Patent Protection and Patent Trolls

Which should you care about?

Okay patents, trademarks, copyright, which is which

Copyrights - protects “original works of authorship”.

Trademarks - protects marks that identify your brand.

Patents - protects inventions from being exploited by others

What does a patent get me

Patents are government-granted rights to exclude others from using your invention.

The deal: you give the public full disclosure of what you invented ---> you get to exclude others for 20 years from the filing date of your application.

The requirements to obtain a patent are defined by statute.

Patent requirements: Utility

35 U.S.C. 101:

“Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent[.]”

Patent requirements: Utility

This is a pretty low bar. Inventions with subjectively low utility like toys can be patentable.

There are additional limitations. You can’t get a patent for:

- Laws of nature
- Natural phenomena
- Abstract Ideas

This area of law is constantly evolving.

Examples of patentable subject matter

Biotechnology:

Ok: Human-made organisms (*Diamond v. Charkabarty*)

Not ok: Naturally-occuring DNA segment (*AMP v. Myriad*)

Software:

Maybe: methods of conducting business, like financial hedging strategies (*Bilski v. Kappos*). But not the strategies themselves.

Landmark decision: *Alice*

A recent Supreme Court decision changed the landscape for patentability.

Before *Alice*, it was much easier to get patents on trivial improvements or broad concepts.

Alice reined in patent protection by imposing stricter requirements on patentability.

Post-Alice patentability requirements

1. Ask if the invention is for an ineligible category: abstract idea, natural phenomenon, law of nature. If so then move to step 2.
2. Can the otherwise ineligible subject matter be transformed into patentable subject matter because of a specific implementation
    a. Non-conventional
    b. Non-generic

This area of law will continue to evolve

InfoBionic Tells Justices Patent Eligibility Is 'Off The Rails'

*By **Britain Eakin***

Law360 (November 12, 2020, 9:51 PM EST) -- InfoBionic Inc. has urged the U.S. Supreme Court to take up the company's challenge to a Federal Circuit decision that revived a rival's heart monitoring patent, saying the case is an ideal vehicle for the justices to clear up the murkiness on patent subject matter eligibility.

Citing worsening confusion, rampant unpredictability and Section 101 jurisprudence that's "fallen off the rails," InfoBionic said in a Nov. 2 petition for certiorari docketed on Nov. 5 that the Supreme Court should take up the case because the Federal Circuit is "hopelessly fractured on the minimum requirements for patent eligibility."

Warren Buffett on patents

Our results have been exceptional for one reason: We have truly exceptional managers. Insurers sell a non-proprietary piece of paper containing a non-proprietary promise. Anyone can copy anyone else's product. No installed base, key patents, critical real estate or natural resource position protects an insurer's competitive position. Typically, brands do not mean much either.

Musk's response

Like superheroes squaring off for battle, the two Titans recently engaged in some verbal sparring about...candy? Well, not exactly–the subject of the divas' disagreement actually has to do with moats. "I think moats are lame," Musk told analysts on Tesla's recent earnings call. "If your only defense against invading armies is a moat, you will not last long. What matters is the pace of innovation--that is the fundamental determinant of competitiveness."

As you've probably guessed, Musk was not referring to a ditch filled with water, but rather to a Buffett-coined business term. An economic moat is a competitive advantage that protects a business against challengers. Moats are an important part of Buffett's investing philosophy. "If you've got the power to raise prices without losing business to a competitor, you've got a very good business," he said in 2010.

So what can you do with a patent

Patents are **property**. So they can be bought and sold.

Think of it like virtual real estate. You can carve out virtual tracts of property and claim it as yours.

And if you don’t have any further use for it, you can sell it.

Enter patent trolls

Patent trolls, or non-practicing entities, acquire patents and then enforce them against other companies.

How do you enforce a patent? Send a letter and state that you believe that entity is infringing on the patent.

So it must stop using that technology or pay a license.

Patent litigation

Anyone with a patent can sue a potential infringer in federal court.

If you are strapped for capital, plaintiff's patent firms can litigate for a cut of the proceeds, often 25%-33%.

Or you can find a litigation finance entity to finance the litigation.

Patent litigation takes a long time

Compared to other commercial disputes, litigation takes a long time to resolve.

The court must make a determination as matter of law about the scope of the claims.

Other issues like the validity of the patents are typically in play as well.

Patent litigation is expensive

A case taken all the way through trial will typically cost at least $2 million.

But the USPTO has offered a new, streamlined means of disputing the validity of patents through inter partes review.

This can cost perhaps $500,000 to resolve. But the scope of the grounds for challenge is narrower, and there are limitations on the information you can use.

So where do patent trolls come from?

Some simply acquire patents from operating entities. IBM has sold numerous patent portfolios to patent assertion entities.

Others used to have operating businesses that fell out of favor.

Remember Blackberry?

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

BLACKBERRY LIMITED, a Canadian corporation,

Plaintiff,

v.

TWITTER, INC., a Delaware corporation

Defendant.

CASE NO. 2:19-cv-1444

COMPLAINT FOR PATENT INFRINGEMENT

JURY TRIAL DEMANDED

Even universities assert patents…

February 17, 2016

Carnegie Mellon University and Marvell Technology Group Ltd. Reach Settlement

By CMU Media Relations / 412-268-4290 / media-relations@andrew.cmu.edu

Carnegie Mellon University and Marvell Technology Group Ltd. today announced that they have settled the patent infringement lawsuit the university filed in 2009. The settlement includes an aggregate payment by the company to the university of $750 million, which, after legal fees and related costs, will be shared with the inventors.

CMU won a record-setting sum

As engineers at Marvell Semiconductor raced to market with its new computer chips in the early 2000s, the company made no effort to conceal the source of their data-processing proficiency. Internally, the simulators in its new chips were called "Kavcic Viterbi" and "KavcicPP", a nod to Aleksandar Kavcic's pioneering work as a Carnegie Mellon University graduate student in the late 1990s.

Marvell eventually sold more than 2.3bn chips using Kavcic's invention. What it didn't do was license the technology from Kavcic who, along with his professor, renowned researcher José Moura, had patented his work. That mistake cost Marvell dearly – and helped Carnegie Mellon reinvigorate its research budget. Following a landmark patent lawsuit last year,[1] a jury ordered Marvell to pay the university $1.54bn. The company eventually settled for $750m.

Much of Carnegie Mellon's windfall went right back into the laboratories where Kavcic's inventions originated. A third of the settlement went to the college of engineering, where the research took place. Kavcic and Moura, who also received settlement funds, donated millions more to data science and engineering research at the school. University assets increased by $862.8m[2] in 2016, a 28.3% improvement on the previous year's performance. US financial services company Standard & Poor's raised its outlook on Carnegie Mellon's debt from stable to positive.

So what do I do if I get a letter saying I infringe?

Don’t panic.

The letter will likely include a detailed “claim chart” going through their patent claims and how they map onto your product.

In many cases, they’re simply wrong. Talk to a qualified attorney with experience handling patent disputes on a response.