

TechRoadmap *Directions*

Intellectual Property Issues of Interest to High Tech Companies

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Welcome

Ah summertime - the season of television reruns. This month, instead of watching TV reruns, I'm rerunning the March 2005 *Directions* that discussed what NetFlix was (or was not) doing with its patent. But like watching last summer's blockbuster movie on DVD, **this rerun has a bonus feature of an alternative ending**. If you remember the discussion you can FAST FORWARD to the new ending, otherwise, press PLAY now and read the whole discussion from "[So you have a patent; now what?](#)".

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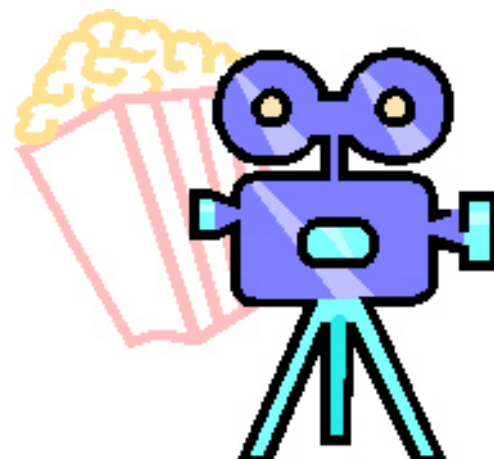
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A question came out of a class on commercializing emerging technologies at WPI. The class was discussing the case of Netflix, which apparently has a patent on its business model of online DVD rental. However, we've seen the entry of Blockbuster and WalMart into this market. What does this tell us about NetFlix patent strategy?



The class on commercializing emerging technology noticed that Netflix had obtained a patent on its business method for on-line video rentals. With 100 claims this was **not an inexpensive patent** to obtain. **Yet, it seems, Netflix has let Blockbuster and WalMart establish similar approaches to video rentals.**

The class wanted to know, "**Does a patent lose power if the holder fails to defend it?**" A second question they might have asked is "**Why would Netflix let competitors infringe?**" Both questions get to the heart of your IP strategy; if you're not willing to defend your patent rights should you be spending money on a patent in the first place? Would you be better off hiring the staff you need to get your product to market or improving your product?

Regarding the first question (and remembering that only an attorney can give you legal advice), in general (unlike a trademark), a patent is intellectual property and **you do not lose your property rights** - the "power" of your patent - by failing to defend it. You may, however, lose the ability to stop the specific infringer you know about but ignore.

The second question - why hasn't Netflix asserted its patent against its competitors - really addresses actions that you, as a patent holder, have control over. There are at least five considerations:

- Unless you have additional info, **you don't know that Netflix isn't taking action.** Such action takes time to show up in public.
- **Perhaps Netflix has decided to license** their competitors because they feel confident of being able to compete on quality of service and operating efficiency. That way they make money whether they rent you a movie or Blockbuster does.
- Without a hearing, **none of us knows if Blockbuster is infringing** - remember you can't patent an idea, so a court has to construe the patent claims and (typically) a jury has to compare the infringer's "product" to the claims to determine infringement. Maybe there's nothing for Netflix to sue about.
- **Business methods patents are usually weak** and hard to defend (personal observation). Maybe Netflix is rethinking its strategy
- **Perhaps Netflix doesn't have the money** to pay for an infringement suit. (Which then begs the question of why did they spend the money to get a patent).

Fast Forward

The Mercury News

MercuryNews.com

As reported in the San Jose Mercury News in June (click logo above to read whole article), **Blockbuster accused Netflix of manipulating the U.S. patent system** in a devious effort to monopolize the booming market for online DVD rentals. And why did Blockbuster file this suit? According to the News, "the antitrust allegations represent Blockbuster's **counterpunch to patent infringement claims** Netflix filed two months ago."

A year ago March I speculated **why Netflix might not be enforcing** its 2003 patent. Now we know why; **it was waiting for its second, stronger patent** to issue (which it did in April 2006), at which time it immediately acted against Blockbuster.

According to the News, Blockbuster framed **Netflix's patent claims as a "sham"** and one of Blockbuster's attorney's is quoted as saying "**Netflix is trying to monopolize this space** on the Internet and restrain competition to the detriment of Blockbuster and the public".

While I realize these quotes are pre-trial posturing, I can only say "**Excuse me?**" An issued patent has the presumption of validity and **isn't the whole point of a patent to reward an inventor with a limited time "monopoly"**.

Reading to the end of the article we see that **Blockbuster's real defense** is the claim that Netflix's patent(s) should be invalidated because they failed to live up to their "duty of candor" by **failing to inform the PTO that NCR was trying to enforce its own patent against Netflix while Netflix' patent was pending.**

Your Thoughts?

I always enjoy reader feedback. Let me know your thoughts on this or any other IP topic. Your experiences interacting with the patent systems are particularly welcome. Reply to this email or send me a note directly at bruceahz@techroadmap.com

Disclaimer

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