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The New Competitive Patent Landscape and Potential Resurgence in Competitor-to-Competitor Litigation: Why Strategic Prosecution Matters More Than Ever

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In recent years, patent enforcement between operating companies has been overshadowed by non-practicing entity litigation. The Patent Trial and Appeal Board (PTAB) loomed large as a challenger-friendly forum for invalidation, litigation funding was portrayed by both trade news and other media as solely a non-practicing entity phenomenon, and many operating companies shifted resources from quality to commodity in their patent filings. Corporate budgets sought to "do more with less."

But that landscape is ripe for change. The past year's developments, both at the PTAB and in the broader patent ecosystem, have created a favorable enforcement environment. As a result, competitor-to-competitor litigation may once again be attractive for companies looking to assert market dominance or capture market share. Third-party financing options are also on the table for funding disputes involving operating companies with commercially meaningful IP.

For in-house counsel and businesses that take IP seriously, these developments carry a clear message: *strategic, litigation-ready patent prosecution is again a competitive differentiator*. Even if a company is not actively planning an enforcement campaign against a competitor, building a portfolio capable of standing up in a courtroom can be a real strategic advantage. And the deterrence effect from a quality patent portfolio can be a meaningful asset for a company looking to pre-empt competitor activity.

The PTAB Pendulum Swings (Way) Back

The creation and rise of the PTAB reshaped patent enforcement and strategy over the past decade. When AIA trials at the PTAB were introduced, they were billed as an efficient check on questionable patents. PTAB practice evolved through minor swings of the pendulum, eventually hitting a reasonably predictable stride. But relatively high institution and invalidation rates at the PTAB often deterred operating companies from asserting patents, at least against sophisticated competitors with whom they may have had reciprocal exposure.

Over the course of the past year, that dynamic has rapidly evolved.[1] The institution rate has sharply declined, particularly with the shifting of the PTAB's approach to discretionary denial. And even for instituted cases, panels appear more willing to credit well-supported prosecution records and technical distinctions. Now, the probability-weighted value of a strong patent has increased. And for operating companies, the takeaway is clear: if the

PTAB pendulum remains at its current peak, favoring patent owners, patents that make for strong competitive assertion are again strategic assets worth cultivating.

The Rise of Competitive Enforcement Options

At the same time, the financial ecosystem around patent enforcement is changing in ways few predicted even five years ago. Litigation finance, once associated almost exclusively with non-practicing entities (or at least cast that way in the media), has developed into a more sophisticated capital market. Indeed, many funds actively seek opportunities to back operating-company plaintiffs, particularly in industries where technology convergence has blurred traditional boundaries, or in companies that have compelling narratives backing a technological advance.

Even if an operating company does not need (or want) to involve funders, *litigation-aware prosecution* that results in patents that are built to survive sophisticated invalidity attacks rather than churned out for numbers on the website or year-end inventor awards should be the goal. And patents that once might have languished in the portfolio may potentially be attractive candidates for assertion. Many operating companies with even modest patent portfolios are well-poised for an audit of potential "Rembrandts in the attic." This means dusting off patents that issued six or more years ago in view of the "settled expectations" developments at the PTAB. Coupled with quick, strategically prosecuted "new" patents, enforcement in a fast district court can be an attractive option for companies looking to minimize delay, and finding ex-U.S. counterparts where competitors manufacture or sell can quickly turn into global leverage.

Conversely, a large but low-quality portfolio is less a deterrent and more a cost center. The message is not that every company should be gearing up to litigate. It is that the economic value of enforceable patents is rising, and market participants are (or at least should be) reacting.

What This Means for Patent Strategy

Many operating companies have optimized their patent programs for throughput. Such programs reward filing numbers and allowance rates rather than comparative strategic alignment with business goals. In a world where patents were defensive checkmarks or negotiation placeholders, that approach made sense. But looking ahead to 2026 and beyond, that approach will find companies missing opportunities for additional leverage and commercial exploitation of their IP.

The companies best positioned for this new environment are those that have built their portfolios deliberately, with a strategic view of the relevant technical and commercial landscapes. They are asking:

- Are our claims simple enough for a layperson jury member to understand, even if the technology is leading-edge?
- Which assets map to key technologies in the marketplace?
- Have we considered potential alternative claim constructions? If *you* were challenging them, what questions would you ask an expert to poke holes in the claims during a deposition? And how can we make them better now, during prosecution, to avoid those challenges?
- Are we creating unnecessary estoppel or inconsistent statements during prosecution? What do we *really* need to say so that the file history is clear?
- Do our specifications support claim flexibility if the product or market evolves? Are they being drafted for future mining?

The answers to these questions do not depend heavily on budget, but on intent. Is patent prosecution being treated as a lower-value commodity or as a continued, strategic exercise aligned with the company's broader competitive posture and market realities?

Strategic Prosecution in Practice

Strategic, litigation-aware prosecution is not about making every patent a litigation weapon. But it does consider, meaningfully, which filings *could* become critical in a dispute, and ensuring those patents and their related families (including outside the United States) are built accordingly. Several practical approaches can help:

1. Layered Claiming and Specification Support

Avoid overbroad "catch-all" claims that invite scrutiny or lack clear reads. Instead, layer narrower, commercially-focused dependent claims with a good story. Ensure the specification provides sufficient written description to support claim adjustments down the road, in response to the market direction or clever design around attempts.

2. Prosecution Discipline

Maintain consistency in terminology both in the specification and claims, as well as replies to Office Actions. Be vigilant against creating estoppel through amendment or arguments that unnecessarily narrow claim scope. And make sure you have a comprehensive, but manageable, duty of disclosure process that is integrated between your in-house and outside counsel. No one wants a surprise accusation of inequitable conduct that could be avoided with thoughtful IDS practice.

3. Competitive Intelligence Integration

Prosecution should not occur in a vacuum. Integrate competitive monitoring to identify where competitors are filing, where they're abandoning, and which claim strategies they're pursuing. Additionally, understanding your competitors' supply chain (e.g., where they are manufacturing and selling) can also inform where you file or not. True landscapes of competitors' global portfolios can help make decisions for your own. Strategic prosecution anticipates and adjusts for—not reacts to—competitor moves.

4. Cross-Functional Collaboration

The best litigation records are written during prosecution. Coordination between in-house counsel, R&D teams, and outside prosecution and litigation counsel ensures that the claims being pursued in prosecution today will align with the litigation theories that might be asserted later on. Once any litigation enforcement is launched, collaboration windows eventually close once protective orders take shape with prosecution bars. Organizing teams ahead of time can effectively manage the continuity of operations so that strategic prosecution continues even after a complaint is filed.

Portfolio Triage

Not all assets are created equal. And not all assets warrant continued, intensive investment. So operating companies should distinguish between routine coverage filings and core enforcement-grade patents. The goal is to focus on quality and budget, where it will make the most difference. There's no avoiding it: strategic prosecution costs more. It requires deeper technical engagement, closer coordination, more careful drafting, and additional forethought that considers other patent families and family members. But in the current and foreseeable environment, it can be one of the most cost-effective investments a company can make. Modest investments now can provide significant future returns.

A patent that can withstand a later challenge (perhaps at the Central Reexamination Unit if activity shifts there from the PTAB), aligns with commercial interests, and deters competitors can be worth many multiples of its underlying cost of prosecution and maintenance. Meanwhile, the hard and soft costs of maintaining a large, low-quality portfolio, including autopilot annuities, internal time spent managing low-value assets, and the false comfort of inflated numbers of relatively weak assets often outweigh the marginal prosecution savings of less rigorous investment.

Moreover, as litigation funders evaluate patent portfolios as investment assets, the market is continuing to reward quality. Well-crafted, enforceable patents are more likely to attract financing, partnership, or acquisition interest. In that sense, the business case for strategic prosecution is not just defensive, but financial.

Operating Companies Need Multiple Options

Most companies are not planning a near-term patent war. But competitive dynamics are unpredictable. Partners today can be adversaries tomorrow; and new market entrants can rapidly become threats to established leaders. So *strategic optionality* in portfolio development, including the ability to assert or defend effectively if needed, is invaluable. Building that optionality takes time and deliberate prosecution choices. And even if enforcement is never actively pursued, the benefits accrue. Strong, well-curated patents enhance market power and can deter encroachment. They signal to the market that the company's innovation is both real and defensible.

In short, enforcement-grade prosecution is not about being litigious. It's about being prepared, showing yourself as a credible threat if attacked, and being positioned strategically in a shifting legal landscape where the pendulum of patent value is once again swinging toward strength.

Conclusion

The intersection of changing PTAB dynamics, and renewed competitive enforcement opportunities (including via litigation finance for operating companies) continues to materially alter the patent landscape. Operating companies should shift from viewing prosecution strictly as a commodity, and consider ramping up their focus on the potential opportunities that strategic prosecution can offer. Strong patents are worth having. Competitors may be emboldened to assert older assets now. Having assets to assert in return (even if newly issued) is important and valuable, if they are strategically prosecuted. The question for every innovative company is whether its prosecution strategy is keeping pace or will be left behind.

Footnotes

1 See recent Sterne Kessler alerts, Patent Office Introduces New Discretionary Denial Process for Challenges to Issued Patents, USPTO Proposes New IPR Rules; Director to Handle Institution Decisions, IP Hot Topic: More Details About Director Institution of AIA Trials – USPTO Hour Webinar Update.