

Intellectual property

The trouble with troll-hunting

NEW YORK

Rules to curb frivolous patent claims may encourage infringement

NUCURRENT, A STARTUP in Chicago, has come up with a way to charge electronic gizmos wirelessly—a nifty trick for devices such as smartphones. So nifty, in fact, that Samsung, a giant South Korean device-maker, uses it in its mobile phones—or so NuCurrent claims. In 2018 NuCurrent sued Samsung in America for using its technology without paying royalties. In February Samsung denied NuCurrent's allegations in a court filing. Then, between March and June, it filed seven legal challenges against NuCurrent's patents. Navigating each will cost NuCurrent between \$500,000 and \$1m, says its boss, Jacob Babcock—a lot of money for a firm with 35 employees and no in-house lawyers.

Predicaments like Mr Babcock's are increasingly common. Paul Michel, a former top judge on America's patent court, attributes them to an “unco-ordinated overcorrection” to the plague of patent trolls, who accumulate patent rights with an eye to extorting payments from supposed infringers. To fight them, America's government has weakened some intellectual-property protections, notably by reducing the threat of an injunction to block sales of the technology in question. In 2012 it created the Patent Trial and Appeal Board (PTAB) to hear retrospective challenges to a patent's validity. And Supreme Court rulings have made it easier to prove patents invalid by narrowing the criteria for what constitutes an eligible patent.

The well-meaning rules appear to have beaten back the trolls; the number of patent disputes this year is down 37% from 2015, according to Unified Patents, a research firm. The PTAB has invalidated thousands of patents. But the reforms have strengthened the position of big firms in relation to the little guy, say entrepreneurs and venture capitalists. Christopher Coons, a Democratic senator critical of the rule changes, has spoken of a “steady erosion of patent rights”. Worse, Mr Coons has argued, they create perverse incentives for big companies to flout patents. Boris Tekler, Apple's former patent chief, observes that “efficient infringement”, where the benefits outweigh the legal costs of defending against a suit, could almost be viewed as a “fiduciary responsibility”, at least for cash-rich firms that can afford to litigate without end.

Samsung's fellow tech giants, including Apple, Google and Intel, have filed numer-

WHEN COSTCO, an American discount retailer, opened its first store in Shanghai this August, huge crowds of shoppers forced managers to shut it down. The world's 250 biggest retail chains are present in ten countries on average and get about a quarter of revenues from international operations. Expansion into foreign markets looks like a no-brainer for retailers, then?

Not so fast. Many firms' foreign revenues have been tepid (see chart). This week Tesco was reported to be considering the sale of its 2,000 stores in Thailand and Malaysia. Since 2013 the British supermarket chain has folded its unprofitable Chinese operations into a state-run firm, unwound a \$2bn foray into America and exited South Korea and Turkey. Germany's MediaMarkt and America's Best Buy, big electronics retailers, and Home Depot, an American home-

improvement giant, all flopped in China. In June Carrefour, a French supermarket chain, said it would sell 80% of its Chinese business. Even Walmart, the world's largest company by revenue, has found foreign expansion tough. It retreated from South Korea and Germany in 2006, and in 2016 said it would close 269 stores worldwide.

Foreign revenues help insulate firms from downturns in domestic markets. But global retailers face nimble local rivals overseas, who often understand consumer preferences better than foreigners do. Foreign ventures do not always offer refuge from domestic competitors, either. Walmart paid \$16bn in 2018 for a majority stake in Flipkart, a loss-making Indian e-merchant, hoping to profit from serving India's rising middle class. Instead, it is battling Amazon for their custom.

Global retail

Aisle and hopper

NEW YORK

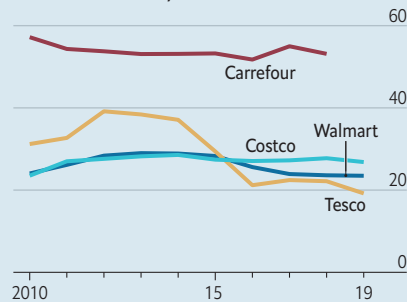
International expansion is a mixed bag for big retailers

Bringing home the groceries

Market capitalisation, December 11th 2019

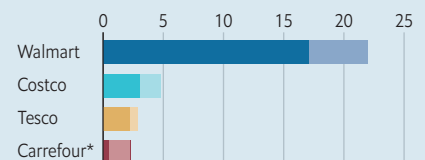


Overseas revenues, % of total revenues

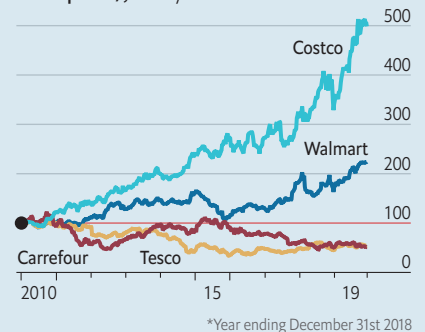


Sources: Bloomberg; company reports; Datastream from Refinitiv

Operating income, financial years ending 2019, \$bn



Share prices, January 1st 2010=100



*Year ending December 31st 2018

ous patent-validity reviews. Big Tech is, predictably, firmly opposed to tougher rules, which Mr Coons and other have proposed. Supporters of strengthening note that weakened patent protection has coincided with a decline in the share of American venture capital going to patent-heavy fields like advanced manufacturing or medical technology, from 21% to 3% between 2004 and 2017, according to a study

commissioned by the National Venture Capital Association, an industry body. Richardson Oliver Insights, a research firm, reckons the average value of an American patent traded in the secondary market fell by 58% from 2013 to 2018. Feebler intellectual-property rights may not be the sole explanation. But having long harranged China for its disrespect of such rights, America now finds itself badgered, too. ■