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Patent Sharks

Key ideas from the [Harvard Business Review](#) article By Joachim Henkel, Markus Reitzig

The Idea in Brief

Technology firms face a serious menace: patent sharks. These predators collect patents through acquisitions in bankruptcy proceedings, licensing agreements, or their own R&D efforts. They hide their intellectual property--to deliberately trap tech firms into inadvertent patent infringements. Then they sue.

And the awards are typically huge. Pure patent holding company NTP, for instance, sued best-selling BlackBerry maker Research in Motion in 2006 for violation of NTP patents. Under threat of an injunction that would have shut down the mobile e-mail service, RIM settled for over \$600 million--even though several NTP patents were later declared invalid.

How to shark-proof *your* company? Don't rely on legal remedies, Henkel and Reitzig advise. Instead, reinvent your R&D processes. For example, make your technology modular, so you can remove and replace components that may be patented. And collaborate with your competitors to spot potential patent problems early.

The Idea in Practice

Henkel and Reitzig offer these recommendations for fending off patent sharks:

Recognize the limits of legal. Recent decisions by the U.S. Supreme Court have created a somewhat less hospitable environment for sharks in the United States. For example, these decisions have eliminated automatic injunctions for patent infringements. But current law doesn't prevent sharks from orchestrating infringements on patented technologies embedded in complex products.

Streamline your patent portfolio. Most high-tech firms' patent portfolios are stuffed with small, insignificant patents. Why? Companies believe that they can collectively mitigate the risk of extortion by cross-licensing patents to one another, thus creating technological interdependence.

But this approach doesn't defend against sharks, since sharks have no interest in exchanging technology.

Also, by flooding patent offices with applications for these defensive patents, you continuously lower the bar for obtaining patents--making it easier for all players to secure protection for simplistic inventions. Result? A dream environment for patent sharks, where trivial patents can exist, may be hidden, and can be enforced.

Create modular technology designs. If a shark's patent is built into a technology standard, and your company can't stop using it or switch to a feasible alternative, you're trapped. So design your technology in modular form. If a patent problem occurs, you can then swap out an infringing module. And if industries simplify their standards, there'll be fewer irreplaceable core components to worry about.

Cooperate with competitors to stave off sharks. Pool your R&D resources and cooperate with direct rivals early on in your development efforts to avoid coming up with products that are prone to subsequent shark attacks. Exchanging knowledge about where your company is heading may make you uncomfortable--but it's better than being blackmailed.

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Further Reading

Articles

Patent Medicine

Harvard Business Review

November 2004

by Adam B. Jaffe and Josh Lerner

The authors explain changes in the patent law system that have threatened companies' ability to innovate. First, judicial appeals of patent cases are now all heard by a single, specialized appeals court rather than 12 regional courts. This new court has interpreted patent law to make it easier to get patents, enforce them, and get large financial awards from such enforcement. And it's harder for those accused of infringement to challenge the patents' validity. Second, the U.S. Patent and Trademark Office's operation costs are covered by fees its clients (patent applicants) pay. The resulting perverse incentives have made it simple to patent even inane inventions and have caused the number of patent infringement cases to skyrocket, along with the cost of defending against them. Unless lawmakers turn their attention to this situation, our global competitiveness and long-term health of our economy are at risk.

How Market Smarts Can Protect Property Rights

Harvard Business Review

December 2004

by Bharat N. Anand and Alexander Galetovic

Patent sharks aren't the only threat to your IP. Developing countries' limited and inadequately enforced patent and copyright laws also pose dangers. To protect your IP from these perils, first consider strategies that will protect your business's core. If, for example, a first-mover advantage is within reach, make yourself more committed to intellectual property. If you and your rivals are equally matched, ask yourself, "Can those that threaten me with copying be copied in turn?" The knowledge that each of you can hurt the other may dampen the competitive intensity or even lead to voluntary sharing of property. If these solutions fail or don't apply, try forging a connection with a product or business closely related to your own. Doing so may prevent a valued asset from falling into a rival's hands or make the asset harder to misappropriate.

Book Chapter

Capturing the Value of Intellectual Capital: Mastering the Legal Aspects of Business

Harvard Business School Press

February 2008

by Constance E. Bagley

Every leader should know the fundamentals of the law as it applies to intellectual property. Excerpted from *Winning Legally: How to Use the Law to Create Value, Marshal Resources, and Manage Risk*, this chapter provides a basic introduction to patents, patent filing, and patent infringements. Bagley discusses the ability to use intellectual property laws to capture the value of your firm's inventions, proprietary information, and other intangible assets and achieve strategic advantage. And she explains how to use patents, copyrights, trade secrets, and trademarks both offensively and defensively.

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