

Patent Connections – A Patent Does Not Protect Your Products January 12, 2011

Patent attorney websites are abundant on the internet, complete with explanations about why inventors and businesses should file patents. Unfortunately, they're almost universally painting an incomplete picture. I will refrain from linking to one because this post is about the perpetuation of a myth, rather than singling out any particular lawyer (myself and my friends included). Chances are you've already surfed through dozens of resources about patent law. In the process, you've no doubt run across statements that encourage you to file patent applications to "protect your products." This is not like taking out insurance, or hiring a body guard, of course. By *protection*, your attorney means preventing others in the marketplace from using, selling, or distributing the patented invention without your permission.

Such a statement, while grounded in historical fact, is for all practical purposes highly misleading. In fact, any attorney who makes such a statement will likely admit to you that patent protection is just not that simple ... eventually ... and only if you ask the right questions. However, a patent portfolio can be useful to protect your overall *business*. Just don't be misled into filing patents for the limited purpose of protecting a product, lest you find yourself making your patent attorney rich, while receiving little or nothing in return. So, how do you get your patent attorney to admit that patents alone are relatively worthless at *protecting products*?

Start by asking whether your competitors will do their own research, discover your patent, and decide not to copy your product. Ok, fair enough. If you've been paying attention to the business world around us, you couldn't even get that question out with a straight face. Companies generally do not perform in-depth patent research, except to occasionally search for prior art on their own inventions, or to look for invalidating art to neutralize a patent threat. Many companies won't bat an eye at spending millions to create a new product while completely ignoring the patent landscape, despite the fact that this is akin to starting construction of a house on a random piece of property on the assumption that the land is free for the taking.

And even when companies (accidentally, I suppose) learn about specific patents, they generally won't let that simple fact alter their production plans. So, your next question might be what government agency can you alert about this patent infringement? You've seen fast forwarded through many FBI warnings in the 80's and 90's on those clunky VHS tapes, so if copying a movie is a crime, then surely ripping off your invention must be too, right? Again, you've been paying attention, so you probably know better. Enforcing a patent is the owner's responsibility alone. There is no law enforcement agency to help you. The only thing you can do is file a civil lawsuit (you know, those federal cases where people are all too quick to tell you it's not about the money).

"A-ha!" you think. Assuming the last paragraph wasn't news to you, then you know how that very expensive patent can help protect your product. You can use the court system to order your competitor to stop making and selling your patented product, right? This means that you are the only one allowed to sell your product, and the patent serves as the basis to exclude all others. Well, this is the moment where the other half of the *half-truth* is exposed. There was a time, several years ago, when patents could (and often were) used for that purpose. Granted, you had to prove a few important things (like ownership of the patent, the fact that the product is what you claimed in your patent). But once you had jumped those hurdles, the court was going to grant an *injunction*, unless it had some good reason not to. Then, a few years ago, the Supreme Court decided that there was never any basis for the automatic injunction, and hit the proverbial "reset" button, wiping out decades worth of precedent. Since that time, injunctions have become significantly more difficult to obtain.

So, then, you ask your lawyer what happens next. Recapping the above, you've obtained a patent, proved infringement, dodged all of the defenses thrown back at you, yet you remain powerless to actually force someone to stop making your patented product. Basically, you'll be given an opportunity to negotiate a license that would allow the defendant to keep making the product as long as they pay you some money. If the two of you can't agree, then, most likely, the court will force you to license the patent on terms it considers fair.

All is not lost, however. You just need to recognize that the only reliable power of a patent is the power to make someone

else pay you money (quickly returning to the statement above that it's not about the money). That said, a patent can be useful to protect your overall business, rather than any given product. As an example, companies sometimes refer to obtaining patents for defensive reasons. Of course, this is a silly idea. Each patent is measured on its own merit, so the mere fact that you have a patent is no defense if you're accused of infringing the patent of another. (For example, a blocking patent may cover a necessary improvement that your patent doesn't address, but is nevertheless present in your product). Thus, a patent is every bit as defensive as a sword, yet the language makes them sound as though they are a shield.

A "defensive" patent portfolio can give a business leverage in a patent fight with a competitor by acting to set off potential damages. More commonly, the competitors make peace by granting cross-licenses to one another. Without patents of your own, you have little to offer in exchange for these situations (except money, see above). Even against a non-practice entity (NPE) whose only business is to license patents, you may be able to sell one of your patents as an investment for the NPE, reducing or eliminating your own licensing fee.

These are but a few examples of the many things you can do to protect your business with a strong patent portfolio. Your products, unfortunately, are on their own...