Legal Opinion Letter

Vol. 22 No. 12 September 27, 2013

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Trolling For A Public Trough:
How Patent Assertion Entities Cost American Taxpayers

by Representative Daniel Lipinski

Congress has taken steps in recent years to reform the U.S. patent system, partly due to the rise of "patent assertion entities" (PAE). PAEs are companies that don't sell, produce, or invent anything, but acquire or purchase patents and demand licensing fees from other companies that develop a similar technology or adopt it without knowledge of the original patent.

PAE demands are often made through litigation or threats of a lawsuit. "Patent trolls," as some deride them, now increasingly try to sink their teeth into public coffers by suing transit agencies, cities, utilities, and even the U.S. Postal Service. These lawsuits have cost public entities hundreds of thousands of dollars—and possibly millions—often without testing the validity of the claims or the patents in question.

Patent lawsuits are risky and expensive, and cash-strapped public agencies can least afford to pay. That works in the favor of trolls, and against public entities that use technology to improve service for taxpayers. In general, PAEs prevail in only about eight percent of cases that reach a judgment or trial, according to one study. John R. Allison, Mark A. Lemley & Joshua Walker, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO. L.J. 677, 694 (2011). But cases rarely reach that far. Patent trolls often leverage the prospective cost of waging a legal defense to "make the decision to settle an obvious one." Brian T. Yeh, *An Overview of the 'Patent Trolls' Debate*, Congressional Research Service.

PAEs increasingly go after "end-users" of technology. Public entities, just like private consumers and businesses, use GPS software, electronic scanners, or online bill-pay systems—all modern-day conveniences that have been the focus of PAE litigation. Patent litigation cost defendants $29 billion in direct costs in 2011. In the public sector, a payout means money siphoned away from important taxpayer-funded public services. Below are four examples of how PAEs have impacted the public sector and hit taxpayers in the pocketbook.

A "Shakedown" of Public Entities

Transit: Many transit agencies have adopted GPS software to track vehicles and inform customers when the next bus or train will arrive. Agencies make this information available via the Web or Smartphone application, so riders can better plan trips to work, school, or home. Two off-shore companies, ArrivalStar S.A. and Melvino Technologies, have sued numerous public transit agencies over patent infringement, alleging they own rights to the concept of a system that provides early notification of vehicle arrival. ArrivalStar and Melvino Technologies have filed more than 250 lawsuits against defendants that include railroads, shipping companies, airlines, retailers, and wireless service providers.

Many of the accused agencies opted to quickly settle, agreeing to purchase licenses for fees reportedly ranging from $30,000 to $100,000. In a 2010 lawsuit involving ArrivalStar, lawyers defending the Massachusetts Bay Transportation Authority accused the companies of a "shakedown," and called their tactics inimical to the fundamental purpose of U.S. patent laws.

Typically, the tracking systems have been purchased from a vendor, and the transit agency is the customer, not the manufacturer or inventor. This litigation continued until the American Public Transportation Association (APTA) sued ArrivalStar and Melvino in federal court, alleging the patents being asserted were invalid and

unenforceable. Two months after APTA's lawsuit, the PAEs agreed in a settlement not to bring any future patent infringement claims against public transit agencies or their vendors.

U.S. Postal Service: ArrivalStar and Melvino Technologies sued the U.S. Postal Service in November 2011 in the U.S. Court of Federal Claims for $10 million, alleging that USPS infringed on three patents related to technology used in its vehicle tracking systems. After more than a year of litigation, the two companies dropped their lawsuit in exchange for the Justice Department agreeing not to seek recovery of attorneys' fees.

Public utilities: Between 2005 and 2006, Emergis Technologies, LLC, filed 16 lawsuits alleging patent infringement against publicly-owned utilities and power companies over online bill-paying software the companies implemented for customers. One public utility agreed to pay $390,000 for a licensing agreement. Sara Stefanini, *Suit over online payment technology settled*, Law360. Emergis Technologies is a Canadian firm that specialized in providing third-party electronic invoicing services to other companies and owned a patent covering automated billing systems. Malvern U. Griffin, Jason V. Chang, and Joshua Curry, *Prowling Patent Trolls*, PUBLIC POWER, Sept.-Oct. 2006. Emergis discontinued its services and switched to a business model based on licensing its patent rights. In 2006, a federal court ruled against Emergis in a lawsuit, finding that language in the company's patent did not cover electronic bill payment systems that were developed by third-party vendors. After that decision, the lawsuits filed by Emergis subsided.

Patent troll demands $1,000 per employee: Officials in several California counties received letters demanding licensing fees of up to $1,000 per employee from DucPla, LLC, a Delaware company claiming patent rights to technology that enables the scanning of documents directly to email via a network. DucPla LLC is a shell company operated by MPHJ Technology Investments, a PAE registered in Wilmington, Delaware. MPHJ operates through 40 wholly-owned shell subsidiary companies that have mailed hundreds, and possibly thousands, of letters to businesses, nonprofits and county governments around the country. State attorneys general in Vermont and Minnesota have taken legal action against MPHJ Technology Investments under consumer protection laws.

Proposals for Patent System Reform

Numerous experts suggest that PAEs do have beneficial effects, but those benefits under current law are significantly outweighed by the costs. The following proposals could serve to better protect public entities, such as transit agencies and utilities, against illegitimate claims of patent infringement:

Protect "downstream users": One proposal before Congress is to allow manufacturers to intervene in patent disputes and stay cases against customers that have little knowledge of patents involved. Another proposal would suspend proceedings against users of products in patent disputes when an infringement suit also has been filed against a vendor.

Fee-shifting: Another proposal would grant federal courts more leeway in awarding legal fees to prevailing parties. Current law provides a court with the power to award reasonable attorneys' fees to the prevailing party in exceptional cases. Another proposal would establish a legal process to identify trolls early on in the lawsuit and require that they post a bond covering the defendant's legal costs should they lose.

Increase transparency: Patentees would be mandated to disclose the "Real Party-in-Interest."

Federal intervention: The Justice Department would be permitted to intervene on behalf of state or local entities in patent cases when federal funding is at stake.

U.S. Representative Daniel Lipinski serves the Third District of Illinois and sits on the House Committee on Transportation and Infrastructure. A more extensive report on the issue discussed in this Legal Opinion Letter can be found at http://lipinski.house.gov/uploads/PAEreport_final.pdf

 ISBN 1056 3059