Creating a National Database for Patent Valuation

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General Idea

- Others have proposed the creation of the national patent license database

- 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?
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
... 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)
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?