Written by
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# The game is changing

**There's an opportunity for game-changing business model innovation in the evolving IP market landscape**

My column was late this month. No, I know what you are thinking: I didn't wait until the last minute — though admittedly there is always that temptation. Rather, there has simply been so much activity at work that I simply couldn't get to the column sooner. It seems that there's been a noticeable increase in IP-related business activity and a pace of deals since June this year with that frenetic year-end sense of urgency. I've polled a number of colleagues across a broad array of industries and geographies, and to varying degrees they all report a similar level of activity. The number of deals and their per-instance value both seem to be climbing in unison. Now, this is clearly not a statistically significant sample, but this growing robustness of IP deals represents what many see as IP's return to former glory. Renascent, yes. But if my intuition bears true, there will be a bit less former in IP's resurgence than many anticipate. Not just the rules of engagement, but the game itself is changing.

## Confluence of factors

As a business asset, IP operates within a grander ecosystem. Nature — and, it would appear, economics — abhors a vacuum, so where some have fallen behind in IP generation and capitalisation, others have filled the void. This phenomenon occurs across industry and national boundaries. For example, it's difficult to pick up a newspaper today without hearing (some of it hyperbole) about the rise of China, India *et al*, and the demise of the old guard in the generation of IP and its underlying innovation assets. In addition, the legal landscape has been evolving — principally in the United States.

Many point to a litigation system gone awry, extreme damage awards or the granting of too many valueless patents as the genesis of the fervour around patent system reform. In response to the protracted absence of a legislative solution, the Court of Appeals for the Federal Circuit and the Supreme Court have stepped in to address many of the perceived problems with a kind of surrogate patent reform. Many of these decisions operate to reduce the apparent scope and strength of IP assets — rendering the road to IP commercialisation more of an uncertain uphill climb. Clearly, IP markets and leverage within them are evolving.

## The changing game

If we take the activity that we're seeing of late in the IP space as a microcosm of what is to come, then the game and the playing field are indeed changing. Changing, not changed; it's an ongoing process. As the IP market — creation and consumption sides — adapts to the evolving business landscape, it creates new opportunities and pitfalls, which themselves in turn extend the change. This has significant implications for patent holders on both the asset creation side and the commercialisation side. For example, if you believe that in general, patents have emerged as less powerful instruments (eg, diminished injunctive powers, reduced damages potential), then low-friction alternatives to assertion become an appealing option to capture value better from all but the very best patent assets. We're seeing this low-friction vacuum being filled in the growth of a secondary market in IP assets. There are several flavours of business model in this secondary market — most largely aligned with either the offensive or defensive side of would-be or could-be patent assertion.

On the defensive side, patent pools such as Open Innovation Network acquire rights to inoculate their members from potential assertions. Other organisations more closely aligned with the offensive side include Intellectual Ventures, which seeks to offer low-friction, relatively low-cost licences to the assets it acquires.

As this secondary market matures, we've also seen the advent of participants attempting to create more of a true market — that is, serving buy and sell sides with roughly equal weight. Although still early stage, these emerging models try to establish a marketplace for IP assets which is low friction in both directions. By way of an oversimplification, they allow licensors to make portfolios available to companies which in turn can elect to take as many (or as few) unit licences as they believe they need to cover their products. This kind of approach moves farther in the direction of increasing transparency and efficiencies in the IP market, as well as theoretically reducing friction and the potential for conflict.

## Game changing

We can, and should, argue about the attendant benefits and flaws of each of these new IP business models — and wonder how they can be improved or even supplanted. Arbitrage opportunities, low-cost access to valuable IP and enhanced appropriability from IP assets probably top the list of benefits that we might cite in their favour.

On the downside, some suggest that they create drag on IP commercialisation by inflating costs with an artificial secondary market aided by the force of numbers in pooling large portfolios that no licensee could effectively assess.

The good news is that we're watching evolution in progress and at each step there's an opportunity for the next game-changing model to evolve. Over the next few columns, we'll explore some new models for IP generation and exploitation in this evolving landscape, and perhaps see how to change the lay of the land itself.

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