FTC Panel on Markets for IP and technology

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Topics

- Non-practicing entities
- Independent invention/prior user rights
- Data needs
Repeating the obvious

What do we want a patent system to do?
- Encourage invention/innovation
- Encourage useful disclosure of invention
- Facilitate trade in technology, to allow efficient specialization

What do we not want a patent system to do?
- Discourage innovation
- Reward inventors with more than their contribution to social welfare
- Provide employment for lawyers

Stronger is not necessarily better
Higher TC does not mean higher social value

Non-practicing entities

Definition: a patent holder that does not practice the invention on which he holds a patent

Benefits
- Allows efficient specialization in knowledge production
- Reduces reliance on scale and trade secrecy, which may favor competition
- Enables VC financing because increases the salvage value of knowledge-intensive firms
- Anand and Khanna (2000) – stronger IPR associated with more and earlier tech licensing

Costs
- “Potential infringing” not a level playing field
- Current bargaining strength in negotiations probably too strong due to
  - Preliminary injunction threat (but, eBay)
  - Some low quality patents (but, KSR)
  - Reasonable royalty computations
Complex products

- Too much bargaining power granted to the owner of a small share of the technology in a complex product
  - “willful” infringement - ignoring a cease and desist letter even if there is good reason to believe one is not infringing
  - “reasonable royalties” principle appears to yield excessive royalties in complex product cases
    - Lemley and Shapiro (2007) – court awarded royalties average 10% in electronics vs. 14% in chem/bio – seems too small a difference
  - Threat of “patent ambush” in SSOs?
- Cross-licensing does not help with NPEs

Number of new patent case filings by non-practicing entities (NPEs)
Source: Patent Freedom Copyright 2008

Independent invention defense

- Problem of inadvertent infringement when there are many minor patents, not always clearly written
- Exacerbated by the imbalance in bargaining power between potential infringer and patentee
- Proposed by Shapiro (2007), among others
  - Obvious costs in terms of discovery, etc
  - Benefit – the fact of independent invention suggests that the invention was not "non-obvious" to persons having ordinary skill in the art
  - Shapiro shows that welfare is almost always higher if indep invention allowed

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Lemley (2007) - concern that racing with no guarantee of being the sole winner may discourage some high cost innovations; he suggests the following modifications:

- Only copying be wilfulness, not indep invention
- Prior user right instead (rules out simultaneous inventions)
- Make simultaneous invention relevant for obviousness in court
- Take indep invention into account when deciding to issue injunction
Data issues

- Given the extreme heterogeneity of patenting behavior and value, one can always find a case study in the patent area to support any particular position.
- Therefore, evaluating the importance of many of these problems depends on looking at the data more broadly.
- But much relevant data is either difficult to come by, or very selective due to differences in firm reporting practices.

Data issues

- Two types of data especially desirable:
  - Better and more consistent litigation data - financial settlements in patent suits.
    - Firms that rely on the court system and public services to settle disputes should be obligated to report the details of any settlement reached.
    - Would this cause settlements to happen before a suit is filed?
  - Financial data for licensing – essential if we are going to understand the markets for technology.
    - require reporting of patent licenses in some standardized way.
Data and value

- Determining valuation a severe problem, given the paucity of public markets for patents
  - Ocean Tomo, Yet2.com promising
  - In principle, data on litigation settlements and licensing transactions would help establish value benchmarks and improve the operation of the market
  - mergers, alliances reported, why not licensing?

Patent renewal

- Higher renewal fees can help to weed out some patents that clog up the system
  - Firms often do not know patent value until 5 or so years out
  - Higher renewal fees would get patent found to be of low to moderate value into the public domain sooner

- Renewal or re-exam status should be shown in the bibliographic information on the PTO website (not buried in PAIRS)
### Comparison of Compustat to Ziedonis’ VC startups

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<thead>
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<th></th>
<th>Semi devices</th>
<th>Medical devices</th>
<th>Software</th>
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<tbody>
<tr>
<td>Granted pat apps/ $10M raised - VC funds</td>
<td>6.8</td>
<td>9.3</td>
<td>3.2</td>
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<tr>
<td>Granted pat apps/ $10M R&amp;D - Compustat firms</td>
<td>4.5</td>
<td>10.3</td>
<td>0.9</td>
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<tr>
<td>Share of startups with patents granted/ pending at exit/last round</td>
<td>65%</td>
<td>80%</td>
<td>27%</td>
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<tr>
<td>Share of existing Compustat firms 1987-2005 with patents</td>
<td>74%</td>
<td>66%</td>
<td>30%</td>
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