

One Right System for IP – Vision Impossible?

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Evolving New Markets for IP and Its Implications

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Background

- There is an increasing pressure for IP driven organizations to improve the return from their intangible assets, in particular if the organization is in a need of incremental cash flow.
 - The improved return is increasingly available through IP transactions, rather than only (or even primarily) through own production and sales.
 - Patent transactions in particular have traditionally not been a particularly well-functioning market.
 - Asymmetry of information, lack of transparent pricing, low liquidity of the market and high transaction costs have made it unattractive.
- ⇒ This is now slowly changing.

New Emerging Patent Market – What is it?

- Trading with patents has increased significantly in the last 5-7 years.

<u>Sources of Patents</u>	<u>Buyers of Patents</u>
<ul style="list-style-type: none">• Small companies that failed during the .COM boom in late 1990's.• Large companies with “excess” patents.• Universities that try to establish a new source of funding.	<ul style="list-style-type: none">• High growth companies who do not have adequate patent portfolios.• Investment Funds• Large companies who treat their patent portfolio as an investment portfolio.

- The new market is enabled by a variety of service providers.

Key Elements of Patent Market

EFFICIENCY DRIVERS

STOCK MARKET

REAL ESTATE MARKET

PATENT MARKET

1. Perfect and complete information
2. Available forums to transact
3. Equal access to markets
4. Sellers and buyers willing to transact



Issue No 1: Lack of Perfect and Complete Information

- Patent transactions are very fact-intensive, and difficult to assess.
- The abstract nature of patents makes it particularly difficult.

Infringement => There is 50% likelihood that the court finds infringement.

Validity => There is 60% likelihood that the patent is found invalid.

Legal systems => Legal systems vary in different parts of the world, i.e. 50% possibility to get the same outcome in all parts of the world.

Pricing => There are no established market prices.

=> The value of a single patent has typically a low trading value, i.e. likelihood of winning on a single patent is $50\% \times 40\% \times 50\% = 10\%$

... But – The buyers may have a different view

- A number of buyers rely on the conservativeness of the potential licensees.
 - IPR function is typically within a legal department, and legal departments are in most cases risk-adverse.
- A typical formula for convincing a legal department is to combine a number of patents into a portfolio.
- From a licensee's perspective, the likelihood of prevailing against a claim of six patents may be seen as follows: $90\% \times 90\% \times 90\% \times 90\% \times 90\% \times 90\% = 45\%$
 - => This means that a typical conservative licensee is inclined to take a license if the licensor offers a license to at least six reasonably good patents at the same time.

The asymmetry of information (both parties may see a low likelihood in their own success) may sometimes be resolved by bundling patents.

Issue No 2: Changing Role of Exclusive Right

- Exclusivity (i.e. the right to get an injunction against an infringer) has been a key element of patent laws.
- When patents are being traded, the new owner of the patent rarely has a justified business interest to obtain an injunction.
 - The threat of injunctions is almost always used solely as the means to obtain high royalties.
- The new regulatory trend is to allow the judge to use his judgment to decide whether an injunction is needed to protect the interests of the patentee.
 - Recent Supreme Court decisions in US (eBay) and China.

... Exclusive rights as a “political” game

- The availability of injunctions is increasingly becoming a tactical/political game.
 - The trend has significantly changed in 3-5 years.
- Currently, Germany is seen as the most conservative and difficult jurisdiction (not any more US or China).
 - Judges do not have discretion in respect of injunctions.
 - Judges are unwilling to take into account contract or antitrust issues.
 - Invalidity claims are in a different (slower) process (although 60% of the patents are ultimately invalid)
 - Buyers of German patents rely on alleged German rule that any prior commitments made by previous owners (e.g. to standards-setting) do not bind the buyer.

Issue No 3: Lack of Pricing Information

- The patents are difficult to value.
 - The value depends on validity, infringement etc.
 - The value is different for each buyer.
 - There is traditionally no reliable pricing information.
- There are efforts to improve pricing information.
 - The current understanding is that a “normal” patent may trade at 15.000 – 50.000 €.
 - A trading value of a single patent is very rarely beyond 10 m€.
 - A typical transaction between the seller and a service provider is based on a revenue share.
- There is a misperception that licensees would normally pay a running % from their sales.
 - It is typical that license fees are capped, and lump sum payments are frequently used.

Issue No 4: New Players in the Ecosystem

TRADITIONAL IP PLAYERS

Product Companies



Universities



Individuals

Dr. Mahoney
Mr. Wong

Patent Pools



Licensing Companies



Law firms



EMERGING IP PLAYERS

Patent Funds



Royalty Funds

alseTIP

Inventive Players



Opportunistic Players



Patent Brokers



Auction Holders



IP Advisors



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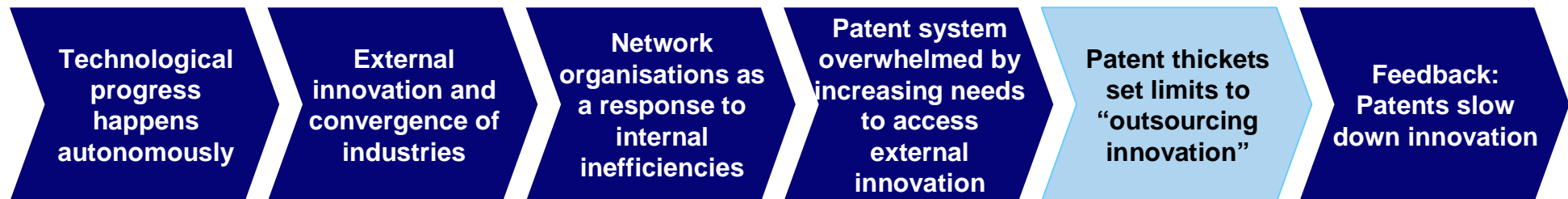
Issue No. 5: Financing of New Market Development

- A part of the new development is financed by “loose” investment money, and it is predicted that the disappearance of such money will slow the market development.
- But a significant amount of money is becoming from wealthy individuals and “cash-rich” corporations, and therefore the market is not likely to collapse overnight.

Issue No 6: Cause and Effect of the New Market?

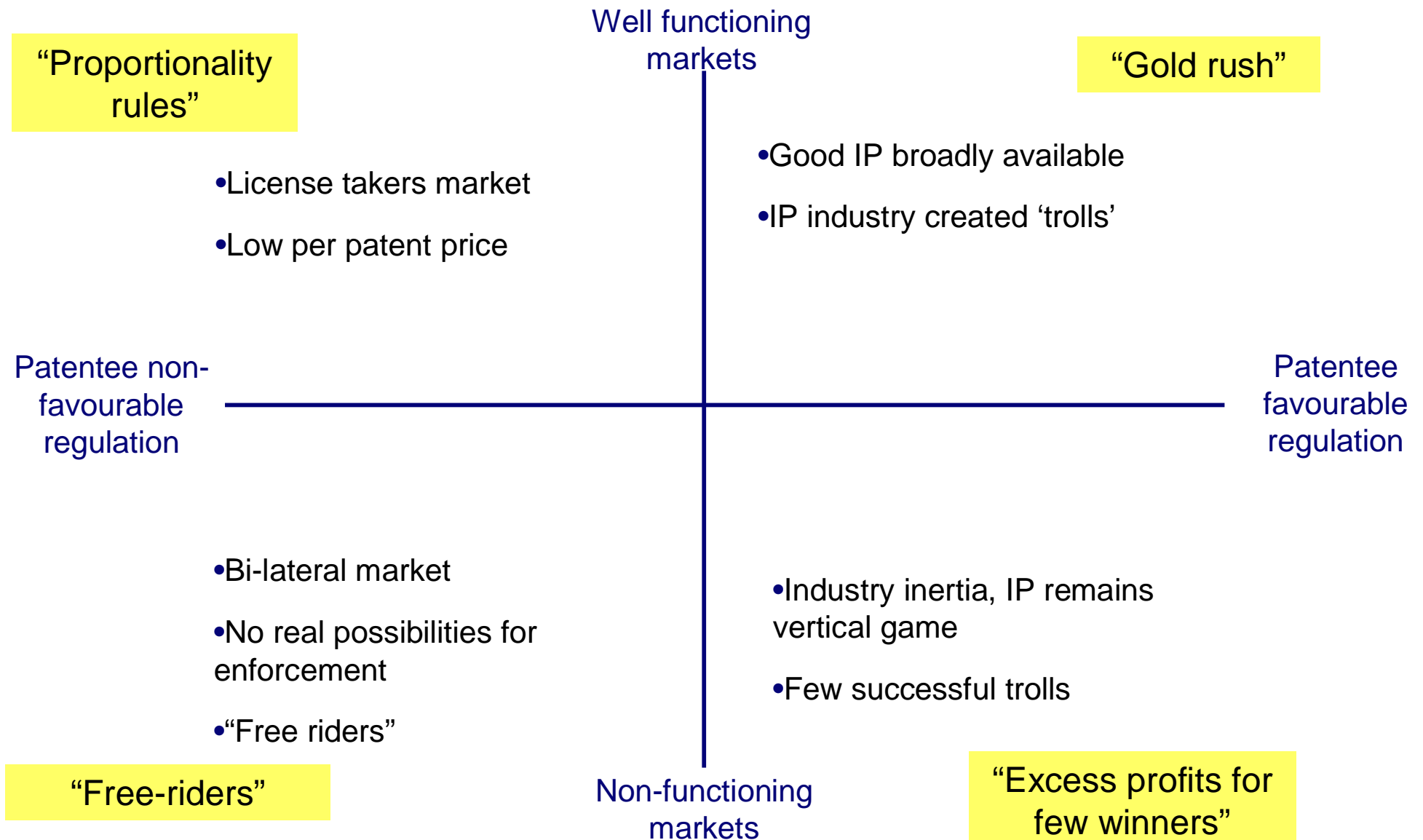


- Positive view: patents induce innovation and the system is working fine
- Use of patents is efficient irrespective of the “patents’ quality issues”



- Negative view: patent system is sick and it needs to be reformed and / or regulated
- Use of patents is out of control and opportunistic behaviour causes inefficiencies

Issue No 7: Future Scenarios



Issue No. 8: Is Regulation Needed?

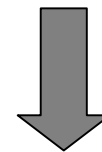
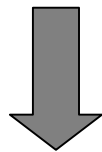
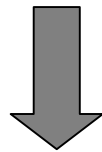
- The patent markets are almost entirely unregulated.
- The regulation is either inside the patent laws (how to get a patent) or in antitrust laws (what is an abuse).
- It is fair to assume that a well-functioning property market needs a basic set of rules to guide buyers, sellers, licensors and licensees in transactions.

Hype or Real Business?

2000

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HYPE

- Random pricing
- Deal frenzy, hot money
- Limited strategic value to the parties

BUSINESS

- Proper pricing
- Stable market, smart money
- Strategic value materialized