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Paper—Idea Submission Policies: Do industries Create Troll Behavior?

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Recent articles on “patent trolls” or, more descriptively, “patent assertion entities” or “PAEs”¹ discuss inefficiencies in litigation and other patent assertions as part of the invention transfer process. In a 2015 article, Stephen Haber and Seth Werfel discuss the asymmetries in financial resources between individual patent holders and manufacturers resulting in an increase of patent transfers to PAEs and PAE litigation activity.² In another 2015 article, Robin Feldman and Mark Lemley find that very few patent licenses from litigation assertion lead to new innovation; most licenses are simply about paying for the freedom to keep doing what the licensee was already doing.³ These asymmetries in financial resources and freedom to operate settlements are not surprising given the cost and time delay of patent litigation, however, both papers and many others focus on only a post-system-breakdown analysis.⁴

Instead of focusing on the costly aftermath of breakdowns in the invention transfer process, more discussion should be on what actually leads to disputes and litigation—prior to a need for financial resources in patent assertion and even prior to infringement of patent rights.⁵ The subject of this article is on the early stage of commercialization communication when a manufacturer has not infringed the patent rights of a third party innovator, but a third party innovator has an invention protected by a patent (or covered by a patent application) that the manufacturer would likely profit in producing. This timing and type of communication, from

¹ The pejorative term “patent troll” and more descriptive term “patent assertion entity” or “PAE” are all used to describe entities that own patents but do not, or cannot, practice the patents themselves. Other synonymous terms include “formerly manufacturing entity,” “non-practicing entity,” and “patent holding company.” This article uses the descriptive term PAE to describe business entities which assert patents but do not practice or manufacture the patented invention.

² Stephen H. Haber & Seth H. Werfel, *Why Do Inventors Sell to Patent Trolls? Experimental Evidence for the Asymmetry Hypothesis* 1 (April 27, 2015) (Stanford Univ. Hoover Inst., Intellectual Property, Innovation, & Prosperity Working Paper Grp., Paper No. 15009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2552734.

³ Robin C. Feldman & Mark A. Lemley, *Does Patent Licensing Mean Innovation?* 101 IOWA L. REV. ___ (forthcoming 2015). http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2565292.

⁴ Patent disputes average almost 2.5 years from complaint filing to the first day of trial. Dispute time would likely double time to trial when considering post-trial motions and appeals. Chris Barry, et al., *2015 Patent Litigation Study: A Change in Patentee Fortunes*, PRICE WATERHOUSE COOPER 14, 23 (May 2015), http://www.pwc.com/en_US/us/forensic-services/publications/assets/2015-pwc-patent-litigation-study.pdf (“Overall, time-to-trial has remained relatively steady, at about 2.4 years, since 2005.” “Time-to-trial is calculated from the complaint date to the first day of either the bench or jury trial for each case.”).

⁵ As Feldman and Lemley note, “[p]atents are supposed to promote . . . innovation—the development and deployment of new technology into the world. If they are serving this function, we should expect to see patent licenses [or offers to license] leading to the deployment of new products or at least creating the proper environment for such deployment. If that is not happening, then aspects of the patent system begin to look more like economic waste, a tax on innovative companies.” Robin C. Feldman & Mark A. Lemley, *Does Patent Licensing Mean Innovation?* 101 IOWA L. REV. ___ (forthcoming 2015). Perhaps it is not aspects of the patent system that need to be changed, but instead aspects of company policies to not contradict the intent of the patent system.

third party to manufacturer, is covered by corporate policies known as “idea submission policies” or “ISPs.”

Among other things, ISPs invite, or block, third party submission of invention ideas, patent applications, or patents. They are the figurative “doors” to a company for any third party inventor, which are crucial to the commercialization of innovation generally. Indeed, a 2014 National Bureau of Economic Research paper found that 49% of American manufacturing and service sector firms report that their most important new product originated from an outside source, notably customers, suppliers, and technology specialists.⁶

Unfortunately for the United States innovation system, a review of current corporate ISPs reveals serious deficiencies and inefficiencies in certain industry policies. While some industries have ISP standards that result in clear paths for third party inventors to knock on corporate doors with invention submissions,⁷ other industries have standards to effectively block submissions of inventions, block third party communications, and effectively slam the corporate doors in the face of outside inventors.⁸ An interesting correlation is that those industries that block third party invention communications are generally the very same industries which complain of increases in patent litigation. Perhaps if early patent innovator idea submissions were not shut-out, then later manufacturer infringement would be less likely, and future patent litigation could be reduced? In short, is the litigation and patent “trolling” certain industries complain about something they are directly contributing to?

This article collects and analyzes the variations of idea submission policies in the largest ten companies within four industries: auto and truck; computer hardware; computer services; and pharmaceutical. When reviewing the policies, focus and analysis is only on the potential submission of patent-protected, or patent-pending, ideas originated by a third party with no affiliation to the manufacturing firm. The policies are broken into one of two categories: “ISPs” (idea submission policies—allowing invention submission); and “NIPs” (no idea policies—blocking all invention submissions). Once individual corporate policies are found, each industry is reviewed to extract general industry standards. These general standards are then compared to other industry data to allow analysis of the policies and their potential impact. Part I provides a

⁶ Ashish Arora, Wesley M. Cohen, & John P. Walsh, *The Acquisition and Commercialization of Invention in American Manufacturing: Incidence and Impact* (June 2014) (Nat’l Bureau of Econ. Research, Working Paper No. 20264) <http://www.nber.org/papers/w20264>.

⁷ E.g. *Contact Us/Email*, PFIZER, https://www.pfizer.com/partnering/partnering_with_pfizer_contact_us (last visited July 20, 2015) (“To protect the interests of both yourself and Pfizer, it is preferred that you consult with an attorney regarding the legal avenues available to protect your idea prior to submission. There may be several options of protection available for your idea prior to submission. Although not recommended, you of course, have the option of submitting an idea without the advice of an attorney. Any submission that you may make to Pfizer is made voluntarily and does not contain any confidential information. . . . Your submission does not obligate Pfizer to adopt your ideas or pay any monies for any use thereof unless and until such obligation is expressed in a formal written contract with Pfizer.”).

⁸ E.g. *Privacy, Cookies and Legal Disclaimer*, NOVO NORDISK, <http://www.novonordisk.com/utills/disclaimer.html> (last visited July 20, 2015) (“Any questions, comments, suggestions or any other communications, including any ideas, inventions, concepts, techniques or know how you may forward to this site or otherwise to Novo Nordisk, electronically or by any other means, are on a non-confidential basis and will become the property of Novo Nordisk, which Novo Nordisk without restriction may use in any fashion and for any purposes whatsoever including developing, manufacturing and/or marketing goods or services.”).

background on ISPs, discusses variations in ISP language, and compares patent idea submission policies with intellectual property submission policies for other industries including movie screenplays and book publishing. Part II presents data gathered on corporate ISPs, as well as additional industry data on patents and patent litigation. Part III analyzes the industry variations in ISPs and proposes future research to understand the importance of ISPs and pre-infringement patent licensing communications. Finally, Part IV proposes recommendations for NIP-standard industries to adopt ISPs and open the door to third party inventors. These changes will hopefully lead to increase invention commercialization and potentially reduce future patent disputes. This paper concludes that it is disingenuous for certain industries to complain about an increase in patent disputes when legal service of a demand letter (or district court complaint) is the only option for outside inventors to open the figurative industry communication “doors.”

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