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WHY IT'S TIME TO TACKLE THE LICENSING BAD GUYS



Building a white-hat brand in the patent industry

With policy makers, business groups and the public demanding action to curb abuses in the patent industry, companies must now differentiate themselves from the taint of patent trolls, developing a white-hat brand not only within the industry, but for the industry as well

By Marshall Phelps and David Kline

Between us, my co-author and I have been involved in the IP business for over half a century, and we have probably worked on or written about nearly every aspect of patent monetisation imaginable. Asset selection, organisational methods, valuation models, building an effective monetisation team, due diligence, assertion tactics – you name it, chances are that we have had something to say about it at one time or another.

But as we look back on it now, so much of what we talked about seems like small ball – as if it were all just an exercise in rearranging the deckchairs on the Titanic. Because while we were debating licensing models, tools and techniques, the licensing industry itself – indeed, the entire patent system – has been sinking into an ever-deeper crisis of public confidence. Even as intellectual property was emerging as a lucrative new asset class, society has been steadily losing faith in our industry.

Make no mistake, patent licensing is widely perceived as opaque and secretive, lacking in ethical standards and probably the most litigious business in the world. It is also believed to be riddled with patent trolls and other extortionists greedy to make a buck any way they can – no matter what the cost to businesses, to innovation

or to society as a whole.

As for patents themselves, they are generally thought to be of often very poor quality. We may shrug our shoulders at the fact that nearly half of all litigated patents are ruled invalid. But what other industry would tolerate a 50% product failure rate?

In short, patent licensing is seen in many quarters today as a shady business selling a defective product – no better, in many people's view, than sub-prime mortgage lending or ambulance chasing in the personal injury field.

What a difference a couple of decades makes. When we first began writing and speaking about IP issues in the late 1990s and early 2000s, patent monetisation was viewed as a corporate best practice. C-suite executives spoke openly about unlocking the value of their 'Rembrandts in the attic' and replicating IBM's success in earning \$2 billion a year in licensing revenue.

Today? Not so much. Nowadays, global brands with reputations to protect don't like to talk about monetisation at all. Or if they do, it's only in whispers because no one wants to attract the attention of the US Federal Trade Commission (FTC) or be branded a patent assertion entity or patent troll in the minds of Washington policymakers or their own shareholders.

This is not a great place for an industry created by the American founders 224 years ago to foster the world's first market in new technology to find itself.

Even the value of the patent system itself is now in dispute – not only in the United States, but worldwide. Indeed, anti-patent sentiment is probably at its highest level than at any time since the late 1860s, when opponents of IP rights succeeded – for a time, at least – in abolishing or weakening the patent systems of several nations around the world.



How did we get to this state of affairs?

Certainly, one factor is that many in academia and the tech community today came of age amid an open source ethos that proclaimed that 'information wants to be free!' Many people today view the patent system as an inherent evil, a tool of monopoly control, even an instrument for extracting super-profits from desperate women suffering from breast cancer, as some opponents of Myriad Genetics' BCRA1 and BCRA2 test patents argued in their successful US Supreme Court case last year.

A second driver of this crisis of confidence is that most people – including the majority of elected officials in the United States and Europe – are not even old enough to remember the competitiveness debates of the 1980s and early 1990s. For many countries in the West, this was the last time they engaged in a national discussion about the importance of a strong patent system for economic growth.

A third reason for the patent industry's crisis of confidence, of course, is that a handful of large technology companies no longer believe that a strong patent system is really in their business interests. So they have led a very well-funded campaign to weaken the patent system by painting it in media and government circles as fundamentally broken.

But there is a fourth factor driving this crisis of confidence in the patent industry, and we should be honest about it: much of this problem we have created for ourselves.

As Scott Burt of Conversant Intellectual Property Management noted in an op-ed in *The Hill* newspaper in Washington DC on May 14, patent licensing may be the only major industry – in the United States at least – without a code of conduct or standards of ethical behaviour. It is probably also the only industry in which the leading players have almost completely ignored branding.

When I attended the IP Business Congress in Chicago in 2009 just after my book *Burning the Ships* was published, my co-author and branding expert David Kline gave a speech arguing that with the rise of anti-patent and anti-non-practising entity sentiment, branding and IP public relations were becoming critical to the success of many companies in this industry. However, as Kline conceded to me after his speech, "Everyone yawned."

No one is yawning now. With headlines about patent trolls filling the major media and business groups demanding federal and state government action to curb abuses in

the industry, it has become increasingly clear that companies need to differentiate themselves from the taint of patent trolls if they are to achieve business success.

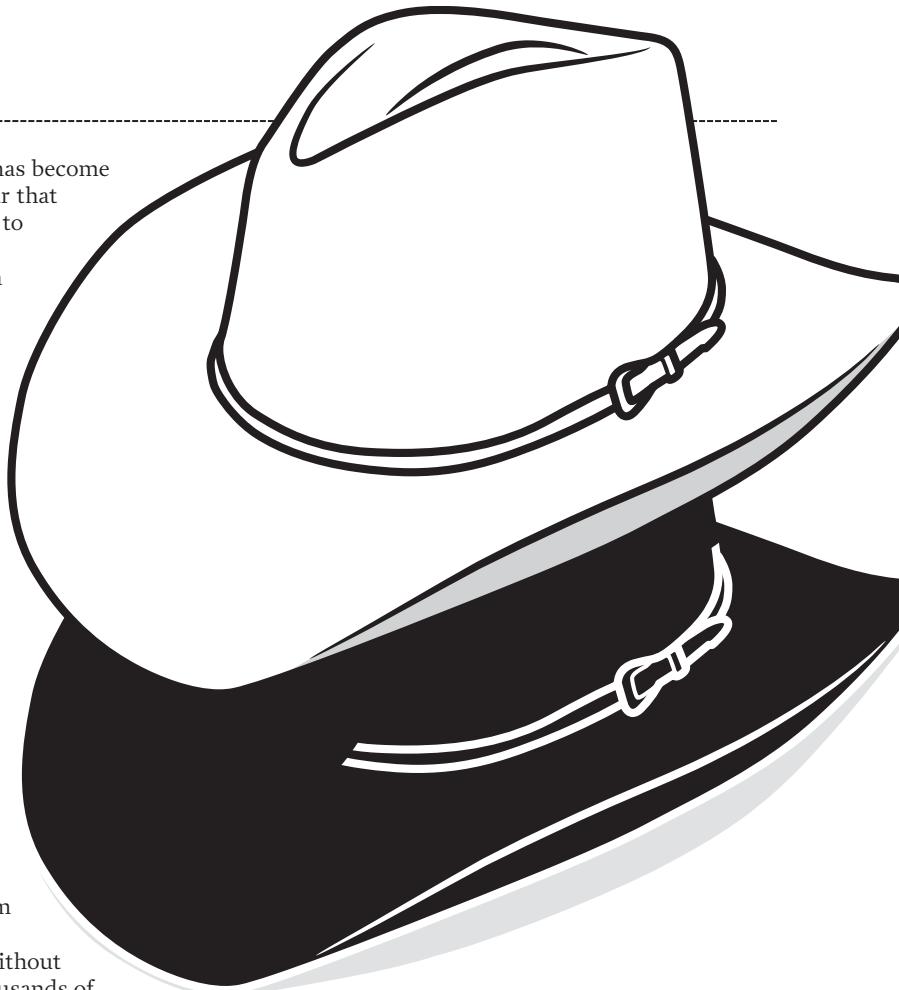
Yet many in our industry still remain silent about the damage done by patent trolls – including the damage they do to our own industry. Some even continue to refer to 'so-called' patent trolls, as if the firms that send extortionist form letters alleging infringement (without evidence) to thousands of random small businesses are a figment of small businesses' imagination or a propaganda ploy invented by big-tech lobbyists to tar the patent system.

It is certainly true, of course, that some big-tech companies cynically label anyone who dares to challenge their sometimes-blatant infringement a 'troll'. But it is also true that real trolls do exist and are extorting small businesses every day while also undermining faith in the patent system.

So why the silence from so many in our industry? Perhaps some companies are afraid of getting embroiled in controversy, or of giving ammunition to those who are trying to weaken the patent system. Others, no doubt, simply prefer for business reasons to keep their heads down – and their litigation options open.

Whatever their reasons, their silence prevents them from developing what we call a 'white-hat' brand not only *within* the industry, but *for* the industry as well.

Indeed, some patent licensors have brands today that can only be described as poison. Global product companies are reluctant to partner with them on monetisation initiatives. Other licensing companies refuse to work with them on joint lobbying efforts in Washington. In some cases, even their own law firms have



been forced to distance themselves from them, after having been pressured by their other corporate clients.

That is what comes from ignoring branding. For if there is one thing about which you can be absolutely certain, it is that if you do not brand yourself, someone else will.

Conversant, Finjan Holdings, Dominion Harbor Group and Inventergy are to be commended, therefore, for publicly committing their companies to ethical patent licensing practices. Other licensors may not agree with every one of their specific ethical guidelines concerning not suing start-ups, for example, or due diligence on patent quality. Even these four companies don't agree on every item.

But that is not the point. The real issue is, how can you expect government and the public to trust you – how can you expect global brands to want to partner with you on monetisation programmes – if you fail to demonstrate in word and in deed that you are committed to ethical, fair and transparent business practices and therefore warrant such trust?

Capturing the next wave of IP value

As noted earlier, my co-author and I have been active in the IP business for quite a while – with big companies and small companies, in the United States and around the world, on the creation side and on the monetisation side and, of course the analysis, branding and government relations side. We have witnessed the transformation of patents in corporate executives' minds from strictly legal instruments into strategic business and financial assets of the first order. And we have seen trends in patent strategy come and go, from their use solely as negative rights in competitive warfare to their utilisation as the scaffolding of corporate partnerships and alliances under the banner of open innovation.

And we are convinced that a failure to brand not only undermines companies' ability to capitalise on existing patent business opportunities. It also leaves patent companies ill-prepared to capture the next wave of IP value, which we believe lies in three broad areas:

- LICENSEE OBLIGATIONS**

 - 5) A licensee's responsibility is to investigate the licensor's claim fully and completely, and, if it determines that the claim is valid and enforceable, to cause, without delay, to have a willingness to take a license or, if not so terms.
 - 6) A licensee should negotiate, good faith discussions with the licensor to determine what is fair and reasonable to the licensee in a family business, and the best of all possible means to reach agreement with the licensor.
 - 7) Where a licensee has a desire to take a fair and reasonable license, this will be taken into account in negotiations. This will be done by the licensee's attorney or, if no attorney is available, by the licensee's technology. A licensee should not take a license without investigation.

DO DUE DILIGENCE OBLIGATIONS

 - 8) Due diligence by either party includes a review and study about the technology being licensed, its potential market, its financial position, and the personal financials of the principal(s) involved.

LITIGATION OBLIGATION

 - 9) Litigation should only be taken by either party to the license agreement if there is a clear violation of the terms of the license agreement. It should consist of litigation to collect compensation for damages suffered after achieving a license.
 - 10) Both parties will try to settle disputes amicably, but if they cannot, they should hire an attorney who is experienced in handling disputes between businesses.

member and David Kline as a branding and PR strategist and writer. Although there are certainly other great companies pursuing opportunities in these three fields, we focus on some of the firms we work with and know best as exemplars for why success in each IP value arena requires building a white-hat brand.

Monetising global brand portfolios

Many global product and service companies now understand that they may have significant value in the patent portfolios they have developed over the years as a by-product of the billions of dollars they invested in R&D. Indeed, according to Navi Radjou of Forrester Research, “US firms annually waste \$1 trillion in underused intellectual property assets by failing to extract the full value of that property.” This is especially relevant for certain Asia-based brands, where traditionally intellectual property has been deployed defensively or in cross-licensing arrangements, but not actively monetised for bottom-line purposes.

This appears to be changing, as more and more of these global brands become interested in tapping the hidden value in their IP treasures. However, many of these firms do not have the resources, industry contacts or singular IP licensing skills and focus necessary to do the job effectively in house. So outsourcing can be an attractive option.

But with whom will they partner?

As Burt wrote in his *IAM* cover story “The Role of Trust in Patent Monetisation” (*IAM* 65), they will prefer to partner with a licensing company known for transparent, ethical and non-litigious business practices. They simply cannot afford the legal risk and reputational damage to their brands that could result from partnering with a non-practising entity that engages in abusive assertion practices or is considered to be a patent troll.

Joe Beyers knows exactly how global operating company executives think because he was one himself for more than 30 years. As the former head of IP licensing at Hewlett-Packard, Beyers concluded literally thousands of licensing deals and grew HP's IP revenue by a factor of 20 in just his last six years at the company. He says that when he launched his new start-up licensing company Inventergy in Spring 2012, he put building a white-hat brand at the top of his agenda.

"HP's brand was extremely important to us when I worked at HP," says Beyers. "When other companies would come and try to license their IP to us, the nature of their brands had a big impact on whether I wanted to work with them or not. I would

Conversant IP Management published its 10-point best practice set of guidelines for patent licensing in November 2013

We work with companies in each of these IP value arenas – myself as a board

look at their behaviour and reputation, and I'd form an impression of the likely value of the IP they were trying to license. If the company had a history of acquiring assets and then suing right away – or had a history of going after nuisance fees – then I'd assume they likely had weak assets or that their licensing practices would do damage to our brand if we chose to work with them. But if the company was a more legitimate player with a reputable brand, we'd take them more seriously and be much more likely to engage with them."

How did brand affect the way that HP deployed its own IP assets?

"At any one time at HP, I was involved in hundreds of transactions with many different companies," Beyers explains. "Inevitably, I would face situations that fell into a grey area in terms of how they might affect HP's brand. But I remember something [former HP CEO] Carly Fiorina told me one time after I asked her what she thought of a particular deal I was considering. And it's something that has always stuck with me.

"She said, 'Joe, you come from a small town in Illinois, right?'" Beyers recalls. "And I said yes, it had about 6,000 people. And she asked, 'You've got a local newspaper, right, and everybody knows each other?' 'That's right,' I said. Then she said, 'So if you do this deal this way, and it appears on the front page of your home-town newspaper, how would you feel?'"

"Well, I thought about it a minute," says Beyers. "And I told her, 'You know, I wouldn't feel very good.' To which she said, 'I think you just made your decision about what to do.'"

Beyers pauses a moment: "That discussion was burned into my mind, and I have spoken to my staff about it often. We've got act as if everything we do is going to appear in our home-town newspaper."

This helps to explain why Beyers has repeatedly and publicly stressed Inventergy's commitment to transparency and ethical practices. It is also one of the factors that led him to take Inventergy public. He found he was much more successful in partnering with big global brands on monetisation projects after they learned that the deals he was doing would be transparent and available for public scrutiny, along with the patent portfolios he acquired.

In addition to transparency and ethical behaviour, however, there is another crucial element in Inventergy's brand. The company is positioning itself as a licensor that is uniquely sensitive to the needs and concerns of global operating companies eager to manage and monetise their IP

assets profitably and safely in today's controversial patent environment.

Inventergy's executive roster is filled with people who are respected in the industry or who have deep operating company experience. General counsel Wayne Sobon is the 106th president of the American Intellectual Property Association (AIPLA) and the former head of IP at Accenture. Anna Johns is a former licensing chief at Ericsson and Nokia. Cliff Loeb is a standards licensing veteran from HP. Jon Rortveit is an IP acquisitions expert with extensive experience in the Asian IP field. And Charlie Bedard is the ex-director of software engineering at Cisco.

To be sure, Inventergy is not the only licensing company building trusted partnerships with the owners of the next big wave of monetisable patents. Conversant, Rockstar, and other licensing firms are also partnering with global brands or have acquired their portfolios.

But many others will be unable to catch this new wave of IP value because they simply don't have brands that global leaders want to be associated with.

Visionary IP creation

Ask almost anyone today, "What's the first word that comes to mind when you hear the word 'patent'?" Almost certainly, the answer will be "litigation".

This is a shame, because not too long ago, people used to associate patents with inventions.

There is a chance that they will again, if John Cronin has anything to say about it. Cronin is the former head of IBM's legendary Patent Factory, where he helped Big Blue to become the world's number one patent holder not only in numbers of patents – up 500% during his tenure – but also in the quality of the visionary semiconductor inventions for which IBM was famous. His new start-up ipCreate just might revitalise the historic link between patents and invention.

It is well known that the greatest value in the IP asset class belongs to a small minority

“It seems that, just as in the pharmaceutical industry, many tech companies now buy their innovation via acquisition rather than invent it themselves”

CONGRESS BLOG
THE HILL'S FORUM FOR LAWMAKERS AND POLICY PROFESSIONALS

Time for patent companies to stand up for reform

Scott Burt—senior vice president and chief intellectual property officer at Conversant Intellectual Property Management Inc.

Not long ago, only like the entire Congress, thousands of angry businesses with experience, or by example, or by centuries-old practices, has remained largely where abuses have occurred. This is unfortunate, as a shell company classification demands a "credible standard" of false claims. That's why

Portfolio Media, Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Time For Patent Licensors To Take The Lead In Reform

Scott Burt—senior vice president and chief intellectual property officer at Conversant Intellectual Property Management Inc.

Law360, New York (March 21, 2014, 11:56 AM ET) — Four months ago, amidst growing calls from some in business and Congress to rein in patent trolls, Conversant Intellectual Property Management Inc. announced a set of guidelines for responsible patent-licensing practices.^[1] The guidelines specifically addressed the hot-button issues of patent licensing, such as royalty rates, term length, and scope of protection. In a statement, Burt said, "We believe that by addressing these issues, we pledged — and

Some non-practising entities are becoming more involved in advocacy

of foundational patents. Working with select leaders of industries undergoing rapid technological disruption — whether market-dominant players or visionary start-ups — ipCreate hopes to forecast the direction of innovation in the fastest-growing new product markets and create strategic portfolios of foundational patents in the high-value technologies driving that growth.

Put another way, ipCreate plans to invent the future before it happens — and then help its industry partners profit from it.

Why is patent creation suddenly on the IP value agenda?

"The fact is that all the low-hanging fruit in valuable portfolios has already been acquired, except for some big operating company portfolios," says Cronin. "The tech wreck threw out all this IP, but most of it has already been bought and litigated."

What's more, he notes, "16% of all litigation in 2012 was over patents that issued in 2012. That's double what it was in 2011, which tells you again that we've caught up with ourselves in terms of the available IP. We've used up all the backlog."

There is a third factor creating pressure for new IP creation. "At the same time that all this is happening, the America Invents Act now mandates a first-to-file priority system," he observes. "Which means that the patents that will be issuing will go to those best organised to file rapidly and systematically, not for the people working in

a routine way in their corporate R&D labs."

And remember, at many if not most large companies, IP creation occurs only on the back end of a rather lengthy R&D process. It is not only slow, but also reactive — a look back, rather than a look ahead or a driver of strategic IP creation.

Cronin pauses a moment to emphasise his main point.

"Large companies are very good at developing new products, building markets and in many cases even filing patents to protect those products. But those skills generally do not extend to creating the strategic patents needed to secure future markets. They're not fast enough and they're not strategic enough. Indeed, the IP creation process in large firms is often a very *ad-hoc* affair, and is usually far too slow to keep pace with the first-to-file priority rules of the new America Invents Act. Nor are they always good at forecasting where markets are headed. That's because they're more focused on maximising their existing business than on anticipating disruptive changes to it. I've worked with smartphone companies that failed to see the need to develop apps early on and this mistake led to some serious competitive losses."

"Bottom line," he goes on, "large companies find themselves in a real bind. They know they can't be as strategic as they need to be about IP creation. And because of first to file, they also know the Patent Office is working against them on speed. Plus they're in the crosshairs of anyone else, including the trolls, who can put IP roadblocks in the way of their product plans."

There may be an even more fundamental problem, however. As a high-profile article in the *Wall Street Journal* pointed out on July 1 2014: "Look around Silicon Valley and it's hard to find established companies still devising their next products in-house. Seen anything new and big lately from Cisco, Yahoo or even Twitter?"

It seems that, just as in the pharmaceutical industry, many tech companies now buy their innovation via acquisition rather than invent it themselves.

"Why are large tech companies losing the ability to innovate?" asks the *Journal*. "Established companies simply aren't structured for that kind of speed." Or, apparently, for that kind of visionary strategic focus.

So who is going to meet the demand for new strategic IP creation? Who is truly capable of producing hundreds of foundational strategic patents in each one of the lynchpin technologies that will disrupt major industries over the next five years?

"You can't just stick a bunch of guys in a room and expect them to invent," Cronin insists. "You need a real process for this – tools, analytics, high-value market information and forecasting capabilities, and the expertise to put it to work in a focused and strategic way. That's what we do, and we can be terrific partners with the product companies. We can give them the visionary product ideas they want – and the strategic patent protection they require – so they can do what they do best: turn visionary ideas into real products that change the world."

IpCreate is not the only company aiming at the Holy Grail of strategic or 'forward' invention. Intellectual Ventures has run an invention development effort for 10 years, with uncertain results. Other smaller firms and consultancies are also trying to capitalise on the demand for new IP creation in various technology niches.

"But don't forget," says Cronin, "the issue of brand and reputation will be a real factor in IP creation, too. Name-brand companies may very well want to partner with a strategic IP creation firm to ensure that their future products are protected by foundational IP. But they won't do so with a company that has a reputation for troll-like behaviour. That's just a fact."

He insists that the reputations of ipCreate's founders and backers – several large investment firms are seeding ipCreate with what may turn out to be the world's largest invention development fund – as well as of its affiliated companies, ipCapital Group and ipCapital Licensing, have already gained it entry into the C-suites of the biggest-name product companies in the world. Working in partnership with these firms, ipCreate hopes to identify promising disruptive technologies, map the competitive landscape of intellectual property and then rapidly create foundational patents at the chokepoints of looming market change.

Interestingly, the company is also teaming up with patent-quality company Article One Partners (AOP) to landscape innovation areas for market value and perform crowdsourced novelty searches on all its patent filings. With the moniker 'AOP Certified' serving as a quality seal of approval on its patents, ipCreate will build its partners' confidence in the quality of its patents and over time, perhaps, begin to restore popular trust in the patent system itself.

Again, success in prophetic or forward invention – whether by ipCreate or other companies – will require a white-hat brand by its very nature. However, one thing

seems likely: simply talking about patents in terms of invention again (rather than litigation) can only help to revitalise the industry's brand – and that of the patent system as well.

Creating a more transparent market for intellectual property

One of the biggest roadblocks to capturing that next wave of IP value is what Jon Ellenthal, the CEO of Patent Properties, Inc, calls a "litigation or bust" model of patent monetisation.

Put simply, you could have the most visionary patent in the world, but unless you have the millions of dollars needed to litigate it, it is hardly worth the paper it is printed on.

Bear in mind that US businesses have spent \$5 trillion dollars on R&D over the last 20 years, resulting in the creation of more than 2 million active patents. But only a tiny fraction of those have ever generated a single dollar of revenue or been put to use in new products or services. As for the large portion of all patents that are owned by start-ups, universities, research labs and independent inventors, monetisation is often not a viable option for them, if only because they usually cannot afford the high costs of litigation.

This is a huge problem when you consider that every major new industry of the last 50 years was launched by a start-up – including the semiconductor, PC, software, biotech and \$3 trillion e-commerce industries – and that start-ups are responsible for 100% of net job growth in the United States over the last 40 years.

As Jon Ellenthal so aptly put it: "Any industry that does all its deals in the court system is not in good shape."

To which we can only add, "Amen to that."

We need better ways for businesses to get access to the innovation they need under commercially sensible conditions and for inventors to get their patented discoveries commercialised for the progress and betterment of society.

Enter IPXI, or Intellectual Property Exchange International – the world's first financial exchange for licensing and trading patents and other IP rights.

Think about the current patent licensing business and the reasons why it is held in such low esteem today. It is a private, opaque and highly secretive bilateral process between adversarial players. There are no standardised agreements, no price discovery, no assurance of patent quality, and no valuation standards. It is inefficient at fostering new technology adoption, offers



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Inventergy - which went public in June 2014 - emphasises transparency as a unique selling point

inadequate access to commercialisation opportunities for start-ups and independent inventors, and monetisation is driven almost entirely by litigation or the threat thereof.

IPXI, on the other hand, aims to provide a central and public marketplace for IP licensing. It plans to bring some much-needed transparency to the business, including market-based pricing, price discovery, standardised terms, vetted patent quality and the identification of comparable technologies, along with information about their adoption rates.

For the start-ups and independent inventors responsible for so many of our breakthrough inventions, it could provide much greater access to monetisation opportunities and be more likely to put their patented discoveries to commercial use in new products and services.

Importantly, IPXI could also provide a much more economically efficient way for operating companies to maintain patent compliance and reduce their risk of infringement.

IPXI is backed by over 60 strategic investors and members, including Philips, JP Morgan Chase, Ford, Sony, HP and Panasonic. The board also includes IP luminaries such as former US Patent and Trademark Office director David Kappos, former Court of Appeals for the Federal Circuit Chief Judge Paul Michel and ex-Philips IP chief Ruud Peters.

IPXI's CEO, Gerard Pannekoek, developed the first multinational market for trading and reducing greenhouse gas emissions. He also ran the Chicago Climate Futures Exchange and the European Climate Exchange, so presumably he knows a thing or two about running an exchange.

No one can predict the ultimate impact of an exchange like IPXI. Nor is IPXI the only new initiative on this front.

The aforementioned Jon Ellenthal's Patent Properties, for example, is developing and will soon launch a voluntary new system called the US Patent Utility, which aims to balance the needs of inventors and users of patented technology in a new type of 'no-fault' licence. The utility will provide

a disruptively low-cost option that serves the huge but ignored mass market of patent owners and users that cannot afford the high transaction costs of litigation. The price of a no-fault package (of 100 patents) can be made low because companies will be buying probability, not legal certainty. Statistical analysis of a company's product lines will establish which patents are most relevant and, therefore, have a probability of needing a licence.

According to Ellenthal, "Probability costs less than certainty. But, as the insurance industry has demonstrated, probability is a commercially sensible basis upon which to do business."

Driving these developing new market structures is the realisation that greater transparency in licensing and more opportunities for a wider array of inventors to commercialise their discoveries have the potential to speed innovation and spur economic growth. They could also help to boost public confidence in our industry – no small matter if you have been paying attention to our industry's problematic reputation in Washington.

"Sooner or later we must develop a commercialisation alternative to litigation," says Michel. "The courts simply can't handle it all. It's too expensive, too slow and cumbersome, too uncertain, too inefficient and too adversarial. But until that day comes, and even after, it's critically important that the responsible actors in our industry differentiate themselves from the amoral opportunists."

Final thoughts

We would like to offer five concluding thoughts about the role of branding in patent business success and its potential to rebuild public confidence in our industry.

First, we need to stop placing so much emphasis on our rights as patent owners to a return on investment. Neither policymakers nor the public cares whether some megabillion-dollar multinational or little-known secondary market licensor gets a big enough return.

Instead, we need to start talking much more about our responsibilities as members of an economically vital 224-year-old industry. Let's talk about doing our part to help curb abuses in our own backyard, just as responsible members of other industries do. Watch a clean coal commercial on television if you don't know what we mean.

Second, let's try to cut down on the bickering and expressions of *schadenfreude* that abound in our industry. Instead, we should become strong advocates for

“Let’s talk about doing our part to help curb abuses in our own backyard, just as responsible members of other industries do”



Action plan

Although there are multiple contributors to the patent licensing industry's terrible brand today, we must be honest that much of this problem is self-inflicted. Companies must now develop a white-hat brand for the industry if they are to capture the next wave of IP value, which lies in three broad areas:

- portfolio monetisation for global operating companies;
- IP creation – especially visionary foundational intellectual property; and
- the creation of a more transparent and fluid market for intellectual property.

Here are five recommendations:

- Stop emphasising your rights as patent owners to a return on investment. Instead, start talking about your responsibilities

as members of an economically vital 224-year-old industry. Talk about doing your part to help curb abuses in your own backyard, just as responsible members of other industries do.

- Become advocates for the patent industry and the vital contributions it makes to the global economy. Remind policymakers and the public what patents for new inventions actually do for the world – and how licensing helps to make that happen.
- Stop talking about how many patents you have. Instead, start talking about the *quality* of your patents. Describe the due diligence you put into prosecuting patents and vetting them for licensing. Provide details about the effort you

put into improving and ensuring patent quality.

- Take the issue of patent quality very seriously. It is the key to building support for the patent system again. No other industry can get away with a product failure rate as high as 50%. We cannot either.
- Stop pretending that the only things that count are money and deals. Embrace the new reality that building a white-hat brand and differentiating oneself from patent trolls will likely make a material difference in the success of your business in the years of patent controversy to come. Indeed, this could be the key to your ability to successfully capture the next wave of IP value.

the patent industry and for the vital contributions it makes to the global economy. We need to remind policymakers and the public what patents for new inventions actually do for the world – and how licensing helps to make that happen.

Third, we should stop talking about how many patents our companies have. This is not the Cold War, and we're not the United States or Russia trying to intimidate each other with how many nuclear missiles we have.

Instead, let's start talking about the *quality* of our patents. We need to describe the due diligence we put into prosecuting patents and vetting them for licensing. And please, don't try to fool anyone. We need to provide details and hard facts about the effort we put into improving and ensuring patent quality.

Fourth, please take the previous point about patent quality very seriously. It is the key to building support for the patent system again. No other industry can get away with a product failure rate as high as 50%. Neither can we.

This cannot be stressed enough. Poor patent quality is hurting us more than we think.

And fifth, let's stop pretending that the only things that count are money and deals. We have to embrace the new reality that building a white-hat brand and differentiating oneself from patent trolls will likely make a material difference in our businesses in the years of patent controversy to come. Indeed, this could be the key to our ability to capture the next

wave of IP value successfully.

If the last two decades of patent industry history have taught us anything, it is that we can no longer ignore the importance of transparency and ethical conduct in building a reputable brand for our companies – and for our industry. The viability of the patent system itself may well depend upon our ability to restore public faith in our industry. *iam*

Marshall Phelps is CEO of Article One Partners and the former head of IP at both IBM and Microsoft. He serves on the National Academy of Sciences intellectual property committee. **David Kline** is co-author of *Rembrandts in the Attic* and principal at David Kline Associates, a branding and strategic communications consultancy. Together, they are the authors of *Burning the Ships: Intellectual Property and the Transformation of Microsoft*.