Column
IP Merchant Banker

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Troll wars – revenge of the inventor?

The Supreme Court's decision in the upcoming eBay case could have profound consequences for the US IP system. Whether these will be welcome is another matter

Restlessness and discontent are the necessities of progress. Thomas Edison

St Louis, Missouri, 16th March 2006: Thank the gods of commerce – the BlackBerry is again safe for consumers to maintain their wireless connectivity with each other. The price to be paid – about US$660 million out of the pockets of Research in Motion, the marketer of the BlackBerry, plus future royalties, all to be handed over to a faceless acronym lurking in the shadows of Washington DC. The villain in this melodrama (and many others of late) is called a patent troll by its adversaries.

On 29th March, with the help of the US Supreme Court, foes of trolls hope to vanquish forever this alleged horror from the fabric of the American economy. That legal joust will pit internet giant eBay against MercExchange – another small patent owner, or troll, depending on your economic bias – over the limits of injunctive relief to stop patent infringers from doing business. The timing is interesting, given the fact that the Court changed membership and recently has re-thought other property rights in a very big way. And the matter has the attention of global markets, well summarised in a recent *Financial Times* Comment & Analysis column by Patti Waldmeir (16th March 2006, page 11).

The list of amicus briefs is the IP community's celebrity equivalent of a runway walk on *Entertainment Tonight*. There are computer, software and pharmaceutical giants; inventor, university and law associations; the US government; and even Research in Motion itself. And no wonder – the question before the US high court is whether patent law should stick with its traditional standard of injunctive relief against infringers or whether some lesser measure of penalty is appropriate. It's a case of money versus brains – in some cases, troll brains – that could dramatically re-weight the litigation options and economic consequences for the next generation of IP.

Like Research in Motion, eBay stands liable for using another company's patents it does not own or license. The patents in question are but one portion of the IP used in online auctioning and, in and of them, do not form a freestanding device or process for internet auctions. But for the lawsuit, it is likely that alternate IP could be developed or is in development by eBay that would circumvent the MercExchange patents for electronically pricing articles for sale. Because eBay lost to MercExchange, an injunction means millions of daily transactions by thousands of innocent individuals and businesses that traffic in everything from Star Wars memorabilia to computer paper will come to a screeching halt until the parties work out a suitable business agreement. Is that inconvenience true justice?

What makes this case doubly interesting is that less than a year ago, the Supreme Court ruled on another aspect of property rights – eminent domain – which it greatly expanded in favour of government. That case, *Kelo v City of New London*, determined that private property could be condemned by local governments acting on behalf of private developers. The fifth and 14th Amendments of the US Constitution protect private property from seizure by government except for just compensation and for a proper public purpose. In *Kelo*, the public purpose was the future prospect of increased tax revenues for the city of New London, Connecticut, from a commercial development of a previously blighted residential neighborhood. The tax revenues were not guaranteed by the developer but it was clear that they would be likely to exceed the property taxes and income taxes paid by the current residents. Legally it was a case for the public good and therefore within the power of eminent domain.

Retired Justice O'Connor penned the dissenting opinion of that 5-4 decision in which she was joined by the late Chief Justice Rehnquist. Nothing so inflames American citizenry as encroachments on the sanctity of private property or the prospect of increased taxes. Since *Kelo*, state legislatures have been inundated with bills proposing to limit state and local governments statutorily from seizing property as agents for private developers – taxes be damned. Ideologically, incoming Justices Roberts and Alito are likely to continue the conservative judicial philosophies of their predecessors, but what that will mean in the upcoming *eBay* case is not yet clear.

Clearly, the injunction is a one-size-fits-all remedy to protect patent property rights even when the patent is but one drop of water in the sea of ideas. Proponents for change argue that the public good from innovation is being stifled by the extreme remedy of injunction. And agents of the public good in this case can mean large marketers of goods convenient to the public at large that are brought into existence through the power of patents. Why should they be constrained from innovating when the marketplace demands more and better innovative products?

No doubt the value of intellectual property has risen dramatically, as has litigation. Recent surveys suggest that, at trial, patentees are successful 65% of the time in patent validity issues. Proponents of change in the injunctive remedy argue that the trend will continue and that investment in R&D and innovation will correspondingly drop. Yet the evidence, in spite of these ominous and public trends, is precisely the opposite.

Patent applications are at record levels in the USPTO, as is R&D spending. And while information systems are imperfect, it is easier than ever to search for intellectual property to assure oneself that a new product launch has all the enabling IP it needs to stay in business. To fail to do this used to be called negligence. Or greed. Now it is called patent trolling. After all, who wants to pay royalties that can be evaded in a court of law? Patently obvious it isn't.

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