



Time for patent companies to stand up for reform

Scott Burt—May 14, 2014

Not long ago, only a handful of members of Congress gave a hoot about patent reform. Today, it seems like the entire Congress cares, having been prodded by a few deep-pocketed Silicon Valley businesses and thousands of angry Main Street businesses to support legislation to curb the patent trolls who prey on their businesses with extortionist demands to pay a settlement fee or face a costly infringement suit.

But amid the clamor from the business community and their elected officials to rein in patent trolls, one group has remained largely silent: the patent licensing industry itself. Unlike the responsible players in other industries where abuses have occurred over the years — abuses by “ambulance chasers” in the personal injury field, for example, or by exploitive subprime “lenders” in the home mortgage business — the leaders of America’s two centuries-old patent licensing industry have not exactly been strong advocates of reform in their own backyard.

This is unfortunate, because advocating against true patent trolls should be a no-brainer. Without doubt, when a shell company sends extortionist demand letters to a thousand random businesses of a certain size and industry classification, claiming with little or no investigation that they are infringing sketchy patents — and then demands a “licensing fee” of \$1,000 per employee to not sue them — this is beyond the pale of any responsible standard of doing business. Such activities violate most states’ consumer protection laws against making false claims. That’s why New York Attorney General Eric Schneiderman was able to get MPHJ Technologies Investments, LLC to sign a consent decree this past January that required the company to repay all the money it received through such tactics from New York businesses.

It’s time for the industry’s silence to end — for the nation’s sake and its own. The nation needs to curb patent trolls because they undermine the benefits of the patent system and raise its economic costs. But the patent industry needs to do so as well because industries grow faster and create more jobs when they police themselves rather than wait for the often-heavy hands of legislation and regulation to deal with the bad actors that lurk in every field of economic activity.

This is doubtless why virtually every major industry in America has some sort of code of conduct for ethical behavior — every industry, that is, except the patent licensing industry. And that is too bad, because the licensing business would greatly benefit from an established code of conduct that all members of the industry pledge to follow.

However, too many in my industry have remained silent about the patent troll scourge. Too many have kept their heads down, fearful of getting embroiled in public controversy. And some even continue to refer to the “so-called” patent troll problem, as if companies like MPHJ Technologies were a figment of Main Street’s imagination or a propaganda ploy invented by well-heeled tech giants to scare Congress into eviscerating the patent system.

It’s certainly true that some tech giants label any legitimate patent owner who challenges their often-blatant infringement a “troll.” But it’s also true that bona fide patent trolls are out there damaging small businesses every day — and need to be stopped.

There are some signs, though, that patent licensors are waking up. Last year, at my own company, Conversant Intellectual Property Management, we publicly committed to a 10-point set of responsible licensing practices. On four of the hottest-button issues in patent licensing today, we pledged — and encouraged others in the industry — to do the following:

- Disclose a patent's true ownership.
- Seek licenses only from appropriate companies, instead of going after, for example, a start-up company, a local retailer, or a small end-user customer.
- License quality patents that diligent investigation indicates are valid, enforceable and being used or likely to be used by the potential licensee.
- Try first to negotiate a license, but if litigation becomes necessary, then initiate it only for the purpose of obtaining fair and appropriate compensation for the use of patented technology — not to extort a nuisance or litigation cost-based settlement.

Then in March of this year, Finjan Holdings, a developer and licensor of patented cyber security software, also stepped forward and committed to licensing best practices that encourage greater transparency, fairness in not targeting small business end-users, and negotiation rather than litigation. One of its goals in issuing these licensing best practices, said Finjan, is "to provide a heightened standard by which we wish to be perceived within the industry."

In addition, Microsoft announced in March the launch of Patent Tracker, an online tool that allows anyone to inspect all of the company's thousands of patents. (My company also is working to make all of our thousands of patents available for inspection on our own Web site.) According to Microsoft general counsel Brad Smith, "Transparency around patent ownership will help prevent gamesmanship by companies that seek to lie in wait and 'hold up' companies rather than enable a well-functioning secondary [licensing] market."

These are encouraging first steps. But more leading licensors need to stand up and be counted — for greater transparency, fairness, and improved patent quality, and against the abusive practices of patent trolls. For if nothing else, without credible evidence that our industry is committed to curbing abuses, our pleas to policy makers that they avoid over-reaching legislation that could stifle legitimate patent licensing — a practice that both protects and encourages innovation — will fall on deaf ears.

Virtually every industry in America commits itself to a code of ethical conduct. Patent licensors should embrace this basic responsibility.

Burt is the senior vice president and chief intellectual property officer at Conversant Intellectual Property Management Inc.