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Eye of the storm

Steve Borsand has been Trading Technologies (TT)'s vice president, intellectual property for three years. His remit at the firm includes TT's much-discussed software patents and the subsequent litigation based on them. In an exclusive interview, he spoke to *FO Week*'s **Jim Kharouf** about patents, litigation and what he believes are misperceptions regarding TT.

When you joined TT, what was your focus? Was it always related to the two granted patents?

I joined TT in January 2002. My goal was to help TT protect its existing intellectual property, including MD Trader, and to create a programme to generate additional intellectual property in the arena of electronic trading. Today, my main focus is litigation and licensing.

What do the TT patents cover?

While I can't get into a legal discussion about the patents, I can address some misconceptions. Some have incorrectly said TT's patents broadly cover every type of order entry screen that shows market depth. Hopefully, the court's opinion in the recent preliminary injunction ruling clarified this for most people. TT's patents in litigation are directed to a specific type of order entry screen. In layman's terms, these two patents cover an order entry screen that provides for single action order entry relative to static prices. When you consider all asset classes, the vast majority of order entry screens in use today for electronic trading do not violate our two patents. Also, the patents are not limited to order entry screens for just futures, as some have said.

Some claim that TT's patents will not hold up in Europe because 'business method' patents are not permitted there and because of Espeed's argument that there was a prior use of the invention before the patents were filed. What are your views on that?

The patents are, in fact, not business method patents. Business method patents cover a way of carrying out a business process, such as a way of processing a loan or a particular trading strategy. TT's patents cover a tool or device used for order entry, not a business process. The commercial embodiment of the device happens to be implemented in software. The fact that the patents do not relate to business methods is evidenced by the patents TT obtained in Europe, where business method patents are not permitted.

"The industry and Espeed have been conducting a worldwide hunt for prior art for a long time. So far they have not come up with anything that is more than what the patent office considered."

In Europe, the general rule is a patent needs to be filed before the invention is publicly used. TT complied with this rule. Espeed's prior use arguments relate to activities that were indisputably not done publicly. Under European law, these activities do not implicate TT's European patents in any way.

Some believe the inventions covered by the patents were not new and that 'ladders' have been around for a long time. Do you have a response?

Interestingly, while there has been a lot of talk, no one has brought forth such prior art. TT searched the world for prior art relevant to the MD Trader invention. All of that prior art was considered by the

patent office in deciding to grant TT's two patents. In addition, the industry and Espeed have been conducting a worldwide hunt for prior art for a long time. So far they have not come up with anything that is more than what the patent office considered and that credibly challenges the original and innovative nature of MD Trader, which was released in 2000. To my knowledge, very few patents have gone through such an extensive vetting process.

Also, when MD Trader was first released, it was viewed as a radical departure from the normal order entry screens which had been in use for over ten years. MD Trader actually has several drawbacks that made it counterintuitive at the time. For example, MD Trader requires a lot of screen space, something traders cherish. Also, MD Trader allows for the market to move on the screen, something which ran counter to the traditional approach in order entry screens where the market was displayed at a fixed location on the screen. After meeting some initial resistance, it was ultimately a huge success.

The innovative nature of MD Trader has also been affirmed under penalty of perjury by 32 independent individuals who have unparalleled experience in electronic trading. These individuals described the invention using words like 'revolutionary,' and 'a paradigm shift.' So, with all due respect, the people making the comments about the originality of MD Trader do not have their facts straight.

A variety of things have been said about TT and its patent litigation. What do you think are the misperceptions of TT's strategy here?

Some say TT is attempting to use the patents in an unethical way that will hurt the industry. I think much of this is based on a misunderstanding of the open letter [see *FO Week* Vol 9 No 50]. Admittedly, the open letter was unconventional. But it is nothing more than a proposal and a transparent way to lay out alternatives for the industry.

Any business with a patent it wants to protect will consider doing one or more of the following: pursue infringers, increase pricing to reflect the value of the protected innovations, or sell the company or the intellectual property to someone that may be better equipped to leverage the invention. Most companies go about pursuing these standard approaches in secret; TT should be applauded for revealing its cards and offering up a creative alternative to these standard approaches.

The more interesting story here is that no one has offered up any alternative creative solutions. Also, no one writes about whether it is ethical to copy protected intellectual property or how copying a product already on the market actually stifles innovation in our industry. To those who make these comments, I like to say 'put yourself in our shoes and tell us what you would do?'

"The open letter was unconventional. But it is nothing more than a proposal and a transparent way to lay out alternatives for the industry."

I also think that those making 'the sky is falling' type comments need to take a step back and put the issue in perspective. The patent system permits the protection of inventions far mo]re valuable than an improved order entry screen. For example, pharmaceutical companies regularly patent and prevent others from making and selling life saving drugs.

How pre-planned were the cases that have been brought? Had all four firms sued been targeted, and was the timing deliberate?

TT does not want to be in litigation. But so long as companies chose to copy our innovations, we will have no choice. And there is no need for protracted litigation if people respect our intellectual property rights, by either stopping their infringement or obtaining permission from TT. This is exactly what Goldenberg Hehmeyer and Kingstree did [see *FO Week* Vol 9 No 39 & 42].

Because there is widespread infringement, we are forced to prioritise. While I cannot comment generally on how we do that, I can point to the publicly available arguments that we made in the Espeed case. As discussed in some of our briefs, when an exchange or entity in a related business chooses to leverage that business and try to get into TT's business, that poses a serious threat to TT. In fact, it poses a serious threat to any ISV, like TT, focused on making and selling order entry software.

Following Espeed's recent claims, how confident are you that there is no prior art to be displayed and that the patented innovations were not in use a year before patent applications were filed?

We are confident in our case. If you are referring to the counterclaims Espeed recently attempted to file, they were just a formality and added nothing new. Espeed presented all of the same arguments as defences against our patent in response to our motion for a preliminary injunction and all of these defences were addressed in the court's preliminary injunction ruling.

How many ongoing infringement cases can TT's legal and financial resources support?

TT is prepared to do whatever it takes to defend and protect its intellectual property.

Are there more cases to be brought?

If people respect our patents, there will be no need for litigation. But, as long as people are infringing, we will have no choice but to protect ourselves.

What's the difference between suing to defend a patent and suing as a profit model? Is TT doing either one, or both?

When people make this distinction, I think they are talking about how some patent owners do not have any business relating to the patent and are suing just to make money. TT, of course, is not in such a position. Our patents relate to MD Trader, which TT first brought to the marketplace and was subsequently copied by many entities. We view our enforcement of the patents as necessary to protect our ongoing software business. If people are just permitted to copy such innovations then the business would become unviable.

"If exchanges or FCMs are able to compete with ISVs like TT by copying their innovations, ISVs do not stand a chance."

Legally, however, there is no difference. All patent infringement lawsuits involve the same legal burdens.

Do you agree with those who say TT's actions are anticompetitive?

No. The idea behind patents, which finds its basis in the Constitution, is to promote innovation by rewarding inventors with a limited time of exclusivity in return for the inventor disclosing the invention to the public. This is exactly what happened with MD Trader. Harris Brumfield came up with an invention he could have kept secret and used for his own benefit; instead, he allowed the invention to be disclosed to the world and turned it into a product. He and TT did this based on the ability to protect this innovation with patents. It seems unfair, now that the industry has benefited and that Harris and TT have lived up to their part of the bargain, to say that the patents should not be enforced.

Without the protection of patents, there would be little incentive for companies to make substantial investments in R&D. This is especially true for smaller companies like TT that specialise in a particular area and even more true for software companies. Without patents, the copyists stand on equal footing with the innovators and this does not promote competition. In the long run, encouraging innovation is what really promotes competition. Patents not only protect innovation but force others to innovate to compete. There is already evidence of this dynamic at work in our industry.

Also, TT's enforcement of its MD Trader patents is pro-competitive on a more macro level. TT specialises in front end order entry functionality. Specialists are better at developing innovative products than more diversified companies. If exchanges, such as Espeed, or FCMs are able to compete with ISVs like TT by copying their innovations, ISVs do not stand a chance. This is true because exchanges and FCMs are in a position to leverage other parts of their business to subsidise front end software. If this happened, you would see less competition on the front end and other parts of the industry. While exchanges may want to release front end products that would result in more fees for the exchange, I doubt they would have the incentive to release new products that promote competition between exchanges.

Commodity Futures Trading Commission has said it would like to create a centre for prior art in the futures industry with US Patent and Trademark Office (USPTO). What are your thoughts on that?

I think it is a great idea. In fact, TT has participated in industry partnership meetings with USPTO to help it become more educated in the area of electronic trading. I think the more of this that is done the better.

Some say USPTO is not equipped to determine original and patentable business processes in derivatives trading. What can you say about your experience there? What work did you do on the patents prior to them being granted?

The patent office has certainly been criticised for not having enough knowledge to effectively prosecute patent applications in the area of business methods. Over the past five or more years, the patent office has worked very hard to improve in this area. The group handling these patent applications, including TT's, now has an allowance rate of less than 16% compared to the overall patent office allowance rate of 70%. Many dealing with the group and whose knowledge is up to date believe the pendulum has actually swung too far and the patent office is being too strict.

The criticism has more merit for patent applications that truly relate to business methods. An example of that would be a patent directed to a business process. As I mentioned before, TT's patents are not business method patents.

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As far as my specific experience, the patent office was incredibly well equipped to determine the patentability of these inventions. TT went to extraordinary lengths to make sure that the patent office had all possibly relevant material in reviewing these patent applications. We did this by extensively doing our own search of potential prior art. As a result, the patent office considered over 50 references in reviewing these patent applications. I say this is extraordinary, because a patent applicant has no legal duty to go out and search for prior art. At one point, we even took the unusual step of delaying the issuance of the patents so that the patent office could fully consider some additional prior art that was identified by TT. This caused a one and a half year delay in us obtaining the patents. So, I am confident that the patent office did a thorough job in reviewing both TT's patents.

Is it true that someone who develops his own software and only uses it for himself need not worry about patent infringement?

No. Anyone who makes, uses or sells something that is covered by a patent is liable for patent infringement. Even if it is used in private it does not matter: it is still an infringing act.

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