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Don’t Shoot the Samaritan

David Balto (Law Offices of David A. Balto) · Wednesday, July 18th, 2012

The patent wars have become a real drag on the economy. A recent study estimated that the direct cost of patent trolls, firms that use patents solely as a source of securing revenue from litigation, exceeded $29 billion. The real costs in litigation: delayed innovation and loss of consumer choice are even greater. Now, the U.S. Congress is taking notice. Just last week, the Senate Judiciary Committee held a hearing to examine the use of standard essential patents (SEPs) in claims before the International Trade Commission (ITC) and now the House Judiciary Committee is holding a hearing on July 18.

After the Supreme Court put the brakes on some abuses of patent law in its 2006 *eBay v. MercExchange* decision, the ITC became the go-to destination for patent trolls and other companies wanting to use litigation to handicap their competitors. Thanks to the well-intentioned, but often abused, Smoot-Hawley Tariff Act of 1930 the ITC can ban the importation of a product into theUSif it infringes a patent. This process is almost automatic; if the patent is found to have been infringed then the offending product is almost certain to be excluded from the U.S. market.

The Wall Street Journal has warned “[the ITC] is poised to take its own turn in the protectionist limelight by potentially crippling the U.S. wireless-phone industry.” Now the problems have reached critical mass. Earlier this year an ITC ruling delayed HTC’s launch of two phones by three weeks. This cost HTC greatly, their recent quarterly earnings report showed a drop in net profit of 57 percent over last year. Now even more popular products are on the chopping block.

While it is good Congress is putting a spotlight on abusive litigation its focus on SEPs may do more harm than good. Thus, Congress must focus on a crucial distinction. Some firms, such as Apple and Microsoft, keep their patents and their technology solely proprietary. These firms want the sole source of the technology and assess the full toll for those who might want to practice the technology.

Other firms take a more Samaritan approach — they envision a more open environment for sharing technology and spurring innovation. Those firms, such as Google, are willing to participate in a collaborative standard setting process and commit their technology to the standard being collectively adopted. Those firms commit their technology and agree to license it on a reasonable and nondiscriminatory basis.

Some Members of Congress seem poised to challenge the ability of owners of SEPs which have made licensing commitments to seek exclusion orders from the ITC, while giving a free pass to patent trolls or firms seeking exclusion orders for proprietary standards. This double standard does

not make sense. This is because, as Judge Posner said, “patents in the field of information technology often have little if any value except defensively.” It is vitally important that SEPs continue to have defensive value comparable to other patents in order for our current system of technology standards to remain functional.

When devices need to communicate they often need to use the same technology. In order to agree on which technology to use there are organizations that set technology standards for specific industries. This is so an iPhone and an Android phone can operate on the same wireless network. When the technology used in a standard is patented, the standard setting organization requires the patent holder to agree to license the patent on reasonable and non-discriminatory terms. These agreements keep the value of the license at around where it was before the standard was set, but the patent holder gets much more business for being part of the standard. The standard setting process is effective because this is an even trade that benefits all parties.

Treating SEPs differently than other patents before the ITC will greatly change this dynamic — it will destroy their defensive value and discourage innovators of core technologies from participating in the standards setting process. It will also deter patent settlements. When one company sues another for patent infringement, the company being sued will find patents of its own to use to counter-sue. If the power of the patents is roughly equal then the parties will settle. This recently happened in the dispute between Facebook and Yahoo; the parties settled a bitter patent dispute by cross-licensing their patent portfolios with each other. By handcuffing SEPs, there will no longer be an incentive to settle when one party has SEPs and the other has non-SEPs.

It is good Congress is addressing this problem, but they need to make sure they address it without unbalancing the current system. Punishing those willing to share technology will be a giant step backwards in the race to create the new products consumers need.

This post originally appeared on the *Huffington Post*.

This entry was posted on Wednesday, July 18th, 2012 at 1:54 am and is filed under Congress, IP Antitrust, Patent Antitrust
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