How the patent system encourages ignorant infringement of patents

Reed Risenmay

Introduction and Summary of argument

The United States patent system is a wonderful system. Many great inventions and innovations pass through the patent office every day. But there is a problem. Hardly any practicing entities are willing to read these patents. And the real trouble is that not reading any patents is the most economically sound decision

These practicing entities, those that actually build, use, or sell useful products, would prefer to blindly practice their own inventions and risk infringing on the patents of others than actually read through the applicable patents to know if they are infringing a patent owned by another because larger damages can be awarded in patent suits that include willful infringement. In many cases proof that the defendant read the patent is sufficient to prove that the defendant willfully infringed the patent.

There is very little incentive for a practicing entity to read the patents. Because of the great number of patents that are published every day it is very difficult, expensive, and time consuming to do an exhaustive search of all of the patents that might apply. It is also often difficult to license patents owned by others.

Even though the patent system was designed to protect the rights of the inventors and to provide valuable disclosures to educate those wishing to practice these inventions, economic realities cause a much different result. Threats of litigation have cause the patent database to become something to be feared rather than a valued educational resource.

The purpose of the patent system

The purpose of the patent system is set out in the constitution. Giving congress power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” US Const. Article 1 Section 8 Clause 8. With these instructions to “promote the progress of science” from our founding fathers congress designed the patent system that we have today. Two of the key features of our patent system are the requirement for disclosure of the invention such that one of ordinary skill in the art could practice the invention, and the awarding of damages to owner of the patent to compensate them for any loses caused by others infringing on her patents.

The requirement for disclosure is meant to promote the progress of science by making all patented material public knowledge such that all can read the patents, and those competent in the art can to use this knowledge to create the same art or to improve on it. In exchange for enlightening the field of science with the knowledge of this invention the inventor is given for a limited term, currently 20 years for most patents, the right to exclude all others from practicing that invention and recover damages caused by the infringing action.[cite]. This protection provides incentive to disclose inventions and thus increase the public knowledge of the useful arts and gives assurances that the inventor’s interest will be protected.

How enforcement of patent rights is achieved in the Federal Courts

The patent holder is not given power to enforce the patent according to his own judgment or through his own power. Any action to enforce a patent must come from the federal courts. The courts have been given power by congress to award several different types of damages and give injunctive relief to patent owners. The most basic and most commonly given is the reasonable royalty.  [35 U.S.C. § 284 (2006)](https://a.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=35USCAS284&originatingDoc=I8c17be8d4cfd11e38578f7ccc38dcbee&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). A reasonable royalty is what the patent owner would have gotten if the infringer had negotiated a licensing agreement with the patent owner and is meant to represent the actual damages caused by the infringement. Other damages such as lost profits can be recovered to ensure that the patent owner has recovered all damages from the infringing action. These damages can be increased to three times the actual harm suffered by the patent holder. Id. “[E]nhancement of damages must be premised on willful infringement or bad faith.” [Yarway Corp. v. Eur-Control USA, Inc., 775 F.2d 268, 277 (Fed. Cir. 1985)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985148683&pubNum=0000350&fi=co_pp_sp_350_277&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_350_277). This means that unless the patent owner can show that the infringer willfully infringed or acted in bad faith the court will only award him damages to put in in the state he would have been if there had been no infringement. In many cases that is only the reasonable royalty.

The courts also have injunctive power to stop the continued infringement. Previously the courts used injunctive power to force those practicing patented inventions without the permission of the patent owner to cease infringing action through permanent injunctions. However currently the courts have decided to use this power more sparingly and have created a rule friendlier to the infringer. Those seeking permanent injunction “must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” [eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2009155959&pubNum=708&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). It is not easy for a patent holder to satisfy this test so the number of cases ending in permanent injunctions has gone down considerably since the eBay case was decided.

The court can also award attorney’s fees to the prevailing side in exceptional cases. “District courts possess inherent power to assess attorney fees as a sanction when a party acts in bad faith, vexatiously, wantonly, or for oppressive reasons.”  L.E.A. Dynatech, Inc. v. Allina, 49 F.3d 1527, 1530 (1995). This power is not used in ordinary cases, but only in extraordinary cases. Attorney’s fees are not granted in most patent cases.

Summary of economic decisions that lead to ignorant infringement

 Given the way that the patent system is set up many entities find it easier and more economically sound to remain ignorant of patents. Small entities especially have incentive not to know what is patented because the high cost of litigating patents makes it hard for a patent holder to recover enough to even cover the costs of litigation without the assistance of treble damages.

Every year about .5 million patents are granted by the United States Patent and Trademark Office. *see* US patent Statistics Chart Calendar years 1969 to 2013 http://www.uspto.gov/web/offices/ac/ido/oeip/taf/us\_stat.htm. It would be a very expensive to search through all of the patents that are still valid today. And even more expensive to assess them for their validity and applicability to what any entity actually practices. And even if such a search were made the chances of the result being accurate enough to predict if a successful suit could be brought against the practicing entity are minimal. Patent cases like all other cases in the courts are decided by a jury of ordinary citizens who probably have never read a patent before. Even the most accurate assessment of the patented art can only lead to an educated guess on what a jury will find.

Patent cases can rage on for years with many expert needed to instruct the jury on the science in question and the economic damages that should be assessed. The total cost is often in the tens of millions of dollars. Many small entities look at these costs and realize that they are not worth suing. Any economic damages that could be asserted against them would certainly not amount to this hefty price tag. Under U.S.C. 286 patent damages can only be awarded for up to 6 years before the filing of the complaint. Damages are also awarded for the time that the case is in litigation if infringement continues through that time. So unless the economic damages that a small entity has caused in six to nine years, is greater than the cost to the patent owner the case is not likely to even be filed because the patent owner would lose money. In the case of willful infringement where treble damages can be given the amount of economic damages needed to break even is three times lower so a case is more likely to be filed.

Even if a judgment is given against a small entity many of them do not have the capital to pay the judgment and will simply go bankrupt and the patent owner will receive nearly nothing and be stuck paying the bill for the costly lawsuit with nothing to show for their actions except eliminating a small player in the market.

If the infringer has not so much as seen the patent he is infringing it is nearly impossible for willful infringement to be found. So many entities do not look through patents so as to avoid any question of their willful infringement. This decision makes very good economic sense but undermines one of the purposes of the patent system. However if the infringer were to be informed by the patent owner that they are infringing they could no longer claim ignorance and any continued infringement would be willful infringement subject to treble damages. This has led to the practice of patent owners sending cease and desist letters to potential infringers informing the infringer of their patents and demanding that the infringing action be stopped. The entity may not be worth suing at this time however in the case that the small entity ever does make enough money that they are worth suing the patent owner can wait for the day that he is worth suing knowing that treble damages will be awarded from the time of the letter forward.

Often small entities that are in a market with large entities do not have the commercial power to even get a license on the patents practiced by large entities even if they wanted to put in the expense to research them out and try to request a licensing agreement. However knowing that the damages they cause to these small entities will only be the cost of the reasonable royalty that they would pay anyway to get the license and also knowing that they are not worth suing. Many small entities choose ignorance of the patents to lower costs and also to avoid treble damages for willful infringement.

If a small entity were to know that it were infringing another’s patent often the resources available to them are not sufficient to be able to change their product so that it would not be infringing. Design arounds are common in industries where they are economically feasible. However in many industries they are not feasible. A small computer chip manufacturer will have spent millions of dollars developing the masks needed to create the chips they build and it is likely that a simple design around that would have been possible at the beginning stages of development would be economically infeasible at this point because the cost of creating the masks is so high and the resources available to the small firm are limited. Similarly in manufacturing where the machinery is often custom made for the product being produced, changing the process to design around a patent may be too expensive to be economically feasible. Once large startup costs have been put in these small and medium sized entities cannot change their processes even if they wanted to and they only reward they could get would be to now be willfully infringing rather than ignorantly infringing so they choose to ignorantly infringe.

Large entities for similar reasons do not look through patents either. They do not have the advantage of not being worth suing. However they do have other advantages. Normally those advantages come in the form of cross claims. Many large entities hold huge numbers of patents. When they are informed that they are infringing on the patents of another large practicing firm they often find that the other firm is also infringing on their patents and will simply cross license to avoid costly litigation. However if one of the parties was willfully infringing while the other was ignorantly infringing the treble damages and the possibility of getting a permanent injunction might make it so that it is worth the risk and cost of suing the other large entity. To avoid the circumstance where they are willfully infringing while the other firm is ignorantly infringing putting them at a disadvantage in litigation large entities often also find it prudent to be ignorant of their competitors’ patents.

Large entities lose many of their cross claim advantages when it comes to small entities or non-practicing entities. Since these entities either do not produce enough for a counter claim to be worth the cost of litigation or do not produce anything at all, they often are forced to pay off the smaller entities so as to avoid more costly litigation. There are too many patents being granted for even these large entities to keep track of all of them and they have very little power to control the patents even if they find them so as to avoid being sued. Sometimes such patents are bought by the larger entities or licensing agreements are made but often these costs are the same as settling a case out of court, so many large entities choose to sit back ignorantly avoiding the possibility of treble damages and just wait for the small non-practicing entities to come to them.

Large entities also often choose to ignorantly infringe patents. In some industries the cost to design around patents is larger than the potential losses in a suit for patent infringement. In other industries the larger entities have large enough patent portfolios that any competitor would be foolish to sue them so they can ignorantly infringe as much as they wish knowing that they could find some of their patents that their competitors were infringing as well. Other large entities have so much capitol that they will simply buy out any entity that tries to sue them so the added cost of following all of the patents issued are not necessary.

How the system defeats its own purposes

 Across the board all entities find it in their best interest to be ignorant of the patents held by other entities and that infringing is often easier than the alternatives. Economically it is smarter for practicing entities to spend their resources in other areas because it is too difficult to keep track of all of the patents being granted and knowing of patents that you are infringing often can only hurts you.

 The patent system was designed to give all knowledge of the state of the art so that the art could improve and everyone could be working forward rather than spending time and resources on problems that had already been solved. The current system although it discloses the information necessary to accomplish this goal, disincentives practicing entities from reading the patents of its competitors. Since practicing entities develop and are granted the majority of patents almost no one that is developing new patents is reading the previous patents. Instead of learning from each other as the system was designed to do we are hiding from a wealth of knowledge out of fear of increased damages from litigation. And worst of all it all makes economic sense.

The patent system was also designed to defend the “exclusive rights” of the patent holders. Their economic rights to royalties are upheld daily in courthouses across America. However the exclusivity of the rights is not upheld in the same way it once was. It is true that the patent holder still has exclusive rights in that he is the only one that controls the patent and the royalties associated with the practice of the invention. However the right to exclude others has been diminished. Previously the court would grant injunctions against infringers as almost a matter of right. Now however under the test the Supreme Court gave in the eBay case the patent holder has a much harder time to get a permanent injunction. His ability to exclude others from practicing the invention is much more limited.

The exclusive rights of the patent owner are also limited by the cost. Litigation is very expensive and the many entities are just not worth suing. The patent owner may be able to get a judgment against smaller entities or foreign entities that have very few assets in the United States but they will not be able to recover much of that judgment. Or the patent owner may not be able to afford to wait for three or four years to get a judgment and may be out of business before they can collect on the judgment.

The patent owner might not be able to use his rights because he cannot find the infringing entities. The system promotes silent ignorant infringement of patents so the patent owner might not know that an entity that is infringing on his patent even exists.

Lack of alternatives and a defense of the patent system

Although far from perfect there are no small fixes that can be made to the current system that will fix the problems that the system faces. If congress were to eliminate the treble damages provision of the law it would only encourage more willful infringement of patents and would make it even harder for patent owners to recoup the costs of litigation. If we somehow reduced the cost of litigation there would be a whole slew of patent cases that would fill the courts, including many more frivolous cases. If the patent office decided to be much harsher with granting patents such that a more manageable number of patents were granted then many worthwhile inventions would not be disclosed because they would not be patented. If the patent office punished ignorant infringement with harsher monetary punishments then many startups and new companies would fail or never be started because the costs and risks of patent litigation would be too great.

Although our patent system is imperfect and works against some of the concepts that it most fundamentally supports it is the best that we have been able to come up with and is a workable if imperfect system.