Patents, Unfair Trade Practices and Free Speech

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Professor Field urges that demands made of unsophisticated infringers be tested under Rule 11.

The Supreme Court has said, "[T]he expense and annoyance of litigation is 'part of the social burden of living under government.'" Petroleum Exploration, Inc. v. Public Service Comm'n, 304 U.S. 209, 222 (1938). Expense and annoyance also induce settlements. Yet, when sets of parties enjoy systemic advantages, judges and legislators usually seek to level playing fields.

Consider, for example, the exclusive right to perform copyrighted music publicly. Because actual damage from an infringement is often too small to calculate, the threat of statutory damages, costs and attorney fees foster settlement. Owners have also been allowed, when consistent with antitrust considerations, to negotiate collectively through organizations such as ASCAP.

Patent holders lacking other sources of income who mimic that approach are often flamboyantly called "trolls." But, as just noted, seeking royalties from infringers too small to afford the cost of litigation or, size aside, seeking royalties well below the cost of defense should not be categorically condemned.

Many nevertheless see need for tactical adjustments in the patent arena. Various definitions of trolls, along with various means to defang them, have been adopted.

When injunctive relief can support demands unrelated to the value of rights, the Supreme Court has limited its availability. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006). When software-supported business methods were seen as more

problematic than other inventions, the Court also, but with less success, endeavored to cabin patentability. Some view pending consideration of CLS Bank Intern. v. Alice Corp. Pty. Ltd., 717 F.3d 1269 (Fed. Cir. 2013) (en banc), with optimism I do not share. Six opinions each venture to describe the elephant, but none commands a majority. This confirms the notion that a subject matter fixation is misguided. *See, e.g.,* *MySpace - Eschewing a "Murky Mess"*

Others troll-related proposals are made with surprising frequency. Last August, the U.S. Government Accounting Office described various of those, but it also found the severity and sources of problems unclear. In general, therefore discretion seems wise.

Yet the Vermont AG is addressing one problem that in a way that warrants applause. As aptly summarized by Ryan Davis, *'Patent Troll' Wants Vt. AG Consumer Protection Suit Nixed,* Law360, Sept. 20, 2013, the AG's complaint alleges that MPHJ Technology Investments LLC, violated a statute by "sending letters to small companies threatening litigation and informing the recipients that other alleged infringers had paid roughly $1,000 per employee to settle the charges, but never actually intending to sue anyone." That the AG calls it a "troll" leads MPHJ to claim that it is being pursued solely because of its "nonpracticing entity business model."

MPHJ, however, settled a similar suit in Minnesota by "agree[ing] to let the state review its licensing demand letters before they are sent out." *Id*. That modest success aside, state initiatives seem to conflict with the Federal Circuit's approach in related circumstances. Relying on, e.g., patentees' obligation to give notice under 35 U.S.C. § 287(b)(2), it has required proof that infringement allegations are "objectively baseless" before their dissemination can be enjoined. *See* Pre-Litigation Hardball After Dominant Semiconductors, where I suggest that injunctions should be available under Lanham Act § 43(a)(1)(B) or equivalent state law if patentees' are incapable of satisfying the good faith requirements of Fed. R. Civ. P. 11.

That approach also seems viable with respect to public actions under § 5 of the FTCA § 5(a)(1), 15 U.S.C. § 45(a)(1) (“unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful”) or state laws modeled on that statute. As related by Erica Becker, at least one Commissioner seems inclined to view the prospect of such actions favorably. See FTC's Ohlhausen Pushes For Targeted 'Troll' Enforcement, Law360, Feb. 13, 2014.

Objections, backed up by § 287(b)(2), must be addressed. They should not be dispositive, however, when speech is commercial and “sophisticated deception” is based on “clever use of innuendo, indirect intimations, and ambiguous suggestions;” American Home Products Corp. v. Johnson & Johnson, 577 F.2d 160, 165 (2d Cir. 1978).

NLRB v. Gissel Packing Co., 395 U.S. 575, 620 (1969), confronts tension between speakers’ and listeners’ rights in an analogous setting. As the opinion recounts at 617, interference with employees’ rights to self-organization is forbidden by 29 U.S.C. § 158(a)(1). Moreover, § 158(c) provides, “the expression of views, or their dissemination in any form, “shall not… be evidence of an unfair labor practice…, if such expression contains no threat of reprisal or force or promise of benefit.” Deprived of the fruits of aggressive electioneering, “[p]etitioner argue[d] that the line between so-called permitted predictions and proscribed threats is too vague to stand up under traditional First Amendment analysis.” 395 U.S. at 620. The unanimous opinion disagrees, finding the employer capable of “avoid[ing] coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees.” *Id*.

Holding patentees likewise accountable for coercive overstatements designed to mislead seems eminently reasonable. This is compelling when speakers have sophisticated understanding of patent law and putative infringers faced with unpleasant

choices do not. Particularly when litigation is merely threatened and the applicability of Rule 11 is postponed, it seems appropriate to regard that rule as a source of well-developed standards for evaluating whether patentees' allegations have merit.

Based on § 287(b)(2), the Federal Circuit finds no room for state law in assessing the merits of such speech. *See, e.g.,* Mikohn Gaming Corp. v. Acres Gaming, Inc., 165 F.3d 891, 896 (1998). But that approach seems misguided.

Until complaints are filed, patent validity and infringement are not in issue. Determining whether attorneys' pre-litigation demands are reasonable seems no more to depend on patent law than does their liability for malpractice. The Supreme Court finds state court judges competent in the latter context because their opinions neither stand as precedential for patent litigation nor affect the validity of patents in issue. *See* Gunn v. Minton. They should therefore be equally competent to evaluate whether, in the former context, attorneys' behavior is reasonable.