Standing on the shoulders of the framers of the U.S. Constitution’s Patent and Copyright Clause

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“Outrage may one day swing the pendulum back from patent madness to something resembling what the Constitution’s framers had in mind. Meanwhile, [patent infringement] defendants will probably continue to pay up. And so will we.”

This was the conclusion of a recent Wired magazine article that was critical of non-practicing entities, or NPEs, and independent inventors who assert patent rights for minor innovations.

This commentary demonstrates that the framers’ primary goal when drafting the Patent and Copyright Clause of Article I of the U.S. Constitution was to provide an efficient means for small businesses and independent inventors to monetize inventions that they disclosed to the government and the public.

Today, however, the most prevalent means of monetizing a patent is through inefficient and expensive litigation in federal courts. Until a well-accepted alternative that provides a streamlined path to monetize patents is made available to small businesses and independent inventors, the framers’ vision will be unfulfilled and we will continue to be confronted with “patent madness.”

THE FRAMERS BALANCED DISCLOSURE WITH MONETIZATION

In 1742, one of the most famous framers of the U.S. Constitution, Benjamin Franklin, invented a wood-burning iron furnace.

Ten years later, to help his older brother, who was suffering from kidney stones, Franklin invented a flexible urinary catheter. In 1784, he invented bifocals. Around 1776, another important inventor, John Fitch, developed the steamboat. The constitutional committee went to see the steamboat while drafting the Patent and Copyright Clause.

With these inventions as a backdrop, it is clear that the framers sought to create a patent system that would benefit and encourage independent inventors and small companies.

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Article I, in part, grants Congress the power “to promote the progress of science and useful arts, by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries.”

The principle behind the Patent and Copyright Clause and the initial Patent Act, which was enacted in 1790, was to grant a period of exclusivity to an inventor in exchange for disclosure of his or her invention — so that others may benefit from the understanding of the new technology and promote “progress.”

In other words, the patent system was designed to prevent discoveries from being locked away in garages and laboratories.

Facilitation of the disclosure of innovations to promote scientific advancement did not originate with the framers. In 1676, Sir Isaac Newton wrote in a letter to Robert Hooke, a rival scientist, “What Descartes did was a good step. You have added much several ways, and especially in taking the colours of thin plates into philosophical consideration. If I have seen a little further it is by standing on the shoulders of Giants.” Likewise, the framers of the Constitution understood that an effective patent system allows others to learn from the dissemination of technical knowledge in order to stand “on the shoulders of giants.”

By allowing third parties to read the patents that the Patent and Trademark Office issues, the framers knew the public could learn from the inventor’s scientific discoveries and commercialization efforts. To encourage disclosure, inventors would be permitted to obtain a period of exclusivity, excluding others from practicing the invention. This right also led to a patent owner’s ability to grant licenses and obtain a monetary return for the license (i.e., the right to monetize the patented technology); this is still an important right today.

For example, Eli Whitney patented the cotton gin, a machine that separated cotton seed from fiber, in 1794. Whitney wrote to his father, “One man and a horse will do more than 50 men with old machines, ‘tis generally...
said by those who know anything about it, that I shall make a fortune by it." His patent was asserted against farmers in Georgia and other southern states to prevent the use of his machine. In 1802, South Carolina agreed to purchase Whitney's patent for $50,000.7

Pecuniary gain and the potential to commercialize inventions remain the main driving motivations for many inventors today. A patent system that fails to provide a monetary benefit to inventors in exchange for their agreement to publicly disclose their inventions is a flawed system.

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The Federal Trade Commission recently reported that many inventions "commercialized by large firms originated with start-ups and small companies, which have accounted for the steadily increasing percentage of R&D [research and development] spending over the past thirty years."8 An effective patent system should benefit all patent holders, but, in particular, start-ups and small companies.

THE REALITIES OF PATENT LITIGATION TODAY

A system that facilitates the monetization of patents for all parties sustains the principle behind the patent system — to encourage the filing of patents for all novel innovations in order to disseminate knowledge of such new technology. This requires that all patent owners with a bona fide basis to allege infringement have equal access to assert their patents in courts9 or through some other equally effective patent monetization system.10

Litigation is currently the most prominent means of monetizing patented inventions. It allows a patent owner to force a potential licensee to cede to his or her right of exclusivity. But many critics of the patent system believe that NPEs are nefariously leveraging the high cost of patent litigation to extract unreasonable settlements from "innocent" defendants.11 By examining the economics involved in litigating a patent infringement suit, one can understand how the complexities and high stakes lead to a system in which only professional patent monetizers such as large corporations, NPEs and patent assertion entities, or PAEs, can successfully enforce patents today.

Although about 250,000 patents are issued by the U.S. Patent and Trademark Office each year,12 95 percent of all patents are unlicensed.13 In some cases, patents are not licensed because the underlying invention is too expensive to implement and the invention cannot be commercialized. Further, many patents are not licensed simply because of lack of enforcement due the high cost of litigation. In cases in which the underlying invention provides only a minor improvement to a minor portion of technology that is a minor revenue-generating product or service ("a minor² patent"), it does not make economic sense to assert any rights if the average cost of litigation is $2.5 million.

To risk the costs and economic realities of litigation, inventors need to have strong infringement claims to overcome the various procedural hurdles and identify an infringing sales revenue base of $25 million.14 As a result, the current patent licensing "system" disfavors small companies and independent inventors because of their inexperience and lack of resources. Instead, current economic factors drive the assertion of a very select group of patents against defendants who have potentially high infringing sales activity. Such selective assertions can be better identified and managed by professional monetizers, including large corporations, NPEs and PAEs that have large patent portfolios and professional licensing staffs that can better identify and manage only the "gems" for assertion against carefully selected infringers.

For example, IBM reportedly generates almost $2 billion in royalty revenue per year, mostly without litigation.15 IBM is able to generate such massive royalty revenue because of its huge patent portfolio and its army of highly experienced licensing professionals who select the strongest patents to assert or protect. IBM never practices many of the patents that it licenses simply because it cannot commercialize everything it invents. However, many other so-called NPEs do not have the benefit of a large patent portfolio and must resort to litigation in order to obtain the inventors' exclusivity and potential monetization rights.16

A former assistant general counsel of Intel Corp. stated, "Small companies and individuals have few good options for licensing their patents [in the United States]."17 Without a means of economically enforcing a patent, Article I's right to exclude becomes meaningless for small companies and independent inventors. U.S. Circuit Judge Pauline Newman stated, "A patent that cannot be enforced on any theory of infringement is not a statutory patent right. It is a cynical, and expensive, delusion to encourage innovators to develop new interactive procedures."18

More troubling than the increase in the number of patent infringement lawsuits is the high cost of patent litigation. Patent infringement lawsuits are more expensive than other types of lawsuits because they involve complicated technical, legal and damages issues commonly requiring the input of multiple experts. The traditional case management procedures established for common types of commercial litigation do not facilitate the quick and efficient use of patent experts or disclosure of their opinions.

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Courts could facilitate the better use of experts in patent lawsuits by providing better alternative dispute resolution processes such as early expert valuation to bring litigants together more quickly to arrive at reasonable values of patented technology. A small-claims patent court that lowers attorneys' fees could also be a step in the right direction to help monetize patents more efficiently. Also, excessive litigation costs and complex patent issues may be stemmed if business executives followed a recent move by the Federal Trade Commission that encourages the use of ADR procedures more frequently.
CONCLUSION

Just as Eli Whitney was motivated in 1794 to patent his cotton gin in order to further himself monetarily, the current patent system must provide inventors with an efficient means to monetize their patents—regardless of whether the party asserting the patent is an independent inventor, a small company, a large company, a university, an NPE or practicing entity. Inventors must continue to be motivated to file patents so that public disclosure of new technologies can continue and persons learning from such disclosures can make further improvements in order to advance the progress of science and the useful arts.

An effective patent system should benefit all patent holders, but, in particular, start-ups and small companies.

Magazines such as Wired are terrific disseminators of information regarding new technologies and help to fulfill the disclosure principle underlying the Patent and Copyright Clause. Many of the technology articles from such publications act to spur new inventions and provide the incentive to make further technological developments. Significant amounts of information are accumulated by publications because of the disclosure of patents and companies’ promotion of new technology. If inventors had been denied a monetary incentive or had hidden their new technologies in basements and garages and refrained from disclosing their inventions publicly, the United States would not have been able to advance technology as quickly as it has during its history.

Patent monetization is still the principle by which inventors are motivated and is the engine that drives innovation. Rapid disclosure and advancement of innovations allow the common man and woman to stand on the shoulders of giants and benefit from life-improving technologies. High rates of patent activity reflect a high rate of innovation and a vibrant economy. The framers of the Constitution envisioned a matching patent monetization system that could efficiently harness such patent activity by economically and fairly compensating all types of inventors. Under such a system, the framers would have been satisfied that the Patent and Copyright Clause was achieving its purpose if increasing levels of patent filings were properly managed and equal levels of patent monetization were provided for all inventors. Doing so would help to sustain patently “mad” economic growth.

NOTES

2 A non-practicing entity is a patent owner that is not commercializing the patented technology at the time its patent is being asserted. NPEs include universities and independent inventors. A subcategory of an NPE is a patent assertion entity. A PAE is an entity that purchases a patent or patents in order to maximize licensing revenue through litigation with manufacturers or practicing entities. See Dep’t of Justice & Fed. Trade Comm’n, Workshop on Patent Assertion Entity Activities (Dec. 7, 2012). A derogatory term for a PAE/NPE is a “patent troll.”
6 Letter from Sir Isaac Newton to Robert Hooke (Feb. 5, 1675/76).
11 Levy, supra note 1. (“[t]he legal system favors the troll. … NPEs have nothing to lose.”)
14 Calculation of the $25 million sales revenue figure is based on an assumption that a party must cover at least the attorney fees it must expend (or that a contingency law firm will risk) in litigation with an average duration of two years, if the damage recovery is likely to be 5 percent of the net sales of the infringing product (e.g., a reasonable royalty).
16 In fact, the patent litigation system is a very poor means of monetizing patents, not only for small inventors, small companies and independent inventors, but also for large corporations. An IBM report on innovation stated: “Patents have become an important currency and a principal means to establish value for creators and users of knowledge-based assets. A fully functioning IP marketplace infrastructure has yet to emerge, however placing an undue burden on the patent systems.” IBM Corp., Building a New IP Marketplace: A Global Innovation Outlook 2.0 Report (2006), available at http://www.ibm.com/ibm/gio/ media/pdf/building_a_new_ip_marketplace-report.pdf.
21 In re Motorola Mobility et al., FTC File No. 121 0120, decision and order issued (F.T.C. Jan. 3, 2013), endorsing the use of arbitration to determine appropriateness of terms to comply with fair, reasonable and non-discriminatory (FRAND) commitments relating to standard essential patents prior to pursuit of an injunction by a patentee (e.g., Motorola Mobility).