Low-End Patents Usually Have Zero Value

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by David E. Rogers

I. Most Low-End Patents Have Zero Value.

The term low-end generally denotes a low-cost product with *corresponding* low quality or value. In the context of patents, however, there is no *corresponding* low value because lack of foresight, carelessness, or apathy can mean the difference between a patent worth millions and a worthless piece of paper. Low-end patents, prepared and prosecuted with the goal of merely pushing something through the USPTO, often have zero value. Costs alone are paramount, and most or all of the invention's value is left on the table for competitors to freely practice. There is no consideration of the end game, which is licensing or selling the patent, or making products and keeping competitors at bay by eliminating practical design-around options.

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II. A Large Percentage of Patents Are Low-End.

A large percentage of patents fall into the low-end category.[1] Often, business managers think only of the current operating budget and how to keep patent costs as low as possible. This fosters a culture of pushing patent applications, regardless of value, through the USPTO. There is little advance thinking about the actual value of the patents obtained or what constitutes value. Not surprisingly, businesses obtaining low-end patents usually earn little money selling, licensing or enforcing them because competitors can design around low-end patents with ease.

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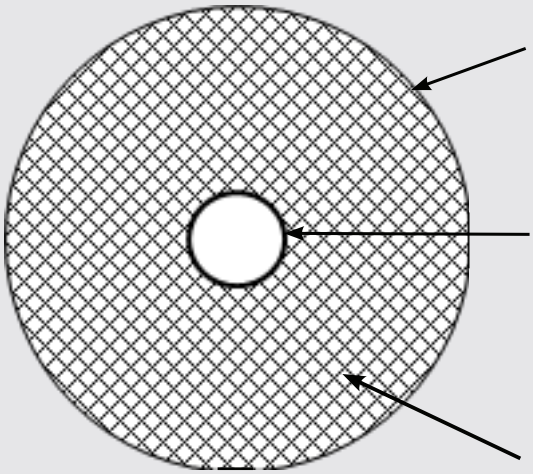
[1] *See* Jackie Huttler, *Strategic Patenting Part 1: Why So Few Patents Create Real Value*, IP Asset Maximizer Blog (Jan. 24, 2014) (only an estimated 5% of patents of the most sophisticated companies create strategic value).

Thus, the driving forces behind low-end patents are costs, disregard for (or little understanding of) patent value, and sometimes an outdated view of how to use patents. Years ago, a large stack of low-end patents was enough to scare off competitors (particularly small businesses) or force them to take a license. Even if each patent was worthless, the time and expense to wade through the entire stack was cost prohibitive. But, the advent of (1) advanced computer technology, which makes it easier to analyze a large number of patents, (2) new methods to invalidate patents implemented in the America Invents Act, and (3) more determined litigation defendants, which cannot afford the cost of unwarranted patent license fees, have drained even more of the limited value from low-end patents.

III. Why Low-End Patents Often Have Zero Value.

A patent ends with numbered sentences called *claims*, and it is the claims that are or are not infringed. The rest of the patent specification and any drawings basically act as a dictionary to define the claims and satisfy other legal requirements.

Low-end patents usually have lengthy, narrow claims and often sketchy, paper-thin specifications, sometimes describing only on a single example of the invention. This leaves large swaths of potentially valuable intellectual property unprotected and free for competitors to copy, and even to potentially patent themselves. It is a one-two punch that decimates the value of even the most creative inventions. Not only is a low-end patent often worthless from the standpoint of stopping infringers, it adds insult to injury because the patent document publicly discloses the invention, thereby providing a road map to design around its narrow claims. The diagram below illustrates the problem.



IV. Why Low-End Patent Prosecution Kills Patent Value.

Low-end patent prosecution usually consists of continually narrowing the claims to capitulate to the USPTO's positions, rather than standing firm and arguing for broad, valuable claim scope. If arguments in favor of patentability are presented at all, they are off-the-shelf, generalized boilerplate. Narrowed claims coupled with claim amendments surrendering subject matter can permanently dedicate much of the invention to the public (including competitors).

V. There Will Always Be a Market for Cheap.

Low-end patents will never die because there is always a market for cheap. But, low-end patents are of little or no value. The bright side is that you can use a competitor's products and low-end patents as a road map to create your own design-around products. Also, it has become more difficult for large companies and patent trolls to use stockpiles of low-end patents against legitimate business, particularly startups, to drain their resources and stifle competition.

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