Comments on Patent Assertion Entity Activities

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Summary

Patent assertion entities (PAEs) provide a valuable service to inventors. As Professor Chien said in her presentation, PAEs "give the little guy a chance." An individual inventor or smaller entity, whether it's a company, university, or NGO, generally does not have the resources or the expertise to enforce its patents. PAEs such as IPNav play an essential role in providing inventors a mechanism to receive compensation for their inventions which could otherwise be misappropriated by large companies with impunity.

We believe it is important to distinguish between "white hat" and "black hat" patent monetization:

- "Black hat" patent monetizers use "spam"-type methods to seek enforcement of weak patents where there is dubious infringement – casting a wide net in hopes that at least some targets will pay to settle rather than spend more money to defend themselves in court.

- "White hat" patent monetizers are the reputable players in the field – companies that only enforce valid patents where there is clear infringement.

Unfortunately, the reporting of "black hat" tactics has unfairly sullied the reputation of white-hat PAEs and has led to all PAE's being lumped together under the pejorative label of "patent trolls."

We agree with what Professor Shapiro said in his presentation: "Better to Fix the Flaws PAEs are Exploiting than to Attack the PAE Form." Even though we are a PAE, we agree that patent quality should be improved. We also support fee-shifting, but to a true "loser pays" system as is common in Europe, not to the sort of biased and lopsided fee-shifting proposed by the SHIELD Act. These reforms would stop the "black hat" "patent troll" behavior while allowing real innovation to be rewarded.

About IPNav

IPNav is a "patent assertion entity." Our business is patent monetization, and we help a wide variety of clients – from individual inventors to universities to corporations (large and small) – earn a return on their intellectual property. We are NOT a "non-practicing entity" (NPE) in that we do not take title to patents, although in some cases we will assist clients in selling their patents to an NPE.

IPNav, a privately-held, Dallas-based company, has been remarkably successful, generating over $600 million in licensing revenues for our clients over the last decade. We only work with clients who have strong patents that are commercially valuable. See our website, www.ipnav.com, for more information on the company and how we operate.

Introduction

We find it curious that the Department of Justice (DOJ) and the Federal Trade Commission (FTC) felt the need to convene a conference to explore the activities of patent assertion entities (PAEs) at all. A patent bestows one right on the inventor: the right to prevent others from using his or her invention. An inventor can allow others to use the invention for a fee. The patent grants the patent owner the right to sue entities that are using the invention without paying for it. *So why is there a need to look into patent owners who are doing the only thing that their patent allows them to do?*

Presumably the conference was called in response to public outcry over "patent trolls" as some sort of "tax on technology." Certain members of Congress have decried "patent trolls" and regulatory agencies naturally pay attention to Congress.

Congressman Peter DeFazio, co-sponsor of the proposed "SHIELD Act," said in a press release

> Patent trolls don't create new technology and they don't create American jobs. They pad their pockets by buying patents on products they didn't create and then suing the innovators who did the hard work and created the product. These egregious lawsuits hurt American innovation and small technology start ups, and they cost jobs. My legislation would force patent trolls to take financial responsibility for their frivolous lawsuits.

It was nice that at the conference the chairman of the FTC, Jon Leibowitz, chose to be polite: he said "we all know a few colorful street names for PAEs, but we are not going to use any of them today."

However, he let his biases slip in his opening remarks to the conference, where he said

> …Not surprisingly, others believe that PAE activity imposes a "tax on innovation," undermining the incentives to engage in R&D. Detractors also raise concerns about operating companies transferring IP to PAEs as a means of raising rivals' costs. If that is actually happening – perhaps because of asymmetries of information and liability – it would seem, well, kind of unsavory.

We disagree with Congressman Defazio that "patent trolls" hurt American innovation, and we disagree with Chairman Leibowitz that enforcing patents through PAEs is somehow "unsavory."

PAEs – Good for America, or Bad for America?

Several of the presentations at the conference addressed the question of whether or not PAEs are a good thing. Professor Chien's paper includes a section "Case Study: Harms/Benefits to Startups." Professor Shapiro's paper includes a section on "What Do We Really Know About the Impact of PAEs on Innovation?"

It seems a little odd that this question even needs addressing. What makes patent monetization as an industry worthy of such special consideration? Do the DOJ and FTC consider whether soft drink manufacturers are a good thing? Video game manufacturers? Dairy farms? Tobacco companies? In the American system, consumers determine which businesses are worthwhile – by voting with their dollars.

In his comments, Lee Cheng of Newegg sees PAEs (he prefers to call them "patent trolls") as evil. Cheng writes

> Never mind that the patent troll does not participate in the marketplace for the patented invention, or even compete with the company that it is suing, and that therefore the patent troll suffers no actual harm even if infringement of the patent is actually occurring.

Cheng seems to be suffering from a too-common view that committing intellectual property piracy is somehow a "right" and that pirates should be protected against lawsuits by IP owners. The misconception is that as an intangible, intellectual property cannot be "stolen" because the owner of the IP suffers no "actual harm" From the theft. That's simply not true. Ask the software, music, or movie industries how much they have suffered "actual harm" because people stole their IP.

Similarly, patents are valuable intellectual property, and if someone steals an idea – infringes a patent without paying for it – the patent owner is damaged. The patent owner is not receiving the income he or she is entitled to. Knowingly infringing a patent that a manufacturer knows is valid is a blatant case of theft.

Patent owners are under no obligation, moral or legal, to manufacture whatever product or idea is covered by their patent. As we pointed out in a blog post [http://www.ipnav.com/blog/was-thomas-edison-a-patent-troll/]

> Thomas Edison is considered America's greatest inventor. He's also one of the most prolific, with 1,093 US patents in his name. Like Blanchard [an earlier inventor who made money without making stuff], he got his start by selling the technology he invented – not by manufacturing his inventions. He built his industrial research lab in Menlo Park, New Jersey with the proceeds from selling his quadraplex telegraph to Western Union for $10,000 – the equivalent of over $200,000 today.

Ericsson was once one of the big names in the cell phone business. With its recent sale of its interest in Sony Ericsson, the company is no longer in the business of making cell phones. Does that mean the company is no longer entitled to earn money from the many millions of dollars it invested in smartphone R&D? Does that mean it should be forced to hand over its valuable intellectual property for free because it no longer "participates in the marketplace for the patented invention"?

Many highly creative individuals, universities, and businesses can come up with great inventions that benefit society, but are not in a position to physically produce the inventions. It is not impossible to imagine that an individual inventor could come up with an idea that would be an extremely valuable smartphone feature, yet not able to go into the business of making smartphones. Nor would it be a good idea for every inventor of a smart-phone feature to make smartphones -- one good feature does not make a product.

By leveling the playing field to some extent – by giving inventors the ability to hold their own against large companies that might otherwise steal their intellectual property – PAEs encourage innovation.

If an inventor is not willing to aggressively assert the rights granted by a patent – in court – the patent is of limited value. PAEs help inventors by giving them access to the specialized skills and financial resources that are needed to protect their intellectual property.

"White Hat" versus "Black Hat" Patent Monetization

The idea of "white hat" versus "black hat" activities is found in several different industries. Most similar to patent monetization is the situation found in search engine optimization (SEO).

Google and other search engines have complex algorithms for deciding which websites get highly ranked for different search terms. This has spawned an SEO industry dedicated to helping clients improve their ranking for valuable search terms.

Naturally, the search providers want to give the viewing public results that are actually useful – links to websites that have exactly what they are looking for, and that other people consider good websites. So measures such as number of links to a website, or amount of content on a website, are known to be part of the algorithms.

"White hat" SEO businesses work with their clients to do what the search providers want: they add quality content, make content search-friendly, find quality websites that should link to them, etc.

"Black hat" SEO businesses try and scam the system. Google wants links? They hire cheap labor in India or the Philippines to spam comments on blogs with links. Google likes websites that have more fresh content? They hire armies of people, again in cheap labor locations, to crank out "content" that no one in his right mind would want to read, often stuffed with so many keywords as to be unreadable.

The search providers take measures to penalize "black hat" SEO while encouraging "white hat" SEO.

Similarly, in the patent monetization business, there are companies that do "black hat" patent monetization. They buy up hundreds of weak patents, send thousands of threatening letters, sometimes to companies that are not infringing even a weak patent, and offer to settle for a royalty far lower than the cost of defending a patent lawsuit. They are scam artists trying to make a buck off the "nuisance value" that companies would rather pay a relatively small amount to make them go away than go to the expense of going to court.

"White hat" patent monetizers, on the other hand, are reputable firms that either work with legitimate inventors, or buy patents from legitimate inventors, and that litigate or threaten litigation only against companies that are actually infringing a valid patent.

Condemning all PAEs on the basis of the behavior of the "black hat" PAEs would be like condemning the entire SEO industry because of the companies that are in business to scam search engines. In the case of patent monetization, the government does not need to interfere with the legitimate businesses to stop the scam artists.

Antitrust and Patents

There has been a substantial increase in patent litigation over the last few years. Does this point to anticompetitive behavior? Are there antitrust issues surrounding patents? Certainly, but for the most part the problem is with operating companies, not with PAEs.

If an operating company that holds a standard essential patent (SEP) refuses to license that patent under the normally required "fair, reasonable, and non-discriminatory" (FRAND) terms it could be engaging in anti-competitive behavior. When such an operating company seeks sales injunctions against competitors, it is because they want to increase their market share. When a PAE asserts a patent, it's not looking to stifle competition: it's looking to get paid for its intellectual property.

Conclusion

PAEs provide a valuable service to inventors, and thus encourage innovation. Patent monetization is a legitimate business which requires highly specialized skills and deep financial resources. There have been some problems – abuses even – but the way to address them is, as Professor Shapiro pointed out in his paper, is to address the flaws rather than to attack a particular class of patent owner. There are two fixes that could help a great deal:

- Strengthen the patent system. Some weak patents have gotten through the system, and some patent owners (not just PAEs) have exploited the fact that defending one's self against even a weak patent is an expensive proposition.

- Go to a "loser pays" system, as is common in Europe, where the loser of a court case pays the legal expenses of the winner.

It should be noted that by "loser pays," we are not talking about the "half step" proposed by the SHIELD Act, which would only award costs including legal fees against an entity that brings a lawsuit alleging patent infringement that "did not have a reasonable likelihood of succeeding."

Some companies infringe patents and knowingly attempt to drag a court case out, hoping that the patent owner will not have the patience or resources to stay with it. A true loser pays system, as is common in Europe, would reduce the likelihood of "black hat" PAEs trying to enforce very weak patents, or trying to get a settlement where there is no infringement. It would also encourage companies in a situation where there is clear infringement of a valid patent to settle rather than to fight it out in litigation.

The Constitution grants Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries…" Inventors are granted exclusive right to their discoveries – rights which they are also free to sell – without regard to the business model they use in commercializing their invention. A patent owner is a patent owner, and all patent owners have the same rights, whether they are operating companies, non-practicing entities, universities, non-profits, or individuals.