

Fighting the Modern Patent Wars

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The wise general wins the war without fighting a battle.

Sun Tzu, The Art of War

Patent issues are making headlines now more than ever. Those of us hooked on our Blackberry devices had anticipatory withdrawal systems after reading about a possible shut down of the system due to patent infringement. Fortunately that was diverted, but at a price exceeding \$600 million.

The U.S. Patent and Trademark Office is under siege for issuing patents that should have never issued, and for excessive delays. Congress is considering changes such as a new opposition system for challenging patents when they emerge from examination. The U.S. Supreme Court is taking more patent cases. Other significant cases are pending before lower courts.

So what can be done by one facing patent issues? What should be done? The uncertainty makes it tempting to say to throw in the towel, or at least "wait and see." But patents are too powerful to ignore, and the wait may be too long. By planning based on the inevitable, the inventor or businessman will likely have a good strategy despite the unknown. Once a plan is in place, accepting that changes are in the offing, staying informed and adapting the plan as changes occur will ensure it stands the test of time.

Consider these unwavering fundamentals about patents:

1. Product and service innovation drive growth and increased profitability. Lack of innovation jeopardizes the

enterprise, leaving it vulnerable to competitors who innovate.

2. Innovation sometimes comes in a flash, but more often comes after a significant investment of time and resources. Therefore, innovation is costly, and giving it away to competitors for free provides competitors with an avoidable advantage.
3. With trade barriers falling and the marketplace becoming increasingly global, innovation is one of the few forms of competitive advantage that remains and will remain an option to distinguish one's business.
4. If competitors can copy an innovation, its value and contribution to revenue growth and profitability fall dramatically.
5. There are very few forms of protecting innovation from competitors. Trade secrets still have a role, but their value is vulnerable to the ability of competitors to discover the same secret either independently or through reverse engineering.
6. Patents are the only way to protect functional innovations that cannot be maintained as secrets, and the only form of protection available against all competitors (even those who have never seen the patent or the patent owner's product).
7. Many companies have successfully used patents to protect their markets and/or generate licensing revenue. Investment, including even venture capital, in intellectual property is increasing. Therefore, competitors and others are using the patent system to their advantage, and continue to file historically high levels of patent applications.

How do these fundamentals apply to a patent strategy? If you innovate, you must consider getting patents. If your competitors get patents, you must consider patents. If your competitors get patents, you should take steps to understand them

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and neutralize any advantage they might provide. While obtaining advice of counsel is touted as reducing the likelihood of owing treble damages and an adversary's attorney's fees, it is perhaps most valuable when it guides a company to change product features that avoid litigation in the first place.

Patents are most effective and valuable for companies who enforce their patents. Therefore, thought should be given to finding cost-effective ways to enforce patents. However, patents should also be recognized for their value without enforcement, including as a deterrent to infringement, as a bargaining chip in negotiating sales or licenses, and as helping to prove innovation in the face of a claim of copying.

If you find yourself considering litigation, or on the receiving end of a lawsuit, thoroughly assess the chances of success as soon as possible, consider alternatives to litigation such as (for patent owners) an ITC proceeding or (for accused infringers) a reexamination, and don't let emotions block thorough consideration of settlement options.

By focusing on the fundamentals, staying abreast of important changes, thinking strategically, and preparing early, the innovator and corporate executive will position himself or herself to survive and thrive in the ever-changing competitive landscape. The patent system is not perfect, but the good news is that almost all of the recent talk about change is directed to change that will spur innovation and creativity without unduly stifling competition. And that is a healthy sign for