Patent Assertion Entities

Brian J. Love
Assistant Professor of Law, Santa Clara University
blove@scu.edu | @BrianJLove

California Assembly Select Committee on High Technology: Informational Hearing on Patent Assertion Entities

October 30, 2013
What is a “Patent Assertion Entity”? An “entity that uses patents primarily to obtain license fees rather than to support the development or transfer of technology” (F.T.C.; Chien, *From Arms Race to Marketplace*)

- Patents don’t *support* its business.
- Patents *are* its business.
What is a “Patent Assertion Entity”? 

Non-Practicing Entities “NPEs”

- Universities
- Early Stage Start-ups
- Tech Co.’s Patent-Licensing Subsidiaries

“PAEs”

- Acquirer Monetizers
- Inventor Monetizers
How can PAEs be problematic?

PAEs are uniquely able to:
• Reduce the cost of patent assertion
• Increase the cost of defense
And thus:
• Extract large settlements
• Even when their claims are extremely weak

Majority of NPE/PAE suits settle for < cost of defense
(Chien, Dec. 2012 DOJ/FTC Workshop on PAEs; RPX survey of 78 tech companies involved in 900 NPE/PAE suits)
Typical Litigation

Litigation Costs

Plaintiff

Defendant

Expected Winnings
Typical Litigation

Settlement Amount

- Expected Damages
- Cost of Defense
Typical Litigation

Settlement Amount

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Expected Damages

Cost of Defense
Typical Patent Litigation

Litigation Costs

Patentee

Accused Infringer

Expected Winnings
**Typical Patent Litigation**

- **Patentee & Accused Infringer**
- **Accused Infringer**
- **Expected Winnings**
Typical Patent Litigation

Litigation Costs

Patentee & Accused Infringer

Expected Winnings

Accused Infringer & Counterclaimant
Typical Patent Litigation

- **Patentee & Accused Infringer**
- **Accused Infringer & Counterclaimant**
- **Expected Winnings**

Litigation Costs
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Patentee & Accused Infringer

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Expected Winnings
Typical **PAE** Litigation

- **P.A.E. Patentee**
- **Accused Infringer**
- **Expected Winnings**

Litigation Costs
Typical PAE Litigation

P.A.E. Patentee

Accused Infringer

Expected Winnings

Litigation Costs

Nuisance Value
Typical PAE Litigation

Settlement Amount

- Expected Damages
- Cost of Defense
Typical PAE Litigation

Settlement Amount

Expected Damages

Cost of Defense
Typical PAE Litigation

- Settlement Amount
- Expected Damages
- Cost of Defense
## Mass Patent Assertion

<table>
<thead>
<tr>
<th></th>
<th>Tech Companies</th>
<th>PAEs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Suits per litigated patent</td>
<td>1.5</td>
<td>4.1</td>
</tr>
<tr>
<td>Accused infringers per</td>
<td>2.9</td>
<td>16.1</td>
</tr>
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<td>litigated patent</td>
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Source: Love
## Mass Patent Assertion

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<th>Overall Rank</th>
<th>Tech Co</th>
<th># NPE Suits Defended (2009-June 2013)</th>
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<td>1</td>
<td>Apple</td>
<td>171</td>
</tr>
<tr>
<td>2</td>
<td>HP</td>
<td>137</td>
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<tr>
<td>10</td>
<td>Google</td>
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<td>Cisco</td>
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<td>Best Buy</td>
<td>60</td>
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</tr>
<tr>
<td>24</td>
<td>Wal-Mart</td>
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- Manufacturer
- Retailers
- End-Users

More entities to sue

Less sophisticated, Less tech knowledge
## Mass Patent Assertion

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<th>PAE</th>
<th># Accused Infringers</th>
<th># Law Suits</th>
<th># Patents</th>
<th>Tech at Issue</th>
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<tr>
<td>GeoTag</td>
<td>435</td>
<td>115</td>
<td>1</td>
<td>Store locator maps on webpages</td>
</tr>
<tr>
<td>ArrivalStar / Melvino</td>
<td>326</td>
<td>211</td>
<td>16</td>
<td>Using GPS to track vehicles</td>
</tr>
<tr>
<td>PJC Logistics</td>
<td>281</td>
<td>44</td>
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<td>”</td>
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<td>Lodsys</td>
<td>106</td>
<td>36</td>
<td>4</td>
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Source: Patent Freedom (numbers current only as of Feb. 2013)
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Most PAE targets are:

- **Small businesses:**
  - 55% make < $10 million in annual revenue (Chien, *Startups and Patent Trolls*)
  - 82% make < $100 million (Bessen & Meurer; compare with Chien finding 66%)

- **Not “tech companies”**
  - In 2011 and 2012 alone, PAEs sued
    - 929 retailers
    - 616 transport/transit companies
    - 524 financial services providers (Patent Freedom)
Mass Patent Assertion

Median cost to defend a patent suit:
- $650,000 (AIPLA: among suits with < $1M at stake)
- $560,000 (Bessen & Meurer: survey of 82 NPE/PAE targets in >1100 suits)

Not to mention indirect, non-economic costs:
- Distraction of executives and engineers
- Delays in hiring and product launches/updates

Total cost might be 2-3 times higher than legal bills (Bessen & Meurer)
Mass Patent Assertion

For every lawsuit there appear to be many more licensing demands . . .

Estimated at 25-50 letters per PAE suit filed
- (Chien, Dec. 2012 DOJ/FTC Workshop on PAEs)

Some send 500 letters per suit or more
- Innovatio sent 14,000 letters, filed 26 cases (Cisco)
- E-Data sent as many as 75,000 letters (Meurer)
Leveraging Weak Claims

PAE patents are more likely to be **narrow incremental improvements**:

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<tr>
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<th>Tech Co Patent Suits</th>
<th>PAE Patent Suits</th>
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<tr>
<td>% High-Tech</td>
<td>37%</td>
<td>75-80%</td>
</tr>
<tr>
<td>% Software</td>
<td>22%</td>
<td>62-65%</td>
</tr>
</tbody>
</table>

Sources: Love; Bessen & Meurer
Leveraging Weak Claims

PAE patents are more likely to be **narrow incremental improvements:**

- 5 patents (Ouellette)
- 250,000 patents (RPX)
Leveraging Weak Claims

PAE patents are more likely to have been erroneously-issued by the PTO:

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<th>PAE Patent Suits</th>
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<td>% ending in judgment of invalidity</td>
<td>~19%</td>
<td>28%</td>
</tr>
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Sources: Kesan & Ball; Risch
Leveraging Weak Claims

PAEs are more likely to exaggerate the breadth of their patent rights:

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<th>Adjudicated Tech Co Patents</th>
<th>Adjudicated PAE Patents</th>
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<td>% found not infringed in court</td>
<td>29%</td>
<td>56%</td>
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Sources: Love
Leveraging Weak Claims

Overall win rate for NPEs/PAEs?

9%  (Allison, et al.)

14%  (Feldman, et al.)
Even so . . .

- Vast majority of NPE/PAE cases settle
  • 88% (Allison et al.)
  • 76% (Feldman, et al.)

- Sanctions are extremely rare
  • Courts award fees in < 2% of patent adjudications (Chien, Reforming Software Patents)
Bottom Line: Many PAEs . . .

• File large number of suits (16+ accused per PAE patent)

• Often against unsophisticated targets (55% are small businesses)

• That face extreme expense to fight (~$600,000 median)

• Even when victory is highly likely (~90% of the time)

• Thus, usually settle for < defense costs (~80% settle)
Sources

• Bessen & Meurer, *The Direct Costs from NPE Disputes*, 99 CORNELL L. REV. (forthcoming)
• RPX, http://www.rpxcorp.com/key-patent-market-trends