Could a Patent Term Reduction Solve the Software Patent Problem?

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Software Patents and Trolls

Not two separate problems

Rather, two factors exacerbating one fundamental problem:
  - Patent rights too often persist long after the useful lifetime of the invention they were originally drafted to protect

Problem is not that these patents exist . . .

. . . But that they exist in a system with 20 year patent term
Software Patents and Trolls

- Software patents, troll patents might have benefits early in term . . .
  - Some software inventions are (probably) worthy of a modicum of protection
  - NPEs can (in theory) serve as
    - Disseminators of heretofore unappreciated technology
    - Champions of wronged inventors who lack resources, savvy to sue

- . . . but not when enforced almost two decades after filing
  - Computing power doubles roughly every 2 years
    - 20 years after filing date, contemporaneous tech is 100,000% more powerful
  - Trolls licensing almost-expired patents aren’t
    - Spreading the word about new technology
    - Vindicating rights against inventor’s would-be competitors
Bad News: 17 to 20 years down the road is precisely when troll-owned, software patents are most often asserted . . .
Empirical Findings


- All litigation filed during the term of 421 (randomly-selected) litigated patents issued between May 1993 and May 1994

- NPEs asserted just 21% of all litigated patents, but responsible for . . .
  - 67% of all suits filed in last 5 years of patent’s term
  - 70% of all suits resolved in last 3 years of patent’s term
  - 83% of all assertions (i.e., per D) filed in last 5 years of patent’s term
  - 83% of all assertions resolved in last 3 years of patent’s term
Years from Each Assertion’s Resolution to Patent-in-Suit’s Expiration

- **Prod. Co.**
- **IP Subsid.**
- **Individ.**
- **Inv. Lic. Co.**
- **Acquired/Failed**

### Years Until Expiration

- **6**
- **5**
- **4**
- **3**
- **2**
- **1 or less**

### Assertions

- **0**
- **50**
- **100**
- **150**
- **200**
- **250**
- **300**

*Note: The chart illustrates the distribution of assertions resolution across different years until expiration.*
Empirical Findings

- Product Co’s and NPEs generally enforce patents at opposite ends of the term
- In fact, most NPEs don’t acquire patents until their terms more than half expired
- The average NPE-owned patent
  - Changed hands twice (post-issue)
  - Over 12 years
  - Before asserted for the first time
Empirical Findings

- NPEs overwhelmingly assert aging high-tech patents
  - NPE problem is largely a software patent problem, and vice versa

- Of all infringement claims filed by NPEs in the last 3 years of asserted patent’s term
  - 88% allege infringement of patents related to computers or electronics
  - 65% allege infringement of software patents
Implications

- Last 3-5 years of patent term overwhelmingly benefit . . .
  - . . . not product-producing companies enforcing patents covering products on the market . . .
  - . . . instead, NPEs asserting outdated high-tech/software patents

- Maybe we should eliminate these last few years?
Solution: Term Reduction

3 year term reduction would impact 60% of infringement claims filed by NPEs

What kind of prod-co claims affected? Mostly . . .
- Filed by product companies acting like trolls
  - Struggling/bankrupt companies asserting high-tech/sw patents (e.g., Kodak and Encyclopaedia Britannica)
  - No great loss
- Filed by biotech and pharmaceutical companies
  - Easily shielded by liberal use of term extensions for patents covering FDA-approved products
Solution: Term Reduction via Maintenance Fees

- Impediments to enacting term reduction?
  - TRIPS obligations / ire of WTO members
  - Congressional gridlock

- Alternative Solution?
  - PTO maintenance fees
Solution: Term Reduction Via Maintenance Fees

- Current fee regime:
  - Renewal at 3.5, 7.5, and 11.5 years post issue
  - ~50% of patents expire for failure to pay as is

- How many more might expire if additional payments required?

- Why should patentee’s renewal obligations end < 12 years after issue?
  - That’s **before** many wind up in the hands of NPEs!
Solution: Term Reduction Via Maintenance Fees

- Post AIA, PTO has fee-setting authority
- Could require annual renewal payments in the latter half of the term
  - Fees could increase from year to year
  - Many countries, including the UK and Canada, already do this
- Additional revenue could help prevent so many bad patents from issuing in the first place