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**Intellectual Property Rights and the Rule of Law**

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The subject of this conference is the “Rule of Law”, so I would like to address my opening comments to a trending narrative that casts opposition to the demands of patent holders as a form of lawlessness. This narrative specifically takes aim at a practice that has been termed “efficient infringement” – the idea that a firm may rationally decide to infringe patents either because it will be too costly for the patent holder to enforce its rights in court, or because it is happy to take its chances in court, where an asserted patent may be invalidated and where damages eventually assessed against the infringer years later will likely be no higher than the royalties that the infringer would have paid anyway under a licensing agreement.

Pundits bemoan a prevailing “steal-what-you-want” attitude among large companies. One commentator explains that efficient infringement “is another way to say ‘it’s ok to violate a constitutionally-granted right’”. Another compares patent infringement to piracy on the high seas, arguing that infringers “exploit the lack of enforcement of the law of nations”.

One conspiracy-oriented writer, just days after the recent U.S. presidential election, was quick to place the blame for “the anti-patent chaos that marked large portions of the Obama Administration” on the “enemy within” – a “handful of politically well-connected companies” that were ... helpful to Obama’s own political ascendancy.

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Among the top recipients of criticism is the Patent Trial and Appeal Board – the PTAB -- an arm of the Patent and Trademark Office that has rejected a large number of issued patents as invalid. As a result, the PTAB has been called a patent “death squad” and a “kangaroo court,” despite the fact that, at least to my knowledge, it has consistently operated within its statutory mandate established by Congress.

Unfortunately, these extreme statements cannot be written off as the intemperate musings of conspiracy theorists and Internet trolls. They have been made by respected figures in the patent world – former government officials and judges, academics at well-regarded institutions, and prolific writers on patent doctrine and litigation.

But are they right? Is the United States descending into a state of patent anarchy?

I claim that it is not.

To refute these statements, let’s consider more closely the conduct that the critics are responding to. When complaints of widespread “efficient infringement” are made, they’re not generally referring to cases in which one company copies its competitors’ patented products and hopes to get away with it. Nor do they refer to cases in which a breakthrough discovery is made and jealous competitors race to incorporate it into their products. Nor is this a case of a licensing deal gone sour – in which one company reneges on its obligation to pay the agreed price for access to its partner’s technology. Finally, these are not cases of industrial espionage, in which valuable technology is surreptitiously pilfered from a competitor’s servers or carried away by disloyal employees. Conduct such as this is, indeed, lawless and worthy of condemnation.

But the scenario in which efficient infringement is generally identified is different. Here, a large operating company – often a manufacturer or service provider -- is approached by a patent assertion entity (a PAE, often referred to as a patent troll). This PAE notifies the company of a patent portfolio in the general area of the company’s business. It offers a fee-bearing license to the company, but the company largely ignores the offer. The message back to the PAE is: sue me, because that’s the only way I’ll ever pay you a cent.

Why would a law-abiding company adopt this approach? Is it evidence of the lawlessness that critics decry?

I don’t think so. In fact, there are several legitimate business reasons that a company should adopt exactly this approach when confronted by a PAE demand.

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First, it is worth noting that PAE patent assertions have increased substantially over the last two decades or so. In the early 2000s, PAEs represented only 15% of patent litigation, but after 2010 have accounted for about 45%. One study found that by 2013, 62% of all patent infringement suits were brought by PAEs.

Second, every year a significant number of patents are found invalid, either at the PTAB or in court. Depending on the industry, this invalidation percentage can be well over 50%. Thus, when a company is approached by an entity bearing patents, there are good odds that some or all of the proffered patents are invalid.

Compounding this fact, patents held by PAEs are often considered to be of lower quality than average. Why? Because they are often acquired from bankrupt firms that did not succeed in the market, or are sloughed off by successful firms that do not find them particularly valuable to their businesses. If these patents happen to cover a company’s products, it is often a coincidence, or the result of broad and aggressive claim drafting by patent attorneys.

This last point is worth spending a moment on. It is undeniable that the claims of many asserted patents – especially in the software industry -- are vague and ambiguous. Patent claims do not protect circuit diagrams or computer code. Rather, they are linguistic constructs crafted by lawyers to be as broad and encompassing as possible. Often, they do not even describe how a particular technology works, but only what its end function is.

I submit that those who analogize patent claims to real property deeds have not read enough patent claims. There are no clearly-drawn boundary lines here. Instead, they harken back to the worst of the metes and bounds systems of yesteryear, in which property lines were established by descriptors like “a stone’s throw from the river” or “where the old church used to stand”.

So the question whether a particular product in the real world infringes a patent claim crafted by someone, perhaps years earlier, who was not even aware of the allegedly infringing product, is a fraught one. Often, there is no clear answer to this question until a judicial claim interpretation hearing.

This indeterminacy is compounded by the behavior of PAEs themselves. Often, a PAE demand letter will refer to a portfolio of patents, with no clear linkage to the recipient’s products. In patent litigation, we refer to a “claim chart” that identifies how every element of a patent claim is practiced by an allegedly infringing product. Claim charts are often omitted from PAE

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demands. This omission is understandable -- many PAE litigation campaigns target dozens or hundreds of different companies and products, so a detailed mapping of asserted claims to allegedly infringing products is infeasible. Thus, it is often ONLY through litigation that a patent presented by a PAE can be assessed and valued definitively.

So it is not at all irrational for a company that’s approached by a PAE with patents of dubious validity, where infringement is uncertain, to ignore the approach and allow litigation to produce a definitive result. This is, in fact, an entirely rational strategy, and wholly in keeping with the law as it stands today. There is no element of lawlessness at work.

But critics also complain about the systemic features that enable operating companies to adopt this wait-and-sue approach.

For example, critics of efficient infringement object vehemently to the PTAB’s propensity to invalidate patent claims after they have been allowed by the PTO. No matter that the PTAB is part of the PTO. This administrative body has been unsuccessfully challenged on Constitutional and administrative grounds for years, and the challenges continue. Why? Because the PTAB takes a more skeptical view of patent claims than the PTO’s examiner corps, which is compensated based on the number of applications processed rather than the quality of its output.

Another frequent target of these critics is the Supreme Court, whose quartet of patent eligibility decisions — Bilski, Mayo, Myriad and Alice — have been roundly criticized for rejecting the patentability of laws of nature, naturally-occurring products, and mental processes. Allegations have been made that the Supreme Court itself is acting in a lawless, or at least an ultra vires, fashion by creating judicial exceptions to the statutory enactments of the Patent Act — a function that the Court has pursued for the past two centuries.

12 Mark A. Lemley, Kent Richardson & Erik Oliver, The Patent Enforcement Iceberg, 97 Tex. L. Rev. 801, 810 (2017) ("a significant minority of assertions (246, or 41%) actually included a claim chart mapping at least one claim to the target’s products").
15 See Michael D. Frakes and Melissa F. Wasserman, Decreasing the Patent Office’s Incentives to Grant Invalid Patents, Hamilton Project, Dec. 2017, https://www.hamiltonproject.org/assets/files/decreasing_patent_office_incentives_grant_invalid_patents.pdf ("every patent application is an input to a patent examiner’s productivity score, which is an important determinant of her performance review.")
I acknowledge that reasonable people can differ over optimal patent scope and policy. Likewise, the PTO and the PTAB can issue and uphold more or fewer patents, and the courts can interpret the Patent Act in ways that we like or dislike. Reasonable people can also seek change through litigation, legislation and administrative channels. All of these mechanisms are organic parts of our tripartite system of government. We will never have a situation in which all partisan interests are equally happy with the rules or the outcome of every case — this is part and parcel of an adversarial legal system. But this is no reason to question the legitimacy of the system itself. So, far from a departure from the rule of law, what we see today in the patent system is the operation of a well-functioning legal regime seeking to address the interests of competing, but largely law-abiding, stakeholders.