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FTC Report Raps Patent 'Troll' Litigation Practices

(October 7, 2016) In its report of a new study on patent assertion entities (PAEs), the Federal Trade Commission (FTC) carefully avoids the term patent troll while finding that "Litigation" PAEs account for 96 percent of patent infringement lawsuits but generate only about 20 percent of patent license revenues of those PAEs studied.

The report, "Patent Assertion Entity Activity," issued October 6, 2016, also finds that the Litigation PAEs' royalty settlements were less than the lower bounds of early stage litigation. "Given the relatively low dollar amounts of the licenses, the behavior of Litigation PAEs is consistent with nuisance litigation," the report states.

Litigation PAEs generally operate with little or no working capital and, to fund their businesses, rely on agreements with patent sellers to share future revenues. The Litigation PAEs are often limited liability companies with no or very few employees and their portfolios usually have few patents. "Litigation PAEs reported retaining outside litigation counsel on a contingency fee basis. Often, these attorneys would receive a percentage share of either gross or net proceeds from litigation, including proceeds from licenses with defendants," the FTC finds. In contrast to the Litigation PAEs, "Portfolio" PAEs were strongly capitalized with numerous patents and negotiated broad licenses. Portfolio PAEs were less likely to litigate.

"The FTC recognizes that infringement litigation plays an important role in protecting patent rights, and that a robust judicial system promotes respect for the patent laws," the report states. "Nuisance infringement litigation, however, can tax judicial resources and divert attention away from productive business behavior." The FTC recommends that Congress and the courts:

- Address the imbalances of the cost of litigation discovery for PAE plaintiffs and defendants. Because Litigation PAEs do not actually use the patents, defendants have very little to discover. On the other hand, because Litigation PAEs frequently sue end users and make voluminous discovery requests, the process for defendants can be burdensome and costly.

- Provide the courts and defendants with more information about the plaintiffs that have filed infringement lawsuits. Because Litigation PAEs are formed to litigate, there is little information about the true owners of the patents and little opportunity to file any countersuit.

- Streamline multiple cases brought against manufacturers and end users on the same theories of infringement. One way to reduce the burden on end users, who must defend or settle, would be to stay the action against them until the claims against the producers are resolved.

Balough Law Offices, LLC assists clients in defending lawsuits brought by Litigation PAEs. The Chicago-based law firm focuses on cyberspace, intellectual property, and business law. Our homepage is balough.com.