Why is Everybody Picking on Me?

Defending your Company against Patent Bullies and Trolls

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In the world of patents and patent litigation, not fully understanding the licensing landscape can cost your company money, and plenty of it. Think about it…if a company like R.I.M. - one that's recently been at the top of the news with a high-profile patent litigation case - had a crystal ball to see the future, would they have chosen a different defense strategy?

Developing a strategy for your patent portfolio and understanding the players in the patent community can pay off if you need to defend against patent trolls or bullies.

In the microelectronics industry, patents and licenses that are involved in any product—a cell phone, an MP3 player, or a computer, for example—will number in the thousands or even in the hundreds of thousands. It is simply not possible to design a modern semiconductor chip or develop a microelectronics-based product without using a vast amount of as yet unlicensed patented technology. To function successfully within this patent thicket, semiconductor and microelectronics licensors need to be increasingly aware of the potential of their patent assets. An effective patent strategy that includes a defensive component is an essential piece of any successful and sustainable company's strategic plan.

Recently there has been a perceived increase in activity in both patent licensing and patent lawsuits. The number of patent lawsuits filed in the U.S. between 1990 and 2004 more than doubled. In fact though, the growth in lawsuits merely tracks the growth in patent applications and grants, which have also doubled in this period. We believe that the overall awareness of the value of intellectual property has increased with a corresponding increase in patent filing, patent licensing and patent lawsuits.

In response to the increasing perceived value of intellectual property and patents, particularly in the world of microelectronics, two distinct types of patent predators have emerged: patent trolls and patent bullies. They each have unique objectives that require you to plan distinct defensive tactics.

Identifying a Patent Troll

"A Patent Troll is somebody who tries to make a lot of money from a patent that they are not practicing and have no intention of practicing and in most cases never practiced." (Peter Detkin, former assistant general counsel at Intel, quoted in *Trolling for Dollars*, The Recorder, July 30, 2001)

Patent trolls acquire patents for the sole purpose of collecting licensing fees. Usually, patent troll companies produce no actual products. Ironically, those who denigrate patent trolls often practice this same patent monetization strategy with their own patents that cover technology, from discontinued businesses or acquired businesses, which their company no longer practices.

It's debateable whether patent trolls are now more prevalent or simply evolving. These trolls date back more than a hundred years. The Selden patent (US549,160), with an invention date of 1877 and an issue date of 1895, covered a few of the basic concepts of the automobile. The inventor of record, George Selden, was a patent lawyer. No Selden automobile was ever built. Selden's patent holding company collected royalties of between 2.5% and 5% from almost all US car manufacturers until 1911 when the patent was ruled invalid.

Today's economic and legal conditions, as well as technology, have combined to make the patent troll strategy effective and profitable in the microelectronics industry.

The Patent Troll's Typical Behaviour

Patent troll licensing strategies are usually quite simple – generate the maximum money in the shortest time at the least expense. Troll organizations purchase or acquire control of patents from single inventors, small corporations or bankrupt companies. Desirable patents are ones that cover an invention that is used in a large market with many players. Many trolls start with a shotgun approach such as distributing unsubstantiated claims in assertion letters to numerous manufacturers. The license fees may be set initially at a low level to induce companies to settle without performing sufficient due diligence – as the due diligence may be more costly than the settlement. However, if a troll can present a stronger argument that is supported by claim charts, then the license fee is set higher, at the threshold of pain for a target organization. This maximizes the troll's return while causing the potential licensee to consider whether it will be cheaper to take an early license that may cost much less than the legal fees required for a defence. Once the troll organization establishes a litigation fund, it can up the ante by filing lawsuits listing large numbers of defendants or targeting one or two highly profitable market leaders.

Troll organizations following these tactics have had considerable success. TechSearch, for example, has licensed more than 100 companies. The Lemelson Foundation has licensed approximately 800 companies and filed more than 15 lawsuits with multiple defendants.

Traditional licensing organizations often vilify trolls as unprofessional. It's true that nuisance negotiations and lawsuits by trolls can cost a company's intellectual property lawyers inordinate amounts of time and significant sums of money. Intel estimated that in 1999 the total dollar amount of patent claims against their products totalled more than $15 billion. However, defendant organizations that ignore these claims can risk missing out on an early and inexpensive settlement if the claim later proves to have merit.

Defending against Patent Trolls

To successfully defend your company against trolls requires a number of different strategies. Patent trolls, since they produce nothing, are not subject to patent infringement counterclaims. Patent trolls typically have legal services on contingency, so legal expenses are less of a concern. Also, since patent trolls have no product, there is no pressure from customers, suppliers, shareholders or employees to settle. All the stakeholders are aligned in their desire to collect a license fee from your company.

Let's say a patent troll sends a letter to your office claiming patent infringement in one of your company's products. You—as a lawyer in your company's intellectual property division—have been given the letter to provide an appropriate response. If there is no claim chart included with the allegations then there is no way to understand how the claims are being interpreted or what your potential exposure is. You must determine the following:

1. Is this patent potentially valid?
2. Could the patent apply to any of your products?

If the answers to both these questions are 'yes', then you and your company experts must determine the next best step:

- Would it be less costly to settle early with the patent troll claimant?
- Should your company take the patent troll to court to fight the patent claim?
    - Are there significant 'warts' on the patent? How broadly does the troll interpret the claim? Are there opportunities to reduce the scope?
    - Are there prosecution problems? (In 2004 the compliance rate measured by the USPTO was 82% - this means one in five patents have prosecution problems.)
    - Is there a good probability that prior art exists that could limit the interpretation of the patent to uses outside of your product's use, or even to completely invalidate the patent?
- Would a declaratory judgement action in a venue more favourable to your company pressure the troll to drop the suit or agree to a favourable settlement?
- Are there strategic issues in the troll's program that create an exploitable weakness? For example, would aggressively pursuing your company impact the troll's chances of a big win with another target?
- Is a technical design-around feasible and affordable: can your company's R&D staff find a new solution?

To assess these questions correctly, you must have a view of your product sector history for prior art and you need to understand the technology incorporated in your products.

Identifying a Patent Bully

Patent bullies are corporations with large intellectual property holdings that seek strict enforcement of their patents in the marketplace. These companies create assertive licensing campaigns to enforce their patent rights by using intimidation and their size as leverage. Their strategic objectives may simply be revenue generation, but they more often employ strategies to protect a market they dominate or to raise a competitor's cost base. This activity is a legitimate means for large corporations with huge R&D investments in technology to obtain a return on their investment and establish an even playing field.

Typical Behaviour of Patent Bullies

The best-known patent bully in the semiconductor and microelectronics business is Texas Instruments (TI). TI took nine Japanese and Korean semiconductor companies to the International Trade Commission in 1985 to assert its intellectual property rights and defend its declining share of the DRAM market. TI won the case, collected far more than the standard settlement at the time, and raised the financial bar in similar cases ever since.

Significant Money

The world of patents and patent royalties involves increasingly large sums of money for patent bullies. IBM and TI both have collected in excess of $1 billion in licensing fees in a single year. "In America alone, technology licensing revenue accounts for an estimated $45 billion annually; worldwide, the figure is around $100 billion and growing fast." (The Economist, *A Survey of Patents and Technology,* Oct. 22, 2005*)*

Defending against Patent Bullies

Defending your company against patent bullies can be complex and costly. A patent bully will usually present a sample number of patents, which are allegedly being used in your products. Typically, the bully will include claim charts that document the alleged infringement.

The common response from many companies is extensive research into prior art to attempt to invalidate the patents as presented. After spending vast amounts of time and money, if you are 100% successful in eliminating all the patents in a negotiation or a lawsuit, a well-endowed patent bully will then merely provide a new batch of patents from their large portfolio. They rely on your own FUD (fear, uncertainty and doubt) to compel you to reach a quick settlement favourable to the patent bully.

The most effective response to a patent bully claiming infringement is to pursue a cross-licensing agreement. Your time and resources are much more effectively deployed generating evidence of infringement of your own technology by the patent bully. Once it can be established that you are both using each other's patented technology and a cross-license is required, the issue then simply becomes an accounting discussion. If the revenues you gain from their technology are less than the revenues that the bully generates using your technology, assuming a similar royalty rate, the patent bully pays you. In fact, this result, while not unknown, is still extremely rare. FUD factors within the target company's management, directors, shareholders, customers, suppliers and even employees usually motivate the target company to accept the bully's demands and settle for a highly unfavourable result.

Develop your patent strategy – stick to it – no crystal balls required

Ensuring that your company has a solid patent strategy that includes a defensive component and knowing the players – be they competitors, bullies or trolls - will pay off when it comes time to defend your business from patent predators.

In all cases the foundation of your defence is derived from the range and depth of your technical knowledge as it applies to both your own and your attacker's patented technology.

When defending against infringement allegations, you need to be able to separate the serious threats of patents with valid claims from fishing expeditions. Insist on a documented claim chart. You must create effective counter-strategies based on the attacker's motivation and profile.

If claiming infringement to support a cross-license, establish your credibility to get the attention of the company you are making the claim against. You must be able to show objective proof – such as a claim chart. You must be able to state 'this is my patent, this is your product, here is a claim chart that proves you are using my technology in your product. I think we should sit down and negotiate.'

Semiconductor and microelectronics companies that take patent defence strategies seriously at an early stage and prepare for the day that they become an attractive patent licensing target won't need a crystal ball. They'll be solidly positioned to successfully defend - or assert - their patent assets.

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