United States of America

Federal Trade Commission

Strong Patent Rights, Strong Economy

October 13, 2017 at 12:00 p.m.
The Woodlands Waterway Marriott Hotel and Convention Center
1601 Lake Robbins Drive
The Woodlands, TX

Maureen K. Ohlhausen[1]
Acting Chairman, Federal Trade Commiy641.76 Tm -27.2-2()13(y6Lk 364a1.96 2

of the Constitution and Congress, to promote the progress of the useful arts, would be seriously undermined."[3] Note the inclusion of "useful" arts among the drafters' goals – their intent clearly was to entice inventors with the lure of "exclusive" rights. The Supreme Court recognized the important role of this system to provide "an incentive to inventors to risk the often enormous costs in terms of time, research and development. The productive effort thereby fostered will have a positive effect on society through the introduction of new products and processes of manufacture into the economy . . . ."[4] In exchange for this "reward for inventions" the patent laws require the inventor to disclose his or her idea, so that after the period of exclusivity expires, the public benefits from knowing about and using the invention freely.

The Founders knew then what some seem to be overlooking today: strong intellectual property rights promote a vibrant economy by encouraging innovation. Despite the Founders' wisdom and foresight, and an over two hundred year history during which the United States, driven by technological innovation, emerged as the world's leading economy, a movement is underway to undermine U.S. patents rights. Op-eds call for limiting patent rights.[5] Reputable sources like *The Economist* voice a skeptical tone.[6] Some technology firms claim that patent lawsuits erode their R&D budgets and bottom lines.[7] And there are even calls to *abolish* the patent system.[8]

---

[3] Patlex Corp. v. Mossinghoff, 758 F.2d 594, 600 (Fed. Cir. 1985) (quoting Smith Int'l v. Hughes Tool Co., 718 F.2d 1573, 1577-78 (Fed. Cir. 1983)) (abrogated by Robert Bosch LLC v. Pylon Mfg. Corp., 659 F.3d 1142 (Fed. Cir. 2011)) (recognizing that a presumption of patent harm was no longer valid after Ebay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006)).

[4] Kewanee Oil v. Bircron Corp., 416 U.S. 470, 480 (1974).

[5] *See, e.g.*, Electronic Frontier Foundation, *Patent Fail: In Defense of Innovation*, https://www.eff.org/patent; Charles Duhigg & Steve Lohr, *The Patent, Used as a Sword*, N.Y. TIMES, Oct. 8, 2012, at A1; Richard A. Posner, *Why There Are Too Many Patents in America*, ATLANTIC, July 12, 2012; *see also* Gene Sperling, *Taking on Patent Trolls to Protect American Innovation* (June 4, 2013), http://www.whitehouse.gov/blog/2013/06/04/taking-patent-trolls-protect-american-innovation.

[6] *The problem with profits*, THE ECONOMIST, Mar. 26, 2016; *Time to Fix Patents*, THE ECONOMIST, Aug. 8, 2015; *A Question of Utility*, THE ECONOMIST, Aug. 8, 2015.

[7] *See, e.g.*, Dana Rao, Opinion, *Patent reform is within grasp*, Mar. 8, 2016, THE HILL; Steve Lohr, *With Patent Litigation Surging, Creators Turn to Washington for Help*, N.Y. TIMES, Apr. 29, 2015 at B2; John

Em

The goal of the patent system is to promote innovation in light of this risk and uncertainty. It does so by granting patent owners the right to exclude others from making, using, or selling a patented invention for 20 years. Patents create a property right for intangible ideas, which makes licensing easier and facilitates technology transfer. This property right also protects innovators from copying that could drive down prices and deter future investment.

These patent rights have real-world effects. The United States government recently reported that IP-intensive industries support at least 45 million U.S. jobs and contribute more than $6 trillion dollars to, or 38.2 percent of, U.S. gross domestic product.[11]

Empirical research supports the fundamental role that patent rights play in promoting innovation. I have written at length—most recently in the *Harvard Journal of Law & Technology*— about the positive correlation between robust IP rights and R&D investment in developed countries.[12] For example, scholars who examined data from sixty countries between 1960 and 1990 to explore the relationship between IP rights and economic growth found that intellectual property rights "affect economic growth by stimulating the accumulation of factor inputs like research and development capital and physical capital."[13]

Other researchers scrutinized data on R&D investment and patent protection from thirty-two countries between 1981 and 1995. This "evidence unambiguously indicate[d] the significance of intellectual property rights as incentives for spurring innovation. . . .

[11] U.S. DEP'T OF COMMERCE,

Countries which provided stronger protection tended to have larger proportions of their GDP devoted to R&D activities."[14]

as insufficient quality control, the broad scope of certain patents, and inadequate disclosure. Nevertheless, strong patent rights should remain at the heart of U.S. industrial policy.

III. Patent Rights in an Age of IP Skepticism

Recent criticism of the patent system requires some explanation. What drives calls to diminish or eliminate the U.S. patent system? Several factors are responsible. For example, patenting technologies and commercializing them are increasingly separate acts, undertaken by different entities, and connected by patent licenses, if at all, after the fact. One effect of this evolution has been the rise of patent-assertion entities, known as PAEs. PAEs are businesses that acquire patents from third parties and then try to makatenanmoEssg(een8(to)2(n)6(te)-4(t12

Ph(A)e6h10(w)2(nv)-2.1Jutmoduec ii P11a.016 Tc 0.004 Tw [(t)--25.0d Td (t)Tj[5e exe r coise o1re

PAEs and the other we called Litigation PAEs. Portfolio PAEs appear to be sophisticated firms that aggregate hundreds or thousands of patents, license their portfolios for millions of dollars apiece, and capitalize themselves through institutional and other investors. Despite making up only 9% of the licenses in the study, they generated four-fifths of the revenue.[22] They hire specialized IP-licensing professionals and typically negotiate licenses without first suing their prospective licensees. All told, Portfolio PAEs engage in conduct that is potentially consistent with an efficient aggregation service. Given the sums that change hands in arms-length transactions between Portfolio PAEs and their licensees – amounts that seem often to exceed the cost of litigation – it appears that technology users paid sums that may reflect the quality of the licensed patents.

By contrast, Litigation PAEs generally sued technology users without first negotiating and settled shortly afterward. The portfolios that they licensed often comprised no more than a few patents. They generated royalties that typically were less than $300,000, an amount that accused infringers could expect to spend through initial discovery.[23]

Given the relatively low dollar amounts of the licenses, the behavior of Litigation PAEs was consistent with nuisance litigation.[24] Despite filing 96% of the lawsuits in the study and representing 91% of licenses, they accounted for only 20% of the reported revenue.[25]

hep(r)3(pb)-10(e)4ortyoud ariescessrytp(r)3((m)-2(t)]TJ18.74 0 Td [(e43((i)-2(nov(a)4(t)-2(i)-2on. A)24(t)-2(t)-2(h)-10(e40(s)-1 a)4(m)-2he)-6( )-10(t)-2(i)-2mt)-

litigation, which relies on estimated costs and not the strength of the patent claims, can tax judicial resources and divert attention away from productive business behavior.

Accordingly, the report presents tailored recommendations to alleviate potential

I am pleased to say that the 2017 Guidelines exemplify my approach to antitrust/IP issues, and offer reasonable guideposts. Most importantly, the new Guidelines continue to affirm that IP laws grant "enforceable rights," which have social value.[27] They also state, "antitrust laws generally do not impose liability upon a firm for a unilateral refusal to assist its competitors."[28] Read together with the FTC and DOJs 2007 IP Report, which stated that, "liability for mere unconditional, unilateral refusals to license will not play a meaningful part in the interface between patent rights and antitrust protections,"[29] it is clear that the Guidelines will continue to protect strong IP rights in the United States.

Some commenters called upon the U.S. agencies to create new, specialized, guidelines to address particular types of IP disputes. I did not support this because the