

LITIGATORS CORNER: Have the Big Guys Wised Up?



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A number of large companies have spent years, and I suspect a good deal of money, to weaken patents. Of course, there are the well-documented efforts of the Coalition for Patent Fairness—which I often refer to as the Coalition for Fairness to Foxes in the Hen House—to get the Patent Reform Act passed. Another example is the spat in the Supreme Court in *Merc Exchange LLC v. eBay*, where the Supreme Court took the CAFC to task over injunctions in patent cases. The *amici curiae* supporting the petitioner, eBay, included Yahoo, IBM, the CCIA, Intel, Microsoft, Oracle, Micron, Time Warner, a number of business associations in the securities industry, the Business Software Alliance and others. The present members of the CCIA, according to its website¹, include Oracle, Microsoft, Yahoo, Google, Redhat, eBay and T-Mobile. The current members of the BSA include Adobe, Apple, Cisco, Dell, HP, IBM, Intel, Microsoft and Siemens PLM Software.² They might just as well have filed one brief by “The Big Guys.” I am sure it would have been a lot cheaper.

The Business Software Alliance is reported to have said:

“This decision is a clear victory for innovation and for consumers and a defeat for patent trolls and others who are abusing the legal system,” said Robert Holleyman, president of the Business Software Alliance,.... “By giving courts greater latitude on whether or not to issue an injunction, we are making progress towards restoring much-needed balance to the out-of-control patent litigation process.”

Not much hyperbole in these remarks. As Adlai E. Stevenson has been quoted as saying, “These are the conclusions upon which I base my facts.”

When interviewed about the eBay decision in *Intellectual Property*, the Fall, 2010 ALM (American Lawyer Media) Supplement, retired Judge Paul Michel said that if a patent owner cannot get an injunction, then “the patent has been made practically meaningless.” He went on to say that the eBay decision makes it “much less clear when you can and can’t get an injunction.” That’s progress.

The Big Guys have spent years undermining patents with their lobbying efforts for the Patent Reform Act and their misguided complaints about small inventors. Other Big Guys, like Disney and the recording industry, are busy insuring that copyrights get even stronger. Yesterday I read that there’s another move afoot to extend the life of Mickey Mouse. I am beginning to think that if the universe stops expanding and begins to contract, the little guy will still be copyrighted at the final implosion.

Now those expensive lobbying efforts and amicus briefs may be coming back to haunt them. The Big Guys aren’t so big when it comes to competition from other countries. In my April 2008 column, “Trolltracker, Cisco and the Coalition for Fairness to Foxes in the Hen House,” I wrote about the prospect of major Chinese companies, such as

Huawei, coming to the United States to sell their products. Companies are starting to figure out, rather late in the game, what China’s strategy is. *The Wall Street Journal* reported that several large multinational companies were eager to sell high-speed trains in China, which is constructing a new rail system. These companies, including Siemens and Kawasaki, entered into joint ventures with Chinese companies. From what I have seen so far, the Chinese partner in the joint venture is controlled indirectly by the Chinese government. (One wag suggested that you are really dealing with the Red Army.) The joint venture agreement requires a technology transfer from the non-Chinese company to the Chinese partner in the joint venture. Voila. Before you know it, a Chinese company is now selling the acquired technology around the world, in competition with its joint venture partner.

That is what has happened with trains. *The Journal* says Kawasaki claims that the Chinese products are the same as their own; that the paint and interiors were changed, and the propulsion system was modified. Otherwise, China is selling trains that embody Kawasaki technology and know-how. Of course, good luck to Kawasaki in pursuing a remedy in the Chinese court system.

These joint venturers lust after the Chinese market. China knows that, and throws out sops to them—some money, or more assurances about the Chinese market. China, on the other hand, is taking the long view, and swiping technology to enable it to compete globally. It knows that it can play off one foreign company against another. *The Journal* article says:

Foreign companies are generally reluctant to criticize the powerful Railways Ministry publicly. Bernd Eitel, a spokesman for Siemens, says the German company has “a trusting relationship” with its Chinese partners and expects that to continue. Bombardier China President Zhang Jiawei said in a statement that “we have contracts and agreements, and both sides respect” them. A spokeswoman for the French company Alstom declined to comment, citing the “sensitive nature” of the subject.

Ah, trust and respect. I believe in Ronald Reagan's "Trust, but verify."

The same article refers to the practice as "shanzhai"—that is, a "bandit" culture. It is happening in other ways, too. Another article reports that China is developing its own drones, using, in part, technology in antiradar drones provided to China by Israel in the 1990s.

That's why I like all the lawsuits I've been seeing recently. These large companies are now assaulting each other with those patents they don't like—unless they own them, of course. Last March, Apple sued HTC, alleging that Android phones infringed about twenty Apple patents. In May, HTC sued Apple, claiming infringement of HTC patents. Last month, Microsoft sued Motorola. Microsoft's suit is for patent infringement, and alleges that Motorola's phones using Android infringe nine Microsoft patents. One article refers to Microsoft as "The Borg." This month, Motorola launched its own salvo. It claims Microsoft's phones, PCs and server software, and Xboxes infringe sixteen Motorola patents.

Motorola sued Apple in October. Its complaint says (I am running out of synonyms for "allege") that a bunch of Apple's patents, including some asserted against HTC, are worthless.

In August, Interval Licensing sued about eleven companies, including AOL, Apple, eBay, Facebook, Google, Netflix, Office Depot, OfficeMax, Staples, Yahoo and YouTube. Interval Licensing is owned by Paul Allen, a co-founder of Microsoft. I wonder if the defendants have the chutzpah to call him a troll.

Others have jumped into this litigation equivalent of the World Wrestling Association. Oracle has sued Google, claiming that features in the Android operating system infringe Oracle's patents on Java. Apparently, Google says that Oracle altered an exhibit submitted to the district court in October. Let the games begin. This will be fun to watch.

An in-house counsel at Microsoft, Horatio Gutierrez, said:

"We have a responsibility to our customers, partners, and shareholders to safeguard the billions of dollars we invest each year in

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I am going to find and save every comment a litigant in these suits makes about the importance of patents; about how a patent gives the right to exclude others from practicing the invention; about how patents are presumed valid; about how infringers are discouraging innovation by ripping off the ideas of others; about how their inventions are not obvious; and about the ingenuity of their inventors.

Some of the initial tactics are interesting, too. Apple is a California corporation headquartered in Cupertino, California. Motorola is a Delaware corporation headquartered in Chicago. But Apple sued Motorola in the Western District of Wisconsin, where neither is located. Do you remember all the lobbying arguments about how small patent owners were abusing venue and personal jurisdiction?

One side benefit: These suits could save the IP practices of any number of big firms. I can only imagine the tsunami of dollars that will be shoveled to law firms fighting the suits and the related actions in the International Trade Commission.

What will U.S. companies do if foreign companies begin selling products here that are the result of technology transfers to joint ventures? There won't be a sign of any stolen trade secrets; any documents provided to Chinese partners in joint ventures will have been laundered, that is, transformed into other documents that no longer reveal the origin of the trade secrets.

Thanks to the short-sighted efforts of some idiots to weaken the U.S. patent

system, and a number of CAFC decisions that have helped weaken it, patents won't help as much as they could have helped in the past. Given the efforts of many large U.S. companies to denigrate patents, they won't have the weapons they might have had. Foreign companies found to have infringed will be able to argue that injunctions aren't appropriate under the standards of the eBay case.

Just as is the case with high-speed trains, companies using technology obtained from these "joint ventures" will be here. Reportedly the U.S. is considering bids by a Chinese manufacturer to provide high-speed trains here. Sooner or later, Huawei will be selling its computer equipment in the United States. It just got into hot water because it bought a U.S. startup, 3 Leaf Systems, which caught the attention of the Department of Defense. Huawei has a number of offices in the U.S., a number of R&D centers, and has about 1,000 employees here. It bought the patent portfolio of Avici Systems.

Perhaps, just perhaps, those who've been busy slamming the patent system will get a reeducation from their sudden flurry of litigation. They might have decided that maybe patents are good after all, and a way to protect inventions that are developed here from copycats overseas. At the very least, they are going to give those of us who represent the small inventor some good sound bites. **IP**

ENDNOTES

1. <http://www.cciagnet.org>.
2. <http://www.bsa.org/country/BSA%20and%20Members/Our%20Members.aspx>.