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PATENT PIRATES SEARCH FOR TEXAS TREASURE

by M. CRAIG TYLER

A growing breed of patent litigators is sailing the seas of Texas federal courts. Sometimes called patent pirates, they're in search of easy money, and they're coming to a courtroom near you.

Those unfamiliar with patent-infringement actions might think all patent cases are brought by a patent owner seeking to protect his turf and to stop a would-be competitor from knocking off his products. But the growing number of patent pirates could care less about that. They may have no products at all, and thus have no turf to protect from infringing competition. Others, although they may have a few products, are asserting patents against companies in industries far removed from their own. It's not at all about protecting a product line or market share, but instead about aggressively asserting claims of patent infringement solely for the money, essentially shaking down their targets with pay-up-or-else threats.

Conditions never have been better for patent pirates. Patent cases in general are getting more expensive and difficult to defend. According to the 2003 American Intellectual Property Lawyers Association Economic Survey, it will cost a defendant in a patent action filed in Texas with between \$1 million and \$25 million at stake roughly \$1.5 million just to get through discovery. Even worse, for that same amount at stake, the defendant is looking at spending more than \$2.5 million if it has to go through trial.

Just two years ago, these numbers were significantly lower, with a patent defendant expecting to spend roughly \$850,000 to get through discovery and \$1.5 million through trial. And these costs aren't trending down. Thus, just the nuisance value of a patent-infringement suit is as much as several hundred thousand dollars as soon as it is filed. That is, a defendant may consider it a win to settle a suit early by paying between \$200,000 to \$300,000 for a guaranteed result — a license to the patentee in order to continue business as usual — rather than spend 10 times that much in legal fees with no certainty of winning and real exposure to being hit with a huge monetary judgment.

Contrary to the defendant's high risks, the patent pirate has little at stake. A patent complaint requires remarkably little information. Indeed, plaintiffs usually premise these multimillion-dollar cases on a four- or five-page complaint that asserts some loose venue and jurisdiction facts, identifies the patent(s) allegedly infringed, alleges that the defendant is infringing on at least one (unidentified) claim of the patent, and ends with a request for an

injunction, damages and a jury trial. Surprisingly, the plaintiff doesn't even have to identify any infringing products. Yet this simple, nonspecific complaint has a nuisance value of a few hundred thousand dollars the minute it is filed and served. And with a glut of patents available at fire-sale prices due to the burst of the technology bubble and the abundance of product, sales and marketing information on the Internet, it is easier than ever for a would-be pirate to find patents and targets.

Moreover, the patent pirate is impervious to two of the most relied-upon defensive litigation tactics: 1. counterclaims; and 2. fee-intensive, scorched-earth litigation. In conventional patent litigation, the most powerful and common counterclaims are typically infringement-based. Many (if not most) large companies — along the lines of Cisco Systems Inc., Motorola Inc. and Dell Inc. — have developed extensive patent portfolios, often including hundreds or even thousands of active U.S. patents. These companies rarely assert these patents offensively but maintain them primarily for defensive purposes. Indeed, anyone in the patent business knows that a patent-infringement suit against these well-patented larger companies will bring a massive infringement counterclaim on multiple patents across multiple product lines. But this tactic is useless against the patent pirate, who typically has no products at all, so there is nothing against which to make an infringement counterclaim.

The common scorched-earth strategy — in which a large company makes it as painful and expensive as possible on a smaller plaintiff in an effort to win a war of attrition — works as well, if not better, in typical patent litigation than it does in other types of cases. Any small company or individual daring to bring a patent-infringement action against a large company should prepare for two years of protracted, expensive litigation, with hundreds of document requests, interrogatories, requests for admissions, millions of pages of produced documents and dozens of depositions. Together with infringement counterclaims, this one-two punch provides larger companies with a varying degree of mutual assured destruction (to borrow a phrase from Cold War strategy) to deter potential patent plaintiffs.

Here again, however, the patent pirate boasts relative immunity. The patent pirate usually is a shell company whose only assets are patents and perhaps an employee or two, formed for the sole purpose of asserting patent claims. This litigation machine typically has gathered all of one or two boxes (as opposed to millions of pages) of documents regarding the patent and will have them prepared for litigation long before a suit is filed. Thus,

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with no product line, no company entity, no documentation and few employees to be deposed, the patent pirate is more than prepared to weather easily the most aggressive counterattacks and litigation tactics from his targets.


Eastern District of Texas

Texas, particularly the Eastern District of Texas, has become a favorite venue of these pirates for two reasons: our judges and our juries. First, many of our federal courts have relatively quick dockets and judges with greater-than-average experience in patent cases. For instance, judges in the Eastern District have dealt with hundreds of patent cases, and some judges have developed special rules for dealing with them. Unlike the Northern District of California, which also has its own patent rules, courts in the Eastern District of Texas typically try to set a trial date in a patent case within 18 months or less from its filing date. This threat of imminent trial is the “gun to the head” that the patent pirate needs to execute his strategy.

Perhaps more important, many in the patent bar know that juries typically have little technical training or knowledge, and often even less interest in technically complex arguments, so they’re not inclined to consider fully the merits of a difficult infringement analysis. Juries in East Texas, unlike those in Houston, Dallas or Austin, are much less likely to have a member with any technical training or education, which exacerbates the problem from the defense perspective, but makes East Texas federal courts an attractive venue for would-be plaintiffs, who know that the jury will, instead, gravitate toward softer or superficial issues that are difficult to predict.

With an almost guaranteed monetary reward resulting from relatively little effort, the motivation to join the piracy trend is fairly easy to understand. Yet there is a fundamental difference between the nature of these claims and other plaintiffs’ claims. Patent-piracy claims originate with and are driven by someone other than a plaintiff who believes he has been wronged. The typical plaintiff in these cases is a shell company that is a front for

the true pirate: the law firm itself or a more nefarious separate licensing company. When involved, these licensing companies, for a share of the resulting treasure, spawn the entire process by orchestrating the efforts of the law firm, original patent owner and the shell-company plaintiff, only to fall into the shadows once litigation commences. Interestingly, there are even a few lawyers out there that have cut out the middleman and have formed their own licensing companies/law firms where they do everything: locate, obtain, assert and litigate the patents. At that point, the lawyers themselves become the named plaintiff.

All hope is not lost, however. Creative and assertive defense teams can use many different tactics and strategies to attempt to defeat or fend off pirates. Of course, the appropriate defensive tactics will vary depending on the pirate, patent(s) at issue, forum and the target. That said, one overall strategy is fairly reliable but requires sturdy sea legs in the face of an oncoming ship flying the Jolly Roger: Don’t make the company a more attractive target. Just paying off patent pirates as an unfortunate but necessary part of doing business may be tempting but generally is a bad idea. A quick and easy payoff to a patent pirate will ensure one thing: more threats from other pirates or perhaps even the same pirate. Although negotiations are supposed to be confidential, it’s amazing how quickly a reputation for being an easy target spreads among the mateys. 



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