

Beware of Giants and Trolls!

Why legal counsel may now be a critical resource for technology projects in North America

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Introduction

Halloween has come and gone; costumes are put away and we're all focused on our projects again. In the Northern Hemisphere, this is now the season for celebrating the end of summer and the autumn harvest. In the far north, thoughts turn to the coming cold weather, winter storms and the long dark nights of another year's end. In fact, throughout history and in many cultures, this is the season for festivals of the dead^[1] celebrations to honor deceased members of families and communities. In Mexico and other countries around the world, the Day of the Dead holiday occurs during 1-2 November each year, a time to pray for and remember friends and family members who have died. It is the time of year when death is celebrated.^[2] It is also the time when children everywhere are entertained with images and stories about ghouls, ghosts, goblins and other scary creatures from mythology and Hollywood.

It occurred to me that this might be a good time to discuss a frightening trend occurring in the business world, at least in North America, that could have serious ramifications for programs and projects in many industries. That trend is the accumulation of patents by giant corporations, the growth of the patent troll industry and the rapid increase in patent infringement lawsuits. The risk of lawsuits related to many technologies that many of us take for granted, and that are used in many organizations and on projects, is increasing rapidly. The need for legal counsel on project and program teams is now also on the rise. Beware of the giants and trolls, it's getting dangerous out there.

Moving Giants – the Patent Wars

Large technology companies seem to be at war, and they are amassing vast arsenals of patents and lawyers as their weapons of choice. The media in the USA are calling it the "patent wars".

According to the Wall Street Journal in August, Google paid \$12.5 billion earlier this year for Motorola's U.S. smartphone business and its 17,000 patents. This is \$12.5 billion that one of America's most creative companies will not use to innovate, fund research or hire anyone beside patent lawyers (or to fund projects). The value of patents in software and hardware such as smart phones has everything to do with litigation risk. It has almost nothing to do with technology.^[3]



According to Google's chief lawyer, "A smart phone might involve as many as 250,000 patent claims that are largely questionable". The arbitrariness of patent grants means mobile-phone operators are inevitably infringing patents, risking billions in infringement lawsuits, but they have no way to know which broad patents will be upheld and which rejected. The best and maybe only defense is a good offense. ^[3]

Image: A buyer tests a Motorola Droid phone in this photo from January 2011; courtesy of npr.com.

On October 17, ft.com published a fascinating graphic that shows the lawsuits filed by giant corporations against their rivals in the so called "patent war" that is now underway. Those companies include Apple, Barnes & Noble, Erickson, Google, HTC, LG, Huawei, Kodak, Microsoft, Motorola, Nokia, Oracle, Qualcomm, Research in Motion, Samsung, Sony, and several others. ^[4]

According to Bloomberg on October 28, the US Court of Appeals for the Federal Circuit, the nation's top patent court, recently reached a decision that will have breathtaking ramifications: scientific research methods per se can be patented for a field of research. This decision promises to accelerate the flood of patent litigation. Classen sued Biogen and GlaxoSmithKline. This case is but one example of patents discouraging further research and innovation. It is not hard to imagine the kind of chaos that might emerge if engineers, scientific researchers, medical providers, and computer programmers were sued for making use of standard methods of scientific discovery. Since the mid-1990s the patent court has been pushing the boundaries for patents beyond technology, issuing patents for relatively abstract processes of practicing medicine, conducting business, and performing mathematical analyses. Patent litigation has tripled as a result. ^[5]

According to Laura Sydell at NPR, "Some call it an international patent arms race: Tech companies like Apple, Samsung, Nokia and Google are launching lawsuits over competing patent claims related to smartphones and tablets.. But those clashes don't affect only the tech giants. There are a variety of ways in which this is also being used to stop the next cool thing from happening. Because you can just try and sue not only a big company — but maybe a small company that's coming in to compete in your market with some new, cool idea. The patent wars aren't likely to end anytime soon." ^[6]

Patents are such a fundamental part of American economic culture that the Founding Fathers saw fit to address them in the Constitution. But in the software industry, patents may be doing more harm than good -- stifling innovation, hijacking the bottom line, and

siphoning shareholder value. Up until 1980, the U.S. Patent and Trademark Office thought of software like language, i.e., you could copyright the code, but not patent the whole idea. The U.S. Supreme Court supported this view. In the 1981 case of *Diamond v. Diehr*, the court reversed its thinking, ruling that software patents could now cover the whole software invention, not just the code used to make the invention function. *Diamond v. Diehr* led directly to *State Street v. Signature*, a 1998 federal appeals court case that allowed the possibility of patenting "business methods." A term as wide open and generic as it sounds, business methods can describe applications as wide ranging as financial data processing methods, computing techniques, online bookselling, and online auctions. ^[7]

The problem? Software patents can be so broad that almost anyone who writes a program can be guilty of infringement and therefore subject to suit. This presents an obvious potential problem for any innovative, high-tech company. In response, big companies started amassing patent hoards, not to build anything new or to innovate with them, but to defend themselves against potential lawsuits. It's mutual assured destruction. A company with a large patent portfolio can say, "Sue me with your patents and I'll sue you with mine." It's patent arsenals, and companies are spending big money to build them. A recent auction of 6,000 patents from the bankrupt Nortel Networks ended with a winning bid of \$4.5 billion and went to a consortium of companies that included Apple, Microsoft, and Ericsson. ^[7]

The borrow-a-patent, rent-a-patent, buy-a-patent industry is growing by the day. Google just bought 1,023 patents from IBM. The big hardware company will hardly miss them. It files more than 5,000 patents in most years. Google will need these patents as it fights off Apple's intellectual property claims and positions itself for the growth of court battles over who had such properties first and what they are worth. Most observers believe that Google's buyout of Motorola Mobility was primarily for access to the handset company's patent pool. TG Daily reports that Google "bought 1,023 patents from IBM, covering everything from cleaning methods to file system management. They include patents relating to server architecture and databases, as well as a number of Java patents and some covering web search." ^[8]

From the above, I think you get the picture. Giant corporations are acquiring huge patent portfolios for both defensive and offensive strategies to deal with competitors, both large and small. And the patent wars do not just apply to mobile phone, software and IT companies, but also to aerospace, chemicals, energy, pharmaceutical, transportation and many other industries, including manufacturing. Industries and organizations using web-based technologies appear especially vulnerable.

Trolls on the Prowl

According to Wikipedia, a Patent troll is a term used for a person or company who is a non-practicing inventor, and buys and enforces patents against one or more alleged infringers in a manner considered by the target or observers as unduly aggressive or opportunistic, often with no intention to further develop, manufacture or market the patented invention. ^[9]

According to Colleen V. Chien, assistant law professor at Santa Clara University in California, in Forbes in August, “An estimated 250,000 U.S./worldwide patents cover the technology behind the devices and components that make them work. Yet, if a U.S. trade court finds just one of the U.S. patents infringed, it will banish the infringing handsets. A patent that costs \$25,000 to get, if valid and infringed in court, can lead to millions of dollars in damages. On a basic level, this is why patent trolling is so popular. Patents can be acquired cheaply, but have the potential to inflict a lot of damage.” ^[10]

Traditional patent litigation is very expensive (often millions of dollars). It’s risky. And it’s dangerous – a defendant might counterattack with its arsenal of patents. As a result, patent litigation between companies that compete with each other is less frequent than it could be, a point that is often lost in the headlines. Successful trolls have found ways to remove these traditional obstacles to suit. Most obviously, not making anything immunizes them against counter accusations of infringement. A liability in every other context, having nothing to sell is an asset for trolls. ^[10] *Image: Troll under bridge sculpture in Seattle, home of several notorious patent trolls (not named for obvious reasons!)*



Successful trolls use a variety of other tactics, too. They sue multiple defendants at the same time. They use the same patents over and over again. They show up in the same courtrooms, using the same set of counsel. Trolls capture economies of scale in litigation, and lower their committed capital by using contingent fee lawyers. Some trolls hold large portfolios of patents, and wield the threat of repeat lawsuits just as some practicing companies have long done, to get royalties. Though trolls don’t make anything, this may be their real “product:” - a safer, cheaper way to monetize patents. They have developed a method of extracting greater value from assets than others have been able to. With this value proposition, it’s no wonder trolls have attracted private equity and venture capital. ^[10]

Patent Trolls are companies that amass patents for the sole purpose of leveraging them in lawsuits. Patent Trolls don’t innovate, they suck cash out of companies that are trying

to innovate. It's legal — and it's about as slimy a practice as you can imagine. Patent Trolls have no intention of creating products or services, no, they are in business to sue others and get huge settlements. Like mafia protection rackets these people push their advantage. Some firms even go so far as to essentially have the "it would be a shame to see your nice little software company go down in flames" conversation, and, offer protection — essentially for a payoff — to be left alone. This has to be one of the darkest stories about capitalism I've heard in a long time. And these trolls attack some of the most promising young companies in the technology sector. ^[18]

There is much more on this industry and phenomenon online, but the threat is clear. There are companies whose sole business is suing other companies for patent infringement, they are aggressive and many are supported by serious investors (and some of the giants themselves). If your organization or project is a potential target for a patent troll, and if you do not have access to big money or legal counsel, you may be in trouble. It could be a big risk.

Changing US Patent Laws

One of the culprits, in my opinion, is the patent system in the United States, including the new patent law passed just this year.

The U.S. Senate passed the America Invents Act on Thursday (Sep 8, 2011) by an 89-9 vote. It cleared the House of Representatives earlier this year by a similarly lopsided 304-117 margin. The legislation notably shifts the granting of US patents from a "first to invent" system, which left considerable leeway for interpretation, to a "first to file" basis and seeks to reduce a backlog of 750,000 applications. Another goal is to curb costly litigation but technology industry analysts tend not to see that happening anytime soon. Ed Black, president and chief executive of the Computer & Communications Industry Association (CCIA), said the bill, the America Invents Act, "doesn't effectively address the real serious problems of our patent system. ^[11]

While anyone can file a patent, the filing process now clearly favors large corporations (the giants) that have the money, experience and lawyers to prepare and file patent documentation.

The Stakes are High

Emerging patent wars in the tech industry have cost U.S. businesses more than \$500 billion since 1990, says a Boston University survey. The study, which only counted tangible costs such as legal fees and settlement payoffs, also revealed U.S. companies lost about \$83 billion annually in the past four years alone due to patent litigation. The suits are most often instigated by companies that own few assets of their own, but maintain broad patent portfolios. The companies generate revenue by using the

intellectual property from the patents to sue or threaten lawsuits against larger companies. ^[12]

Vague wording and flaws in the U.S. patent licensing rules helped to give rise to this breed of aggressively litigious patent-holding firms, according to James Bessen, a Boston University School of Law lecturer. These organizations have pressed hundreds of lawsuits against thousands of defendants over the past 20 years, and business is booming now more than ever. Bessen wanted to know just how big the problem was, and according to a recent study he co-authored, fighting these firms cost companies an estimated \$500 billion from 1990 to 2010. ^[13, 14, 15]

It's not as though most of the lost \$500 billion ended up in the pockets of litigious firms, or even inventors. That total represents money that simply vanished—wealth that never was, because companies spent so much time fighting over patents. ^[13]

The Risks are Real

According to the Motley Fool, “As in other spaces affected by excessive litigiousness, the current software patent system is feeding on itself and growing worse. It is what it is, but it's a shame to see good shareholder money thrown after bad. For the big high-techs, a few billion here and there aren't going to exhaust their cash hoards. But for the smaller high-techs, the kind that don't have a few billion extra lying around to get in on a big-time patent auction or hire a team of lawyers to sue for patent infringement, the ongoing patent wars are something you may need to factor in. ^[7]

The end result is a highly dysfunctional situation where virtually any startup is at risk of being shut down by a patent suit; and where nameplate companies with no business and no revenues are the perfect vehicles to launch patent suits, since they're not susceptible to countersuits. Essentially, if you're small, you have to hope to fly below the radar; if you're big, you have to pay billions of dollars on patents you have no particular interest in. ^[13]



Large stockpiles of patents can lead to a legal détente between tech giants simply because both companies own enough patents to sue the other repeatedly. But that only works if both parties make things. When trolls entered the fray, the game changed, Bessen says, because they are immune to cross-litigation. The companies that non-practicing entities (NPEs) target can't cross-sue them for patent infringement because the NPEs don't make anything. And their influence is growing. NPEs brought 5 percent of all patent lawsuits from 2000 to 2002, but 16 percent in 2009. ^[13]

It's enough to make developers and IT pros tear their hair out because they don't know where any of this is going. Suppose Apple were to win similar injunctions against the Samsung tablet and other competitors (like the upcoming Amazon one for instance) in other markets. In this consumerized IT world where more often than not it seems, users are choosing their devices, you might find yourself wasting your company's time and resources learning to support devices that are no longer available because of a court decision. And this isn't just phones, it's whole platforms. Don't forget that Oracle is suing Google over Java patent violations regarding its implementation of Android. Regardless of any direct impact these lawsuits might have on you and your organization, eventually they have to hurt the market as a whole as more dollars are directed to buying patents, suing others and defending suits. It's completely out of control right now, and in spite of some noise from politicians to the contrary, it doesn't look like the situation is going to improve any time soon. ^[16]

The damages caused by patent trolls might be specifically important in fields where technology is complex, such as electronics and software. ^[17]

What Project Risks?

So what are some real risks that project managers might need to worry about on technology projects? Here are seven possibilities:

- 1) Lawsuit associated with patent infringement on your program or project – could shut down the project
- 2) Supplier of a key technology, component or system is sued – could delay or shut down the project or require new technical solutions
- 3) Supplier further down the supply chain is sued for patent infringement, disrupting key suppliers – could delay or destroy the project
- 4) Project customer could be sued, leading to delays or cancellation of project due to financial disruption
- 5) Your organization is sued for patent infringement, related to different program, project or operation, leading to financial disruption or even failure of the company (if organization is a small business)
- 6) Patent suits could disrupt the entire marketplace – if big technology supplier or major corporations significantly affected – including disruption of financial markets
- 7) Increased patent infringement lawsuits might lead to new unexpected legislation – this could be either positive or negative

There are many other possibilities related to both direct and indirect risks. The impact of the above on projects and project management should be obvious. If your project uses or involves new or recently developed technology, you, your project or your organization may be at risk of a patent infringement lawsuit

What can you do?

So what can be done to mitigate or alleviate some of these risks? Here are a few ideas:

- a. Recognize the potential risks and their impact – identify technologies that could be subject to patent or copyright infringement attacks;
- b. Use off-the-shelf or older technologies that might not be subject to patent troll activity;
- c. Study your supply chain for at-risk suppliers, technologies, equipment or important supplies and materials; identify patent risks and ask suppliers about their own risk mitigation strategies;
- d. Be aware of patent lawsuits among the larger companies for possible disruptions in key technologies or supplies – especially if the outcome is either predictable or announced;
- e. Team up with a larger organization that might be better equipped to fight patent trolls or lawsuits;
- f. Collaborate with other organizations that are using the same technology, so banding together in defense of patent infringement lawsuits can be facilitated;
- g. Hire patent defense resources or consultants (there are some available and probably for the technology that you may be using);
- h. Hire experienced legal counsel for your project or program; and
- i. Fly under the radar for as long as possible!!

At the end of the day, I think we all need to complain to our elected political leaders. Patent trolling should be outlawed (or more heavily regulated). Improvement of patent laws and processes should continue. Countries should cooperate on this subject, so expensive lawsuits can be reduced and innovation projects can increase.

Conclusion

This article was not intended to scare readers too badly. However, I was shocked to learn about Patent Trolls and their potential harm to technology organizations and projects. Their damage to companies has ranged from millions in costs to defend lawsuits to hundreds of millions in lost market value resulting from the media coverage that comes from such litigation.

Many organizations, programs and projects face potential risks of patent infringement lawsuits. If your business or project is one, then some prudent steps to understand and mitigate those risks would be wise. In that regard, I hope this editorial has been useful.

If you have a comment related to this editorial, please send an email to me.

Good luck with your projects.

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