

AntitrustConnect Blog

Eradicating Patent Trolls

David Balto (Law Offices of David A. Balto) · Tuesday, December 11th, 2012

One of the critical obstacles to our innovation economy are patent trolls or Patent Assertion Entities (“PAE”) which acquire patents simply to bring patent litigation and effectively tax innovation. PAEs exploit numerous problems in our legal system including the expense and uncertainty of patent litigation, the excessive granting of patents in the high-tech space, the ambiguity of abstraction surrounding the claims of many high-tech patents, and the anticompetitive pricing power that comes from aggregating patents in an industry where market definition is especially difficult. PAEs are costing the economy over \$29 billion annually and creating barriers to the innovation that is critical to the growth of the economy.

Patents are a means to an end, a tool for accomplishing a broader policy objective: the promotion of innovation and enhancement of consumer welfare by protecting innovation. PAEs tip this function on its head and turn patents into litigation tools to tax success and impede innovation.

The patent license market is analogous to the purchase of any other input in a supply chain. The licensee is aware of the input he needs, and has the opportunity to obtain that input or seek an alternative. This is not how PAEs operate. PAEs are contemporary pirates exploiting the vulnerability and risks faced by those that actually innovate and produce products. Like a pirate they can sue without fear of a countersuit since they produce nothing.

They can easily identify the manufacturers, and prey on those most vulnerable, but these companies cannot identify the patents that are likely to be asserted against them.

Harm to Established Competitors

PAEs offer established competitors the ultimate false choice: endure the expense of litigation with the knowledge more lawsuits will follow, or pay a licensing fee with the knowledge that this will make them vulnerable to future extortion.

Boston University’s James Bessen and Michael Meurer estimate the direct cost of PAEs on just established companies to exceed \$29 billion in 2011. They demonstrate that PAEs prey on the most vulnerable — large companies represent only 10 percent of the companies facing litigation from PAEs, they account for 41 percent of litigation filed.

Established competitors are also particularly vulnerable because they make a variety of products. Even if a manufacturer may be well-positioned to combat a PAE on a particular technology, he may be more vulnerable in another. The PAE understands this cross-product hold up, and creates

patent pools that target manufacturers' vulnerabilities.

Harm to Small Companies and Market Entrants

PAEs often focus on smaller competitors, creating a substantial entry barrier or limitation on growth for fledgling high-tech firms. Santa Clara's Colleen Chien reports "Companies with less than \$100 million annual revenue represent at least 66 percent of unique defendants and the majority of them make much less than that: at least 55 percent of unique defendants in PAE suits make under \$10 million per year." Yes, like any pirate they focus on the weak and vulnerable, those least able to defend themselves.

Small firms can barely deal with the costs and uncertainty of litigation. If it chooses to fight it is committing itself to years of costly litigation in the best case scenario.

Harm to Consumers

Consumers may not be defendants in this pirate litigation scheme but they pay the bill at the end of the day. Settlements lead to higher costs for the products. But the higher cost is lost innovation especially because firms can't just innovate; now they must always be ready to bear the cost to litigate. Innovation will become a secondary concern after protecting against continued exploitation. As PAEs continue to hold these companies hostage, and even drive them into relationships with other PAEs as a means of mitigating risk, innovation will suffer.

Fortunately the FTC and DOJ are holding [hearings on PAEs](#). This is long overdue. The agencies should use all of their powers to bring attention to the harm of PAEs so that the creative forces of innovation can be unrestrained. The purpose of the patent system is to promote innovation, not litigation.

Co-authored by Brendan Coffman.

David Balto is a former policy director of the FTC, attorney-adviser to Chairman Robert Pitofsky, and antitrust lawyer at the U.S. Department of Justice. He has been a senior fellow at the Center for American Progress, and is a contributor to Patent Progress, a website dedicated to promoting innovation through the reform of the patent system. Patent Progress is hosted by the Computer & Communications Industry Association (CCIA). Balto has also published research and authored scholarship for Google on technology policy topics.

Brendan Coffman is an attorney in Balto's office, and is also a contributor to Patent Progress.

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