

Black hats and white hats in the patent law system

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It took a few seconds to come up with this analogy, but after reading the “Wear a White Hat” article by Scott Gibson, I couldn’t stop thinking about how relevant the concept of black hat, white hat was not only to archetypes, hackers, and network security professionals, but also to patent practice professionals.

In the hacker / network security / cybercrime world, a black hat is a hacker who, among other things, penetrates networks and security systems and often wreaks havoc on the systems s/he has gained access to. Viruses can be installed, information can be exploited and/or manipulated, and general bad things can happen when a hacker penetrates your system.

On the other hand, there is also something called a white hat, which generally refers to an “ethical” hacker. Frequently, this is a programmer or a team of network security professionals who are hired by a company for the purpose of testing the company’s network for security holes, vulnerable entryways, and for weaknesses in the company’s network security system. While they may work with gray hats (best described as those who walk the fine line between violating laws and ethical hacking), these white hats help companies combat black hats who are intent in finding a security hole, penetrating a network, and exploiting the vulnerabilities inherent in that vulnerable network.

I see patents the same way. There are white hats who practice traditional patent practice whether on the side of patent prosecution, patent licensing, or patent litigation. These are the practitioners who write the patents and advance technology by sharing inventions with the public in return for a multi-year monopoly so that the inventor can benefit from their invention. The goal with white hat patent practitioners is that they are looking to help their inventors to find where the inventor’s understanding of the invention is lacking, and to help their inventors secure protection of their inventions by covering as many embodiments of the invention as possible to most completely and to most broadly describe the invention. This is similar to the white hat ethical hacker who finds security holes with the intent of writing a patch to fill those holes and to keep the network secure.

In licensing and in litigation, there are also white hat patent practitioners. These are the attorneys who help the inventor protect their inventions against companies who have knowingly or unknowingly taken the protected invention and have used the invention to make a product or a service which incorporates the protected subject matter of the patent. This white hat patent practitioner will often approach the company or individual using the protected invention of the inventor and will ask the company to properly compensate the inventor for the value of his/her contribution. If and when the company decides not to pay the inventor for the invention that is protected by law as belonging to him through his patent (whether their decision is in bad faith, e.g. denying the inventor compensation based on the company’s greed or whether their decision is based on a good-faith belief that the patent is invalid), the white hat patent practitioner (here a patent litigation attorney) will file suit to enforce the inventor’s patent rights. Throughout the proceedings, the white hat patent litigation attorney will develop evidence and will ethically move through the lawsuit proceedings so that the judge or jury will find that their client was wronged by the company who refused to take a license and pay the inventor his/her fair share of the value their invention contributed to the company’s profits, and in the end, if the inventor is in the right, the court will find for the inventor and will order the company or infringer to pay the damages rightly owed to the inventor.

Interestingly enough, just as there are white hat inventors and patent attorneys, there are also gray hat and black hat inventors and practitioners. Often known as patent trolls, these individual or companies will patent or acquire patents to inventions with the sole purpose of using them as a weapon to harm another company, whether it be to block them from making a product, or more frequently, to carve out a profit for themselves by asserting the newly acquired patent against the company. The stated purpose of patents are to promote and to reward innovation and to further the growth of technology; forcing a company to “pay up or else,” or to stop producing a product under threat of lawsuit blocks and hinders technology.

Black hat patent practitioners and black hat inventors usually fall into the category on non-practicing entities (NPE's). These individuals generally see a patent as a commodity to be mined and exploited rather than an invention to further technology. You'll often find black hat practitioners trying to reverse engineer and to invent around existing inventions for the sole purpose of suppressing the next step in the furtherance of technology, or to try to induce the real inventors and companies to “trip” (so to speak) over the patent and infringe it and then WHAM! the lawsuit and threats start pouring out. You'll also find many venture capital companies acting in a black hat capacity by aggregating patents for the sole purpose of making a pretty penny by enforcing one or more patents against a target company with deep pockets who stand to lose the most by being confronted with one or more patents which may or arguably may cover the technology they are practicing.

Lastly, the distinction between a black hat patent litigator versus a white hat or gray hat litigator is how they conduct themselves in the preparation for and during trial. Black hat litigators will threaten, scream, intimidate, and will use scare tactics and legal maneuvers to intimidate the other side into settling with them WHETHER OR NOT they really are infringing the patents being asserted against them. Sometimes a party facing a lawsuit will settle giving money to a black hat litigator who has no leg to stand on just to save money on the expensive costs that will be incurred if they decide to fight the black hat litigation attorneys.

In the network security world, the job of the good guy belongs to the white hats who write security updates and patches to prevent the hacker black hats from causing damage through their illegal and often immoral activities. However, in the patent world, a white hat is often at a disadvantage when facing a black hat, and their only remedy is to endure the high costs of litigation and attempting to file a declaratory judgment and or summary judgment motion, or defending their client all the way through trial until a judgment is granted in their favor.

However, the real white hats in the patent world belong not to the patent attorneys and the patent litigators who ethically run their practice, but to the congressmen, the senators, and the lawmakers who are able to explore how black hat patent practitioners exploit and abuse the system, and they can pass laws to patch up the vulnerabilities in the law which allow black hats to do their damage. This can only happen through advice and letters from ordinary people like you and me who write them and share their thoughts, their feelings, and their experiences to best empower the real white hats to propose legislation changes to remedy vulnerabilities in the patent system as it is today.