

STANDARDS BLOG:

The Problem with Patents: Operating with Blunt Instruments

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On June 4, the Obama administration announced a new effort to curb the baseless patent that it believes are stifling innovation and economic activity. The new initiative would take five actions under the President's Executive authority, and also makes seven legislative As anyone who watches technology even casually will be aware, the assertion of patents has played a dominating role in the mobile sector press of late. It's not often that a new platform takes over, and as a result, both the stakes as well as the opportunity to unseat incumbents are high. recommendations intended, "to protect innovators from frivolous litigation and ensure the highest-quality patents in our system."



In such a situation, the dominant players have an incentive to pull out all the stops, and indeed they have. The resulting suits have been particularly troublesome where infringement is unavoidable, as is the case with so-called "standards essential patents."

But the high level head bashing between technology leviathans like Apple, Samsung, Google and Microsoft has partially obscured a more troubling and ongoing crisis in the technology sector, which is the misuse of patents by companies referred to as "Patent Assertion Entities" (PAEs), "non-practicing entities" (NPEs), or simply as "trolls."

PAEs are entities that own (or control) and assert patents, but do not themselves offer products or services that implement them. PAEs come in several flavors, including universities that develop technology (often with public funding), entities formed solely for the purpose of owning, licensing, and asserting patents, and shell companies, sometimes formed by actual vendors to indirectly assert patents against their competitors without the plaintiffs knowing who is really behind the attack.

The entities that have incurred the greatest public wrath are those whose business it is to threaten implementers – and even simply users – with litigation unless they pay up. Often, the patents such PAEs assert may be weak or improperly issued, or may not in fact be infringed at all by the target of their attention. But patent litigation is extremely expensive, so many of those contacted (and particularly small companies) simply pay up rather than fight.

Ironically, the uptick in market activity that is now raising the patent issue to the forefront of the President's busy agenda was partly the result of an action taken by Congress to lessen the woes of those attracting the attention of trolls. Previously, a PAE could sue

multiple defendants in a single law suit. But as a result of the America Invents Act recently enacted by Congress, trolls must now sue each defendant individually. The result? A dramatic rise in patent assertion suits clogging up federal courts.

President Obama has been harsh in his criticism of PAEs, describing them in February of this year as entities that, "don't actually produce anything themselves...[but instead] essentially leverage and hijack somebody else's idea and see if they can extort some money out of them." He went on to say that the patent reforms achieved in the America Invents Act, which he signed into law in 2011, did not go far enough: "our efforts at patent reform only went about halfway to where we need to go."

What the President did yesterday was to try to bridge that gap. You can find his announcement [here](#), and the Fact Sheet containing those actions and recommendations is here. A [related report](#) by the President's Council of Economic Advisors, the National Economic Council, and the Office of Science and Technology can be found here.

The Report acknowledges that not all innovators (such as universities or skunk works) wish to productize or police their patents, and that intermediaries may therefore have a place in an effective innovation economy. But the Report also recognizes that an increasing number of PAEs embark upon "overly aggressive" litigation and threats of suit against "thousands of companies" based on patents "without specific evidence of infringement" (especially in the case of software). It also gives specific examples of documented negative impacts:

A range of studies have documented the cost of PAE activity to innovation and economic growth. For example:

- One study found that during the years they were being sued for patent infringement by a PAE, health information technology companies ceased all innovation in that technology, causing sales to fall by one-third compared to the same firm's sales of similar products not subject to the PAE-owned patent.
- Another study found that the financial reward received by winning PAEs amounted to less than 10% of the share value lost by defendant firms, suggesting that the suits result in considerable lost value to society from forgone technology transfer and commercialization of patented technology.

The goal, the Report asserts, should be to employ the types of actions that have historically been taken to curb abuses while preserving innovation, concluding that:

...fostering clearer patents with a high standard of novelty and non-obviousness; reducing disparity in the costs of litigation for patent owners and technology users; and increasing the adaptability of the innovation system to challenges posed by new technologies and new business models; would likely have a similar effect today.

It's hard to fault the President for once again taking action to plug the gaps left by inadequate Congressional action. But, as the phrase goes, the President's plan "Says easy, does hard." The reason? Because patents, by their nature, are blunt instruments that are too easily granted and too often wielded like cudgels.

Consider just the following by way of example:

- A patent gives monopoly rights for over 20 years, and the same invention can underlie an increasing cascade of products and services, even though the level of overlying innovation may soon dwarf the invention in question.
- A pharmaceutical product can be based on a single patent, but a mobile device can implement thousands.
- A successful drug can cost hundreds of millions of dollars to develop and test, and can follow on the heels of multiple failed, but equally costly efforts, while a software patent can be based on an idea an engineer has in the shower one morning.
- Some inventions are based upon years of complex work and vast investments leading to unique results, while others can be simple and independently conceived by multiple inventors in the same narrow time frame.
- Different courts vary widely in their willingness to enforce patents, leading to domestic and international “forum shopping” to gain the most desired result.
- Patent litigation is highly expensive and interpretive, allowing both plaintiffs and defendants to honestly believe that they are in the right.
- Practicing as well as non-practicing entities use the same legal tools to assert their rights.

It is hardly surprising then that many people feel that even legally valid patents actually adjudicated in courts can cause real problems, especially in areas such as software. But even leaving that concern aside, how does one differentiate “overly aggressive” litigation from permissible assertion of legal rights, or PAEs that serve a useful purpose by conservatively assisting universities from “trolls” asserting shaky patents obtained by the same source non-infringing end-users?

Taken as a whole, the actions and recommendations have the potential to dramatically improve the situation. Unfortunately, many of the actions would require Congressional action, meaning that with a few exceptions the initiatives to be pursued under Executive Authority can make only incremental progress (e.g., by providing educational materials to help “main street” businesses defend themselves if they are sued by trolls). More meaningfully, the administration will be stepping up training of patent examiners, which will hopefully result from fewer inappropriate patents being granted to begin with.

Almost all of the forceful actions, sadly, would require Congressional action. Those recommended practices include allowing courts to force losing patent plaintiffs to pay the legal costs of successful defendants, requiring PAEs to disclose the entities that may ultimately control them, and changing the rules for gaining an injunction in the International Trade Commission.

It’s hard to imagine that such action will follow any time soon. Meantime, perhaps the brightest hope may, as often is the case, arise at the state level. Recently, Vermont enacted a law allowing defendants to recover not only costs from trolls, but damages as well. Such a law can provide a significant disincentive for any owner or licensor of a patent to assert it unfairly. If such laws proliferate, perhaps we’ll see a decline in blunt force assertion of invalidly issued and irrelevant patents against innocent vendors and users sooner than later.

Of course, passing similar laws in 50 states would be a slow and tedious process. But state action is better than no action, so hopefully more states will follow Vermont's lead. Until they do, as usual, only the trolls (and lawyers) will benefit from the status quo.

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