STUDY PROPOSAL

Commercial Patent Licensing Data

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A. Goals of Study

To provide researchers, litigants, judges, policy makers, regulators and the public with previously unavailable information regarding commercial patent licensing practices, including royalty rates, in a manner that does not compromise firm-level confidential information.

B. Background

The Void in Patent License Information

There is currently a lack of freely-accessible public information regarding patent licensing practices. While some commercial services seek to compile patent licensing data from public sources such as trial records and filings with governmental agencies, access to these databases is not free and, to our understanding, these databases do not claim to contain comprehensive information on confidential licensing transactions. The lack of public information regarding patent licensing practices, particularly royalty rates, has led to widely divergent jury awards in patent damages cases. It has also stymied productive discussions among scholars, policy makers and regulators regarding the economic impact of patent law rules and potential policy changes.

For example, a debate has been raging for nearly a decade regarding the existence of “royalty stacking” in certain heavily patented industry sectors such as wireless telecommunications. Some argue that there is no evidence of royalty stacking in these industries, while others counter that the reason for this lack of evidence is the concealment of patent license terms by those having an economic interest in continuing obfuscation. By and large, the only evidence brought to bear in this debate has been circumstantial and anecdotal.

In the context of litigation, this lack of information adds unpredictability to patent damages determinations. The popular media regularly report on huge jury awards in patent cases, which often are then drastically reduced by courts. One

might critique this pattern as being indicative of a system that is operating with inadequate information. Juries are exposed only to license and royalty data that can be obtained from the parties themselves, which is often a small slice of the overall industry picture. And judges, reacting to popular accounts of patent “trolls” and runaway juries, may act to counter these seemingly pernicious trends, also without the benefit of reliable industry-wide data to guide their thinking. The license information gap is particularly pronounced in markets characterized by technical standards and “standards-essential” patents. There, some might criticize efforts to set royalty rates as having been both unpredictable and arbitrary.

Finally, policy makers considering new patent legislation hear about massive damages awards without more general information about industry norms and practices. As a result, it is possible that decisions about critical amendments to the patent laws will be made with incomplete information, which some might argue could lead to changes that are economically inefficient and detrimental to innovation.

Collecting Patent Licensing Data

To fill the void that currently exists regarding patent licensing practices and metrics, we are undertaking an ambitious project to harvest and make publicly available (1) licensing agreements that have been disclosed in judicial proceedings, (2) agreements that are filed as exhibits to public company filings with the U.S. Securities and Exchange Commission (SEC), (3) licenses offered by patent pools, (4) licenses of government funded inventions, and (5) licenses that have been recorded at the US Patent and Trademark Office. Others, including the U.S. Federal Trade Commission, are collecting data from patent assertion entities and others that will soon be made public.

While these efforts will undoubtedly expand the amount of public knowledge regarding patent licensing transactions, it will still be incomplete. Based on informal discussions with industry participants and our own personal experience, most patent licensing agreements between large commercial firms are negotiated on a bilateral basis and are subject to strict confidentiality provisions. The terms of the agreements are thus known only to the parties and their advisors, who are also bound by ethical and contractual confidentiality commitments. Such agreements will never be litigated and exposed in open court, they will not be filed with the SEC or other governmental agencies, and are not utilized in patent pools. Thus, a large swath of commercial patent royalty data remains secret and unavailable to researchers, regulators, litigants, judges, policy makers, and the public.

C. Summary of Proposed Study

As noted above, the key obstacle impeding public access to commercial patent license agreements is the confidentiality protection built into each license agreement. To overcome confidentiality restrictions, absent a court order, the consent of each party to the relevant agreement is required. Accordingly, we propose a framework in which (a) consent will be obtained from each party to relevant license agreement (b) to release key data regarding those agreements (party size and industry, product category, number of patents, royalty rates, term, etc.) on an aggregated, de-identified basis. In order to preserve the confidentiality of remaining license terms, participating firms will be asked to submit data concerning each agreement to the Study Group through a pre-determined template. Copies of agreements will not be made or provided to the Study Group, though provision will be made to validate survey responses through an independent agent. Once a sufficient quantity of data is collected, it will be compiled by the Study Group and made available on a public web site.

D. Methodology

1. *Study Phases.* We anticipate that the study will proceed in several phases, as outlined below.

a. *Pilot Phase.* The “pilot” phase of the study will constitute a proof of concept in which a small group of firms in a single industry sector will be selected to provide data regarding a limited number of patent license agreements, for example, over a particular technology. During this phase, we will collaborate with the pilot firms to refine our data request and collection procedures. We aim to recruit 4-6 firms for the pilot phase, representing a mix of both patent licensors and licensees.

The Study Group will compile and analyze the data collected from the pilot phase and determine whether additional data should be collected. We will also use the pilot data to develop the format and structure of the database. However, because the number of firms participating in the pilot phase will be small, leading to potential identifiability, we will not release pilot phase data to the public via the database.

For the pilot phase, given the small number of participants, we will select a relatively narrow scope for the licenses as to which we request data. This is necessary to ensure that we collect data that can be meaningfully compiled and compared. Thus, we may request data regarding licenses of patents relating to a particular standard in the wireless networking (Wi-Fi, Bluetooth) or wireless telecommunications (4G LTE or 3G UMTS/GPRS) industry. We anticipate that some firms may be more comfortable disclosing data regarding expired licenses or licenses pertaining to prior-generation technologies, and we may focus our request on these agreements during the pilot phase.

We anticipate that the pilot phase will last approximately six months. At its conclusion, we anticipate making selected public announcements of our results, including presentations at patent-focused conferences (IP Scholars, PatCon, etc.), through online blog postings, and at least one academic paper. As noted above, we will not disclose data collected during the pilot phase and may, instead, illustrate our data collection and presentation methods using publicly-available data from litigated or SEC licenses.

b. **Collection Phase.** If the results of the pilot phase are promising and generate interest within the industry, we will move on to a more robust data collection phase. In the collection phase, we will target several different product categories and/or standards (the number will depend on project funding and personnel resources), and may seek to collect data regarding active and in-force license agreements, as well as expired and prior-generation agreements. We will seek to identify all firms with substantial involvement in those fields, and will approach them regarding participation in the study. Our hope is that a successful pilot phase will encourage broad industry participation in the collection phase. We anticipate that the collection phase will last approximately one year.

The compiled, de-identified data acquired during the collection phase will be made publicly available via a database hosted, most likely, by an academic institution. Data will not be posted until the conclusion of the collection phase. The public release of data will likely be accompanied by an academic paper describing the project and the data to be made available.

c. **Operational Phase.** Following the public release of the data from the collection phase, ongoing data collection may occur in selected fields, depending on resource availability. At a minimum, the public database will continue to be maintained and operated for the indefinite future.

2. ***Data Handling and Collection.*** The key to the study will be persuading commercial firms to contribute data concerning their confidential commercial patent license agreements. To encourage this, we have developed a framework that is designed to prevent the compromise of confidential information and the re-identification of data with individual firms. The steps involved during the collection phase (an abbreviated process may be used during the pilot phase) include the following:

a. a firm will confidentially disclose the existence of one or more patent licensing agreements to the study group, identifying only the date of the agreement and the counterparty;

b. the disclosing firm will conditionally (subject to the study group's receipt of a corresponding waiver from the counterparty) waive the agreement's

confidentiality provisions as to royalty rates, number of patents, firm size, product categories and similar data elements;

c. the study group will approach the counterparty to each identified agreement and request such a waiver;

d. if both parties to an agreement waive their confidentiality rights, then the parties will be asked to provide the study group with summary data regarding the agreement using a pre-determined template;

e. the study group will compile, analyze and publish this summary data on a de-identified basis (i.e., without disclosing party names, patent numbers, product models, etc.);

f. no agreement copies will be provided to the study group, and the study group will maintain the confidentiality of party names and all correspondence with the parties.

3. *Validation.* Because all data will be self-reported by firms, we will require means to ensure that data is accurate and valid. We have two general means for validating collected data:

a. Double-entry accounting. Each party to an agreement will be asked to submit a data sheet relating to that agreement (agreements will be identified by parties and date). We will check the consistency of data submitted by the two parties to each agreement. If inconsistencies appear, we will request clarification from the parties.

b. Independent audit. We will also consider engaging an independent third party (e.g., an independent auditing firm or industry analyst) to selectively “spot check” the data submitted by firms against actual agreements. A system would be established to give the third party auditor access to selected agreements at the firm’s offices or via a secure VPN connection. The firm would be required to maintain the confidentiality of any agreements that it reviewed, and to submit to the study group only corrections of data included in the forms. If a particular firm is found to have a high number of inaccurate submissions, then that firm’s submissions may be removed from the database or more substantial correction procedures may be put in place, with the consent of the firm.

E. Challenges

The study presents numerous challenges.

a. We may not be able to recruit a sufficient number of firms (particularly patent holders) to participate in the study;

- b. Firms may be unwilling to supply meaningful data, either as to the relevance, scope or field of patent license agreements, or the number of agreements as to which they agree to submit data;
- c. Data may be too individualized to be suitable for comparison or analysis;
- d. The market, regulators, litigants or courts may not trust the accuracy validity of self-reported firm data, even with the external validation procedures outlined above.

F. Funding

External funding will be sought for the study. Uses of funding will include:

Project planning and design
Travel (faculty) for meetings with potential participants
Research assistant support
Database hosting and maintenance
Independent validation of submitted data
Dissemination of results (conferences, publications)

Conclusion

We believe that the framework proposed above can serve as an effective means for unlocking the vast trove of patent royalty data that is currently hidden from public view, while maintaining the confidentiality of firm-level business arrangements. We invite the business community to participate in this effort to bring much-needed data to the discussion patent licensing royalties.