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Creating a National Database for Patent Valuation

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General Idea

- **Others have proposed the creation of the national patent license database**
 - Lemley & Myhrvold, *How to Make a Patent Market* (2007)
- **But no one has taken a close look at the specifics:**
 - Who administers the database? Public or private?
 - What information is gathered?
 - On what authority?
 - What is disclosed to the public?
 - Can this data be introduced in court?

Background

- **Reasonable royalties: patent law's punching bag**
 - Setting a RR “involve[s] more the talents of a conjurer than those of a judge.”
(*Fromson v. Western Litho* (Fed. Cir. 1988))
 - Judge Michel, even, has noted “**massive unclarity**” about RRs
(*Lucent v. Gateway* oral args)
- **Why are they so hard to calculate?**

Background

At core, we are trying to recreate a market rate

- *Georgia-Pacific* Factor 1: “established royalty”?
- Factor 2: Rates paid “other patents comparable to the patent in suit”?
- Factor 12: Rates “customary in the particular business or in comparable businesses”?
- Factor 15: hypothetical, willing negotiation
- Caveat: assuming ‘valid and infringed’ ex post is important, too

Background

... But no market to recreate: real world patent licenses are virtually always kept secret

- “[I]gnorance of prices permits unscrupulous patent owners to ‘hold up’ companies that make products by demanding a high royalty from a jury that has no way of knowing what the patent is actually worth.” (Lemley & Myhrvold)

Background

- **Worse still, public licenses are highly skewed**
 - Those few disclosed in litigation are tiny or huge
 - Experts' royalty estimates sometimes diverge by 10,000% or more (Golden, *'Patent Trolls' and Patent Remedies*)
 - Those disclosed otherwise are large
 - “most significant source of public patent licenses is federal securities law filings, which require disclosure ... if it is material” (Lemley & Shapiro, *Patent Holdup and Royalty Stacking*)

The Solution

- **Lemley & Myhrvold**
 - “The solution is straightforward--require publication of patent assignment and license terms.”
- **But is it really so simple to implement?**

Could It Be Voluntary or Market-Driven?

■ Voluntary program?

- WIPO tried: As of 2012, PCT applicants can request that interest in licensing be indicated on PATENTSCOPE website.
- Of >220,000 pub'd in 2012, only **35** checked the box so far!

■ Industry associations?

- Lifesciences not likely to embrace
- High Tech: Why bother if trolls not bound, too?
 - 3Ps intervening in Apple v. Samsung

Our Proposal

- **Compulsory, Federally-Administered**
 - Require the disclosure of all patent licenses
 - Report them to the public in manner that is as specific as possible, while maintaining anonymity (of specific transactions/patents/parties)

Which Agency? Legislation needed?

■ PTO

- Pros: Already has the power? No legislation needed?
 - 35 U.S.C. § 2(a)(2): “subject to the policy direction of the Secretary of Commerce...shall be responsible for disseminating to the public information with respect to patents and trademarks”
- Cons: PTO track record with info dissemination not great (Colleen Chien, *Rethinking Patent Disclosure*)

Licensing Data

- **Collect:**

- Value: percentage rate, or lump sum value
- Scope: exclusive or non; duration; geography;
- Others: size of licensor/licensee

- **Disseminate:**

- Rough ranges of \$ values / % royalties
- Broken down by tech categories, based on PTO classifications
- Not a max, min, or recommendation. Just a sanity check.

Possible Stumbling Blocks

- **Arguments about loss of confidentiality**
 - Database designed to provide confidentiality
 - Regardless,
 - Patentees already disclose licenses to FDA, SEC in certain circumstances.
 - PTO, FDA, SEC, FTC, DOJ already handle confidential business information, sky has not fallen

Possible Stumbling Blocks

- **Privilege (FRCP 26, FRE 501)**

- Was recognized by some cts: 6th Circuit, some districts
- But no longer (for patent cases anyway)

In re MSTG (Fed. Cir. April 9, 2012)

- **Inadmissible (FRE 408)**

- 10th Cir: “408 does not require the exclusion of evidence regarding the settlement of a claim different from the one litigated” 7th Cir., 8th Cir. agree
- Some courts have excluded 3P settlements on limited basis, though

Possible Stumbling Blocks

- **Gamesmanship / Standard Practice**
 - Lump sums
 - ↑ number of patents
 - Incorporate other IP/knowhow into price
- **Still useful: Posner in *Apple v. Motorola*:**
 - “One patent is 1 percent of 100 patents and 1 percent of \$700 million is \$7 million. But according to [expert] declaration, the license fee for that single patent ... would be “up to” 40 to 50 percent of the royalty for the entire portfolio—that is, up to \$350 million.”
- **A sanity check, not a recommendation**

How you can help

- **What road blocks are we missing?**
- **What data collection/dissemination specifics would you suggest?**