

Comments on the Evolving IP Marketplace

Federal Trade Commission

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Other nations and a handful of large corporations have mounted a concerted, long-term attack on U.S. patent rights under the guise of “reform.” The debate has largely been political in nature, devoid of empirical and economic analysis.

If Congress is to make informed decisions, it requires reliable, undisputed analysis. In that spirit, one of the most useful actions the FTC can take in its work on the Evolving IP Marketplace is to prepare and disseminate empirical and economic analyzes that address the following questions, among others

1. Is the United States experiencing a patent litigation explosion?

The analysis should address the following facts drawn from the annual Federal Judicial Caseload Statistics.

- The number of U.S. patent lawsuits filed annually for almost 20 years has remained about 1.5 percent of patents granted annually.
- More than 96.5 percent of the roughly 2800 patent lawsuits filed annually are settled before, during or after Pretrial.
- Between 2001 and 2007, the average number of patent cases that went to trial per year was 93. In 2007, 99 did.
- Of the 254,000 civil cases of all kinds filed in U.S. District Courts in 2007, 4.1 percent went to trial. Only 3.5 percent of the patent lawsuits were tried.

2. What were the average awards in patent infringement cases over the past decade?

- What is the non-inflation, indexed value of those awards over time?
- Which of those awards are inappropriately large and why?

3. Is the USPTO issuing a “significant” number of low quality patents?

Such an analysis should consider the following facts drawn from the Annual Reports of the USPTO.

- The USPTO granted 8,714 requests for ex parte reexamination between 1981 and 2007. Of the 6,066 completed cases, only ten percent had all claims cancelled. Of the balance, 26 percent had all claims allowed and 64 percent had one or more claims allowed.
- The U.S. has more than 1.8 million patents in effect. The annual total of patent lawsuits and ex parte and inter partes examination requests involve only one ten-thousandth of patents in effect (0.0001%). By contrast, the EU has more than 5 percent of all granted patents challenged validity. What are the implications about USPTO patent quality does this differential suggest?

4. What economic effects will the proposed apportionment of damages changes have on corporate stock values?

The answer should include an analyze the validity of *THE LIKELY ADVERSE EFFECTS OF AN APPORTIONMENT-CENTRIC SYSTEM OF PATENT DAMAGES*, Scott Shane, Case Western Reserve University, Cleveland Ohio, January 2009

- Shane calculates the provision would reduce the value of patents by 20-39 percent.
- Shane calculates the provision would reduce the value of patents held by U.S. companies by between \$15.5 billion and \$38.4 billion.
- Shane calculates the provision would reduce the value of patents by between \$34.4 and \$85.5 billion.

5. How many of the 100 largest U.S.-based corporations do patent clearance searches (due diligence)?

In the second panel of your December 5 hearing, two of the panelists agreed that most large corporations do not do patent clearance searches. Interviews other corporate executives and IP experts reveal that many corporations instruct their engineers and technologists not to read patents or technical journals where patents might be discussed. A process termed “engineered ignorance.”

- How extensive is this engineered ignorance?

- Would engineered ignorance be considered “reckless” for purposes of willfulness?

6. How much time, on average, would any of the proposed post-grant examination solutions take from the effective live of a patent?

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