How Companies Use Patents

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It comes as a surprise to many people to learn that obtaining a patent for an invention does not mean the invention will be a commercial success. There are thousands of patents that have never been commercialized and whose only status is that of an over-glorified wall hanging. Therefore, a company that chooses to pursue a patent on certain technology must understand that a patent does not guarantee commercial success. The fact is that the criteria for patenting (novelty and usefulness) are far different from the criteria for commercial success. For example, who would have that there was any commercial value in selling something as banal as miniaturized stuffed animals? Yet though their products are clearly unpatentable, TY has made a fortune selling Beanie Babies.

True enough, the desire for commercial success is often what drives the inventive force. However, commercial success is the product of filling a desire, a need or a perceived need. Often times, the need was not known prior to the invention. In fact, many an inventor eschewed patenting and commercializing an invention due to the inability to see the commercial value in same.

Remember also the two key fundamental concepts of patents. First, having a patent does not mean your company can use your invention. Someone else may have a patent that also applies to the technology. In such a case, a mutual licensing arrangement is in order. Second, a patent is not self-enforcing. If you want to enforce your patent, you have to sue.[1]

How then do companies make money off of patents? There are several ways, which I have outlined below.

II. Using Patents to Thwart Competitors

a. Using to Patent to Gain Market Exclusivity

The paradigm usage of a patent is to prevent a competitor from offering a product that contains a feature covered by the patent so only the patentee can sell covered products in the market. This gives the patentee exclusivity in the marketplace and allows the patentee to fully

[1] When it comes to patents, one school of thought holds that a patent worth applying for is a patent worth enforcing.

commercialize and exploit the invention in the marketplace. In essence, the patentee has a court sanctioned monopoly.

b. Tying Arrangements

The patentee may also try to use a "tying arrangement." A tying arrangement is an agreement by a seller to sell one product (the "tying product"), but only on the condition that the buyer also purchases a different product (the "tied product") from the seller or on the condition the buyer will not buy the tied product from a different supplier. For example, if a company wants to buy your patented IV pump, you might require the company to buy all of its requirements for the ampules that the IV pump uses. In the case of patented products, the tying product is the patented product and the tied products are unpatented products. Tying arrangements involving patented products are allowed under the law, but do raise antitrust concerns. Courts have held tying arrangements are illegal as violations of antitrust law when (1) the seller has "market power" in the tying product and (2) a significant amount of commerce in the tied product is restricted.

In the case where the tying product was covered by a patent, courts presumed the patent owner had market power. This made it easier to prove the patent owner violated antitrust law (aka patent misuse). Alleged infringers would often assert antitrust counterclaims when sued for infringement. In a unanimous opinion issued in March 2006, the U.S. Supreme Court ruled that there is <u>no presumption</u> of market power against a patent holder in antitrust cases.[2] In other words, <u>the alleged infringer must prove the patent holder has market power</u> to prove his case of patent misuse.

c. Using a Patent to Block Entry into a Market

A company may choose not to sell products covered by its patent. Nevertheless, the company can still use the patent for economic advantage by precluding others from selling products covered by the patent. For example, the company may not have the financial wherewithal to make products covered by the patent, but its competitor does. The blocking patent thus thwarts the competitor from receiving a revenue stream that could be comparatively detrimental to the patentee.

III. Licensing

[2] *Illinois Tool Works, Inc. v. Independent Ink., Inc.,* 547 U.S. 28 (2006).

Many companies pursue patents with the intent of entering into licensing deals allowing use of the patented technology. In fact, this method of commercializing patented technology is common in the case of pharmaceuticals, electronics and agricultural chemicals. Licensing permits one (the "licensee") other than the patent holder (the "licensor") to practice the invention. Normally, the licensee pays a royalty to the licensor for the right to practice the invention protected by the patent. In effect, a license is a promise by the licensor that it will not sue the licensee for infringement as long as the licensee complies with the terms of the license.

IV. Creating Prior Art

Many times company personnel will come up with an invention that the company is not quite sure how to commercialize or whether it will ever commercialize the invention. In such cases, the company would be tempted to avoid the fees for pursing a patent application. However, the invention might later have value. If the company defers filing a patent application until it knows the invention will have value, a competitor may come along and file for patent rights to the invention. This then would preclude the company from using its own invention or would require the company to fight for those rights through an expensive interference proceeding. An alternative to these latter scenarios involves the company filing an application and simply allowing it to publish. This publication creates prior art that will prevent later patent applicants from obtaining patent rights to the invention. By doing so, the company is giving up its exclusive rights to the invention in return for insuring no one else can claim the invention.

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