
Kluwer Patent Blog

Managing IP under an Open Innovation Perspective

Roya Ghafele (OxFirst) · Monday, June 22nd, 2020

The many opportunities provided by managing patents under an open innovation paradigm have so far not found the attention they deserve among the patent community. The nationalist approaches prevailing in the search for a vaccine to coronavirus provide ample support for this statement. A look at the academic literature on patents helps to understand the issue at stake. The vast majority of journal articles are written by patent lawyers for patent lawyers and prepared with the aim of helping other patent lawyers to understand more fully substantive aspects of patent law. For sure, these discussions are both interesting and exciting, but they do not help to come to grips with IP from a business perspective.

Equally, the string of literature discussing Open Innovation is well developed, but the two do not often intersect in any meaningful way. At the rare occasions the two worlds meet, it is an encounter of mutual scepticism. For the patent community Open Innovation is associated with issues such as the preservation of confidentiality in Non-Disclosure Agreements. Often, patent lawyers fear that Open Innovation aims to give away patentable technology for free. For the Open Innovation community again, patents appear to be little more than an esoteric and mostly costly instrument of law. In this brief note I am trying to offer a bridge between the two communities.

What is Open Innovation?

Open Innovation has been one of the most successful innovation paradigms of our times. It argues that innovation is omni present and that companies should look beyond their own firm to innovate. As such it encourages the collaboration between large and small firms, universities and public research institutions and proposes boundary spanning as an innovation paradigm.

Open Innovation is concerned with slashing the narrow boundaries set by institutions. Knowledge creation, according to Open Innovation, is more successful if different agents come together in a spirit of mutual exchange so to find joint solutions for established challenges. The underlying reasoning of open innovation is quite simple. Innovation becomes richer, the more diverse the community is that strives to innovate.

The concept of innovation in silos is replaced by a notion that creative and innovative ideas can be found all over the world. Tapping into this wealth of international creativity can help bring new ideas to market.

What about Patents?

Does the patent system constitute an antagonism to the aspiration to tap into the world's global creativity?

After all, a patent is designed to exclude to the best extent possible others from using the technological innovation it protects for the period of exclusivity prescribed by the law. In practice, companies often use patents to fence in their innovation territory, oppose other firms' aspirations to do just the same or to pursue legal proceedings in case of infringement.

Without a question these are important strategies that help firms succeed in business.

At the same time however, one can also observe that many companies maintain patent portfolios without being overly aggressive to maximize the commercial potential of their patents. Particularly large companies prefer to maintain patents rather than give them up, even though they may not be able to trace a direct line between corporate performance and their patent portfolios. IP managers generally tend to be in the unfortunate situation to have to inform the CFO that their departments remain cost rather than profit centres.

Patent strategy under an open innovation lens

I am not the first to suggest that patent portfolios can be the source of profits rather than costs. There is a wealth of literature that has sought to argue that patents are a source of wealth. They are 'the Rembrandts in the Attic' and all that seems to be needed is to dedust them and previously unknown wealth will come to those who find such intangible treasures. Just, for many this never happened.

In particular, it has been argued that patents can offer attractive licensing revenues. This idea triggered a rush to license patents out. An active market is however not only driven by sellers. It also needs equally motivated buyers. Open Innovation provides just such a motivation for firms to license patents in. As such it establishes a motivation that bears the potential to establish active markets for IP.

Nothing lends itself better to transferring knowledge across firms than a patent. A patent is a codified piece of knowledge where the invention is laid out in great detail. This distinguishes a patent from tacit know-how. Such know-how is very difficult to transfer as it is not clearly deciphered and somewhat inherent to the understanding of a community.

A patent to the contrary is a legally sanctioned instrument that makes technological know-how explicit. It accords with some of the most fundamental aspirations of Open Innovation. It allows firms to exchange and enrich their know how by licensing each others' IP in and out. Such a wealth of knowledge exchange stands in opposition to the type of licensing discourse that is particularly common in the ICT sector. It is not a licensing that is strongly interwoven with litigation, or the risk of litigation. Rather, licensing is used as a mediating structure between various firms or between firms and universities and serves the purpose of enriching one's innovation capabilities by entering in exchange with others.

Next steps

For IP departments to become profitable, there is a need to look at their role in a corporation with a fresh eye. They are not just an 'appendix' that simply makes sure that a firm's technological inventions enjoy adequate patent protection. They are core to any firm's innovation strategy and as such IP managers should deserve a seat in the board room. Because they are the managers of patented technology, they are the central units that help firms leverage Open Innovation. For this to happen, both IP managers and their colleagues may need to slightly adapt their perception of each other. As such adopting an Open Innovation paradigm needs to start as early as the generation of IP. In my view, it is through the instrument of patents that firms can best capture the many opportunities provided by Open Innovation.

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