



Return to normalcy: retreat or redefine

Retreating to the past or redefining the future in the face of growing international patent competition is the choice now facing the US and other countries

Warren G Harding is not a name that leaps to mind ... quite probably not even for our American readers. One of the few things for which he is today remembered is his presidential campaign slogan from 1920: Return to Normalcy. At the time, his words resonated with a country still reeling from both a war overseas and a recession. His slogan, and subsequent victory in 1921, were resounding rejection of the progressive policies of Woodrow Wilson, and a return to a more isolationist national demeanour, complete with tariffs to support domestic industry.

In a very real sense, Harding spoke to a people facing circumstances much the same as those before us now. Though economies are showing signs of recovery from a huge economic downturn, its vestiges are still fresh and palpable. So, though there is a real temptation to retreat into the illusion of domestic bliss, but can we, or even should we?

How things are

Although they have undergone some dramatic changes, capital markets show signs of recovery. And as newly free capital rolls again into innovation investment, it is natural to wonder whether the IP market is a place where we can also return to normalcy. Let's use patenting in the US as a proxy for how that might play out in the US and other jurisdictions as well.

Overall, indications are that patenting is recovering in 2010 just like (and in part because of) the financial markets. But as the IP market recovers, it seems clear that business as usual may not be an option. International competition in patent markets is fast approaching levels seen in international product markets.

So, if you look at aggregate patenting in the US, you'd expect a portion of the patents to be filed by foreign nationals in support of products and services exported to the US. And you see exactly that. Over

time, however, the percentage of foreign patents filed at the USPTO has consistently risen. In 1965, for example, the percentage of patents filed by overseas entities stood at about 24%. By 1985, that figure had risen to nearly 45%, where it hovered for the next 15 years. In 2000, the percentage of US entity filed applications began to sink again and is on a trajectory to drop below the 50% threshold by 2010.

What drove this downward pressure on domestic patenting? Largely expanding and industrialising economies. For example, in 1965 Japanese patent filers comprised a scant 3% of US patent applications. As the Japanese economy enjoyed unprecedented growth over the next 20 years, that number rose until the Japanese were filing about 25% of all US patent applications in 1985. A mature economy by then, Japan's contribution to US patenting has remained largely flat at that rate, plus or minus a few points, since 1985.

Much later, South Korea began a similar, if less dramatic, rise on the US patent charts. In 1990, Korea filed less than 1% of US patents. Now Koreans file nearly 10%. Comparing Korean filings five years ago to those today yields a rate increase of almost 87%. By contrast, the rate of increase for all US patent filings over the same five years has been only about 28%, with US-originated filings increasing at 22% and foreign filers enjoying a 34% rise in filings.

Yet the filing growth rates for some emerging economies make even Korea's numbers pale by comparison. India, for example, has posted a five-year filing increase of about 120%. China is another example. In 1975, the grand total of Chinese patent filings in the US was ... zero. It took almost another 15 years to break the 100 filings per year threshold. Yet if you look at China's patent filing rate increase over the past five years, it tops 200%. Yes, that's a 200% increase, not a 200 patent increase. Now, to put these numbers in perspective, India is currently filling only a few thousand patents per year, while China's filings at the USPTO last year were only about 2.5% of the total number filed by US nationals. Although

the amplitude may not be high for the moment, the signal should be clear.

... And how they could be

The message is that patent markets have become, and will remain, increasingly competitive across national boundaries. If the trend continues – and expect that it will – the majority of patents filed in the US could well be held by foreign entities in the very near future – for the first time in history. And remember, we are using foreign filing in the US as a proxy for what other mature patent markets should expect or are already experiencing. This is not a US phenomenon or problem.

But the cautionary part of the tale is not some jingoistic call to arms. Tariffs and protectionism are equally ineffective for intellectual property markets as they are for economics. Protectionism doesn't inure to any broad constituency's benefit in the long term. To the contrary: as in any market, you want to invite as much new investment and innovation as possible – patent markets are the rising tide argument at its best.

Competition in the patent markets is here to stay and we can all benefit from it if we remain in the game and stay on top of our game. We are facing a new and evolving IP landscape. We couldn't retrace our footsteps back to that simpler time even if we wanted to. The challenge is not how to return to normalcy, but how to redefine it and effectively participate (and compete) going forward.

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