

FTC Panel on Markets for IP and technology



Bronwyn H. Hall
UC Berkeley
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Topics

- Non-practicing entities
 - Independent invention/prior user rights
 - Data needs
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Repeating the obvious

- What do we want a patent system to do?
 - Encourage invention/innovation
 - Encourage useful disclosure of invention
 - Facilitate trade in technology, to allow efficient specialization
- What do we not want a patent system to do?
 - Discourage innovation
 - Reward inventors with more than their contribution to social welfare
 - Provide employment for lawyers

Stronger is not necessarily better
Higher TC does not mean higher social value

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Non-practicing entities

- Definition: a patent holder that does not practice the invention on which he holds a patent
 - Benefits
 - Allows efficient specialization in knowledge production
 - Reduces reliance on scale and trade secrecy, which may favor competition
 - Enables VC financing because increases the salvage value of knowledge-intensive firms
 - Anand and Khanna (2000) – stronger IPR associated with more and earlier tech licensing
 - Costs
 - “Potential infringing” not a level playing field
 - Current bargaining strength in negotiations probably too strong due to
 - Preliminary injunction threat (but, eBay)
 - Some low quality patents (but, KSR)
 - Reasonable royalty computations

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Complex products

- Too much bargaining power granted to the owner of a small share of the technology in a complex product
 - “willful” infringement - ignoring a cease and desist letter even if there is good reason to believe one is not infringing
 - “reasonable royalties” principle appears to yield excessive royalties in complex product cases
 - Lemley and Shapiro (2007) – court awarded royalties average 10% in electronics vs. 14% in chem/bio – seems too small a difference
 - Threat of “patent ambush” in SSOs?
- Cross-licensing does not help with NPEs

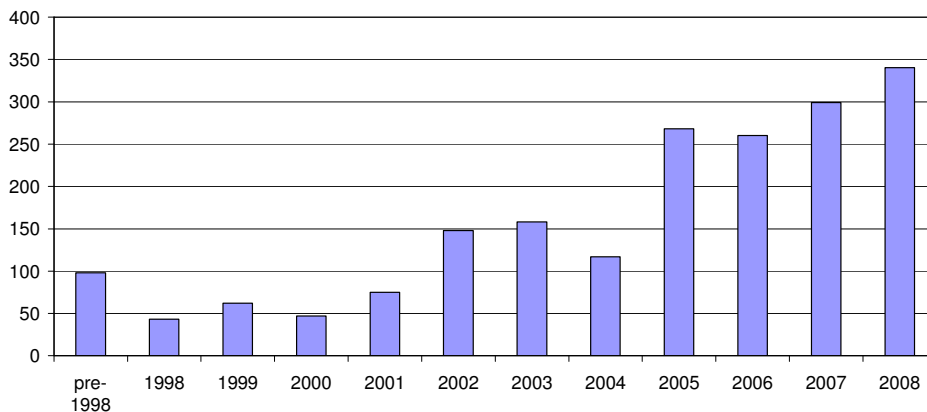
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Number of new patent case filings by non-practicing entities (NPEs)

Source: Patent Freedom Copyright 2008



Preliminary work by Hall and Ziedonis (2007) confirms this pattern in semi-conductors. Lerner (2006) finds very high litigation rates for small entities in financial methods patenting

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Independent invention defense

- Problem of inadvertent infringement when there are many minor patents, not always clearly written
- Exacerbated by the imbalance in bargaining power between potential infringer and patentee
- Proposed by Shapiro (2007), among others
 - Obvious costs in terms of discovery, etc
 - Benefit – the fact of independent invention suggests that the invention was not “non-obvious” to persons having ordinary skill in the art
 - Shapiro shows that welfare is almost always higher if indep invention allowed

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Independent invention defense

- Lemley (2007) - concern that racing with no guarantee of being the sole winner may discourage some high cost innovations; he suggests the following modifications:
 - Only copying be wilfulness, not indep invention
 - Prior user right instead (rules out simultaneous inventions)
 - Make simultaneous invention relevant for obviousness in court
 - Take indep invention into account when deciding to issue injunction

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Data issues

- Given the extreme heterogeneity of patenting behavior and value, one can always find a case study in the patent area to support any particular position
- Therefore, evaluating the importance of many of these problems depends on looking at the data more broadly
- But much relevant data is either difficult to come by, or very selective due to differences in firm reporting practices

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Data issues

- Two types of data especially desirable:
 - Better and more consistent litigation data - financial settlements in patent suits.
 - Firms that rely on the court system and public services to settle disputes should be obligated to report the details of any settlement reached.
 - Would this cause settlements to happen before a suit is filed?
 - Financial data for licensing – essential if we are going to understand the markets for technology
 - require reporting of patent licenses in some standardized way.

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Data and value

- Determining valuation a severe problem, given the paucity of public markets for patents
 - Ocean Tomo, Yet2.com promising
 - In principle, data on litigation settlements and licensing transactions would help establish value benchmarks and improve the operation of the market
 - mergers, alliances reported, why not licensing?

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Patent renewal

- Higher renewal fees can help to weed out some patents that clog up the system
 - Firms often do not know patent value until 5 or so years out
 - Higher renewal fees would get patent found to be of low to moderate value into the public domain sooner
- Renewal or re-exam status should be shown in the bibliographic information on the PTO website (not buried in PAIRS)

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Comparison of Compustat to Ziedonis' VC startups

	Semi devices	Medical devices	Software
Granted pat apps/ \$10M raised – VC funds	6.8	9.3	3.2
Granted pat apps/ \$10M R&D – Compustat firms	4.5	10.3	0.9
Share of startups with patents granted/ pending at exit/last round	65%	80%	27%
Share of existing Compustat firms 1987-2005 with patents	74%	66%	30%

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