

# LITIGATORS CORNER: Earth Calling Corporate Executives



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I'm bored by corporate executives who seem to think they are God. They complain loudly when others (namely, independent inventors) try to protect their property by asking a corporation to take a license. The implication is that these inventors take up too much of executives' precious time with their "frivolous" requests. Let's be honest. It shouldn't be so difficult to distinguish legitimate patent inquiries from frivolous ones. The tools needed to do this are reading and thinking — although these may be two skills many executives lack. (I am reminded of the Dilbert strip where the engineer prepares a detailed technical report on a matter of importance to his company. As the report progresses upward in the company, it becomes shorter and simpler. By the time it gets to the CEO, the detailed report is one page with a smiley face.)

One published report describes the chief patent counsel of Intel as complaining because his company gets five letters a week from inventors wanting Intel to take out licenses on their inventions. As an example, he tells about an inventor who

wrote Intel about a patent for a drill used to make a hacksaw blade. I surmise that an adequate response to this inventor would have been, "Dear Sir: Thank you for your interest. Intel does not make hacksaws, drill bits, or hacksaw blades." I will bet that I am right, without spending a second investigating Intel's products.

The same attorney says that other cases are less frivolous, and require "hours" of investigation by attorneys and engineers. To this I say: So what? How many hours did Intel spend acquiring its more than 1600 U.S. patents in 2004 (according to a fact sheet on its website)? In this same fact sheet, Intel boasts that it is "one of the top global innovators [of] issued U.S. Patents." And how many hours did IBM spend acquiring its 3,248 patents in 2004, as reported in my last month's column, *Is IBM a Patent Troll?*

The senior intellectual property counsel at General Electric expressed a similar complaint. She is reported to have said that in some cases her company has received patent infringement claims in form letters that list another company as the accused infringer. If so, the right spot for such a letter is the circular file. Alternatively, GE might respond with its own form letter: "Dear Sir: Thank you for your letter. However, GE is not Mrs. Gray's Storm Door Company. Please send your letter to the right company. Thank you." That took me fifteen seconds to type, and I am a slow typist.

But, GE complicates its job in cases like this. The same attorney claims that GE writes back and asks which product infringes. (That doesn't make much sense if the letter names the wrong company.) Supposedly the accusers respond to GE by saying, "Oh, come on. You know what you're doing." All GE has to do is ask for the identity of the product and a claim chart of some kind. Receiving neither is a good reason to do nothing further. But, when a company does receive information about a product and reasonable information about infringement, stonewalling is a lousy

idea. We wrote to a large company providing all the requested information, including products, claim charts, patents, file histories and court opinions sustaining our claim construction. We provided everything the company asked for, and more. The company promised over and over to respond. After nine months of foot-dragging, we received an obnoxious letter accusing our client — an inventor with over sixty patents — of being a liar to the Patent Office. No wonder individual inventors become skeptical of large corporations.

More of the same nonsense comes from the assistant general counsel in charge of patent issues for Eastman Kodak Co., who is quoted in a Bloomberg article, originally published in the *Taipei Times*, "U.S. debates restriction of 'patent trolls'" as saying of individual inventors that "they want to collect US\$50,000 from 1,000 people and retire." Does he know how his own company got started? George Eastman's inventions created not only Kodak, but also the assistant general counsel's job. The notion that every inventor expects fifty million dollars from his invention is silly. Most inventors want a reasonable return. But the price goes up when intransigent defendants put patent owners through the gauntlet for years, doing everything they can to steamroll the inventor.

Kodak itself doesn't actually have the same negative attitude about the independent inventor who started its own company. Here's what Kodak's web site says about Eastman:

He was a high school dropout, judged "not especially gifted" when measured against the academic standards of the day. He was poor, but even as a young man, he took it upon himself to support his widowed mother and two sisters, one of whom was severely handicapped.

He began his business career as a 14-year old office boy in an insurance company and followed that with work as a clerk in a local bank.

He was George Eastman, and his ability to overcome financial adversity, his gift for organization and management, and his lively and inventive mind made him a successful entrepreneur by his mid-twenties, and enabled him to direct his

Eastman Kodak Company to the forefront of American industry.

Apparently this kind of entrepreneurship is only valuable because it occurred one hundred years ago.

These corporations I have described expect their patent rights to be respected. They have that right. But they do not have the right not to be bothered because the inventor is a small company or an individual.

Jim Balsillie, one of RIM's CEOs, never met a microphone he didn't like, with one exception: the one in front of a court reporter. In RIM's litigation with NTP, NTP moved to compel RIM to make Mr. Balsillie available for deposition. The Virginia Court granted the motion. It said that if RIM did not make him available for the deposition, RIM would be barred from offering any testimony from Mr. Balsillie at trial. (The docket entry is number 189 on October 23, 2002, in *NTP Inc. v. Research in Motion*, Case no. 3:01 cv 00767-JRS, in the United States District Court for the Eastern District of Virginia, Richmond Division). Of course, RIM lost the case. The jury verdict was for \$23,118,570.90. But the court increased that to \$53,704,322.69. Two elements of that judgment indicate that the court wasn't happy with RIM. First, it awarded 80% of NTP's attorneys' fees, \$4,203,160.79. And second, it increased damages by 50%, to \$14,032,161.00. (See docket entry 376). NTP got a directed verdict on RIM's inequitable conduct claim. (See docket entry 254). The end result was that a \$23,118,570.90 jury verdict got turned into a \$612,500,000 settlement. The settlement was twenty-six times as large as the jury verdict. Congratulations, RIM.

So what happened? This reminds me of criminal cases I prosecuted where the defendant had no realistic chance of acquittal. Instead, those defendants went to trial, spent a lot of money losing, and often testified falsely, really irritating the daylights out of the jury and presiding judge. The result was usually a slam-dunk conviction, with the defendant's false testimony providing the icing. I call this "Storming the Jailhouse Walls."

That's what RIM did. Perhaps the case against it wasn't a slam dunk. But there is a time to fold your cards, and that was when the jury came in. The evidence suggests that RIM was determined to go all the way, and common sense be damned. An article

by Mark Heinzl and Amol Sharma from the on-line edition of the *Wall Street Journal*, "Facing Shutdown Threat, Maker of Blackberry Digs In For Battle," quotes Mr. Balsillie as saying that NTP's patents were "committed to the garbage bin," and that "parasitic little firms hold up innovative companies for ransom." Cooler heads questioned Mr. Balsillie's tactics: "wireless executives have questioned Mr. Balsillie's strategy of legal brinkmanship in recent weeks," according to the same *Journal* article. In March, 2006, Mr. Balsillie was quoted as saying that "settlement has never been an option" for RIM. (See "To reach one of the biggest patent settlements ever, it required two last-ditch meetings, \$612.5-million and some very bad pizza," by Paul Waldie, posted at <http://www.globeadvisor.com>).

Even though the court had to coerce Mr. Balsillie to be deposed, that didn't stop him from popping off to Congress in April. His remarks remind me of the definition of the Yiddish word "chutzpah": a man murders his parents, and throws himself on the mercy of the court because he is now an orphan. In his statement to Congress, Mr. Balsillie faults everyone but RIM: the PTO doesn't do its job, the judge ignored the actions by the PTO, Congress hasn't legislated enough, courts too willingly grant injunctions, a legal opinion costs \$200,000 (he's using Jones Day), and the ultimate canard: patents cover ideas. He doesn't cite a single source for any of this rubbish. He also told Congress that too many bad patents were being issued. But neither he nor RIM have a track record of being able to tell a good patent from a bad one. And, as for the reexamination of the NTP/Campana patents, if Mr. Balsillie thought they were so bad, why didn't RIM seek reexamination when sued by NTP in late 2001? Had it done so, it could have argued persuasively for a stay of the litigation. RIM did not request reexamination of the '960 patent (and six others) until June 24, 2003, according to the PTO's web site. That was after the jury trial in November, 2002.

RIM should face it: it waged war, because that is what its CEO wanted. But, like Napoleon in Russia, RIM bit off more than it could chew. Like Barry Bonds hanging over the plate, RIM got mad when it was hit by a fastball. As Tom Hanks said in *A League of Their Own*, there's no crying in

baseball. I'd also like to know who suggested accusing a deceased American inventor, Thomas Campana, of inequitable conduct with a theory so weak that it was directed out, too. It seems to me that Congress should have had some very hard questions for Mr. Balsillie.

Mr. Balsillie blasts with verbal lava everyone who disagrees with him, even the judge who presided over the case. Ever the diplomat, according to an article, "RIM Chairman calls for overhaul of U.S. patent laws," by Barrie McKenna at <http://www.globeadvisor.com>, Mr. Balsillie "compared RIM's treatment by the court with 'a judge in a murder case pondering execution while ignoring DNA evidence that exonerates the accused.'" That is the same judge who stayed an injunction pending appeal, keeping the axe off Mr. Balsillie's neck. Nothing like gratitude to the judge who could have shut RIM down. So why does anyone pay any attention at all to pronouncements by CEOs, such as RIM's, ranting about how unfair the patent system is? Could it be hypocrisy?

Recently, the *EE Times Newsletter* complained about a San Diego company, Patriot Scientific, enforcing its patents. The Newsletter said:

It's all gravy for Patriot and its investors. But when a company that proudly proclaims that it doesn't need to manufacture anything or market a single product continues to rake in the revenue, where is the benefit for the electronics industry? Business models like Patriot's amount to little more than a high-tech shakedown and provide a textbook example of why that the U.S. patent system is in desperate need of reform.


One might think that the electronics industry benefited, more than just a bit, from the invention of the transistor. One of the inventors, two-time Nobel prize winner John Bardeen, wasn't in the transistor industry, because it didn't exist at the time. He was working on a research project at Bell Labs with his co-inventors. Several patents resulted, e.g., 2,617,865, "Semiconductor Amplifier and Electrode Structures Therefor." If John Bardeen had to manufacture in order to have any patent, I wonder if he would have made his invention. Would Bell Labs have spent the

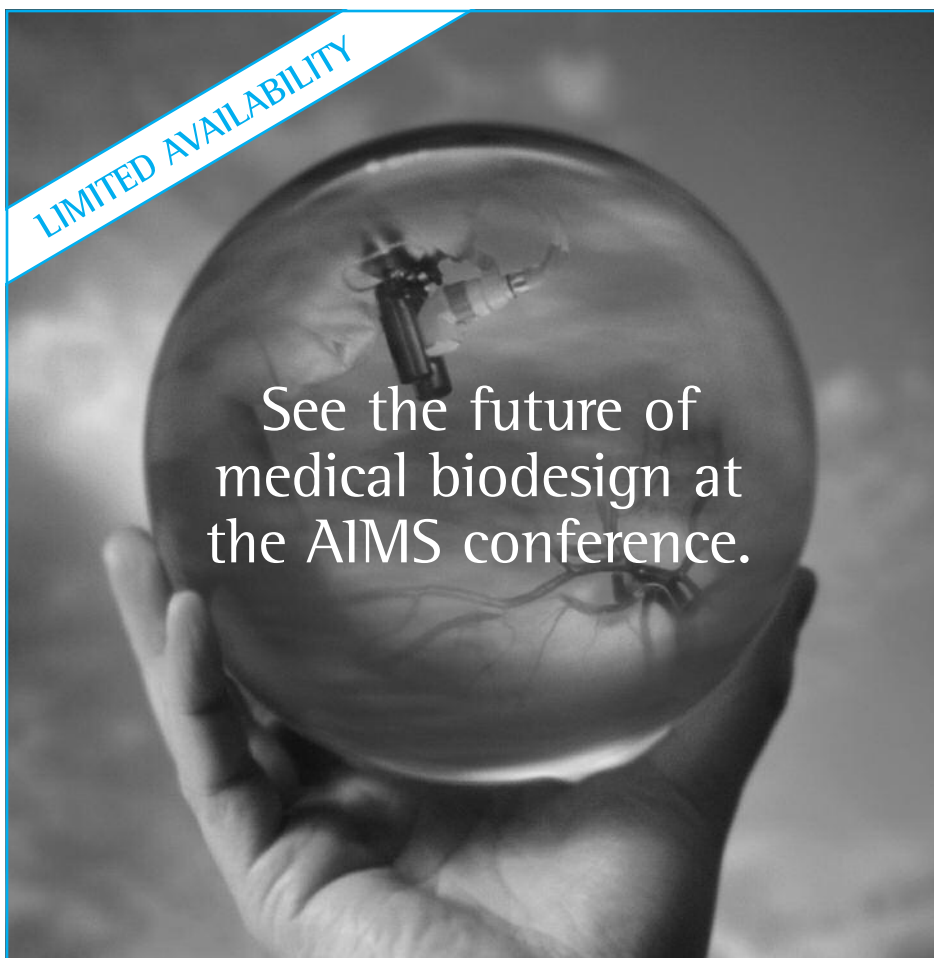
money if there was no chance it could protect these inventions? The *EE Times Newsletter* is parroting the anti-patent blather of other biased individuals, not thinking on its own.

I said this in my May, 2000 column, *The Sky Is Falling: Or, Over-Reaction to the Anecdote*, and I'll say it again here: Denigrating a patent as immoral isn't new. James Watt pointed out in the 18th century that he would probably never have made a success of his steam engine had he not been able to protect his invention:

I agree that by the late decisions we have seen to what lengths the arm of despotic law may be stretched to undo any man who is suspected of the heinous crime of getting rich by his ingenuity. The same spirit of leveling prevailed there that has shown itself in forming the Irish resolution. The one was taking away the exclusive right of a private person to the productions of his own ingenuity and the other was the wholesale taking away the exclusive privilege of the nation.

So here are some simple rules for companies confronted with accusations of patent infringement:

- 1) Read the patent. It won't hurt you.
- 2) Is it well written? Does it cite prior art? If not, consider a search. Use that thing called the Internet to look for free. If the patent passes the initial "straight face" test, and you still are skeptical, have a search done.
- 3) Ask the party accusing you for a claim chart. Many or most will provide one. If that party cannot do so, then you have a reason to say there is no infringement.
- 4) Take a look at the file history.
- 5) Stop disrespecting inventors who are individuals or who are at small companies. Maybe there is a benefit in their inventions for you, as well as for society.
- 6) Negotiate.
- 7) Be aware that "CEO" and "GOD" both have three letters, but that they are not synonyms.
- 8) Stop telling Congress we need nineteen kinds of patent reform. Tell Congress the PTO needs its funds. 



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