



## JUDGMENT CALL

# The case against patent auctions

*Informed buyers conducting deliberate negotiations will create the most efficient market*

by Ron Epstein  
and Joe Chernesky

The attraction of the recent Live Patent Auction modeled on auctions for luxury goods is understandable. Patents are generally recognized as one of the most underutilized assets in business. The expertise and required to monetize them has historically led to many patent owners never collecting a tangible return on their invention and investment.

Auctions are great for selling commodities or objects with widely understood valuation methods like wine, cars and art. Patents are more like commercial real estate—potential buyers need to do their homework on such issues as the property's location, current occupants and habitability. Patent buyers need answers to similarly fundamental questions.

But a fast-moving auction with multiple bidders might not offer the right atmosphere for potential patent buyers to conduct the kind of investigation that a \$1 million bid would require. The nature and complexity of these transactions, which often include patents with complicated histories, the need for confidentiality of the buyers—and often the sellers—and the requirement for grant back rights or an ongoing relationship between the parties, requires a somewhat slower, more engaged negotiation between the parties than an auction provides.

Patents have actually been bought and sold for years, mostly through privately brokered transactions managed somewhat like investment banks supporting M&A transactions or at public auctions (as is most often the process for bankrupt companies). The market value of standalone patent sales (not including the value of patents in M&A or other types of collaborative transactions) is estimated to be well over \$500 million annually. Many technology companies like **Intel Corp.** and **Broadcom Corp.** have active patent purchasing programs and acquire patents for strategic or tactical purposes. There are also patent investors such as **Intellectual Ventures LLC** and **Acaria Research Corp.**, whose business

models seem to be more focused on a return on investment for the patents themselves.

Most patent-buying companies do not advertise their interest in order to maintain the confidentiality of their strategies and goals. And most of these companies will never appear at a live, public auction.

Understanding why and how companies buy patents is the most misunderstood aspect of patent transactions. Patents are knowledge assets as well as property rights. To make an informed decision to acquire this knowledge asset, the buyer needs to know two things. First, the buyer needs to know whether the patent is valid, enforceable and infringed, which can be a very difficult and expensive process. Although each buyer can do this analysis, it is expensive, time-consuming and requires technical, patent and business expertise specific to the underlying technology of the patent. This analysis is subjective and requires a person to understand and interpret the claims of the patent, the relevance of those claims to actual or planned products, as well as to provide a risk assessment on the asset itself. A quantitative tool is unable to accurately provide this information.

Second, a prospective buyer must know the history of ownership and any potential problems such as existing license agreements, covenants and other encumbrances. This scrutiny often requires confidential or private information from the seller. Many times, the seller has not thought of this or the information is not readily available. This process for an exchange of information between the seller and prospective buyers is most similar to the process used when selling companies.

In addition, the value of the patents will vary depending on how prospective buyers expect to use them. The value to a company that is in active patent litigation and in need of patents to assert back, for example, is different than the value to a company that needs patents to support products going into new markets or the value to a patent investor looking for a high ROI.

Transactions advisers and interme-

diaries play an important role in this process. These service providers are typically well connected with prospective buyers of all types—companies, patent investors and other buyer brokers. They are also typically experienced at the process of collecting the required information, presenting that information to prospective buyers, responding to questions and requests from the buyers and facilitating the negotiations between the parties. A good patent broker runs an effective yet confidential auction-like process by building interest among many prospective buyers—not just those in a position to move quickly and willing to take higher risks on the patents they are bidding on—and actively selling the portfolio as opposed to waiting for buyers to show up. This process usually takes several days or weeks and allows buyers to make an informed decision and get comfortable (and necessary approvals) with the higher purchase price as well as lowering the risk of a mistake by obtaining more information on the history of the patents.

Because most companies will not attend public auctions and these companies are typically willing to pay the greatest amount for patents of interest, patent auctions will have limited appeal

and effectiveness as a means for patent owners to sell their patents. However, as the level of awareness of the market for buying and selling increases and as patent owners become better informed on the process and resources available to them, the infrastructure of this emerging market will continue to develop. This dynamic will result in greater liquidity, which will benefit both buyers and sellers.

While the promoters of auctions are energetic and sincerely want to increase the patent marketplaces' liquidity, live auctions are not suited for complex assets where information, negotiation and informed decision-making yields the greatest results for both buyers and sellers. As the market for patents becomes more efficient and the volume of transactions grows, advisers will become more sophisticated, knowledgeable and more connected with interested buyers. The complexity of the transactions will not change, but as the market becomes more efficient, both sellers and buyers will be better served. ■

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## Allianz Capital buys German printing machinery group

by Jonathan Braude in London

**PRIVATE EQUITY** German buyout shop Allianz Capital Partners GmbH has agreed to buy a 160-year-old manufacturer of printing machinery from **MAN AG**, a Munich-based transport engineering group that now plans its own shopping spree.

Allianz, the buyout arm of German insurer **Allianz AG**, will pay €875 million (\$1.1 billion) for MAN Roland Group, it announced Friday, putting flesh on an agreement first announced in outline in March. MAN AG will retain 35% of the company, while Allianz will acquire the remainder. The two sides will invest €275 million of equity in the joint venture, while a consortium led by **Bayerische Hypo- und Vereins-**

**bank AG**, or HVB, will provide debt.

MAN Roland, which will be groomed for an initial public offering expected four or five years from now, is the second-largest printing machinery producer worldwide after German rival **Heidelberger Druckmaschinen AG** and is the world leader in newspaper printing machines. The company, founded in 1846, employs 8,800 people in 120 offices worldwide and generated 2005 Ebit of €53 million on sales of €1.74 billion.

**Deutsche Bank AG** is advising MAN AG while Axel Epe and Burkhard Richter of **Freshfields Bruckhaus Deringer** are counsel. Allianz did not use a financial adviser but turned to a legal team led by Georg Thoma at **Shearman & Sterling LLP**. ■