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Are patent trolls waiting at the gates?

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The major US patent litigation cases of recent years, involving the payment of hundreds of millions of dollars in compensation, have become legendary and have popularised the term “patent troll” to describe patent licensing enforcement companies consisting of little more than a legal division. So far, Europe has not seen these one-person companies wrest large sums from big players.

With this in mind, a recent infringement suit reportedly valued at €12 billion may herald the start of a new era of US-style litigation in Germany. Some reports have even asserted that the German patent litigation system could prove particularly fertile ground for patent trolling. So, is the German patent litigation system about to be revolutionised?

The answer is no – the reasons that patent trolling has been so much less lucrative in Germany than in the United States are still valid. The litigation strategy of patent licensing enforcement companies is simple: claim patent infringement with a fabulously high litigation value and rely on overburdening litigation costs and unpredictable jury decisions to browbeat the defendant into a settlement.

In the United States, no requirement exists to have a jury decide on infringement, but it may be requested by an involved party. However, as a jury decision is usually preferable to at least one party, in practice it has become the rule rather than the exception. In fact, the uncertain outcome of the jury process may be the single most important factor for patent trolls aiming for a settlement. If the plaintiff is found to be infringing, the jury may also determine the amount of damages due; if the infringement is deemed to be wilful (which is the case more often than not), this amount may be tripled. The bottom line is that the eventual outcome of a patent infringement suit is rarely predictable and thus poses a significant risk to defendants. It is no wonder, then, that companies may think it is in their best interests to settle for a fraction of the astronomical sum demanded by the plaintiff, even

if the factual grounds for the infringement suit appear shaky.

In contrast, the essential ingredients to make this formula work are missing in the German system. First and foremost, specialist judges with many years of experience decide whether patent infringement has occurred. In particular, the Dusseldorf District Court handles hundreds of patent infringement actions a year and has dealt with patent litigation for over 75 years - and this experience extends to the Dusseldorf Appeal Court. Therefore, decisions issued under the German judge-based system are far more predictable than decisions made by juries, whose ability to follow every technical intricacy may be limited.

Even if the defendant is found to be infringing, the German system does not allow for punitive fines. Instead, compensation is awarded for loss suffered. The expected revenue from a licence is used as a reference figure for the amount of compensation awarded to a patent owner. Although this may be a significant amount, it is unlikely to pose a major threat to the infringing company as long as it is operating under sound economic principles. In theory, it should put the infringing company in approximately the same position as its patent-compliant competitors.

Moreover, rather than setting the compensation, the German courts decide whether the claimant is entitled to compensation and whether to issue injunctive relief. Thus, in many cases a German verdict is the basis for a settlement based on reasonable grounds. Furthermore, German litigation costs are much lower than in the United States. By carrying bringing a civil action against the losing party, the winning party usually receives reimbursement of its legal costs. This helps to encourage defendants that are confident of their legal position not to be forced into a premature settlement.

In addition to the potential financial burden of a settlement or a verdict, an allegedly infringing company embroiled in patent litigation may also feel strong pressure from media coverage, particularly in the United States. It is easy to see how incessant reports about allegedly wilful infringement and its dire financial consequences may sap shareholder, customer and public confidence in the defendant company and undermine public relations efforts. This becomes an even bigger problem if it becomes clear that, if awarded, the damages sought would close down the defendant’s operations. In contrast, patent litigation hardly ever makes the news in Germany.

The United States is already showing signs of resistance to what is increasingly perceived to be a judicial system in which the odds are stacked in favour of patent trolls. The controversial *eBay Inc v MercExchange* decision was an attempt to create a more level playing field by making the grant of an injunction dependent on the actual market participation of the plaintiff.

It is probable that the laws and rules underlying the German patent system already

incorporate sufficient safeguards to ensure a fair balance between inventors, industry, patent holders and the general public. Radical solutions departing from tried principles may not be necessary in Germany, taking into account all relevant factors.

However, with the credit markets in turmoil, it may be that private equity companies are seeking a new business model in which to invest in Germany. So, expect more frequent attempts by patent licensing enforcement companies to grab headlines by announcing fantastic infringement claims – and do not expect to see headlines when these claims fail to materialise.

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