

Patent protection essential for the future of innovation

The history of patents dates to at least the Middle Ages. In the United States, patent and copyright protections are included in the Constitution because our founding fathers believed this would encourage innovation and benefit the public.

In exchange for disclosing their invention publicly, instead of keeping it secret, patents give the inventors a limited period to exclude others from use of the invention. Under current U.S. law, inventors have a 20-year monopoly to develop their invention, bring it to market, sell it or license it.

This ability to protect your discovery is essential to the success of the innovation economy, and thus to San Diego's economy.

Venture capitalists and other investors are willing to invest in startups, and big companies are willing to fund research and development, because they view the resulting intellectual property and the legal right to protect it as an important barrier to entry from competitors. This is especially important in biotech.

A patent does not give you an exclusive right to do anything. Rather it gives you the right "to exclude others" from doing something without your permission. (Note: The author of this column is not a lawyer.) However, let's be clear.

Enforcement of that "exclusionary right" requires tenacity and expenditure of an extraordinary amount of time and money, which can be a daunting challenge, especially for small companies.

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Take the case of Ameranth Inc., a small San Diego company that says it has spent between \$15 million and \$20 million in legal fees over the last eight years in lawsuits against companies that it claims have infringed its patents.

Keith McNally, a graduate of West Point who spent five years in the military as an artillery officer, started Ameranth in 1996. After 15 years in the defense industry, where he developed various mobile devices for the military, McNally decided that he wanted to start a company. Like many entrepreneurs, his business idea came out of his personal experience.

"I hate waiting in lines, so when I founded Ameranth our mission statement was to eliminate lines, waits and inefficiencies through the innovative application of Web and wireless technologies.

Initially, we decided to focus on the hospitality industry — restaurants, hotels and casinos,” he said.

Friends and family provided the company’s initial capital. Since then, McNally says the company has raised \$25 million from a number of investors, including Microsoft, Springboard and Western Pacific Capital Partners.

According to McNally, Ameranth developed mobile/Web products that handled restaurant reservations, wireless ordering and table-seating management. Its licensees include Taco Bell, BJ’s Pizza and Tillster, a San Diego company that provides online ordering systems to the hospitality industry.

By 2007, McNally saw similar products entering the marketplace, and he believed that Ameranth’s patents were being infringed.

“The only way that we could realize our potential was to enforce our patents,” he said. “You have to be willing to spend a decade to prove that your patents are valuable. However, if you don’t have the determination and financial backing to do this, you just can’t enforce them. The big companies know this, they won’t pay unless compelled to do so, and they have the resources to keep you tied up in court.”

The companies that Ameranth has sued include Apple, Grubhub, Pizza Hut and Hilton, and McNally said it could be at least another two to three years before there is final resolution. Meanwhile, the legal bills on all sides continue to multiply.

The Leahy-Smith America Invents Act, passed in 2011, allows defendants to challenge whether a patent should have been issued by the U.S. Patent and Trademark Office in the first place. This tactic has been used against Ameranth, unsuccessfully, according to McNally, who says, “All of my patents have made it through.”

He is concerned, however, about what he contends is a serious loophole in the “covered business method” provision that allows defendants to file an unlimited number of petitions against patent holders.

Patent reform legislation is winding its way through Congress. There is legitimate concern about the proliferation of so-called “patent trolls” who have made a business out of filing lawsuits based on patents of questionable validity. At the same time, adequate patent protection is essential for the future of our innovation economy.

The patent game is highly complex. And yes, we do need the lawyers to defend us, as well as to prosecute on our behalf. Intellectual property can be costly to create and powerful to own. On the other hand, consider the proliferation of open-source software. The idea of allowing everyone to contribute, as well as to use, has exponentially increased the speed of product creation. The best idea wins, not the tallest wall.

The Innovation Alliance, whose membership includes Qualcomm, recently submitted a letter to Congress opposing efforts to weaken patents and make it harder for inventors to enforce their rights.

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