

**Newsweek**

Levy: Changes in Patents May Be Pending

'Patent trolls' come out of the woodwork after companies have spent billions on a product.

By Steven Levy

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March 12, 2007 issue - Jon Dudas's flight was canceled, so he didn't make the first day of last week's Tech Policy Summit held in San Jose, Calif. Just as well. One of the subjects of the day was patents, and he could not have avoided hearing the familiar refrain that the system is "broken." Dudas, who is under secretary of Commerce and director of the Patent and Trademark Office, hates that term. As he explained to me over breakfast, after he belatedly arrived in California, the process is certainly not perfect—but even more certainly not broken. "It's the envy of the world," he says. "Brazil, China, other countries, they want to know how we do it."

I'll wager, however, that China would be less than delighted to emulate us if the consequences included events like the one in a San Diego courtroom last month. Following the rules of our system, a jury laid a whopping \$1.52 billion judgment on Microsoft for infringing on a patent involving the mechanics of playing MP3 music files. Here's what is outrageous: Microsoft had already licensed MP3 technology from the consortium that developed the standard, for \$16 million. Years later, after MP3 technology took off, Alcatel/Lucent (inheritor of patents filed by the fabled Bell Labs) emerged to file its suit, and won almost 100 times as much as what was determined a fair license fee originally (because Microsoft had unwittingly infringed that patent). Unless the judgment is overturned, more than 400 other firms using MP3 technology are prone to a similar ambush.

I'd also guess that China or Brazil does not envy the outcome of the case where Rim (BlackBerry) had to pay \$612 million to settle a case—even though the patents in question had been re-evaluated as invalid after the suit had been filed. Those are only two of a number of cases where patent holders used the system to extract huge, apparently unearned, sums. Other problems involve the granting of undeserved patents, which are nonetheless used to extract license fees from companies unwilling to challenge the patents in court.

A who's who of high-tech companies like Apple, Microsoft, Cisco and Micron—though they are themselves big patent holders—are banding together to urge reform. They say their products often involve dozens of potential patents, some of them obscure or poorly granted, and are vulnerable to "trolls" who come out of the woodwork with arguably relevant patents after companies have spent billions developing a product. Meanwhile, small companies can't afford to fight in court. Not everyone agrees. "The argument that the system is broken comes from people who have an ax to grind," says Nathan Myhrvold, CEO of Intellectual Ventures, a company that develops new ideas and also buys latent patents.

Rep. Howard Berman, a California Democrat who spoke at the Policy Summit, is pushing reform legislation, particularly to make it easier to challenge bad patents and mitigating the judicial outrages. He says that previous attempts to pass a bill were blocked by Republicans loath to offend the big pharmaceutical firms, which like patents just the way they are now. Berman is optimistic that he and his allies in both houses will pass a bill that could put a stop to nutty verdicts like the \$1.52 billion MP3 judgment.

Under Secretary Dudas himself says that though he's worked hard to improve patent quality (hiring more assessors and increasing the rejection rate), he does support legislation that would make it easier to challenge questionable patents. With the administration onboard and a Congress not as beholden to corporate America, we may just get a law that would make the system less broken. Or, as Jon Dudas would have it, even better.

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