

COMMENTARY

Editorials, letters, columns and other opinions

Patent Rights Are Crucial to Local Economy



COMMENTARY

Jonathan Muenkel

Anyone who has seen the TV show "Shark Tank" has likely heard the word "patent" uttered between the contestants and panel of investors. And while the average American may understand generally what a patent is, many may not realize the critical role patents play in our nation's economy. Closer to home, patents are crucial to the growth and financial health of many San Diego businesses, large and small alike.

Regrettably, the past few years have seen an erosion of U.S. patent rights, caused in part by the U.S. Supreme Court, and a growing anti-patent sentiment based on a few "bad actors" who have unfairly gamed the patent system for their own pecuniary gain. But more about why patent rights have deteriorated in a moment.

Patent rights stem from the U.S. Constitution, which gave Congress the power to help "promote the progress of science and useful arts" by granting an inventor exclusive rights to their discovery for a limited duration. Thus, a patent grants its holder the right to *exclude others from practicing the invention* without the holder's authorization. In exchange for this right, the patent holder discloses to the public the nature of the discovery so that others may learn from, and potentially improve upon, the patented invention.

Rewarding Investment

Patent rights reward investment in

research and development and encourage innovation. They do so, for example, by permitting a company to sell its patented product — thereby recouping its investment and earning additional revenue — while protecting against copycats seeking to sell their own product at a cheaper price before the patent's expiration. Profits earned by a patent holder are often reinvested as additional R&D or other forms of growth, including capital expenditures and increased hiring. This spending also may benefit other local businesses. But weakened patent rights diminish a patent holder's ability to stop copycats, thereby reducing the incentive to spend valuable resources on R&D.

Patents also generate revenue through licensing fees, which, for some companies, can be quite large. For example, Qualcomm made approximately \$7.5 billion in licensing revenue in 2013. Patents are so important to Qualcomm they have a "Patent Wall" at their headquarters, displaying 1,395 of the more than 13,000 patents the company has received.

For smaller companies, patents are often a key component of any investor pitch. Companies who cannot demonstrate protection of their products through strong patent rights run the risk of not getting the financing they need to grow.

Perhaps the greatest reason why patent rights have slowly been diminished comes from the U.S. Supreme Court's actions. Through many of its patent decisions, the Supreme Court has either created uncertainty on the ability to enforce a patent or more directly attacked

patents by, for example, limiting what is eligible for patenting.

The Troll Toll

Another reason is the growing anti-patent sentiment due to actions of so-called "patent trolls," a controversial name used to describe companies who enforce their patent rights against others in an attempt to collect licensing fees, while never actually practicing the patented invention. Negative attitudes toward patent trolls — while in some ways justified — have arguably led to legislative and judicial measures that have harmed the patent system.

While I am pro-patent, to be sure, I do not believe that every idea is worthy of patent protection. Our U.S. Patent and Trademark Office and federal courts work tirelessly to determine what does, and does not, deserve patent protection. Achieving an appropriate balance is not easy. But the pendulum has swung too far in the anti-patent direction, at the risk of causing financial harm in already difficult times.

We need to work toward moving the pendulum back in favor of patent rights while simultaneously finding ways to discourage the abuse of these rights committed by a select few.

The past decade has seen technological advancements that have enhanced our lives and helped many San Diego businesses prosper. And patents often are behind such advancements. I am almost certain that "Shark Tank's" Mark Cuban would agree.

Jonathan Muenkel is a co-founder and shareholder of Torrey Pines Law Group, whose focus is Intellectual Property.

The California Conundrum: the iPhone Effect



COMMENTARY

Reo Carr

For the past several weeks I have focused on the efforts of the **San Diego Regional Chamber of Commerce** to make San Diego the most business friendly community in California.

Our own small business owners give their hometown and the state an "F" for business friendliness. This suggests things are pretty bleak in San Diego and California.

Many of us in business speculate about our business environment as we point out businesses that have famously departed our city and state (who can forget **Buck Knives** departure to Idaho, or more recently **WebSense** leaving for Texas). We complain about high taxes and over regulation and all manner of unfriendly business policies at the state and local level.

The sky is falling.

In fact, it is not. Not even close.

California and San Diego small businesses are, by-in-large, doing pretty well. This empirical evidence is the first hint that while surveyed business owners may think things are bad here, a look around suggests that while things can always be better, the situation is far from dire.

Indeed, California and San Diego play leading roles nationally and globally as economies that are distinguished by such metrics as venture capital investment, number of new technology startups, number of patents filed, employment growth, etc.

I call this the "iPhone effect." It is the California conundrum.

California and San Diego have global reputations as centers of innovation where new businesses are born and flourish.

For evidence of this look at the 24 companies recently recognized by the **World Economic Forum** as "Technology Pioneers 2015". Eleven of the 24 companies are based in California; **Organovo** and **Genomatica** call San Diego home.

How could this be? How could, according to one poll, this anti-business state and city generate so much innovation, so many world-class concepts?

Obstacle Course

The answer is that innovators, entrepreneurs, take-charge business people don't read polls or ring their hands over concepts like business friendliness. They work around the obstacles before them.

Why is this the iPhone effect? I chose the iPhone as a symbolic representation of this seemingly incongruous juxtaposition of a place (state or city) that

receives a failing grade for business friendliness on one hand and is a world leader in innovation on the other hand.

The iPhone was born in overregulated, overtaxed California and created a whole new class of communication devices we call the smartphone. The company that produced the iPhone, **Apple**, is firmly planted in California. San Diego-based **Qualcomm** plays an important role in the iPhone as they supply various chips for the device.

If you are operating a small business and reading this column, I can read your mind. You are not Apple or Qualcomm. You are impacted by taxes and regulation.

I get that.

Leading By Example

Many of your peer small business owners throughout the region and the state are growing and prospering despite the obstacles before them. While it is worthwhile to support local and statewide efforts to create a more business friendly environment, in the end, you as a small businessperson will face challenges.

It is entirely possible to build a thriving, profitable business in California and San Diego in today's environment.

That's not up to the chamber or the city or the state, that's up to you!

Reo Carr is Executive Editor of the San Diego Business Journal.

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