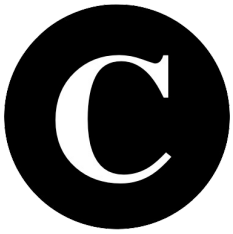

Le Concurrentialiste

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Patent privateering, or patents as weapons

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In the late 16th century, Queen Elizabeth I of England commissioned Francis Drake to sail for America. The Queen asked him to plunder Spanish vessels on its way there. Francis Drake became a pirate commissioned by the crown. This type of "legal" pirate was called a "privateer." They allowed nations to attack one another without the risk to be counter-attacked, because the identity and the nationality of these pirates' employer were kept secret[1].

Today, the spirit of those pirates is reborn. Called "patent troll," they now act for high-tech companies by "patent privateering" others.

I. What is a patent troll? A quick overview

A patent troll is a company that does not practice patents and is principally in the business of collecting money from others that practice them[2]. Because they do not produce any good or services outside of the patent world, they are also called Patent Assertion Entities ("PAEs").

Specialists keep arguing about whether patent trolls are devil-incarnate or a necessary evil. While they disagree with each other, numbers keep growing. For instance, patent trolls activities costed 29 billion dollars in USA in 2011 only.[3] That represents an increase of 400 percent since 2005.

The legal legitimacy of these patent trolls cannot be discussed in its principle.[4] However, some "strategies" they use are prohibited under the scope of antitrust law. It can be some "patent ambushes," where a patent troll does not reveal the existence of its patent, waits for a standard containing it to be adopted, and then reveals its existence in order to obtain a license at exorbitant prices. It can also be "patent privateering."

The aim of this study is not to report the existence of patent trolls who, in some very rare cases, can serve some legitimate purposes.[5] However, we aim to show that some of their practices, in particular the one called "patent privateering," might be caught by antitrust law, for the better.

II. What is "patent privateering"? Its legal scheme

Contrary to what we can read, patent privateering is not a distinct concept from patent trolling, but a strategy conducted by patent trolls (here acting as a privateer).

Patent privateering is a strategy where a company - a patent troll - acquires/buys patents to its original holder and then engage a lawsuit against companies, in most cases the rivals of the original holder. The troll and the original holder then share the booty. It could be either licensing royalties, litigation settlements or damage awards. There are many variations of this scheme. Sometimes, patent trolls only finance the trial without buying any patent (parties transfer them under many forms). In some other occasions, patent trolls just threat to introduce a lawsuit and then settle the case. But in any cases, the original patent holder and the patent troll maintain relationships so the original patent holder can target its rivals.

Some usually describe patent trolls as entity holding weak patents and frightening companies by introducing lawsuit on the ground of hundreds of patents. Patent privateers usually hold "solid patents," those where the original holder knows he can win a trial by arguing a breach of them.

III. Evaluation of the risks for consumers created by patent privateering

As of today, the literature on patent privateering is very limited. Depending on who the writers work for, papers mostly emphasis benefits or drawbacks to the existence of patent privateering, without any real balance.

a / Benefits

There are some benefits to the existence of patent privateering:

1. It is a way to outsource (and finance) patent litigation to those who know how to handle it. It is worth noting that this is only true in cases where small companies are transferring their patent to trolls, since big corporations usually dedicate a budget to litigation.

2. For original patent holders, it is a good way to avoid the bad press about the patent war. Of course, this also constitutes criticism of the entire patent privateering scheme.

3. It allows not to "waste" patents by not enforcing them. However, this benefits only exist if we consider that patent should be used as weapons.

4. It may, in some cases, generate royalties or damages that original patent holders can then use to develop innovations.

b / Drawbacks

There are also some drawbacks to the existence of patent privateering:

1. By avoiding countersuit[6] and by evading reputational constraints, original holders do not have incentives to cross-license anymore. Patent privateering destroys the "state of mutually assured destruction"[7] in which big high-tech corporations usually live, for the better.

2. Patent privateering allows to evade Fair, reasonable, and non-discriminatory ("FRAND") and other licensing commitments. FRAND commitments are usually offered in the context of standardization. When SSOs ("Standard setting organizations") choose a standard which implement a way to product, they integrate patents to it (called "SEP" or standard essential patents). In exchange for being used by all companies wishing to produce, patent holders pre-agree to offer FRAND licensing terms. In the case of patent privateering, the original patent holder will maintain its FRAND commitments, while, at the same time, having the patent troll litigate some new license fees that it can share with the original holder. It is one of the most harmful side effects of patent privateering.

3. The principal targets of patent privateers are big tech companies which spend billions on R&D. The more they spend, the more they release products, and, therefore, the more patent privateering will be active against them. And because litigation is expensive, they will have fewer available funds to spend in R&D. By raising the costs of the original holders[8]' rivals with costly litigation, patent privateering is contrary to the process of competition which aims at reducing costs, prices, and stimulate innovation in order to win market shares.

4. Patents are intended to stimulate innovation. Companies do not innovate for the sole purpose of generating patents so they can sue others without using their technical aspects. It is always important to go back to the fundamental reason of the creation of the law. In this case, IP law, which is based on the Lockean principle of property, aims to encourage innovation. When patent trolls use patent privateering against companies in order to collect more royalties and evade FRAND licensing commitments, there is no contribution to innovation. IP law then becomes dangerous. This could/should serve as a basis of enforcement against patent privateering.

c / Balance

There are very few studies establishing that beneficial aspects of patent privateering are greater than its drawbacks. However, it is easy to find that patent privateering accentuate all of the risks created by patent trolls[9]. Indeed, if most of the patent trolls strategies are not supported by non-patent troll entities, precisely because they are the targets, it isn't true for patent privateering because the original patent holders can target their rivals and therefore benefit from it.

Patent privateering is costly to consumers. Indeed, by evading FRAND commitments, by eliminating cross-licensing, and by targeting their rivals in order to raise their costs, patent privateering contributes to the increase of products final prices. Some estimate the patent royalties to be paid by smartphone manufacturers at the very least exceeds $120 per device. Yes, licenses are mostly pro-consumers, they allow companies to use technologies developed

by other companies, specialist in their own field. However, the development of patent privateering could raise the price of those royalties very quickly, in exchange for no innovation since patent trolls do not produce any good.[10] And in fine, the consumer will pay for it.

Enforcing patent rights is, as a general rule, an indirect contribution to innovation. In the common hypothesis where we consider patents as being a good incentive to innovate, it is worth noting that without the possibility to enforce them, patent would be useless. Therefore, when a company enforces them to fight against some violations of the related rights, this encourages the company to keep innovating and patenting. However, the situation is much different when some patent troll use patents in order to get higher license fees by fooling FRAND commitments. Also, patent privateering harms consumers by discourages cross-licenses that allow products to go cheaper on the market since royalties are mutually lowered.

In the hypothesis where we consider that patents hinder innovation because they allow legal monopoly over ideas,[11] the issue of patent privateering can be seen as another proof that patents are, on balance, not a necessary evil.

Therefore, if most arguments against patent trolls can stand, most of those pro-patent trolls, like the fact they can be used to grant only one license over patents bundle, don't stand in the specific case of patent privateering. This is a crucial point. The debate over the necessity of patent privateering is, for that reason, easier to settle than the more general one on patent trolls. Patent privateering mostly harms consumers.

4. How to fight against patent privateering

a. Raising awareness and antitrust law as the best ways

Patent privateering appears to be a new form of misuse of state protection. In other words, patent privateering hinders free market mechanism. And since free markets involve the free sharing of information, this study aims at providing all necessary information to consumers in order to deter these practices. So far, sharing information about patent privateering, to reveal their practices, appears to be the best way to fight against it.

Enforcement is also a good way to fight against privateering. Patent acquisitions that create or enhance a monopoly power and create the likelihood of anticompetitive effects can be challenged under article 102 of the TFEU, and Section 2 of the Sherman Act in the US (as well as Section 7 of the Clayton Act). For instance, in 2011 the DOJ already prevented Microsoft from acquiring Novell's patents to which Microsoft already had a license. Evading FRAND commitments and raising rivals costs can also be challenged under article 102 et Section 2, since it might be used to maintain or obtain monopoly power.

Patent privateering can also be challenged under article 101 of the TFEU or Section 1 of the Sherman Act under the prohibition of certain pooling arrangements.

In the US only, the Section 5 of the FTC Act, aiming to prohibit “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce” can be used to fight patent privateering.

However, it should be pointed out that it is difficult, and not desirable, to prohibit companies from selling their patents at the best prices to the best buyer. These texts should be used to prohibit anticompetitive strategies only.

Would antitrust agencies open investigation on patent privateering practices? There is a possibility for it. Because of its anti-competitive effect, two American agencies, the FTC and the DoJ, were already reunited in December 2012 to hold a workshop to debate, in part, over the question of patent privateering. More recently, on August 8, 2014, the FTC received a Notice from the Office of Management and Budget Action in order to realize a new study on Patent Assertion Entities. Patent privateering will be targeted. These two agencies appear to be very skeptical about it. And the European Commission is also on guard.[12] But if patent trolling is a popular topic, patent privateering is still very unknown, and so far, informing consumers remains the priority.

b. Consumers, watch out for this big money industry

The issue of patent privateering involves "big money." Companies like Microsoft, Nokia, British Telecom, Google, Blackberry, Apple, Ericsson and many more all have opposite interests in this business, by encouraging patent privateering or by fighting against them (Google for instance). Some of them already transferred thousands of patent to patent trolls in order to implement such strategies. Therefore, consumers need to be alert that writings on this issue may be guided by strong incentive to advocate a particular point of view.

And it isn't necessary nor desired to stigmatize some companies. There isn't any decision fining anyone for using patent privateering. So far, this practice is the translation of the fact that companies are free to sell their patents to the highest bidder. This raises the issue of patent delivering. We argue that patent offices need to be more vigilant before delivering them[13]. Only real economic and antitrust analysis in those agencies will help to prevent some companies from sending or transferring many patents. In other words, solving the "too many patents problem" will be a good way to start fighting against patent abuses, like patent privateering.

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