



Communicating IP strategy

You have invested a great deal on an IP strategy, but can you enhance your investment by proactively communicating your investment asks **Magdalena Fincham**

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Many companies spend a notable amount of time and other resources formulating and implementing an IP strategy. An IP strategy is considered to be a proactive plan or method to acquire and use IP to intelligently implement and support business objectives. It presupposes that the IP strategy, such as a trademark or patent application filing initiative, has been carefully developed to achieve and integrate with desirable business objectives. Such objectives may include creating defences via aggressive IP protection of products in early stages of development, creating leverage and business opportunities in future cross-licensing or partnership relationships by strategic acquisition of IP (which does not necessarily protect proprietary products), or pursuing IP assets in order to generate licensing or asset sale revenue. An effective IP strategy may create value for a company via traditional vehicles such as increased consumer awareness, increased prices for the company's products or a licensing revenue stream. What often goes unrecognised or underappreciated, however, is that additional value may be extracted by utilising effective communications of IP

investments, to appropriate audiences, as part of the strategy. A company that spends time formulating and communicating an "IP story" can leverage and further enhance its internal efforts to create and implement a strategy. The present discussion highlights some proactive measures that may be taken to integrate IP-related communications into a company's IP strategy.

As a preliminary matter, a company should always consider the audiences to whom it wishes to communicate as part of the company's strategy, and what benefits can be obtained from such communications. Typically, the two main sets of desirable audiences include (i) current or potential licensees, potential partners, and competitors ("Audience A"), and (ii) shareholders, investors, and market analysts ("Audience B"). The present discussion focuses on some suggestions for how and why to effectively reach this audience, particularly in a US IP framework.

Press releases

Press releases (eg, to announce pending trademark or patent applications once they publish, issue or register) are a useful tool in implementing

communications as part of an IP strategy. Press releases are inexpensive and will likely reach at least some members of both Audience A and Audience B. But for many companies, the announcement of the publication or issuance of one or two patent applications or patents; for example, will be insufficient to distinguish it from a multitude of other applicants or patent holders vying for the attention of targets in Audience A or Audience B. In most cases, unless a press release is directly provided to a specific audience (eg, a specifically-desired licensee in Audience A) or picked up by the popular press (which will vary based on the skills of the company's marketing agent and other events vying for press attention at any given time), it is unlikely that it will be noted by the target in Audience A or Audience B. Of course, in order to have a press release communicating elements of the IP strategy, a company should have IP-related events to announce. How, then, can a company expand, or at least accelerate, the number of newsworthy IP events it can claim?

Patent publication

Whether made the subject of a press release or not, patent application publications may be a reliable vehicle for achieving the desired awareness level for a company's IP strategy with a particular audience. In the US, a patent application typically will be published 18 months from its earliest priority date (unless non-publication is requested). Members of both Audience A and Audience B may see a patent application publication, for example, as tangible proof that a company is devoting resources to a particular patent strategy. Where a member of Audience A is also active in IP, it is likely to be monitoring the publications of patent applications in its technical area. Another competitive effect of the publication of an application is to make it available for use as potential prior art against any patent applications filed after the company's application, including those of Audience A.

Beyond the inherent benefits of publication, additional steps may be taken, as part of a filing and publication initiative, to communicate a company's dedication to an IP strategy, and to help realise the IP investment. In one example, an applicant can leverage the investment in one invention or patent application by efficiently filing multiple patent applications (eg, based on a similar, or identical, base application) to cover different aspects of the invention. More applications means, of course, more publications, and clearly signals that the company is pursuing an aggressive patent acquisition strategy. By devoting some additional resources to what amounts to an IP marketing budget, a company can efficiently multiply the effects of patent application publications and make it difficult for potential competitors or licensees to ignore.

As noted, even if Audience A is not monitoring published

patent applications diligently, increased patent publication may have an adverse affect on a target's ability to pursue its own patents. If, for example, the technologies of a company and Audience A are sufficiently relevant to one another (something that may perhaps be presumed in many cases if the company is viewing Audience A as potentially being interested in the company's IP), it is likely that the patent office will bring these published patent applications to Audience A's attention by citing them against their pending patent applications. In some cases, a company may cite its own patent application publications directly to the US Patent and Trademark Office (USPTO), for possible consideration in the examination of a target's application. If Audience A is continually forced to distinguish its own patent applications from those of another company, it is likely that it will start to look further into this other company and become interested in their IP (and business) activities.

The timing of the filing of applications may be useful in communicating a company's pursuit of a particular IP strategy. For example, the filing of multiple patent applications may be staggered, such that patent applications publish on a consistent basis (eg, one or two each week), thus further signaling an ongoing investment in IP in the relevant technical area.

In another example, the USPTO allows an applicant to request early publication and provide early payment of the publication fee (US\$300 as of March, 2011). Patent applications for which early publication is requested typically publish within six months of filing. A company aggressively filing patent applications may find it desirable to request early publication in order to raise awareness of its filings with Audience A by having its patent applications publish sooner rather than later. This strategy of requesting early publication should be carefully weighed against the trade-off of having the company's own patent applications create a bar, under the appropriate laws of various jurisdictions, against further improvements to its technology in an expedited timeframe.

Collaboration between the legal and marketing departments should also be undertaken, where possible, to coordinate not only the substantive efforts of implementing an IP strategy (eg, having a patentability analysis performed at early stages of product development), but also to maximise the effectiveness of the IP strategy communications by timing them in a particular manner. The example of Gillette's release of the Fusion razor in 2005, followed closely by the publication of many patent applications and patents covering various aspects of the razor technology, is a good example of effective IP strategy communication results that may be achieved by coordination within a company¹. Due to the timing of the publications of the patent applications, it can be said that Gillette made it particularly clear to competitors (as well as investors) that it was very serious and thorough in its patent protection pursuits for the new product.

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Shareholder education

Educating investors, shareholders and analysts (“Audience B”) about a company's IP strategy is also a pursuit worth undertaking, in an effort to maximise the return on the investment in developing an IP strategy. Over recent decades, it has been recognised that IP awareness



has become an increasingly relevant factor in the valuation of a company². This is at least due to the trend of intangible assets, such as brand awareness, know-how and the appearance of innovation, as accounting for more and more of a company's value. For example, intangible assets increased from 38% of the Standard & Poor's 500's value in 1982 to approximately 85% in 2005³. If a company does not effectively communicate to Audience B that it is aggressively and intelligently pursuing an IP strategy, which seeks to capture all IP opportunities in a manner that supports key business objectives, the company may be undervalued because Audience B will not have the information necessary to factor the true value of the company's IP into their assessment of the company.

In valuing a company, the company's IP strategy and IP assets should be taken into account (as well as the skills of the officers of the company in understanding and managing the IP assets in an intelligent and strategic manner) as a routine part of due diligence, along with the more traditional investigations of revenues and tangible assets. Thus, reassuring Audience B in a clear and consistent manner of the existence of an IP strategy, the factors that went into developing it, and ongoing assurance that it is being actively and intelligently managed and recalibrated, may go a long way towards increasing the perceived and real value (and projections of future success) placed on the company. Top US business schools, for example, are teaching business students that an understanding and effective management of its IP is a key determinant in evaluating a company's likelihood of long-term success and value⁴. Thus, a company who has invested in creating and implementing an IP strategy needs to take the next step in extracting value from that investment by promoting it (and the fruit thereof) to Audience B at every opportunity. For example, the strategy should be highlighted in calls with analysts, in interviews by C-Level

executives, press releases and marketing collateral. Ineffective (or non-existent) communication of a company's IP strategy and assets may unfairly undervalue a company due to the lack of recognition in this strategic investment.

In summary, it is recommended that efforts be expended to include proactive IP-related communications as part of an IP strategy. Otherwise, the investment in the development and implementation of the strategy may not reap its full and intended rewards.

Footnotes

1. Gillette had published, between September 6 and November 10, 2005, 11 "razor-related" patent documents, as follows: three Issued Utility Patents, three Issued Design Patents and five Patent Application Publications.
2. http://brodyberman.com/articles/MIP_PositioningIP_2002Mar.pdf
3. Litan, Robert E. and Wallison, Peter. 2000. Corporate disclosure in the internet age. *Financial Times*, 24 May <http://www.brookings.edu/views/oped/litan/20000524.htm>
4. <http://pages.stern.nyu.edu/~blev/docs/EnhancingShareholderValueThroughIPDisclosure.pdf>

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