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IMMIGRATION PANIC AND ECONOMIC COLLAPSE ARE BOOSTING EUROPE'S FAR-RIGHT

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Global IP Law Group: business leaders must keep abreast of patent changes

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Interview with: *Graham Gerst, Partner, Global IP Law group*

Patents play an important role in encouraging innovation and determining long-term economic prosperity. Understanding the global changes in patent systems is critical for business and government leaders seeking to ensure future economic success

With a mix of expertise in patent litigation, high-value international patent transactions and IP public policy, Graham Gerst, a partner with US-based law firm [Global IP Law Group](#), has a unique perspective on developments in the international patent system. According to him, that system is undergoing dramatic changes today that business leaders need to understand as they plan investment in this class of assets.

"Patents exist to foster innovation. They incentivise research and development", says Gerst. By giving inventors temporary legal monopolies over their inventions, patents

without protection from copying by competitors.

But Gerst also points to a somewhat counterintuitive benefit of that patent system: sharing technology. "It's important to understand that public disclosure is a critical part of the patent system. Patents are published and available to everyone to analyse, dispersing information about new inventions. Others may get new ideas of their own by reviewing a particular patent, or they may choose to license the patented technology and build upon it. Either way, it leads to further innovation", says Gerst.

Growth and strategy

Historically, patents were a quiet, US-centric industry. "Patents were viewed more as a defensive tool rather than one to be leveraged for strategic advantage or licensing revenues", says Gerst. That thinking began to change with the patent boom that began in the early 1990s. More than ever before, companies started competing aggressively through the patent system, particularly in high-technology areas. One aspect of this change was a sharp increase in patent litigation.

In the US, the number of patent lawsuits tripled between 1991 and 2000. Other countries with robust enforcement regimes soon saw similar growth. In Germany, for example, the number of patent suits doubled from 1995 through 2004. China went from having no patent lawsuits in the late 1980s to more patent lawsuits than in the US

New opportunities also exist for using patents as collateral for loans



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today. Another aspect of this boom was an explosion of patent applications. From 1990 through the present, applications worldwide increased almost 250 percent (see Fig. 1).

This increase in patent activity became particularly frenzied over the last five years, with major implications for business strategy. "Since 2009, we have seen an array of patent strategies that are either new, or are being used with a frequency and on a scale greater than ever before", says Gerst. For example, the last five years has seen patent transactions larger than anything seen before. The Nortel Networks \$4.5bn patent sale in 2011 started this trend, with just a subset of Nortel's patent assets generating more than the sale of all of its operating businesses combined.

In 2012, Microsoft spent \$1bn on 800 legacy AOL patents, and then sold a significant portion of those assets to Facebook for \$500m. Even Google's \$12.5bn acquisition of Motorola Mobility was viewed as patent-driven, and Twitter acquired 900 patents from IBM last summer. "These are the large deals. Many technology companies also have personnel focused on smaller patent transactions that do not get headlines but are significant", says Gerst.

New opportunities also exist for using patents as collateral for loans. That practice has long existed on a small scale, with companies collateralising single patents or small groups of patents. But nothing like the massive scale of Alcatel-Lucent's successful \$2.6bn patent-backed debt offering in 2012 had ever been tried.

Gerst also points to a new strategy that appeared over the last several years, known as 'patent privateering'. "Companies with large patent portfolios transfer some of their patents to patent holding companies, which then litigate and license the patents, paying the granting entity some of the proceeds." This model helps companies capitalise on their R&D investment by generating revenue from patents that otherwise would generate nothing. As Gerst explains, "companies are often reluctant to assert patents themselves because of the risk of countersuits, which typically end with both companies cross-licensing each others' patents with little money changing hands except that paid to lawyers for pursuing the litigation." According to Gerst, "although many large companies criticise the privateering strategy publicly, some of them quietly employ it nonetheless."

Pure patent holding companies have always existed, but they have grown dramatically over the last 10 years, and some are even publicly traded. Companies like Intellectual Ventures, Acacia, and InterDigital today possess thousands of patents and focus solely on generating revenues from those assets – and entirely new types of entities have sprung up.

There are also now defensive patent holding companies like RPX and Allied Security Trust. These companies acquire patents on behalf of dues-paying members to protect those from the patents being acquired. New platforms have been tried or are being developed for auctioning patents and trading patent licenses. "Not all will succeed, but the fact that they are being tried illustrates the creative ways people are thinking about patents", says Gerst.

Tumultuous times

Against this backdrop – one in which patent actions are litigated with greater frequency than ever before, patents are the subject of massive corporate transactions, and are employed as the central asset in a growing number of offensive and defensive business strategies – the patent system is taking on an increasingly international character. Even though a patent only grants rights within the country that issued the patent, traditional patent strategy often involved filing patent applications in just one or two countries. In the early 1990s, however, the Uruguay Round of GATT resulted in patent harmonisation standards. Greater worldwide uniformity and consistency in patenting procedures and rights followed, encouraging more investment in patents worldwide.

The entry of China in the global economy and the emergence of South Korea as an economic power also fostered more patent internationalism. Both countries have grown dramatically over the last 25 years, and patents are important to the products driving that growth – consumer electronics and telecommunications. Moreover, these countries are not just manufacturing centres; they are also giant markets, and, increasingly, the place where new innovation occurs. Each has improved its patent

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system and strengthened enforcement through the courts. Whereas 25 years ago, few considered filing patents in either country, both are an important part of many corporate patent strategies today.

In addition, international patent litigation strategies are more common today. One of the characteristics of the current smartphone patent wars is the simultaneous prosecution of multiple cases around the world. Courts in Japan, China, South Korea, Germany, France, the UK, and the US have been active. Lawyers today are more familiar with foreign enforcement and more willing to use it.

Antitrust regulators around the world are more active in the patent space. Officials in the US, EU, and China have all issued guidelines for the enforcement of patents that are essential for making or using a particular technology standard, such as the LTE wireless communications standard. Recently, China's Anti-Monopoly Bureau investigated Qualcomm's patent licensing after previously reviewing the patent implications of Google's acquisition of Motorola Mobility. "Neither inquiry was limited to Chinese patents", says Gerst.

This international aspect will increase, particularly in Europe. The next few years will see the creation of the Unitary Patent, a patent enforceable throughout Europe, and the Unified Patent Court, a body capable of making patent rulings covering the entire EU. "These changes will likely make Europe the most attractive venue for patent enforcement, given the size of the market, the reliability of the courts, and the low cost of enforcement", says Gerst.

All these forces leading to greater internationalism are only enhanced by the fact that the US is becoming less hospitable to patent rights. This trend has been building for a decade, but it accelerated over the last few years. An array of court decisions by the US Supreme Court and the US Federal Circuit – which hears patent appeals from across the federal court system – weakened patent rights in many respects. In the last year, for example, the Supreme Court issued four unanimous anti-patent decisions. Gerst notes, "Obtaining injunctions on directly competing infringing products is now quite difficult. Damages are lower. And many previously granted patents are now likely invalid."

Moreover, the 2011 American Invents Act is having an impact, creating new procedures for challenging the validity of patents. Few patents have survived, and more anti-patent legislation is being planned. One may wonder why the US would be scaling back patent rights when the rest of the world is strengthening them. Part of the reason is that US patent rights may have been too strong for too long. But, according to Gerst, "perceptions of judges, lawmakers, jurors, and the media have not caught up with the realities of the current US environment, which may prove detrimental to long-term US innovation."

Gerst ends on an optimistic note however, stating: "Regardless, these worldwide developments make patents an exciting area with great opportunity. Companies and countries that understand these changes will be able to position themselves to benefit from the new and evolving environment."

Fig 1 Patent applications

	2008	2009	2010	2011	2012
US filings	456,321	456,106	490,226	503,582	542,815
Non-US filings (billions)	1.45	1.39	1.49	1.64	1.8

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