Patent Law at the Centre of Today's IP Debate

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Patent law seems to be at the very centre of the IP debate today. From time to time news about developments in patent law can even be found in the headlines. Not so long ago we witnessed a fiery debate over the landmark Court of Justice decision relating to the patentability of human stem cells.¹ This debate is far from over as new questions were referred to the Court of Justice for preliminary ruling.² Today we are carefully watching what will happen with the unitary patent protection in the EU. We are also awaiting the Court of Justice's decision in *Huawei v. ZTE* on FRAND defense in cases relating to standard essential patents.³

In the meantime, however, while awaiting further developments in the pending cases as well as the ratification process, the author of this editorial intends to turn the reader's attention to a report entitled *Patent Assertion and US Innovation*.⁴ The report was released in June 2013 by the US President's Council of Economic Advisers, the National Economic Council, and the Office of Science & Technology Policy. It is interesting for a number of reasons. First, the United States usually experiences many developments before these are experienced by other countries. Learning from that experience might be helpful to prepare for the developments that are also inevitable in the EU. Patent law is not an exception. Secondly, the report

¹ Case C-34/10 *Oliver Brüstle v. Greenpeace e.V.*

² Case 364/13 Reference for a preliminary ruling from High Court of Justice (Chancery Division) (United Kingdom) made on 28 June 2013 – *International Stem Cell Corporation v. Comptroller General of Patents*.

³ Case 170/13 Request for a preliminary ruling from the Düsseldorf District Court (Germany) lodged on 5 April 2013 – *Huawei Technologies Co. Ltd v. ZTE Corp., ZTE Deutschland GmbH*.

⁴ Patent Assertion and US Innovation, text available at: http://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf (visited 4 October 2013).

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highlights the threats posed by abuse of patents, particularly by patentees who do not practice their patents or manufacture any goods. Their business model is based on employing aggressive and costly litigation strategies in order to claim excessive royalties. These patent holders are referred to as Patent Assertion Entities (PAEs), but are better known as “patent trolls” or “patent sharks”.

Before analyzing the negative impact of PEAs, the authors of the report describe various types of patentees operating on the market today. Among them one would find those who develop technologies, seek patent protection for their inventions and later practice them, as well as those who are devoted to innovation but who then stay on the technology market and live from commercializing their technologies. Finally, one also finds the so-called patent intermediaries such as those who operate patent pools or clearing houses. These three types generally do not pose a serious threat to either innovation or the welfare of the society as a whole.

The real threat results from the operations of the PAEs. PAEs are not involved in research and development, they are not innovators. They do not manufacture products embodying their patents. Consequently, they do not fear patent infringement counterclaims and need not be concerned with negotiating cross-licensing agreements that would guarantee them design freedom. PAEs risk very little when employing their aggressive litigation strategies. It is the potential infringers who risk much more. Thus, PAEs have very strong incentives to enter into patent disputes. They concentrate on sending warning letters against businesses they suspect to be patent infringers, hoping that many of their addressees will settle instead of getting involved in risky, time-consuming and costly litigation. Eventually, in case their pre-trial strategies do not result in a licensing or settlement agreements being concluded, they file law suits. This often takes place once substantial investment in a given technology is made. Then the costs are sunk and usually PAEs' victims have little choice but to surrender and pay. PAEs target virtually all types of businesses, both big and small. They collect, often excessive, royalties but are very unlikely to spend it on further innovation.

The consequences of PAEs' aggressive strategies both for the individual companies as well as the economy in general, are far reaching. Firstly, PAEs activities lead to there being less investment in research and development. Sometimes, as a result of PAEs pursuing their aggressive strategies, innovative companies cease all research activities letting the production and employment fall. There are concerns that PAEs are capable of affecting economic growth. Secondly, as a result of the PAEs hampering research and development activities, consumers are deprived of new products. Thirdly, PAEs' activities often interfere with the proper functioning of standardization processes, proliferation of standard technologies once the standards are established within the SSOs or the operations of patent pools. By threatening companies with litigation, patent trolls distract them from their core operations and force some of them to cease operations in various areas or – in extreme cases – even to exit the market. Fourthly, aggressive litigation strategies substantially affect the value of shares of the companies targeted by PAEs.

Data presented in the document suggests that this loss in share value is only to a very small extent compensated by what the PAEs gain as a result of royalty

payments received from their licensees. It seems then that the overall loss to society is tremendous. The loss might even be greater because the scale of the patent trolls' activities to a great extent still remains unknown. The hard data relates only to the number of cases filed. Thus, we do not know how many disputes initiated by PAEs end up in settlements that are subsequently hidden under a veil of confidentiality.

Being aware of the problem the authors of the report suggest measures that should be taken to address the concerns raised by the activities of PAEs. According to the authors, what is required is a reform of patent law. In particular they advocate that the standards of novelty and non-obviousness should be raised in order to reduce the number of patents granted. Less patents would mean that there would be less patent sharks or patent trolls. It seems then that the authors call for a reform of major patent law concepts. This might be very difficult to achieve and certainly this would require time. It seems though that there are ways to combat these negative effects of patent in other ways. Reasonable enforcement of competition law combined with a more balanced approach to granting injunctive relief may help to address the challenges posed by the activities of PAEs more properly, particularly in the standardization context. The conclusions are certainly not the strongest part of the report, but having read it, we at least are more aware of the dangers lurking behind the great number of patents granted.