

From: Martin Snyder [mailto:mart[REDACTED]]
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To: ATR-LPS-PAEPublicComments
Subject: Stautuatory Reform Concepts + Not All Trolls Live Under Bridges

The FTC, the Congress, and the DoJ need to consider the costs to competitiveness and job-creation engendered by abusive patent litigation beyond the direct costs, which are substantial. The result is that beyond the direct costs, the entire legitimacy of the patent system is brought into question, which then paints even legitimate users as racketeers in the minds of the people.

The patent office clearly had not adjusted to the explosive pace of change in the 1990's such that a great number of patents from that era are those subject to the most abuse and litigation today. It was a land rush- tens of thousands of entities patenting any possible use of computers. Any substantial tech company formed in the late '80's likely has enough of their own prior art to invalidate many of the patents associated with their niches, and likewise, determinations of "obviousness" become very hard to judge as matters of law or fact in such an accelerated milieu. That's why patent trolls have such a dismal record of success when cases are adjudicated, yet the costs remain very real.

The solution is to put some skin in the game for patent holders. Some simple statutory reforms could greatly help the situation without creating undue burden for patent holders to protect their legitimate interests. For one example, if the obviousness of a patent is found as a matter of law, the plaintiff should have to pay the legal costs of the prevailing defendant. Another should be that Plaintiffs damages would have to be calculated in some proportionality to the economic value of the infringement; because too many cases turn on what amounts to trivial elements of functionality in an overall offering- elements that may have little or no impact on the behavior of the buyer, which is the essence of patent protection- the creation of a sanctioned, temporary monopoly. If that monopoly has zero or very little effect on buyer or competitor behavior, it should have that proportionate economic value to a plaintiff; zero or little.

The current situation makes no distinction between the cardinal and the venal- making it a moral failure on the basis of proportionality.

Finally, there are many cases where the plaintiffs do conduct business using the inventions, but the defendants do not functionally compete or have little or no chance of ever forming an alternative to potential buyers- meaning that constructively those plaintiffs are as much a troll as any non-practicing entity because there is no effect on the monopoly of the patent owner.

It goes against common sense and legitimacy of government to allow one party to harm or collect damages from another when no damage has occurred. It's the job of our government and institutions to prevent that from happening, and in the software patent arena, they have failed at doing so in too many instances. I hope your workshop becomes a plank in the structure that must be erected to correct that failure.

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Yours Truly,

Martin Snyder

President

Main Sequence Technology, Inc.

p: (440) 946-5214 | f: (440) 856-0312
martin@mainsequence.net
www.PCRecruiter.net

personal email: [bluebase](#)[REDACTED]

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