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Patent Connections – Licensors vs Implementers: Who's Really Promoting Innovation? January 26, 2011

In a previous Patent Connections installment (Using Patents To Open Innovation And Open Minds), I mentioned the misconception that some people hold who think that only technology *implementers* should be financially rewarded, rather than technology creators. Public discussion about patent lawsuits reveals an interesting manifestation of this phenomenon. Consider patent owner DataTreasury, a company that owns more than a dozen patents relevant to electronic banking technology. DataTreasury won a jury verdict against US Bancorp last year, and has settled with several others.
Judging by commentary, DataTreasury's patent licensing efforts have not gone unnoticed, being described as *patent trolling*. Here's a description of the DataTreasury's actions:

> On the face of it, it looks like a *typical patent holding lawsuit*, where a company (*that doesn't do anything*) holds a very broad patent on the concept of automatic check scanning. It's suing a whole bunch of banks for their use of automatic check scanning without paying a big licensing fee for permission to do so.

From the article Alberto Gonzales Finds A Job: Helping To Settle Patent Trolling Disputes, at Techdirt.com (emphasis added).

However, a writer at Huffington Post has a different opinion, suggesting that large companies, like the banks opposing DataTreasury, "calculate the benefits of stealing someone else's patented technology against the possibility of getting caught." This calculated risk forces the hand of the patent owner, resulting in litigation. Setting up the dispute as the stereotypical David-and-Goliath battle, he writes:

> DataTreasury's founder invented a revolutionary check-processing system in the mid-1990s and tried to market it to high-level executives at Chase Manhattan Bank (now known as JPMorgan Chase). Instead of partnering with DataTreasury, those bankers are accused of walking off with the idea and using it to start a pair of highly successful check-processing companies of their own -- companies which are now owned by the biggest banks in the nation.

From the article Patent Theft as a Business Strategy at HuffingtonPost.com.

Certainly paints a different picture, but which view is more accurate? Suggesting that the banks are no more than opportunistic (and intentional) patent infringers may be equally as simplistic as suggesting that DataTreasury is an opportunistic patent filer. However, in cases like these, patent owners are fulfilling part of the bargain that flows from the existence of the patent system—namely, the part about promoting progress. Infringers, meanwhile, are obtaining the benefits of the patent system, while not contributing to the advancement of the technology.

Yes, the previous paragraph makes the *assumption* that a validly issued patent is actually infringed. Obviously, the possibilities exist that patents were improvidently issued, or that beliefs and investigations into the operations of an alleged infringer turn out to be incorrect. But, as they say, that's why we have trials.

And what do I mean when I say infringers don't advance technology? Well, assuming they are actually infringing, then they are duplicating the claimed invention owned by another. (Some might also call such duplication "copying.") As such, while their contribution has been to take an invention and deploy it commercially, such work doesn't necessarily give rise to new inventions. It may be true that infringers make certain improvements or add additional features, but the fact remains that the act of infringement itself is nothing but a repetition of something that was already made known by publication of the patent.

Then how do patent owners, by filing lawsuits, help to promote progress? After all, lawsuits are typically used

as an example of patents being used to restrict progress. Patent litigation is the result of a combination of two facts: 1) ownership of patented product/process etc., and 2) unlicensed use of the patented product/process (and, again, refer to the assumptions above). Thus, receiving notice that infringement may be occurring provides an additional opportunity to learn about a technology that may have been proven to be valuable (evidenced by replication by a competing firm), as well as an incentive to look for new innovations related to that technology.

For example, even if an infringer wasn't previously aware of the existence of the patent, patent litigation notifies not only the infringer, but also the infringer's other competitors. Federal litigation is a very public way of identifying a likely infringer, and companies generally keep an eye on what's being said and done about themselves and competition. (While I haven't seen anything written, I have little doubt that someone at General Electric is paying at least passive attention to the turbine blade patent battle going on between Pratt & Whitney and Rolls Royce.) Litigation is also a sign of the seriousness of a patent owner's interest in ensuring that any use of the patent technology is compensated. Thus, separate from patent issuance itself, the value of the technology can be validated by the existence of patent lawsuits.

As far as further incentives go, firms defending patent litigation, and firms who think they might be next are motivated to examine alternative technologies so that future implementations of a product won't fall within the purview of a known patent. This desire to "design around" a patent encourages firms to develop creative solutions that can solve the same problem as the original product while avoiding the specific patented solution. Often, these advances can constitute novel, non-obvious inventions in their own right. But whether these advances are ground-breaking or not, they are still different, and over time a series of incremental advances can give ground to a commercially important innovation.

The patent system as a whole also promotes innovation, but not necessarily in the way that many people think. Believing that the patent system is supposed to encourage *individual inventions*, it is far too easy to point to specific inventions that came into existence without the need for a patent system. Thus, the argument goes, the patent system has "failed" by creating a monopoly out of an invention that would have existed otherwise. But this argument also misses the point. Patents provide the vehicle for *disclosure* of inventions, including how to make and use them, and this knowledge is imparted to all, even if the rights to apply the knowledge in specific ways must be procured through license. In the absence of patents, intellectual creations can be protected by trade secrets which have the opposite effect, encouraging firms to shield their know-how from the public. Consider every IP attorney's favorite trade secret example, the Coca-Cola formula. This trade secret has existed for over 100 years, and the formula (other than a brief aside, and a substitution of high fructose corn syrup for sugar) has gone largely unchanged for decades. How innovative is that?