

Legality of patent process

Technology



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These searches can add considerable cost and reduce the likelihood that new technologies will be developed. The legal costs associated with litigation initiated by patent trolls also reduce the funding available for innovation, and these legal costs can rise to quite significant amounts. Personnel who would otherwise be engaged in promoting innovation throughout the organization will have their attention diverted elsewhere by the litigation, which will consume the human resources of the technology developers in addition to the financial resources. Not only must well known patents of competitors be taken into account, but obscure patents with only vague connections to the technology being developed must be identified. The difficult process of patent troll avoidance is made harder due to the fact that under many legal systems, especially that of the United States (U. S.), potential trolls have an incentive to remain hidden and have their patents infringed, rather than to enter into negotiations with developers of technology.

Damages awarded through litigation have the potential to vastly overcompensate a patent holder whose patent has been infringed rather than a patent holder who grants a license. The U. S. grants punitive damages to patent holders in cases of willful infringement. These punitive damages can be treble the initial damages claim. Second, the various forms of damage awards available to infringed patent holders fail to take into account some important factors that would tend to reduce the amount of damages available. Whether a patent holder is seeking to disgorge profits or to extract a “reasonable license fee”, there is an assumption that developers of the infringing product had no alternative but to have incorporated the patented technology into their final product. This suggests a model in which the final

product could not have been produced without the patented technology, and that the patented technology contributed to the value of the final product. However, this is not always the case. In cases where the patented technology is of little value, the product developer will be able to easily invent around the patent, or avoid using the technology altogether. Thus, the amount it would be willing to pay to license the technology would be very small. However, damage awards do not tend to take into account the ability of the product developer to avoid using the patented technology had they been approached earlier.

Patent holders seeking to assert a troll-like strategy can also seek overcompensation by relying on the availability of permanent injunctions which prevent another party from using the patented technology once a finding of infringement has been made. This allows the patent holder to be overcompensated by pursuing a strategy of waiting for its patent to be infringed and for the product incorporating the infringing technology to be on the market. Once the product is on the market and the developer has made a substantial investment, the product developer will be willing to pay a large amount of money to settle an action for infringement in order to stay in business and recover its investment. The availability of permanent injunctions can also impose costs on a society as a whole, rather than merely on the patent infringer. For example, the patent infringement dispute between RIM and NTP threatened to lead to a shutdown of all Blackberry services. The interruption in service which would have ensued would have caused serious difficulties for consumers of the service, such that the economy as a whole could have been negatively affected. Interestingly, the

availability of permanent injunctions in patent infringement suits has recently been addressed by the U. S. Supreme Court in *eBay v. Exchange*.

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