

# PATENT FILE

## Unicorns: the next troll bait?

What happens to the patents when a \$1bn start-up dies?  
A familiar monster will appear, says **Paul Hunter**



Paul Hunter

The cover story from the February 2015 issue of *Fortune* describes the recent phenomenon of venture-backed start-up companies valued more than \$1bn.<sup>1</sup> In the article, *Fortune* lists 80 companies recently valued at \$1bn or more,<sup>2</sup> with the list including promising technology companies such as Uber, Dropbox and Xiaomi. As the article notes, many previous successful start-up technology companies, including Google and Amazon, were never valued at \$1bn while privately held, but a billion-dollar valuation appears to be the new standard in start-up credibility.

However, the unicorn moniker implies something fanciful or fictitious about the valuation. Clearly, the 80 unicorns identified by *Fortune* cannot all be worth 10 figures, can they? What happens when the unicorn never materialises into a reality? At such high valuations, what results could possibly be a success for investors dreaming of big pay days? Yes, some unicorn companies will go public and become household brand names. Many, though, will be acquired for pennies on the dollar or simply wind up, leaving investors and the public wondering if the unicorn companies were all just fantasy.

The potential exists for the unicorn fantasy to turn into a nightmare featuring another creature of fantasy – trolls – or, more specifically, patent trolls. Hoping to obtain exclusive rights to a piece of the marketplace, unicorns often use investor funds to hire patent attorneys and file patent applications covering their technology systems and methods.

When the hopes and dreams of the unicorns fade, though, investors are likely to insist that resulting patents be sold off to provide a better return on the investment. The drama then becomes dark. Patent trolls step up to be first in line to acquire the patents.

A patent troll is the pejorative nickname for

a non-practising entity (NPE), whose business model is solely to acquire patents and go after litigation settlements from large numbers of technology users. The patent-buying troll is unlikely to take the form of some seedy mobile character with an East Texas address – more patent troll litigation occurs in the East Texas towns of Marshall and Tyler, Texas, than anywhere else combined – with the buyers more likely to appear very legitimate.

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Investor groups or enterprising lawyers may appear with cheque in hand ready to buy patents from the struggling unicorn company. Specialty firms of lawyers are frequent buyers of patents with the prospect of taking the newly

acquired asset and finding as many licensees as possible. Seemingly less dangerous buyers may include established, public companies and consortia of companies. Yet, even these established companies may purchase the unicorn patents with the intention of monetising them through licensing or litigation.

Technology companies should consider acquiring patents from failing companies, like unicorns that don't live up to their promise, so that the patents do not fall into the hands of patent trolls or competitors. A few years ago, the Nortel bankruptcy included a huge patent sale. A number of technology companies joined together to buy the Nortel patents and keep them out of the hands of entities that could sue them.

Unlike established companies, unicorns place little or no resources to licensing or litigating patents. Unicorns focus on building customer bases, generating exposure in the marketplace, obtaining customers or followers and moving towards profitability. The trove of patents owned by unicorns provides investors with hope that the unicorn has established barriers to entry for copycats. The patents also provide gravitas and legitimacy to the company's technology. Enforcing the patents seems far afield from the unicorn's objectives.

Moreover, unicorns are often in nascent technologies that have not matured yet. Unicorns' fields of use are not yet ripe with patent damages. Simply stated, at the early stages of a technology's development, patent enforcement by licensing or litigation doesn't make sense. However, the equation changes when companies start deriving revenues from the technology and others enter the market to compete.

The following table (next page) lists a

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Table 1

RANK	COMPANY	VALUE (bn)	SECTOR	HQ	YEAR FOUNDED	NO. OF US PATENTS	PUBLISHED APPLICATIONS
1.	Xiaomi	\$46.0	Consumer Electronics	Beijing	2010	12	98
2.	Uber	\$41.2	Transportation	San Francisco	2009	1	19
3.	Palantir	\$15.0	Big Data	Palo Alto	2004	64	43
4.	Airbnb	\$13.0	Lodging	San Francisco	2008	0	2
5.	Dropbox	\$10.4	Cloud Storage	San Francisco	2007	3	8
6.	Snapchat	\$10.0	Social Media	Venice, CA	2012	6	2
7.	Theranos	\$9.0	Laboratory Services	Palo Alto, CA	2003	32	40
8.	Square	\$6.0	Mobile Payments	San Francisco	2009	61	58
9.	Pinterest	\$5.1	Social Media	San Francisco	2008	0	2
10.	Cloudera	\$4.1	Big Data	Palo Alto	2008	3	13
11.	Spotify	\$4.0	Music	Stockholm	2006	4	29
12.	Pure Storage	\$3.6	Storage (IT)	Mountain View	2009	28	20
13.	Stripe	\$3.6	Mobile Payments	San Francisco	2009	0	11
14.	Atlassian	\$3.3	Software	Sydney	2002	0	1
15.	Bloom Energy	\$3.0	Alternative Energy	Sunnyvale	2001	122	67
16.	Jawbone	\$3.0	Consumer Electronics	San Francisco	1999	8	42
17.	Moderna Therapeutics	\$3.0	Drug Discovery	Cambridge, MA	2010	14	185
18.	Magic Leap	\$2.0	Electronics (B2C)	Dania, FL	2010	1	11
19.	Nutanix	\$2.0	Business Software	San Jose	2009	6	1
20.	DocuSign	\$1.7	Productivity Software	San Francisco	2003	11	11
21.	MongoDB	\$1.6	Database Software	New York	2007	4	4
22.	LivingSocial	\$1.5	Online Deals	Washington D.C.	2007	2	7
23.	Jasper Technologies	\$1.3	Communications Software	Santa Clara	2004	37	11
24.	Sunrun	\$1.3	Solar	San Francisco	2007	10	7
25.	Evernote	\$1.2	Productivity Software	Redwood City	2007	21	34
26.	Proteus Digital Health	\$1.2	Monitoring Equipment	Redwood City	2001	91	52
27.	Pivotal Software	\$1.1	Business Software	Palo Alto	2013	46	17
28.	Shazam	\$1.0	Music	New York	2002	7	8
29.	CloudFlare	\$1.0	Web Publishing	San Francisco	2009	21	10
30.	Kabam	\$1.0	Gaming	San Francisco	2006	44	13
31.	Lookout	\$1.0	Mobile Security	San Francisco	2007	48	43

selection of unicorn companies from the *Fortune* article, along with a count of the number of US patents and published US patent applications owned by each.

The patent industry has significantly changed during the two decades I have been practising law. In the late 1990s, like the proverbial question about unseen falling trees making sounds, a patent would issue and seemingly no one would notice. If a patent issues and no one notices, does it really do anything? Now, I routinely receive unsolicited inquiries from patent brokers, licensing entities and even established companies, asking if a patent I prosecuted could be bought or licensed from the patent owner. Websites track the publication of patent applications from companies like Apple, attempting to get an insight into possible future products.<sup>3</sup> Investors follow patent filings, patent assertions and patent judgments to aid in investment decisions. Recently, investment groups filed challenges to patents using the *inter partes* review programme at the US Patent Office in an effort to affect patent owners' stock price and profit from the change. Patents attract much more attention now than in the past.

A proactive in-house IP counsel should consider the following strategic steps in view of the patents owned by unicorn companies:

- Evaluate whether patents and patent applications for unicorn companies pose potential threats to current or future technology offerings for counsel's company.
- Inform the general counsel of the potential risks from the patents potentially falling into adverse hands.
- Obtain opinions from counsel regarding non-infringement and/or invalidity to provide a defence to charges of willful patent infringement.
- Perform a cost-benefit analysis of potential exposure versus cost of a licence, and – depending on the analysis – obtain a licence to the patents from the unicorn company. A licence from a unicorn company is likely to be less expensive than litigation and eventual settlement with a patent troll. Such a licence generally follows the patent, if it is sold.
- And, consult with other industry participants about forming a group to acquire the patents at a shared cost to remove the patents from the patent troll market.

Much like the astronomical valuation of unicorn companies, the patent filings of unicorns have not gone unnoticed. Patents figure into the pricing of IPOs and valuations for investment rounds. Companies looking to provide similar technologies study the potential for blocking patents, looking for design-arounds or safe harbor implementations that avoid the claims. Companies also search for prior art defences and weaknesses in the patents.

When the lustre of a unicorn company begins to fade and investors begin to worry the return on investment will not be as promised, the patents that once held so much promise for the company become assets for sale to the highest bidder. Whoever the buyers of the patents from unicorn companies may be, they will come and – unlike the cute, docile unicorns of fantasy – all of them should be feared.

#### Footnotes

1. 'The Age of the Unicorns.' <http://for.tn/15vwj0v>
2. <http://trn.ch/1kgIEHq>
3. See <http://www.patentlyapple.com>