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Patent Enforcement and the Law of Unintended Consequences.

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The law of unintended consequences has been a heavy burden on patent enforcement over the last eight years, and it has left patent law and patent owners in a sorry state. It is largely the result of: (1) the rise in importance of the computer/electronics industry, (2) the increased appearance of some bad actors in patent enforcement, (3) the huge amount of money spent by some companies to not only counter those bad actors, but to persuade Congress, regulatory agencies, the President, and the public to adopt policies which discourage the enforcement of patents generally (except by companies as large as themselves), and (4) the Supreme Court's, Federal Circuit's and Congress' response to these circumstances. The unintended consequence (unintended at least by the courts and Congress) is a patent enforcement regime which works only for the very well capitalized.

This avalanche of patents in the computer/electronics field has given rise to some patent enforcement abuse. For example, this is a field where many of the patents contain inventions of very small incremental value. There also can be tens, or hundreds of patents reflected in a single device or system. Those facts, plus the enormous cost of patent litigation, have encouraged some to acquire patents for the sole purpose of extracting settlements which will cost the defendants less than the cost of defending the lawsuit. The rise of this industry, the patents issued relating to it, and the appearance of some who are abusing the patent system to take advantage of these changes have caused changes in patent law in attempts to respond to the exaggeration of those abuses. Those changes have had serious unintended consequences.

It has been estimated that just one company alone in the computer/electronic industry has spent over $100 million in a campaign to persuade the President, Congress, the FTC, the Antitrust Division of the Justice Department, and the public that there is an epidemic of patent enforcement abuse which is destroying American industry. The campaign being waged by those companies has been based on faulty statistics (which keep getting repeated up the political chain) and disingenuous arguments. It nevertheless has been so successful that "patent troll" has come to mean any company or person which seeks to be paid for use of its or his/her patent if it or he/she is not practicing the patent in an operating business. These companies simply do not believe in the patent system as it has been understood historically in this country. Unsurprisingly given their true view of patents, the "reform" they seek goes well beyond the abuses practiced by the bad actors; it is aimed at undermining patent enforcement generally. They are being extraordinarily successful in achieving that objective.

No one will dispute that patent enforcement litigation is very expensive. Indeed, as noted above, accused infringers have complained that the high cost of defending such litigation is a major factor in bad actors being able to extract settlement payments which are not warranted by the asserted patents. But what the accused infringers do not mention is that they also use the huge cost of patent enforcement to their advantage – to discourage anyone from suing them. The simple fact is that infringers will almost never voluntarily pay anything, let alone a reasonable royalty, for patents they are practicing without permission, no matter how good the patents are. If an inventor or other patent owner went to an attorney with a patent being infringed by a large, well-capitalized company, and asked the attorney to get the company to take a license to the patent, the attorney would almost certainly advise that the infringer will not voluntarily pay any significant royalty. If the inventor then asked the attorney to sue the company, he would be told that such litigation will cost millions of dollars – perhaps over $10 million. The inventor, not likely to have that kind of money, might then ask the attorney whether he would be willing to take the case on a contingent basis. Even if the attorney was willing to do that, given the strength of the patent, the inventor would be told that she would have to pay the costs – perhaps $1.0 - $3.5 million. If the inventor said that she could not afford that, and asked whether she has any alternative, she would be told that the only alternative is to partner with an IP management company like ours, which has the capital and expertise to level the playing field with the infringer.

The large companies which do not want to pay for the inventions they use without permission understand this dynamic very well. They know that, given the cost of patent enforcement litigation, their only real potential risk is from companies which have the capital and expertise to challenge them. But they can't openly admit that they want to put companies out of business which provide capital and expertise to patent owners to enforce good patents. Fortune, however, has looked favorably on them – it has provided the infamous moniker "patent troll", which has been used unfairly as an umbrella term to capture any enforcer, good or bad. So, in the guise of wanting to put a stop to abusive patent litigation, they spend huge amounts of money on a public relations and lobbying effort to create new statutory and regulatory obstacles to enforcement of patents – all patents. They largely have succeeded.

The changes in the law in response to the perceived abuses have made this advantage in favor of large, well-capitalized, companies even greater. There is not space here to address every relevant change in the law which has been responsive to the perceived abuses and which have had important negative unintended consequences for the patent system. The following are a few.

Congress was persuaded to enact new review procedures by which patents can be challenged in what is called an Inter-Parties Review (IPR). Congress envisioned the IPR as an efficient way to get poor patents invalidated before an accused infringer has to incur the expense of trying to prove invalidity in a court proceeding. What Congress did not anticipate was that accused infringers, even in well-found-

ed cases, would routinely put the patents into an IPR proceeding. The result is additional cost and delay for those who have valid patents which are being infringed, i.e., Congress did not anticipate that the accused infringers would use the IPR as an offensive tactical weapon rather than as an efficient defense.

The Supreme Court also has reacted to the broadly publicized alleged patent litigation abuse by making it easier to impose fees and costs against the losing party in patent litigation. On the face of it, this seems like a good way to stop abuse. In fact, it has little impact on the abusers, since they rarely ever try cases to a conclusion. For the non-abusive patent owner, however, such a rule has a chilling effect. Patent cases, even the best of them, are complex and not certain of outcome and the consequences of losing can be enormous if the patent owner is at risk to pay every defendant's attorneys' fees and costs. It has now become routine for infringers to seek attorneys' fees and costs even if the case was simply hard fought. As with Congress, the Court did not anticipate that it had simply added a new weapon for large companies to use to discourage infringement suits.

Under the present patent enforcement regime there is no reason a well-capitalized company will voluntarily pay for use of someone else's patent. There are simply so many obstacles a patent owner has to overcome in order to get paid. The unintended consequence is that inventors have less reason to invent and, importantly, investors can have no confidence that if they provide capital to a new company based on its inventive patents, large companies won't infringe those patents with impunity. We have ended up with a patent system for large, well-capitalized companies and for patent abusers who sue just to settle for the cost of defense. It does not work well for the poorly capitalized inventor or company. Congress and the courts have helped bring about that result. That cannot be good for America.

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