

The Complicated Relationship Between Tech Cos. And Patents

By **Jonathan Link** (May 15, 2019, 4:18 PM EDT)

Patents and technology companies are often intertwined. The story of the startup company patenting its groundbreaking technology is a well-known one. We see this often on the television show "Shark Tank," as investors such as Mark Cuban and Lori Greiner routinely ask whether the founders of a potential investment opportunity have filed for patent protection. They recognize that without that protection, there is often little that will prevent someone else from quickly copying the invention and offering a competing product.



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The relationship between technology companies and patents becomes more complicated as companies grow. While patents are still important, growing companies must contend with the growing risk of being on the other side of patented technology.

Falling in Love With Patents

Protecting intellectual property is an integral part of growth in the technology field. The number of patents issued in the technology field has steadily grown since 2002.[1] Many startup companies rely on patents to protect their innovations. Venture capitalists and other investors almost always look at patents and pending-patent applications to ensure that the company founders have tried to protect their inventions. Venture capitalists are more likely to invest in the early funding stages of a company when it has patents.[2] Patents can also indicate the quality of the company's innovation, as well as be used for collateral in an investment.

Moreover, small companies are often the drivers of innovation. Small companies file more patent applications per employee than large firms.[3] These inventions tend to be more revolutionary and disruptive to industry. By one measure, patents granted to small companies are twice as likely to be among the 1% most cited patents, thus providing an indication that these patents are at the forefront of their technology.[4]

Because larger companies have often already created and commercialized their products, their patent filings are more likely to be directed toward incremental improvements to those products. This means that valuable, leading-edge technology is more likely to come from small companies and startups.

What Happens After the Honeymoon?

As technology companies grow, their views on intellectual property become more nuanced. In particular, there can be a downside to success — being the target of patent enforcement. Large technology companies being sued for patent infringement are often in the headlines. But those are not the only patent lawsuits being filed. Patent litigation spiked in 2013, with over 6,000 patent cases filed. That number has since dropped, but it was still at about 3,600 patent cases in 2018.[5]

Many of these lawsuits involve smaller companies that otherwise compete against each other in the marketplace. Other litigations involve patent assertion companies or nonpracticing entities enforcing their patents against those companies that sell products and

services. While the number of patent lawsuits being filed has been decreasing since its peak in 2013, the damages collected per litigation have actually increased in that time.[6]

This, justifiably, makes larger companies nervous, as they believe their deeper pockets make them more likely to be the target of a lawsuit. Thus, as tech companies grow, they must determine the value of strengthening the protections offered by patents for their own inventions versus the value of defending themselves when they are the target of patent enforcement. This conflict can be seen in the examination of existing laws and debate over whether and how to change them.

The America Invents Act is at the forefront of this debate. Enacted in 2011, the AIA provided for a number of changes to the patent law. Some, such as moving to a first-to-invent system, brought the U.S. into conformance with international patent law. Post grant proceedings in front of the Patent Trial and Appeal Board were also enacted by the AIA with the goal of simplifying the process of eliminating bad patents.

However, within just a few years the PTAB was invalidating more patents than expected and being referred to as a "patent death squad." Many believe that the AIA had gone too far and reduced the value of patents too much.

Two particular changes stand out. Prior to the AIA, patents were generally awarded to the first inventor to have conceived of the invention, even if they were not the first to file a patent application with the U.S. Patent and Trademark Office. While converting to the first-to-file patent system brought the USPTO into conformance with most other countries, it can have drawbacks for smaller companies.

One result of this switch is a "race" to the patent office, as the first inventor to file is generally granted the patent.[7] This tends to favor large corporations, as they have more money and lawyers to both prepare and be the first to file applications on their inventions. This can be especially significant to startup companies, which are often raising capital with investors and thus are particularly sensitive to any money and time that are diverted from commercializing their product.

Further, post grant proceedings at the PTAB have reduced the value of patents. For example, when initially created, the PTAB instituted over 85% of the petitions for inter partes review of challenged patents.[8] While that number has dropped over time, it still stands at 64% for fiscal year 2019.

Moreover, since its inception, 81% of patents where the IPR was instituted have resulted in all or some of the claims being found unpatentable.[9] This is because the standard for demonstrating unpatentability in the PTAB is lower than that used in district court. With so many claims being found unpatentable, many courts are staying litigation when an asserted patent is put into a post grant proceeding.[10] This has made it more difficult to enforce patents in district court.

One practical way to determine who benefits most from the AIA is to examine the efforts of those who believed it would help them. Lobbying expenditures show that large corporations invested heavily in efforts to pass the AIA. Thousands of lobbyists worked the House of Representatives, Senate and USPTO to gain passage of the AIA, and corporations spent hundreds of millions of dollars in this effort.[11] The corporations involved in these efforts are some of the largest in the world. Other entities with extensive lobbying efforts included the U.S. Chamber of Commerce, which spent over \$20 million on its efforts. It is clear that these large companies certainly believed at the time that the AIA would benefit them.

Reexamining Their Love for Patents

With these changes in the patent landscape due to the AIA, some are questioning whether the pendulum has swung too far. Versions of the STRONGER Patents Act have been offered both in the Senate and the House of Representatives and would roll back some of the AIA laws.[12] These proposed changes include requiring the PTAB to use the same standards as district courts when it rules on patent validity and reducing the ability for multiple reviews of the same patent in post grant proceedings at the PTAB.

A number of entities are supporting these bills, including the Biotechnology Innovation Organization, the National Small Business Association and the Medical Device Manufacturers Association, to name a few.[13] Interestingly, the Pharmaceutical Manufacturers Association, an organization that lobbied in favor of the AIA, is now a supporter of the STRONGER Patents Act.

Technology companies are struggling to determine the best way to balance the benefits that come from patents with the downside of having a patent enforced against them. These companies certainly recognize the benefits that strong patents provide them. However, that strength becomes a negative when they are on the other side of enforcement. Reaching the right balance will be an ongoing, and complicated, debate.

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[1] https://www.uspto.gov/web/offices/ac/ido/oeip/taf/ec_dps_is_efh.htm#PartA1_1.

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[5] <https://www.law360.com/articles/1124208> (citing Lex Machina).

[6] Id.

[7] Donald S. Chisum, The Harmonization of International Patent Law, 26 J. MARSHALL L. REV. 437, 447 (1993).

[8] https://www.uspto.gov/sites/default/files/documents/trial_statistics_mar_2019.pdf.

[9] Id.

[10] <http://docketreport.blogspot.com/2017/02/success-rates-on-requests-to-stay.html>.

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[12] <https://www.congress.gov/bill/115th-congress/senate-bill/1390>;
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[13] <https://innovationalliance.net/from-the-alliance/letters-statements-groups-support-stronger-patents-act/>.