Sanctioning Intellectual Property Bullies?

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Intellectual property bullying of individuals and small entities has become more of a problem in recent years. This was recognized by Congress in 2010 when it requested the United States Patent & Trademark Office ("PTO") to examine the issue of trademark bullying. Unfortunately, in the 2011 report published, the PTO makes light of the extent of the problem due to the lack of empirical evidence. Instead, the PTO adopted the view promoted by the large attorney organizations that the current sanctions available under Rule 11 of the Federal Rules of Civil Procedure and attorney fee awards under Section 35 of the Lanham Act appropriately served to punish and deter any would-be bullies. This reliance on current tools to manage intellectual property bullies may not be warranted, however, as it is not based on any empirical evidence of how well such sanctions work in intellectual property litigation. This Article seeks to fill in this gap and will provide an empirical analysis of Rule 11 and Section 35 awards in intellectual property litigation. Primarily, this Article will analyze: (1) how often Rule 11 and Section 35 award requests are made and granted; (2) how often these awards are overturned on appeal; (3) the types of behavior being sanctioned; and (4) whether sanctions awarded do in fact punish and deter. Based on this analysis, this Article will propose that the current mechanisms designed to keep abusive litigants in check does not appear to be working in intellectual property litigation. As a result, victims of bullying need another form of relief and this Article proposes that a "groundless threat of intellectual property litigation" cause of action be adopted by Congress.