – will represent the most significant form of wealth in the new millennium" (James W Ely, Jr, *The Guardian of Every Other Right: A Constitutional History of Property Rights*, 6).

The value of intellectual property can clearly be seen in two recent and heavily discussed corporate transactions. First, in Google's 2011 acquisition of Motorola Mobility for US\$12.5 billion, 44% of the purchase price (ie, US\$5.5 billion) was attributed to the acquired patent portfolio. Second, 41% of Cadbury's enterprise value (ie, US\$10.3 billion) was attributed to its trademark portfolio when Kraft acquired the company in 2010. These transactions bolster the belief that the IP marketplace has matured, with IP monetisation being widely recognised and adopted.

Corporate realities

Given the IP marketplace's maturation, the question becomes how companies can afford not to monetise their most valuable assets. When the value of US intellectual property is approximately US\$5.8 trillion (38% of gross domestic product) and accounts for over US\$1 trillion in US exports (see US Chamber of Commerce, Global IP Centre, *IP Creates Jobs for America*, 25th May 2012) many of corporate America's IP counsel (both in-house and external) must now show and prove their worth to the C-level executives to whom they report. To put it another way, given

Table 1. Average US patent costs for 2011

Amount in controversy	End of discovery	Through trial
< US\$1 million	US\$490,000	US\$916,000
US\$1 million-US\$25 million	US\$1.6 million	US\$2.8 million
> US\$25 million	US\$3.6 million	US\$6 million

the increased awareness of intellectual property in corporate boardrooms, IP departments are increasingly being asked to make the transition from cost centre to profit centre. This typically involves moving past the paradigm of building an IP portfolio solely for defensive/freedom-to-operate purposes. This is because, as Rick Thoman, then president and CEO of Xerox Corporation, once said: “The world’s most successful companies are aggressively promoting, protecting, and marketing their own intellectual property. ... [T]he stakes are enormous – billions of dollars – for those companies that successfully mine and maximize the value of their patented ideas.”

Accordingly, the landscape for IP transactions has changed in the past decade. Corporations have begun to realise the value of their intellectual property and to exploit these assets aggressively. For example, many firms are actively seeking to engage in patent licensing and sale activities. In some instances, patent monetisation has become a major source of corporate income, surpassing traditional profit and loss (or business lines).

Even with this change, intellectual property is still an illiquid asset class that requires a significant investment of time and resources to transact successfully. More specifically, there are numerous challenges associated with monetising intellectual property, including:

- The lack of a transparent and efficient marketplace.
- The vast majority of IP assets having little to no value.
- The complexity in assessing the value of specific IP assets.
- Certain companies having specific policies against reviewing IP acquisition opportunities due to concerns of notice and/or wilful infringement.
- Many companies reviewing and fully participating in IP acquisition opportunities, but failing to submit acquisition proposals in a timely fashion or even at all (this could be due to potential future repercussions resulting from a would-be acquirer communicating a value expectation for an IP asset, but not prevailing as the winning bidder).

Further, IP sale and licensing campaigns often face challenges such as protracted timing and large gaps in buyer/seller value expectations. The realities and challenges associated with IP transactions can make for a prolonged and frustrating experience for stakeholders who do not have a realistic view of the process.

Picking the right option

In light of the current marketplace and against the (harsh) backdrop of corporate realities discussed above, ‘IP monetisation’ refers to the process of deriving value from patents, trademarks, copyright, trade secrets and other intangible assets through arrangements with external parties. Monetisation options include licensing, sale, litigation and securitisation. Looking at patents specifically, sales routinely involve a lengthy sales process. Recent developments in creating more flexible processes (eg, patent auctions) can make the sale of patents a profitable, more streamlined experience. On the other hand, a well-executed licensing programme can often maximise the value derived from patents when compared to other monetisation options.

In short, such options include monetisation through sale (ie, private or public sale, or live or online auction), litigation or (carrot or stick) licensing. However, any IP monetisation effort will almost certainly involve patent litigation in US federal courts – the option that has historically yielded the greatest financial rewards. This is because unless a patentee is willing to back its (stick) licensing demands with the threat (and eventual filing) of a patent infringement lawsuit, it is a mere paper tiger and stands little chance of achieving patent licensing revenue.

Avoiding becoming a paper tiger has high stakes and is not inexpensive. PwC’s 2013 Patent Litigation Study – which analyses data from 1995 to 2012 – revealed that patent litigation in the United States continues to rise amid growing awareness of patent value. Highlights of the report include the following key observations:

- In 2012 5,189 patent actions were initiated – the highest figure of all time.
- Annual median damages awards (in 2012 dollars) ranged from US\$1.9 million to US\$16.5 million between 1995 and 2012.
- The median damages award was approximately US\$4.9 million over the period between 2007 and 2012.
- Patentees have an approximate two-third success rate at trial.

Further, according to the American Intellectual Property Law Association, the average (ie, mean) US patent litigation costs for 2011 are outlined in Table 1.

The table reflects fees and costs associated with outside and local counsel, associates, paralegal services, travel and living expenses, court reporters, copies, couriers, exhibit preparation, analytical testing, expert witnesses, translators, surveys, jury advisers and similar expenses. Given the multimillion-dollar potential gains and costs, undertaking IP monetisation efforts without a proper informed strategy is a fool's game.

Competitive intelligence and business strategy

Commenting on Google's 2011 acquisition of Motorola Mobility Holdings, Inc (and its 17,000 patents) for US\$12.5 billion, two of the people who helped build IBM's billion-dollar IP programme stated: "[T]he Google-Motorola deal offers important lessons for CEOs. First, make sure your intellectual property strategy serves your business strategy" (Marshall Phelps and John Cronin, *Mining Patent Gold: What Every CEO Should Know*, Forbes.com, 9th September 2011). Thus, let us step away for a moment from the IP marketplace and formulation of IP strategy, and consider overall business strategy.

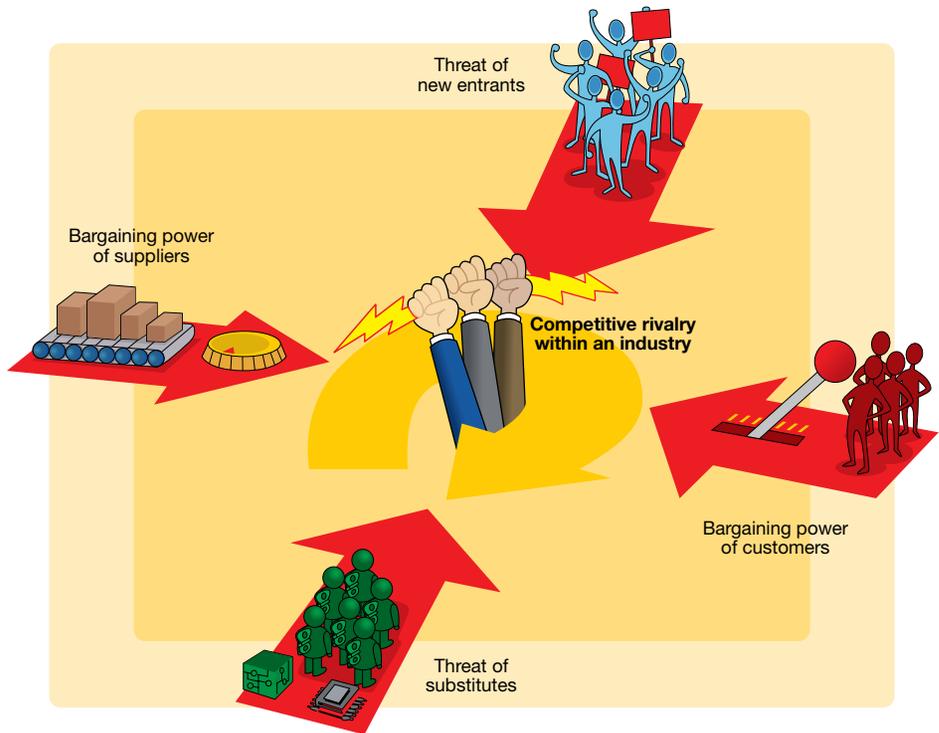
In 1979 Harvard Business School Professor Michael E Porter – recognised today as a leading authority on business strategy – published an influential article which presented a five-forces model for analysing an enterprise's competitiveness in a specific marketplace (*How Competitive Forces Shape Strategy*, Harvard Business Review (1979; 2nd ed, January 2008). These five forces are:

- The threat of substitute products or services.
- The threat of established rivals.
- The threat of new entrants.
- The bargaining power of suppliers.
- The bargaining power of customers.

Porter's five-forces analysis is but one model (or framework) for assessing an enterprise's competitive landscape in order to develop business strategy. However, it efficiently illuminates the process and the need for competitive intelligence.

Generally speaking, competitive intelligence is the process of looking at the many disparate elements in the business universe that affect an enterprise's ability to compete. These include changes facing distributors, suppliers, customers and the industries indirectly related to the business

Figure 1. Porter's five-forces model

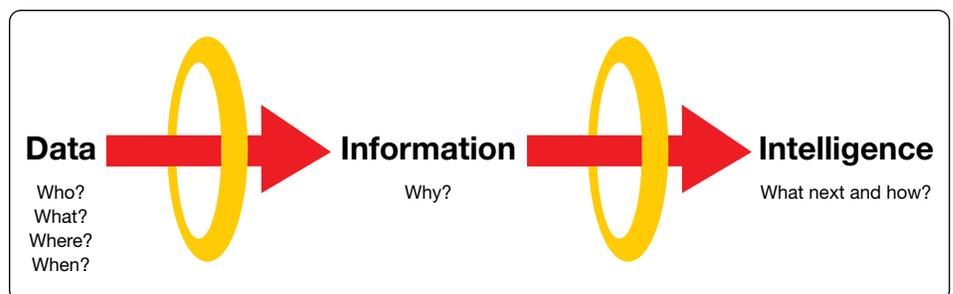


in question. Thus, competitive intelligence requires an understanding of changes in the economy, along with societal attitudes and demographics, technology and regulations. It reveals current business realities and provides clues about what the near future holds. It provides informed risk and competitive advantage based on knowledge, not assumptions or predictions. In sum, competitive intelligence is the process of going from a massive amount of data to information gleaned from the data to actionable intelligence.

One can see that having a formal process to (ethically) gather and process competitive intelligence is essential to setting business

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Figure 2. Competitive intelligence process



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strategy in accordance with Porter’s five-forces analysis or any other business strategy framework. As one competitive intelligence expert has noted: “Because so few companies actually do [competitive intelligence], the ones that engage in [competitive intelligence] disrupt the usual competitor activities and gain an immediate and powerful advantage for themselves. This is how you ‘un-level’ the playing field: by doing what competitors don’t recognize or expect and by being proactive” (Seena Sharp, *Competitive Intelligence Advantage: How to Minimize Risk, Avoid Surprises, and Grow Your Business in a Changing World* (John Wiley & Sons, 2009)).

Using IP-based competitive intelligence to support monetisation

The beginning of any IP monetisation strategy is due diligence on the enterprise’s own portfolio and those of its competitors. Such due diligence should encompass ownership analysis, maintenance records analysis, completeness analysis, encumbrance analysis, employee/

consultant records review, prior art research, infringement/litigation analysis and freedom-to-operate determination. The last three of these can be lumped into what is often referred to as ‘IP analytics’ or ‘IP landscaping.’ Nomenclature aside, these are just a special case of what many in the business community would simply call ‘competitive intelligence’.

More specifically, patent-based competitive intelligence can help an enterprise to identify:

- Its competitors (ie, potential targets for stick licensing).
- Potential human capital (ie, using inventor records to identify potential new hires or consultants).
- The results of competitors’ R&D efforts and direction.
- Specific emerging technologies.
- Clues about important developments (via patent quality indicators, such as the number of filings, law firms used, number of citations, the existence of foreign counterparts and the number of litigations).

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- Technology market trends (via expiring patents, patent clusters, whitespace analysis or the timing of filings).
- Potential licensees (ie, target for carrot licensing).
- Other various benchmarking data.

There are many free, 'freemium' and paid cloud-based tool offerings, service/consulting companies, offshore business process outsourcing providers and traditional enterprise software providers available to help firms perform patent-based competitive intelligence. However, regardless of whether an enterprise engages in self-help patent analytics or uses a commercial service/tool provider, there are essentially four methodologies used to search for patents and thus extract competitive intelligence from the resulting patent sets' bibliographic data:

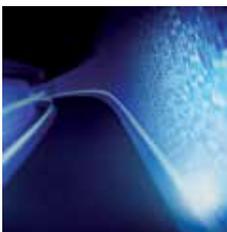
- Text segmentation (ie, keyword) analysis using latent semantic analysis, latent semantic indexing, subject-action-object based semantic analysis or Boolean searching.

- Classification analysis (eg, using the International Patent Classification system).
- Text clustering (ie, topic identification) using various TF-IDF, K-Means or Bayesian Naïve algorithms.
- Citation analysis.

Of these four, citation analysis – both backward and forward analysis – is worthy of further discussion. Specifically, backward or reverse citation analysis refers to the set of (patent and other literature) documents that a patent cites. Forward citations, on the other hand, refer to the set of documents that cite a patent. That is, forward citations utilise the patent in question as part of their own backward citations. Forward citations are always newer than the patent in question and change over time as new patents issue. In contrast, reverse citations are a static data set, as they cannot change once a patent issues. Further, both backward and forward citation analysis may be carried out over more than one generation. A second-generation analysis, for example, would

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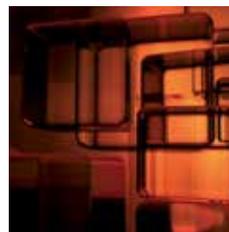
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Action plan



In order to implement the use of competitive intelligence in an IP monetisation strategy, an enterprise should follow this six-step action plan:

- Make someone responsible for competitive intelligence – as for every other task important to a firm's success, someone (whether from the legal, business development or marketing departments) must be put in charge and made responsible for ensuring that competitive intelligence is properly (ie, ethically) gathered, disseminated and utilised. Without someone in charge, no one can be blamed if IP monetisation efforts ultimately stall.
- Set a competitive intelligence budget – again, as for every important function within a firm, a budget must be set. Without a budget, every dollar spent on competitive intelligence activities is simply over budget!
- Select the right competitive intelligence partners/providers – depending on available resources, budget, internal talent pool and technology space, it is important to select the competitive intelligence service/consulting firm and/or tool that is the right fit to achieve the firm's IP monetisation strategy.
- Understand the limitations of any competitive intelligence tool utilised – after selecting and utilising a competitive intelligence tool, it is important not to accept the chosen tool's results blindly. All tools have inherent flaws and none can provide 100% accurate data-gathering results. It is thus critical to recognise these blind spots and compensate for them.
- Incorporate competitive intelligence into your IP strategy (and eventually align it with your business strategy) – it is not enough to put someone in charge, set a budget and expend resources on gathering competitive intelligence data. A firm must systematically incorporate the results of the competitive intelligence-gathering process into its IP strategy formulation and execution (no doubt this will require cross-functional team cooperation for many medium and large-sized enterprises).
- Proactively manage the competitive intelligence process – after a competitive intelligence process is put in place, a firm must proactively manage the process by frequently reviewing and refining the competitive intelligence tools and partner firms utilised. Like any other human or computer resource within an enterprise, it must be regularly evaluated against specific goals and objectives and corrective action should be taken when it falls short of expectations.

uncover patents that cite the same patents as the patent in question cites (reverse) and patents that are also cited by patents that cite the patent in question (forward).

Many who engage in patent analytics become too enamoured of citation analysis, relying on it as the sole basis for their competitive intelligence process. However, such analysis must always be used cautiously. This is because the resulting data sets are often misleading for various reasons. First, certain patents have become favourites and will be cited by an examiner, group of examiners or law firm in almost every case it handles. Second, forward citations vary over time and thus a purely quantitative analysis results in misleading conclusions (ie, the age of a patent must always be considered when reporting and interpreting the number of forward citations). Third, studies have shown that the quality of information gleaned from citations varies by different jurisdictional patent offices (eg, the US Patent and Trademark Office versus the European Patent Office). Lastly, it is often difficult to glean what the number of backward citations really reveals. Does it indicate a strong patent? Does it mean that you have identified an incremental invention in a crowded field? Does it mean something entirely different? Nothing can really substitute for an experienced practitioner's careful analysis of the results of any patent analytics (or,

generally speaking, IP-based competitive intelligence) methodology. Only then can IP-related data become actionable intelligence that will serve as the basis for crafting and implementing a monetisation strategy.

Last, while the usefulness of IP-based competitive intelligence cannot be seriously questioned, patent-based competitive intelligence (or patent analytics) has at least two important limitations. First, it will not reveal any intelligence about start-up companies in the relevant industries because such firms may have no patent filings, or their applications may not yet be public under the 18-month publication rule due to their newness. Second, it will not reveal any intelligence about existing competitors operating in stealth mode (ie, by opting out of the 18-month publication rule, working with a start-up which is listed as the assignee of certain patent assets or utilising IP holding companies to avoid assignee searches).

A novel approach

The concepts presented herein are for educational purposes and designed to stimulate debate. They are not intended to be an all-inclusive treatment of, or treatise on, the use of IP competitive intelligence techniques needed to support a successful IP monetisation programme. However, the six-step action plan presented below provides a general framework for implementing competitive intelligence as part of an enterprise's IP monetisation efforts. Last, regardless of the level of sophistication of the competitive intelligence tools and processes implemented by an enterprise, nothing can replace good old-fashioned IP counsel or other IP professionals analysing each IP asset to determine its overall strengths and weaknesses, whether it should be sold, or whether a licensing programme should be undertaken to ensure that certain rights remain with the enterprise. Using competitive intelligence to clarify overall IP strategy can help firms to avoid costly mistakes and instead choose the best monetisation options for the IP asset under consideration. **iam**

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