

Will Reform Reverse the “Patent Crisis”?

A (New) Stakeholder’s Insight and Reasons to be Bullish

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Taking Stock from 2007 CFR Roundtable

- Problem areas driving crisis:
 - Patent quality
 - Litigation abuse
 - The rise of NPE's as new actors
 - Favorite fora for asserting patents
 - Uneven effect in differing industries
 - Traditional industries where patents are part of the landscape
 - New technologies and eligibility questions

2007 CFR Conclusions

- Modernization of US Patent laws and ‘ecosystem’ overdue
- Litigation claims and awards rising, burdening innovation
- Unitary system should be preserved (special rules disfavored – Lerner)

What's Changed, Which Issues are Implicated?

- 2007 Reform Bills (S1145, HR 1908)
 - Financial Services industry associations (SIFMA, FSR, American Bankers Assn) assert themselves as stakeholders
 - 'Balanced Portfolio' Reform
 - The ensuing debate frames the issues and provides important transparency as to the role and application of patents vis-à-vis:
 - industries 'experience'
 - the underlying issues implicated

Then and Now – the ‘Inside Baseball’ and Reasons for Optimism

- FS 2007 Senate Judiciary
 - Patents and FS: “Every where you go, there you are...”
 - quality, predatory assertions, litigation abuse issues differentiate the industries experience
 - Cited Lerner’s study
 - Not a ‘tech’ vs. ‘pharma’ debate
 - American competitiveness at stake

Practical Issues with Patent Assertions, NPEs and valuation

- “Notice”
 - In a world of complex value chains and incremental innovation, when are duties triggered and what to do about them?
 - implicates:
 - Willful infringement (when should I be on notice?)
 - Post-grant opposition (EZ Pass)
- Damages - Transparency
 - Lack of a standard and the ‘entire-market-value’ rule (*Alactel-Lucent vs. Microsoft*)

The Major Issue- Damages

- FS Experience
 - Where the 2007 Bill debate broke down
 - *Alactel-Lucent vs. MSFT* provides a fright
 - What about the value chains?
 - cell phones vs. new blockbuster drugs
 - *Quanta* (9-0) offers hope for ‘economic valuation’
 - The FTC’s engagement on the issue is encouraging (FS testimony)
 - 2009 Bill ‘compromise’ – the Court as enhanced gatekeeper
 - (Cornell Case – Judge Rader sitting by designation)
 - can it hold?
 - will it work?
 - Other issues - active interaction with Judiciary/Fed Circuit may be the key
 - Venue – TS Tech
 - Volkswagen