

OPINION

Deck stacked against manufacturers

In patent infringement litigation, nonpracticing entities have the upper hand against product manufacturers; it's up to Congress and the courts to remedy that situation.

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The district courts and Congress can and should take steps to create a fair hand for product manufacturers. Nonpracticing entities (NPEs), also known as “patent trolls,” file nearly one in five patent infringement suits today, a tenfold increase from the late 1990s, according to PatentFreedom.com. Certainly, research institutions or individuals have an absolute right to protect their inventions, but many NPEs obtain patents for the sole purpose of forcing third parties to purchase licenses.

Aside from the question of whether NPEs abuse the patent system (and the answer is often “yes”), what can be done when the deck is stacked against product manufacturers? Congress and

the courts should change the game to give product manufacturers a better hand.

NPEs often invest as little cash as possible in assembling their patent portfolios. They typically seek patents with enforcement potential and obtain exclusive licenses for peanuts or in return for a small share of any recovery. They have little to lose in patent litigation—unlike product manufacturers that may invest millions in developing and patenting inventions in the United States and abroad.

NPEs also have much lower litigation expenses than product manufacturers. They have negligible documentation to gather and produce during discovery, few employees to depose and very low case-preparation costs. In addition, NPEs almost exclu-

sively use contingent fee counsel and often do not even cover any costs in advance. Product manufacturers, in contrast, typically pay counsel regardless of the result, with fees exceeding \$3 million in the average patent infringement trial.

In the courtroom, NPEs are ready, willing and able to sue multiple defendants, including manufacturers and customers together. If a proposed settlement constitutes only a fraction of forecasted litigation costs, most manufacturers are compelled to settle even in meritless cases brought by NPEs because mounting a joint defense is complicated and difficult, and the litigation costs are so high.

Still another advantage to NPEs is venue. NPEs can deliberately choose to base their operations in

court jurisdictions most favorable to their cases as patent-holders, such as the Eastern District of Texas. Product manufacturers, in contrast, typically choose their principal place of business on the basis of labor, tax laws, supply-chain access and a host of other criteria, and have limited choice of legal venues.

NPEs also are starting to file complaints at the U.S. International Trade Commission (ITC) to obtain the threat of injunctions that might force manufacturers to settle. Despite having no domestic industry to protect, several NPEs have been successful in establishing standing in the ITC by showing proof of other domestic activities, such as licensing.

The courts should intervene to prevent the expensive chaos that these multidefendant cases necessitate. District courts have enormous power to manage their dockets under the Federal Rules of Civil Procedure. Under Rule 16, a district court could, for instance, try the infringement claims against one defendant first and stay the remainder of the case against the others. It could force the plaintiff to choose one defendant. If the case is proven meritless, the cases against the other defendants may never occur.

Alternatively, the district court could order an early claim-construction *Markman* hearing with very limited discovery. Very few NPE cases ever proceed to judgment, and most that do are losses

for the NPE. Summary judgment on invalidity would include all the defendants, but sever them for the remainder of the case for separate discovery and trials. Parties could obtain a *Markman* ruling to assess their risk before settling. Again, a meritless case will end before litigation costs explode. Shoehorning all cases



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into the standard schedule promotes settlement of cases to avoid litigation expense and works in the NPE's favor.

Even by loading the deck by selecting pro-patentee venues, NPEs win only 29.3% of their cases though the trial court, according to the PricewaterhouseCoopers 2009 Patent Litigation Study. Moreover, these results do not reflect the likelihood that an NPE trial court win will be vacated or reversed on appeal. Congress could change the game by requiring the district court to award not only costs, but also attorney fees to the prevailing party in patent

litigation. Congress should also reconsider its 1988 amendment to 19 U.S.C. 1337(a)(3)(C). It makes little sense for the ITC to protect entities that use patent litigation to compel prelitigation settlements and use the ITC to drive up settlement amounts.

Many NPEs are thinly capitalized. The party filing suit should be required to place a bond covering the expected legal fees of each defendant in the event it loses. Such a system would motivate defendants to stop settling pointless suits simply to avoid the greater expense of mounting a defense. A bond rule would also force NPEs to be judicious in filing suits, requiring them to perform a careful investigation before filing.

The increasing trend of NPE suits should be addressed for the greater public good. NPEs have huge advantages over defendants in terms of risk and cost—advantages that have resulted from a system in which aggression trumps merit. The current system permits a party to profit from meritless filings by obtaining small settlements from parties unwilling to incur sizable defense costs. Defendants sued by an NPE should stop paying settlements for meritless cases. The district courts and Congress can and should take steps to create a fair hand for each player at the table.