Focusing on Competitor's Products
Increasing Intellectual Property Effectiveness

Nearly every company faces competition. It is often relentless. It often threatens profitability and therefore the very existence of most enterprises. Normally, beating the competition simply means outselling them in the marketplace.

But sometimes competitive advantage is not achieved fairly, but is achieved by stealing confidential information, creating product knockoffs, copying documentation, or removing critical know-how data. Even though there are many legal remedies to address unfair business practices, the burden of proof nearly always rests on the damaged party. Providing proof is no trivial undertaking.

When proving patent or copyright infringement, it is always a given requirement that the "areas of infringement" be identified and that the offending party be put on notice as to the exact components of their product or service offering that infringes. To obtain this information, a company's IP group, individual inventor, creative department, or publishing group must provide evidence. It must clearly show the infringing material, as identified with the selling company, and the associated product/service that is infringing.

Unfortunately, this process is often time consuming and requires staff members (sometimes in significant numbers) drop what they're doing to dig up the "goods" by scouring the offending company's offerings. This activity is often "knee-jerk" in nature and certainly not planned or anticipated. In reality, all of the panic occurs long after sales have been negatively affected.

To correct this situation, the discovery of unfair business practices by competitors must be moved to a much earlier point in the marketing cycle.

An example of an ideal discovery situation is when a competitor introduces a new product at a trade show, the details are reported, and the infringing company is immediately put on notice. Then, the initial investment is usually at a manageable level and legal action is normally not necessary to bring the infringing activity to a halt.

Most companies that are well along in integrating IP into their Corporate Governance operations have at least two processes in place. One is routinely conducted by the IP Legal group, with guidance from Marketing, to periodically monitor the new product and service offering activities of competitors (this may be done as simply as joining a mailing list).

Another is to monitor the sales Win-Loss reports using a process described in our white paper “Sales Win-Loss Reporting, Considerations for Intellectual Property”. Once these activities become routine, the response to unfair business practices in the form of knock-offs, copies, names, etc. is done efficiently and the resulting legal costs are often greatly reduced.

As the monitoring process is conducted over an extended period of time, it often is a good idea to organize the discovered data into a database. The form of this database may be a simple spreadsheet showing each company, the name of the product, followed by a description of the IP infringement. Then, multiple people can share the task of keeping the information updated as changes occur.

A more effective, but complicated, way to pin down infringers involves first codifying the company’s own IP portfolio to enumerate, copyrights, trademarks, patents, and trade secrets into a special database that is designed to organize this type of data into a variety of classifications and codes, then correlating to each discovered infringement.

This requires a similarly organized database to codify the characteristics of each major competitor’s offerings. Then, as both databases are compared, elemental matches may be noted therein. This is often referred to as “hits” on competing products, and can lend significant support to infringement demands in a structured form. This becomes invaluable when supporting negotiation (settlement) discussions.

During negotiation with a competitor’s IP staff, it is a relatively simple matter to convert the raw infringement information noted while comparing the databases into a more presentable form to be reviewed during discussions.

One way to do this is to abstract the data in the form of a Power Point, Acrobat, or other presentation system so that the infringing party can see specifically which product/service areas are of concern. Once the infringing product or service is identified, it is straightforward process to extrapolate the information into product sales data followed by associated damages that are occurring as a result of the infringing activities.

Because the study of a competitor’s product line becomes an ongoing effort, it may be an attractive option to accumulate the data over a period of time before putting competitors on notice. By recording the data and logging the potential damages, a case may be built until it reaches are predetermined threshold.

Why fire an IP case at the competition if it has minimal recovery potential? As more and more products are offered, the case becomes stronger. However, legal requirements should be followed so as not to exceed time limitations on proper notification of infringers to obtain full damages.

Although not routine in standard business practices, if an IP group obtains a steady flow of competitive information, there may be red flags noted in areas where the company's product line is falling behind in the marketplace.

A double red flag may be indicated when a competitor's new product releases are accompanied by a flurry of new patent activity. It is a given that the IP legal group inform management of these situations, but it is up the company as a whole to take the appropriate action. If the product or service evolution of a competitor signals a competitive threat in the future, the sooner this information is acted upon, the better.

Of course, databases get outdated and it is also the IP group's responsibility to purge out information that applies to expired patents or competing products that are no longer being offered. This maintenance activity is very important, not only to eliminate wasted effort later, but also to address a fact of business that potential damages vary over time.

Once a product or service is no longer on the market, sales begin to decline rapidly, and so do potential damages. Making a decision to "just leave it alone" is not uncommon, especially with high technology products that undergo many evolutionary changes. This acknowledgement of the fleeting nature of the maximum sales return of many product lines can also affect the scope of IP protection that is sought.

Further, if market window only lasts 2 years, there is reduced justification for filing a patent, but trademark and copyright protection remain essential. This situation often occurs during a time of transitional technologies, such as when one computer platform is replaced by another and customers want to continue running legacy systems.

There are many opportunities for transitional products while both platforms need to work together, but once the older platform becomes totally obsolete, the transitional technology is no longer needed. In retrospect, an extensive investment in IP for the transitional era is often a waste of resources. This is why a heavy investment in IP to protect the new platform is often the optimum area to apply resources.

Sometimes market feedback indicates that a market window is about to close. This is often apparent when a product with a low revenue contribution is experiencing a disproportionately high level of R&D with corresponding requests for patent protection to cover the continued enhancement activity. A decision is often necessary just to let the product sink. There are many risk analysis methods to apply to these decisions.

The most basic method is simply for the IP legal group to ask the question to management if it is a wise idea to continue making high levels of IP investment in products that are no longer competitive in the marketplace. It may also be useful at this point to let marketing know what the competition is doing about this and make strategic changes as necessary to lower the risk.

In summary, if an IP group is well informed of the Win-Loss data from the Sales and Marketing groups along with current information from competitor actions that is aligned with the company's IP portfolio, it is possible to maximize the effectiveness of the IP investment.

It is also possible to proactively manage the IP portfolio over time in order to keep up with competitive pressures by always having the information on hand to actively pursue negotiations and possible legal action. By advising management about observations of competitors from an IP perspective, company investment in products and services may be further optimized to compete aggressively.

Process Focus Areas

- Win-Loss Report
- Product Revenue List
- Corporate Governance
- Customers
- The Competition
- IP Legal