IP Strategy - Heading for the Boardroom

The currency of ideas: IP can make or break a business

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An Aistemos Report

Innovation, and the research and development that delivers it, is crucial to a company's survival. Whether this involves developing new products or services, enhancing existing product lines, or making operations leaner and more efficient, R&D is the fuel in the tank, which propels ventures forward.

In the previous chapter, we discussed the need for boards to engage with intellectual property (IP), and understand its role as a value driver. But ensuring that the rest of the organisation is aware of the issues around protecting new ideas is equally challenging. Those developing new IP, teams focused on mergers and acquisitions, and staff who work collaboratively on innovation projects, may not appreciate what's at stake.

Without vigilance, protection for new ideas can evaporate or drag the organisation into a protracted dispute with a rival company. Furthermore, R&D is hugely expensive, so business leaders are increasingly looking for certainty that revenue can be derived from these activities, and that the IP offers the necessary protection.

Yet new research by Aistemos, a specialist in IP analytics and strategy which surveyed a wide range of business leaders, suggests that many organisations simply do not have the right data at the right time to support key business decisions.

The Aistemos survey found that just 11pc of respondents believe that R&D decisions are always made with sufficient understanding of the IP issues at play. Alarmingly, more than half stated that IP was only "sometimes" taken into account.

One of the well know IP risks is so called "Freedom to Operate" (FTO). This is the ability to sell a product without infringing the IP rights owned by a third party. The converse is just as important, why invest in R&D if there is no IP protection and others can copy with impunity? This is why it is so important to access valid and up-to-date information about who owns which IP, and to integrate this information into the decision-making process. However, in a world of 80m patents, this is not easy. Sifting through incomplete databases or innovating on a wing and a prayer are no longer viable options.

According to Dr Bobby Mukherjee, Chief Counsel in Group Intellectual Property for global defence firm BAE Systems, it is not enough to simply educate management about the true impact of IP on business strategy - this must be communicated to the whole organisation. "There is always more work to do at grass roots level," he said. "The key is to integrate IP into routines and processes, such as inductions and exit interviews. Education is an important part of the process."

Profiting from innovation

There are other ways companies exploit their IP: licensing and litigation. In recent times these activities have become quite closely related. What routinely starts as an offer to licence (the "carrot") can turn quickly into litigation (the "stick"). Either way, the opportunities are core to business strategy. In some situations, the licensing revenue is very significant, in other cases the IP is the way competitors are kept out of the market. This makes the case for IP to move up the chain of priorities within an organisation.

Technology giant IBM received 7,355 patents in 2015, more than any other single organisation. Speaking to World IP Review recently, Manny Schecter, Chief Patent Counsel said of IBM's litigation strategy: "Billions and billions of dollars has been spent on research and development to maintain that innovation edge. We do bring litigation against others that take our IP and refuse to compensate us."

But litigation is a high-risk game with more losers than winners. While the majority of IP cases rarely go to trial, when they do the outcome is expensive and uncertain (and often fails to deliver an outcome perfect for either party). Little wonder then that management would rather settle out of court: think back-room brawl over a boxing match in Madison Square Garden.

While patent litigation has been broadly on the rise in recent times (largely due to “patent trolls”), licensing trends perhaps provide a more accurate gauge of organisations’ willingness to commercialise their IP. There are many indicators that activities of this sort are also on the rise. According to the International Monetary Fund (IMF), charges for the use of IP increased from US$285.5 billion in 2012 to US$328.5 billion in 2014.

But more could be done to encourage innovators to licence out their IP. “While litigation is as transparent as it needs to be, licensing isn’t, and it’s a problem,” said David Kappos, partner at the law firm Cravath, Swaine & Moore, and former director of the United States Patent and Trademark Office (USPTO).

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In the wake of macroeconomic shocks, such as the UK’s decision to leave the European Union and talk of a protectionist stance in the US by its new president elect Donald Trump, licensing could become a crucial way to keep the currency of ideas flowing across borders.

Mergers and acquisitions

In yesterday’s business environment, mergers and acquisitions were used to move into new territories, generate cost savings, eradicate a rival or simply grow at pace.

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Now, a large driver of M&A is enabling “adjacencies” - allowing companies to move into new technology areas. Yet IP due diligence has failed to keep pace with the needs of the dealmakers.

Aistemos CEO Nigel Swycher was formerly an IP partner in law firm Slaughter and May, and explains the issue this way: “The challenge is to understand complex technology landscapes, involving thousands of patents, within a finite deal window and budget. Conventional due diligence tends to deal with counting patents and renewals. With the advent of analytics, you are now able to understand both the assets and overall environment”.

The consequences of not assessing the intangible assets with the same degree of scrutiny as the financials can be disastrous. There are plenty of war stories of buyers assuming that they had all the IP they needed, only to be caught out late in the day, or worse still post-closing. “Today’s reality is that IP issues are now often at the heart of the deal. The issues need to be surfaced early if they are to be addressed effectively” adds Nigel Swycher.

Ownership and risk sharing

One of the greatest challenges faced by innovative companies today is understanding who owns what. “Analysing a company’s patent portfolio is so fraught with difficulty as you can’t really trust the public data,” said Tony Clayton, Director of the Open Register of Patent Ownership (ORoPO) and former Chief Economist at the UK IPO. “If there was better quality information about who owns what IP, this would provide a welcome boost to licensing and a corresponding reduction in litigation. The 2015 ORoPO Report estimated this benefit at $300bn”.

When business leaders were asked by Aistemos researchers whether they have adequate access to the competitive intelligence they need about what IP is owned by others, over half responded to indicate that they did not. This is a shocking indictment of the current levels of transparency in othe world of IP.

As the age of technology moves on apace, collaboration is going to become more and more commonplace. Innovators must work together if they want to solve tomorrow’s challenges. The Internet of Things may be the tipping point for greater collaboration. “In a world where all devices are connected, there will need to be greater collaboration” comments Nigel Swycher.

According to Hywel Ball, a Managing Partner at EY: “We have to find to a new form of collaboration to reach a better answer for business. We need to accelerate the way that companies talk about long-term value. It’s essential because the public is losing trust in business and collaboration is a way that we can regain that trust.”

Dan McCurdy, Senior Vice President at RPX, warns that the IP must evolve if it is to become an enabler of change, rather than a barrier.

“Much of the recent focus has been on patent battles, not using patents and other IP to maximise financial performance,” he noted. “Yet as we know from examples such as ARM, Qualcomm, and Dolby, tremendous value can be extracted from IP. The issue is that most IP staff are engaged in harvesting and protecting IP on the one hand, and defending against attacks from adversarial IP owners on the other.”

Open innovation may sound like a pipedream, but innovators across the world accept that collaboration will be critical to their future success. In a world of open-source, cloud computing, and big data, R&D is no longer something that has to take place in isolation. This means that corporations need to understand their IP as never before. This will reduce risk and open up a world of opportunity.

About Aistemos

Aistemos was founded to empower the IP community, by pioneering business communication in IP to create a global conversation. We tackle IP issues head on, and find solutions fit for growth.

As more data becomes available and technologies shift, the world of intellectual property is rapidly changing: join us on that journey.

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MIP IP Strategy Forum
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This report forms part of a **series** of articles examining the findings from the IP Strategy Survey conducted by Aistemos earlier this year.

This **series** will culminate in a final report to be launched at the **MIP IP Strategy Forum 2017** co-hosted by Aistemos at ETC County Hall, London on the **26 April 2017**.

Registration is now **open**.

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