Bad Economic Times Are Great Times to Act on Intellectual Property

by Jack Stuart | May 11, 2020 | Patents

A Fighter Vignette

"Back in the day", as they say, America's front-line air superiority fighter, the F-15 Eagle, ruled the skies. Many in the Eagle community called the F-15 "Rodan", likening it to the flying monster in the Godzilla movie series that similarly dominated the air. Referring to its capabilities at very high altitudes, some fighter-jocks would snipe, "It's a pig!", meaning its ability to maneuver was substantially limited.

But here's the thing: A "pig" compared to what, exactly? Another Eagle? Very low air densities at such altitudes demand performance very few aircraft could deliver, and none as well as the F-15, at the time. Yes, it was unwieldy. Yes, its turning performance was poor compared to its capability at lower altitudes. But when every other aircraft can't even get to your altitude, a "pig" is more than adequate to rule the heavens and liberally scatter other aircrafts' parts in ooh-ahh-worthy fireworks displays.

So what does fighter-jet lore have to do with intellectual property (IP)? Everything. Much like the thin air of very high altitudes impacts all aircraft flying in it, a very bad economic stretch likewise impacts everyone forced to endure it. But just as all planes do not perform alike at high altitudes, neither do all those subject to economic adversity weather economic storms alike. Harsh economic times thin out competition and force companies to become more competitive in the fight over the remaining scarcities. Those whose focus had once been "keeping the lights on" are now gone; those once thriving are now the ones trying to keep the lights on. In short, thin economic air winnows down commercial market herds much like thin high-altitude air winnows down combat-fighter contenders.

Why Bad Economies Are Good for IP

Companies that develop solid IP portfolios during downturns - especially severe downturns - stand to emerge from hard times in much better positions than do those that simply "hunker down and endure". First, IP assets provide stability in uncertain periods. These assets fuel investment and growth when markets are otherwise subject to emotional overreactions and factually-unmoored decisions.

Second, crises are excellent opportunities for visionary innovators to establish leads otherwise unavailable, as the would-be competition's focus is drawn away from its "neighbor's" goings-on. And third, as World Intellectual Property Organization (WIPO) Director-General Francis Gurry aptly summarized, "History has shown that companies and countries which continue to invest in new products and innovation during times of economic recession will be those that will be best positioned to take advantage of the recovery, when it arrives."

Underscoring these truths is the evidence of a host of innovations, all created during bad economic times. Examples include the television, chocolate-chip cookies, nylon, the photocopier, the electric razor, the personal computer, the Internet, the iPod, Scotch tape, ketchup and fluorescent lightbulbs - to name only a few. The visionaries in these fields were the ones emerging as clear winners when the economic storms finally subsided. This present period of economic calamity will no doubt repeat this pattern.

It's also no accident that all but one in the "FANG+/FAMGA" group - Facebook, Apple, Amazon, Alphabet/Google, Microsoft and Netflix - have publicly badmouthed the value of patents while they have simultaneously, quietly, relentlessly and purposefully gobbled up smaller high-tech companies owning valuable patents. Those who know and apply these historical lessons will be the winners who "come out swinging" at the end of economic declines. The others? They are the ones no one will know about - let alone remember.

The Key Role of Patents

Patents are the legal bedrock that underwrites technological innovations. This fact is especially true of high-tech companies, whose values disproportionately vest in technology. Many unreflective thinkers baldly allege that 90-99% of patents are largely worthless. But these statistics are uncertain, at best. The reality is of course much more nuanced and complex than these patent-hecklers would have you believe. The truth, as FANG+/FAMGA group members have amply demonstrated, is that at the heart of every high-multiple-value company lies some form of IP. And patents are especially good at forging those multiples.

These "statistics" are misleading for a number reasons. First, most are largely drawn from opinion surveys from C-suite executives, not from empirically-sound studies. Second, such statistics fail to account for connections between a company's patents and its valuation. This correlation is "baked into" a company's overall valuation, and is usually not capable of being broken down into individual patent valuations. Why? Because patent valuation usually occurs only in hindsight: Everyone knows the value of a patent - at least its relative value - after its contents have translated into a commercial success.

Before that, however, a patent's value is largely speculative. This is especially the case for patents encompassing truly cutting-edge technologies. Even after a commercial success, the value of any one patent is extremely difficult to determine within the context of the total contribution of the company's patent portfolio.

Third, the values of those patents that do produce high returns are exceedingly disproportionate to the value of the "average" patent. The problem? Notwithstanding the snake-oil hype otherwise, no one really knows in advance which patents those will be. Did either Larry Page or Sergey Brin really have any idea in 1998 that Page's "PageRank" patent filed in that same year would lead to the monolithic empire known as "Google", for instance?

Thus, it is true that: 1) valuable patents are difficult to predict, and 2) present patent values are difficult to pinpoint. Nevertheless, these facts do not mean patents are valueless; quite the contrary. Yet, this is the fundamental fallacy echoed endlessly by the "ninety-something-percent-are-worthless" mantras. If this fallacy were in fact true, virtually all innovation would halt. No innovator innovates for free. A light must exist at the end of the tunnel. And it does: The ability to obtain an exclusive benefit from the fruits of one's labor is alive and well in the U.S. patent system, as it is worldwide in other organizations, which look to it as the gold-standard benchmark.

Now Is the Time to Act

"Strike while the iron is hot." This age-old cliché is packed with wisdom relevant to the moment. Now is the time to consider whether patenting your technology would add value to your company. Assuming you have patentable technology as well as the drive to bring that technology to commercial market, such a move would align very well with that clichéd truism.

The history of innovations is littered with "also-rans" - those overly-cautious companies, who, looking back through the perfect lens of time, reflected, "If only we had done [X] when we had the chance." Well, you have the chance now; you won't have it later. That's virtually guaranteed. And no one has a perfect lens looking forward. But we do have history as a reasonably reliable guide.

This economy will get better. And when it does, you should not be asking yourself whether your company should have used its excess maneuvering capability in the thin air of these economic times to gain a lasting edge in its market. If, however, you find yourself asking this question someday, the answer will most likely be as obvious as the crowded field of competitors in front of you, who have all come to the same conclusion while pondering the same question.

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