

“PATENT OPERATIONS – ACHIEVING BUSINESS VALUE RESULTS”

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BUSINESS PERSPECTIVES ABOUT IP/PATENT VALUE

- Do business people really understand how patents , as major IP assets, add value to their organizations?
 - Do they know what they are getting and what they pay for?
- Business leaders talk about patent strategies
 - Actually attempting to couple patents with strategic business goals

BUSINESS PERSPECTIVES ABOUT IP/PATENT VALUE

- Business leaders need education about what patents are and what they are not
 - Many still believe a patents assure the right to sell/market the patented products
 - Many have no idea what a patent claim is
 - Many business leaders think that patent systems around the world are equal: “any country” = U.S.

BUSINESS PERSPECTIVES ABOUT IP/PATENT VALUE

- Many don't understand patent litigation
 - Infringement
 - Validity
 - Discovery
 - Markman /claim construction
 - Why so expensive, so long, so uncertain
- Many believe that “they” seem to obtain very broad and strong patents, while “we” only get narrow and weak patents

BUSINESS PERSPECTIVES ABOUT IP/PATENT VALUE

- We tell our business people that patents give them the right to exclude infringers
 - What value do business people place on that?
 - Does the right to exclude, and therefore the value, depend on patent enforcement?
 - lawsuits?
- Recommend: Focus the business peoples' attention on more pragmatic, but meaningful, things that patents provide which are
 - Achievable
 - Business-understandable
 - Cost-effective

PRAGMATIC BUSINESS VALUE OF PATENTS

○ Four such business-meaningful things that patents provide for value

1. Lead time

- at least limited exclusivity, de facto
- design arounds will happen, but they take some time, even with fast-follower competitors
- “patents don’t prevent competition!”

PRAGMATIC BUSINESS VALUE OF PATENTS

2. Silent enforcement

- force competitors to detour, spend more money, maybe design inferior alternatives
- comes from the mere publication of applications and the issuance of patents
- may have to sue occasionally in order to give silent enforcement some teeth

3. Product differentiation

- patent the improved features, the differences
- could be the only distinction over competitors' products (particularly store, generic brands)

PRAGMATIC BUSINESS VALUE OF PATENTS

4. Bargaining chips

- out-licensing opportunities and revenue stream
- dealing with competitors – you have to “play the patent game” to bring chips (patents) to the table
- patent yourself to prevent competitors from patenting (maybe just publish defensively)

SUCCESSFUL PATENTING AND BUSINESS DRIVERS

- Real key for value is to couple the patenting activities with business goals/directions
- Too many quantitative measures that do not necessarily equate to business value:
 - How many patent applications filed
 - How many patents issued/granted domestically and internationally

SUCCESSFUL PATENTING AND BUSINESS DRIVERS

- How many patent attorneys in the department
 - How much spent on the organization's patent portfolio compared to competitors
- Look at the real business drivers that achieve strategic goals and critical success factors for patenting

SUCCESSFUL PATENTING AND BUSINESS DRIVERS

○ Keys:

- Connect the important business drivers to meaningful patent success
- Identify and select your business's measures that relate effectively to strategic goals
- Focus on business-relevant measures or metrics, not just on how many patents were granted

SUCCESSFUL PATENTING AND BUSINESS DRIVERS

- How to make the connection between business drivers and successful patenting
 - Learn the organization's business drivers
 - for the entire entity and its business units
 - review the business plans and strategies
 - Discuss with the business leaders
 - obtain feedback, get buy-in
 - Create a template or scorecard
 - concentrate on strategic performance measures

SUCCESSFUL PATENTING AND BUSINESS

DRIVERS

- Develop a list of important performance measures
 - clearly define/understand the measures
 - keep decision-making in mind for these measures, e.g., costs, priorities, markets, need for exclusivity, etc.
- Determine the measures that are the best fit for the organization
- Formulate a plan to implement procedures for data collection and assessments relating to the selected performance measures

SUCCESSFUL PATENTING AND BUSINESS DRIVERS

- Examples of business drivers:
 - Grow market share of X product
 - Launch X product in Y countries this year
 - Derive X% of sales this year from products launched within the past Y months
 - Increase profit margin by X%
 - Spend X% of R&D budget on breakthrough projects in the new product development area
 - Increase the number of external partners by X% next year

SUCCESSFUL PATENTING AND BUSINESS DRIVERS

- Examples of critical success factors related to patenting:
 - Up-to-date and accurate forecasts of technology trends
 - Effective invention tracking system
 - Early identification of patentable/protectable technologies under development
 - Linkage between patenting decisions and overall corporate strategy

SUCCESSFUL PATENTING AND BUSINESS

DRIVERS

- Linkage between the organization's patents and use with current products and those products under development
- Identification of technological white spaces for possible patenting
- Patent acquisition opportunities
 - licensing
 - cross-licensing
 - freedom to operate
 - portfolio building

TOOLS FOR MEASURING SUCCESS OF PATENTING

- Examples of measures/metrics of patenting-value assessments
 - Invention disclosures on key, critical projects
 - Track invention disclosures relative to key project start date
 - compare to expected number of disclosures
 - Grade/rate the invention disclosures' importance to the business
 - Compare invention disclosures to R&D expenses

TOOLS FOR MEASURING SUCCESS OF PATENTING

- Patent portfolio utilization
 - practice invention?
 - defensive?
 - cluster?
 - abandon?
- Patent portfolio classification
 - strategic/core
 - critical
 - incremental
 - “recreational patenting” - other
- Align patents to revenue and profits from the associated products

PATENT VALUE IN THE FUTURE

- Where is the value of patents heading today?
 - Can we continue to rely on patents for value in today's climate/economy?
- Patents (and the entire U.S. patent system) seemingly under siege
- If “value” = $\frac{\text{quality}}{\text{cost}}$

then this equation needs to be thoroughly understood when applied to patents

PATENT VALUE IN THE FUTURE

- Costs: higher costs equal lower value
 - Increasing for patenting, maintaining, enforcing and avoiding conflicts (e.g., right to practice opinions)
 - What's the real ROI for obtaining/maintaining patents?
 - With the USPTO allowance rate currently between 35-45%, need to be more selective
 - Some companies spend more on infringement avoidance than on patenting

PATENT VALUE IN THE FUTURE

- Quality: higher quality equals higher value
 - High rate of invalid patents – acknowledged by a recent Commissioner of Patents
 - How many granted patents may be invalid for obviousness under KSR?
 - Doctrine of Equivalents virtually dead at the Federal Circuit since Festo
 - Injunctions harder to obtain since e-Bay

PATENT VALUE IN THE FUTURE

○ Uncertainty in the system

- Recent Supreme Court decisions – many believe that the current Supreme Court is anti-patent
- Federal Circuit – all over the place
 - business method patents/software patenting
 - design patents
 - opinions/attorney-client privilege
 - willful infringement/enhanced damages
- New USPTO rules – controversial, at least

PATENT VALUE IN THE FUTURE

- Patent reform legislation in Congress
 - difficult to find consensus
 - strong views pro and con
 - many likely to be unhappy with any new laws
- Negative public press about patents
 - Recent publications
 - “Innovation and Its Discontents”
 - “Patent Failure”
 - FTC paper on broken patent system (2003/4)

PATENT VALUE IN THE FUTURE

- Re-focus, re-trench and re-evaluate
 - Spend wisely, selectively for patents
 - Couple success of patenting to important business drivers
 - Don't be greedy about the scope of patent protection sought
 - Remember that:
 - patents are negative rights (the right to exclude)
 - patents don't sell products