Getting Ahead in the Changing Patent Litigation Marketplace: Thinking About a New Toolkit for Pre-Suit Coordination of Patent Joint Defense Efforts

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The business of patent litigation is in the process of dramatic change, and the way in which companies deal with patent assertions is going to have to start changing with it. Patent investors are bringing increasingly sophisticated quantitative strategies to bear in order to increase the value of their investments. For good or ill, the new "Quants" of the patent litigation world, along with other even more or less sophisticated new entrants to the patent scene, are changing the landscape in a very real way.[1]

The Statistics

Some of the evidence of this shift is easy to spot. For example:

- The early 2000's saw substantial growth in patent lawsuit filings. Studies indicate there were 2,853 patent infringement lawsuit filings in 2010, up four percent from 2009.[2] Annual filings are well over double what they were in 1991.[3]
- Hidden in those easy-to-find numbers are even more significant statistics about the number of defendants in each new lawsuit. Patent plaintiffs are naming more defendants in each case. Some "massively multi-defendant"[4] patent lawsuits named as many as 129 defendants.[5] This data is not a surprise to the businesses caught up in the resulting flood of litigation, but it still comes as quite a shock to those who still lack that personal experience.
- Patent plaintiffs now routinely target almost all users of allegedly patented articles (except perhaps the final individual consumer) in an effort to increase the damages they can claim. The reaction to these lawsuits can sometimes border on shock. Virtually everyone is a potential target. It does not matter whether the company makes sophisticated hardware systems, consumer devices that just incorporate electronics components like semiconductors and memory chips, or is just a retailer selling them or even a business that just buys and uses them off the shelf. Businesses all along the chain are finding themselves on the receiving end of a patent demand letter or lawsuit. It does not matter whether the patent just relates to a small component within a much larger system or device, or that they are just a retailer. Targets can try to contact suppliers, whose technology is the real core of the dispute. But, patent targets frequently have no easy way to combat these patent assertions.

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They may lack even the most basic understanding of the component accused of infringement.

- The type of patents that are most asserted in litigation also appears to be changing qualitatively. By some reports, "the most litigated patents are the most valuable ones and that they are most commonly in the hands of companies other than the ones building new products."[6]

The New Entrants

The statistical evidence of the shifting patent litigation landscape only tells part of the story. The entry of several new players to the patent licensing business is well-reported. For example, Intellectual Ventures reportedly holds "more than 30,000 U.S. and international intellectual property assets."[7] Acacia Research is a publicly-held patent licensing company, litigating patents across the country with varying degrees of success.[8] RPX calls itself a "provider of patent risk solutions"[9]; it raised $160.2 million in its recent IPO.[10] RPX's impact has already been felt in the context of settlements of a number of patent lawsuits. Its real impact may have yet to be felt as it finds its footing. For example, RPX recently qualified to bid in the bankruptcy-inspired auction of Nortel's enormous wireless patent portfolio —Google's opening bid for the same portfolio totaled over $900 million.[11]

In sometimes well publicized moves, big firm litigators are opening smaller shops in the hopes of being more nimble and avoiding conflicts. John Desmarais is one such litigator; a former litigator at Kirkland & Ellis, in 2010 he formed Desmarais LLP.[12] His clients include his own patent licensing company, Round Rock. While only in its second year of existence, Round Rock already appears to boast an extraordinary licensing success rate, and recently began enforcing its massive portfolio (boasting many patents from Micron) in litigation.[13]

A Few Answers, But Many Open Questions

Notwithstanding the publicity, the real-world impact of these new entrants on patent litigation is really not well understood. From the perspective of the Courts, it simply will not matter whether the plaintiff in a patent case is a large company or a small one; a "non-practicing entity," "troll," or "licensing" shop or a solo inventor. Only the merits will matter, as they always have.

Beyond the Courts, however, the changing patent litigation landscape raises many more questions. Will the evolving patent litigation business mean an up-tick in patent lawsuits? Will the number and type of businesses facing such lawsuits continue to grow beyond the traditional targets? Will the evolving patent (and patent litigation) marketplace improve the quality of the patents being litigated and of the infringement allegations being asserted, making litigation more risky? Or will the proliferation of patent plaintiffs, and law firms willing to represent them, have the opposite effect? And what will this all mean on the bottom line for companies facing patent assertions on a regular basis?

The answer is a resounding "yes" to the first two of these questions. The answer to the next set of questions, however, is far more challenging to predict. It is possible that some of the new entrants are not nearly as sophisticated and nimble as the image that they hope to project. Of course, the answer to the last question posed above is that costs will go up, unless sophisticated steps are soon taken to mitigate them. Even then, cost increases may simply go up less than they otherwise might.

Mitigating Risk —and Surviving — in the Evolving Business of Patents

Patent litigation is typically reactive. Companies take steps in response to a demand letter. A set of claim charts exchanged during a face-to-face negotiation. A complaint or ITC investigation is filed. Until an assertion is made known (or seem coming by

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virtue of assertions made against competitors), the traditional patent litigation toolkit lacks tools to take highly proactive steps to deal with it.

That has to change.

Companies should be thinking deeply about at least five strategies for proactively mitigating the risks of the changing patent litigation landscape.

"Easy" In-House Best Practices

First, almost any company should have at least general counter-assertion strategies in place. These include implementing "best practices" when receiving a patent demand letter or a complaint. Capable counsel (whether in-house or outside) can guide a client step-by-step through an assertion based on the particular circumstances — from deciding whether or not to respond to a demand letter, agree to a face-to-face meeting, negotiate and agree to a license, seek a formal patent opinion to support an advice of counsel defense to willful infringement or to refute allegations of inducement, prepare a declaratory judgment action, contemplate a reexamination request to the PTO, or simply await a complaint. All of these steps can help mitigate risk, depending on the context.

But dealing with the sophisticated Quants and other new arrivals on the patent litigation scene — as well as some of the top "old hands" — will likely require much more.

Information Acquisition

Second, obtaining reliable and thorough information is a key component of the new patent assertion toolkit. For example, patent licensing entities in particular frequently do their best to hide their true identities. It is frequently not at all immediately clear who controls a given licensing entity. Nor are their investors typically known (or easy to figure out). Their prior licensing efforts (unless they were outright successes that the licensing entity chose to boast about when making a new assertion), are typically not public. And unless the licensing company has sued multiple targets, it can take a lot of time and effort to identify who else is a target. This is particularly true if the licensing company has not yet initiated any litigation at all.

All of this means that a company facing a patent assertion will all too often think that it stands alone against the would-be licensee. A licensing company may send demand letters to dozens (or hundreds) of targets; if those targets do not talk with one another, none will ever be the wiser that they are not alone in the fight. The reality is that most companies are not alone in finding themselves the targets of a patent assertion. But it can take a fair amount of digging to identify potential allies.

At present, there are few sources even of components of this sort of information, and there are fewer sources that aggregate all of it. Blogs, including the famed "Troll Tracker" blog (taken down during a court fight about whether its description of patent litigation tactics in the Eastern District of Texas crossed the line into defamation) were early pioneers in information aggregation for patent litigation. Of course, blogs generally depend on volunteers relaying anecdotes and information that can have varying degrees of accuracy, and coverage (especially of pre-litigation patent assertions) is usually hard to come by.

Promising new entrants may supply platforms for sharing information. For example, PatentFreedom offers subscription-based services designed to help operating companies and their advisors more effectively assess, respond to, and ultimately reduce the specific threats posed by licensing companies through a knowledge management-based system.[14] RPX is another potential example. But at the moment the RPX business model is not really based on aggregating information about patent assertions; it is much more focused on using the information they glean for purposes of purchasing (and monetizing) patent rights for its membership.[15] Non-members

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will not have access to this information unless RPX is attempting to pick up a new paying member. Even among its membership, it is not at all clear that RPX has the incentive to share all of its information.

The bottom line is that, as of now, specific and highly credible information concerning patent assertions and the true value proposition on a licensing demand or on a typical lawsuit filed by most licensing companies is hard to come by. This is a market niche that ought to be filled. In the meantime, it means that companies facing patent assertions will have to do a lot of leg-work themselves or via outside counsel.

Defense Groups

Third, companies dealing with the new patent litigation landscape should be making better use of coordinated joint defense groups. The joint defense group is not new to litigation in general or patent litigation in particular. At their heart, these are simply groups of companies with a common interest in defending against a claim. The "common interest doctrine" permits the sharing of certain types of information between companies with a common interest in actual or potential litigation as if the information were subject to the attorney-client privilege.

In patent litigation, this allows companies to share information concerning all sorts of defensive strategies: non-infringement analyses, prior art and charts mapping the prior art against the patent claims for purposes of assessing invalidity, and draft patent reexamination petitions are just a few examples. They permit both free sharing of information and coordination of positions for purposes of briefing and oral argument in Court. Joint defense groups also play a significant role given the growing popularity of large-scale mediation efforts involving multiple parties, where some degree of coordination can have an important impact on the outcome.

Effective coordination may include use of subgroups within a larger joint defense group to steer efforts to develop invalidity defenses, obtain patent opinions to permit invocation of the advice of counsel defense to willful infringement, prepare claim construction contentions, coordinate responses to mirror-image discovery, and deal with myriad other issues.[16] One or more trusted members can "take the lead" on a given task, to the benefit of all involved.

Potential Pitfalls

The fact that joint defense groups are a well-known tool does not mean that they are uniformly effective. Pitfalls abound.[17] Savvy patent plaintiffs seek to exploit potential differences of opinion between defendants in the same case or between parties in ongoing parallel lawsuits. They may also seek to use an initial lawsuit against one target to obtain a patent claim construction that can be then used against other — much larger — targets in follow-on litigation.

Joint defense groups are typically reactive — they are frequently formed only after a complaint is on file, and the focus of the group is specifically targeted toward dealing with a specific case and an easily-defined set of parties (just the named defendants). These scenarios can lack a "big picture" perspective on how this engagement relates to the changing patent litigation landscape.

From a management perspective, all too many groups are rendered ineffective by a lack of resources. Absent a mechanism for sharing expenses or dividing up resources, some members are tempted to free ride on the efforts of others. Occasionally, free-riding will backfire, as in one case in East Texas in which a defendant apparently found itself without an expert after its co-defendants settled the case prior to trial.[18]

On the opposite extreme, all members may take an extremely active role in crafting strategy, each with

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differing views of the merits and how to approach them. Occasionally, fights may erupt among outside counsel and their clients about such things as who will speak at an oral argument. This can and does sometimes play into the hands of the patent plaintiff, leading defendants to fracture and take wildly different positions in litigation.

All of this means that effective coordination and management of defense groups is essential. Participants, whether in-house or outside counsel, should be flexible. Members should be willing to make contributions to the group in amounts that reflect good faith participation. Where exposure is disparate (as where one member has massive exposure while others estimate exposure as less than the cost of defending the case), it may be logical to apportion contributions of time and money to take that into account. From a coordination and management perspective, the key is that everyone make a meaningful contribution to the common good of the group to avoid the perception of free-riding.

Cost Sharing

Fourth, once formed, joint defense group should try to make use of cost-sharing mechanisms. This does not mean that every member must share outside counsel. In many situations, common counsel just will not make sense from either a practical or an ethical perspective (as where members of a defense group may have to make different arguments or emphasize different themes based on their potential liability and exposure). Rather, it means that there are ways that companies represented by different counsel can still pool resources to make it less expensive and more efficient to deal with a patent assertion.

Cost-sharing typically involves the pooling of funds in a common retainer account. Outside counsel for one of the members can usually create and administer the account for the members. This will require members who have not retained the supervising outside counsel to acknowledge that the retention account will not create an attorney-client relationship, to agree to waive any potential conflicts, and to confirm the member will not seek to disqualify the outside counsel based on administering the fund. All of that can usually be done in a single simple letter.

Once formed, a common fund can be used for a variety of activities. Most frequently, this includes searching for, sharing, and evaluating prior art. More proactive strategies can also be supported by a common fund —including preparing reexamination requests, monitoring patent prosecution activities, and preparing declaratory judgment strategies (where one or more recipients of a qualifying patent demand letter file suit seeking a declaration of non-infringement, invalidity of the patents, or unenforceability).[19]

Newer Potential Vehicles for Coordination

Finally, companies facing the changing patent litigation landscape should consider moving beyond the improvements to the existing patent litigation toolkit. A more-permanent, reliable, and consistent platform may, with the help of outside counsel, prove to be another part of the answer. It could also allow more proactive, big-picture efforts to deal with the changing patent litigation landscape, rather than the singular, tactical focus on a particular engagement that characterizes most defense group efforts.

This "new new"[20] entrant would provide a platform for sharing information, coordinating and managing efforts on behalf of the entities facing a pre-litigation patent assertion, administering common funds, and proactively pursuing strategies that include ex parte and inter partes reexamination, one or more of the new "post-issue review" mechanisms that may become law if Congress adopts the current draft of the Patent Reform Act, declaratory judgment strategies, or group licensing efforts.

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With the right legal foundation, such an entity could even pursue some of these pre-litigation strategies on its own, as a trade association might. Particularly in the context of patent reexaminations, a self-funded entity (perhaps with funds generated by aggregating patent-related information) could initiate its own patent reexamination proceedings, depending on the context.

Conclusion

Whether or not it means creating a new vehicle for coordination, patent licensing targets should be thinking deeply about management of defense groups and cost-sharing. It can be difficult to create a frictionless approach to collaboration that also limits transaction costs. "Herding the cats" can be time consuming and inefficient, begging for new and creative approaches.

The changing patent litigation landscape requires companies to think and act proactively about patents. Failure to do so will only increase the cost of doing business.

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1 Scott Patterson, The Quants: How A New Breed of Math Whizzes Conquered Wall Street and Nearly Destroyed It (Crown Publishing 2009).

2 *See* U.S. Patent Litigation Statistics (available at http://www.patstats.org), Jeffrey Johnson, et al. eds. (University of Houston Law Center 2011).

3 2009 Patent Litigation Study (PricewaterhouseCoopers Jan. 2010) (available at http://www.pwc.com/en_US/us/forensic-services/publications/assets/2009-patent-litigation-study.pdf) at 4 (chart 1).

4 The author uses term "massively multi-defendant" to describe patent cases with ten or more defendants, in a play off "massively parallel processing."

5 *See Technology Patents LLC v. Deutsche Telekom, et al.*, No. 07-CV-03012 (D. Md. 2007) (naming 129 defendants in two-patent case involving international text messaging).

6 John R. Allison, Mark A. Lemley, and Joshua Walker,*Extreme Value or Trolls on Top? Evidence from the Most Litigated Patents*, Stanford Public Law Working Paper, No. 1407796 (May 2009) (available at http://www.law.stanford.edu/publications/details/4309/). The author's personal experience defending against patent assertions, to date, has not supported the conclusion reached in the working paper.

7 *See* http://www.intellectualventures.com/ProductsServices.aspx

8 *See* http://acaciatechnologies.com/2011ACTGIRPRESENTATION.pdf; *see also* Joe Mullin, *Acacia Stock Price Holds Firm Despite Company's Third Trial Loss*, Corporate Counsel (May 10, 2010) (available at http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202457878810&Patent_Litigation_Weekly_Acacia_Stock_Price_Holds_Firm_Despite_Companys_Third_Trial_Loss__).

9 *See* http://www.rpxcorp.com/

10 RPX Corp. Form 10Q (Quarter ending March 31, 2011) at 4.

11 Cromwell Schubarth, *Intel, Apple, Ericsson join Nortel patents fray*, San Jose Business Journal (June 20, 2011).

12 *See* http://desmaraisllp.com/firm.html

13 *See* http://www.roundrockresearch.com/lic.html; *see also* Zach Lowe, *John Desmarais Takes His First Shot as a Patent Owner*, American Lawyer, Oct. 4, 2010 (available at http://amlawdaily.typepad.com/amlawdaily/2010/10/desmaraiscase.html).

14 *See* https://www.patentfreedom.com/

15 In its most-recent 10Q, RPX explained, "RPX helps companies reduce patent-related risk and expense. We provide a subscription-based patent risk management solution that facilitates more efficient exchanges of value between owners and users of patents compared to transactions driven by actual or threatened litigation. As of March 31, 2011, we had a client network of 81 members. The core of our solution is defensive patent aggregation, in which we acquire patents or licenses to pa-

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tents, which we refer to collectively as "patent assets," that are being or may be asserted against our current and prospective clients. We then license these patent assets to our clients to protect them from potential patent infringement assertions. We also provide our clients access to our proprietary patent market intelligence and data. As of March 31, 2011, we had deployed over $280 million to acquire patent assets." RPX Corp. Form 10Q (Quarter ending March 31, 2011) at 16.

16 Jonathan S. Kagan, Michael M. Markman, and Mallun Yen, *Joint Defense Strategies and Agreements*, 2008 Advanced Patent Law Institute (Panel Presentation Dec. 12, 2008).

17 *See* Ryan Davis, *5 Tips For Managing A Joint Defense In Patent Suits* (Law 360 July 23, 2010).

18 *See*QPSX Developments 5 Pty Ltd. v. Nortel Networks, Inc., No. 05-CV-00268, 2008 BL 55306 (E.D. Tex. Mar 18, 2008).

19 *See* SanDisk v. STMicroelectronics, 480 F.3d 1372*(*Fed. Cir. 2007).

20 With apologies to Michael Lewis. *See* Michael Lewis, The New New Thing: A Silicon Valley Story (W.W. Norton & Co. 2000).

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