Patent Troll Myths and the Law of Unintended Consequences

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The Federal Trade Commission is the latest government entity to jump on the patent troll bandwagon.

In September, the FTC announced it would use its subpoena power to investigate the operations of 25 so-called patent assertion entities (PAEs) -- also known more pejoratively as "patent trolls." The announcement follows a veritable governmental free-for-all: From proposed legislation with names like the "Patent Abuse Reduction Act" and the "End Anonymous Patents Act" to executive actions by the president himself, the government has, it seems, declared war on companies that buy and sell patents.

But while Congress has constitutional authority to oversee the U.S. patent system, the FTC is overstepping its authority. By using its subpoena power to investigate PAEs, the FTC is acting more like a player on the field of commerce than the impartial referee it rightly should be. Such governmental overreaching is more than an annoyance; it may prove damaging to our entire patent system, threaten the right to individual property and choke off the very spirit of innovation and invention the government claims it wants to protect.

PATENT TROLL MYTHS

Before we address the government's proper role in the PAE debate, however, let's take a moment to dispel some of the many myths that have been promulgated in recent months by those asking the government to curtail the activities of patent assertion entities:

1. All PAEs are created equal(ly bad)

Those who claim PAEs are the scourge of free enterprise are painting with an awfully broad brush. According to commonly used definitions, a PAE is a business that does not practice or produce the product or idea for which it holds a patent. And yes, in some cases, PAEs sue other companies for infringing upon the patents they hold. Indeed, media reports abound of patent trolls suing businesses indiscriminately for millions of dollars over patents of dubious quality and validity.

Such sweeping generalizations ignore the broad spectrum that is the U.S. patent market. Many colleges and universities, for example, have world-class research programs that have produced numerous innovations in, say, the pharmaceutical arena. But they have no intention of selling aspirin or venturing into the market for analgesics. Instead, they license their inventions to others and direct the proceeds into further research. Are such universities "patent trolls" because they choose not to practice their patents?

Moreover, it's been rightly noted that by today's standards Thomas Edison himself would be considered a patent troll. Edison obtained a substantial portion of his funding not from manufacturing his own inventions, but from licensing them to others -- thereby freeing him to focus solely on what he did best: inventing new products that transformed the lives of people the world over.

2. PAEs serve no positive purpose in the patent system

Contrary to popular thought, not all PAEs devote their energies to suing random companies for baseless patent infringement claims. Some PAEs, in fact, play a vital role in the patent system by offering a market for patents.

While major corporations may have no trouble funding the development of their inventions, your typical independent "garage inventor" often lacks the resources needed to produce and market his or her ideas. Many have no desire to do so. For such individuals, PAEs serve as a legitimate conduit, buying their patents and licensing them to companies capable of actually producing and marketing the product.

3. PAEs stifle innovation

By the time a PAE purchases a patent, the innovation has already occurred. An inventor has developed his idea and patented it. By purchasing patents, PAEs create a valuable market for such intellectual property, creating an incentive for *more* innovation, not less.

But don't all those frivolous patent troll lawsuits stifle innovation, critics say? That brings us to patent troll myth number four…

4. All PAE lawsuits are frivolous

Not all patent infringement lawsuits are without merit -- even those filed by PAEs. In fact, the dirty little secret of the current patent troll brouhaha is that much of the hysteria is being fueled by major software companies that are tired of getting sued for infringing on patents.

Some of those infringement claims are valid. But rather than argue such claims on their merits, the companies opt to "kill the messenger" by branding the plaintiff a "patent troll" and labeling the lawsuit "frivolous."

What's more, our current legal system has built-in safeguards already in place to protect companies against frivolous lawsuits. They're called the Federal Rules of Civil Procedure, and Rule 11 specifically states that sanctions may be imposed by the court if a suit is presented for any improper purpose.

THE FUNDAMENTAL RIGHT TO PROPERTY

So, why all the fuss over patent trolls? If companies truly believe they are the target of frivolous lawsuits, why don't they simply pursue the remedies afforded by our existing legal system instead of asking Congress, the president and the FTC to intervene?

What's really going on in many of these cases, it seems, is that companies are trying to reframe the patent troll issue. Instead of addressing whether the infringement claims are valid, businesses are steering the debate to one of whether PAEs should have any legal standing to sue at all since

they don't actually practice the patent in question.

And that's why government agencies such as the FTC shouldn't intervene in this issue. Simply put, it's not the government's job to say, "We don't like who owns this patent." Such statements ignore the fundamental right to property that distinguishes the American patent system from its counterparts in other countries.

Unlike the European system -- where if you don't practice your invention, you lose your patent -- Americans have always enjoyed the right to do with their property as they see fit. Just as a homeowner may choose to rent his house to another individual, an inventor has the right to sell or license his patent to others. This basic individual right to private property is at the very heart of the American way of life. Suggesting, therefore, that PAEs are not entitled to the protections afforded by U.S. patent law because they choose not to practice their patents is an assault on the individual property rights enjoyed by all Americans.

Moreover, this individual right fulfills a very important public purpose. In drafting the U.S. Constitution, our founding fathers recognized that giving individuals exclusive rights to their inventions for a limited time would create a powerful incentive for them to share their ideas, thereby fueling the new nation's growth and prosperity. Fostering innovation, therefore, was the express purpose behind the creation of our existing patent system.

THE LAW OF UNINTENDED CONSEQUENCES

Nevertheless, for those who claim that some patent assertion entities are indeed abusing that system, there are a number of potential remedies that could address the issue without dismantling individual property rights or invoking antitrust laws. In addition to the aforementioned legal remedies offered by the Federal Rules of Civil Procedure, Congress could consider changing patent law so that if a patent passes from an individual "garage inventor" to a PAE, the lifespan of the patent would be shortened and normal damages for infringement would be reduced.

Such changes would be far less drastic, and far less likely to result in unintended consequences, than would FTC or other government intervention. Consider the possible ramifications if the government were to declare patents invalid simply because it didn't like who owns them. Deprived of the ability to sell patents, inventors might decide to forgo filing for patents and keep their ideas as trade secrets. They may even decide to stop inventing altogether. Either way, invention and innovation would be stifled -- exactly the outcome the government claims to be trying to prevent.

It wouldn't be the first time well-intentioned government intervention produced such unintended consequences. When the patent law changes of the America Invents Act (AIA) were first announced in 2011, included among them was a provision prohibiting companies from filing patent infringement suits against multiple companies at the same time. Such a provision, it was believed, would dissuade companies from filing frivolous infringement lawsuits and so-called patent troll lawsuits would decrease.

In reality, the exact opposite happened. Deprived of the ability to file multiple lawsuits, companies merely filed individual lawsuits, and the numbers skyrocketed. The White House's June 2013 "Patent Assertion and U.S. Innovation" report, in fact, states that since 2011, suits brought by PAEs have tripled, rising from 29 percent to 62 percent of all such lawsuits.

So, is the AIA patent law change to blame for the supposedly sudden jump in patent troll lawsuits? It's difficult to say. But given a choice between more government intervention and the free market, it's safe to say which has a better record of protecting individual property rights and fostering the innovation for which American industry is known. IPT