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"Patent Pirates" Only Exist in Neverland

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Calling companies whose intellectual property rights have been infringed and the lawyers that represent them "patent pirates" makes a nice alliterative headline. But name-calling doesn't help resolve the real problems that exist in patent litigation today. It also conceals the truly dangerous claim Craig Tyler's article advances: that ownership of intellectual property — the coin of the realm in our new information society — should be restricted only to major corporations.

At bottom, a patent case is simply a trespass case — the only real issue is whether the defendant is on the property without permission (infringement), and the only real defense is that the owner doesn't actually own the property (invalidity). It has never been a defense that the owner doesn't live on the land or isn't the right sort of person to own the land in the first place. The article's assertion is tantamount to claiming that, unless a landowner is a real estate company, it has no right to object if someone builds an office building on its land without permission and keeps the rent.

But limiting the enforcement of property rights based on the status or character of the holder of the rights is not just alien to property law — it is alien to free enterprise and a free society. Intellectual property is assignable and anyone who purchases it can enforce it. In addition to the fact that giving property owners enforcement rights has been a quaint characteristic of property law for some time now, those protections reward innovation, investment and the attendant risk-taking that free enterprise requires. That it also rewards entrepreneurial litigation is hardly something corporations ought to complain about — they do exactly the same thing to compete successfully in the marketplace.

And with all due respect to alternative dispute resolution, courts and lawsuits are a terrific way to resolve disputes over ownership of property rights. Resorting to the courts isn't limited to plaintiffs: Major corporations file patent litigation suits against each other and have been known to view their patent portfolios as assets whose value can be enhanced by aggressive prosecution.

In short, plaintiffs in patent litigation are hardly pirates — they are simply investors who bought an asset and seek a return on their money. In the information age the purchase of patents simply reflects the highly socially desirable migration of investment away from tangible or real property toward intellectual property. Nations that want to compete in the information age should refuse to devalue intellectual property by allowing competitors to infringe it with impunity. Enforcing property rights is a hallmark of an advanced and prosperous society. The absence of meaningful protection for these rights, far from being a benefit, is in fact a significant detriment for commercial activity, as nations such as China and Russia are learning. While no one likes being a defendant, certainly few would agree that the ability to infringe on intellectual property rights is a good thing for our society.

No Free Ride

The article indicates that, while the system imposes massive costs on defendants, it is a free ride for plaintiffs. Of course, this isn't true. If plaintiffs want to have any hope of prevailing, they must invest significant sums to fund patent litigation, including investigating and buying the patent, then funding expensive litigation. Defense lawyers typically are pretty diligent about standing between the

plaintiff and what the article paints as easy money.

While patent litigation can price small defendants out of being able to defend themselves on the merits, the principle also works in reverse: Litigation costs also are prohibitive when small plaintiffs want to enforce their claims. So while defense attorneys have their violins out for giant corporations, forced to scrimp to pay tall-building firms to defend them against infringement claims, costs pose a bigger threat to the small business or individual inventor that cannot afford to protect its intellectual property from infringement, because the amount at stake does not justify litigation. That cost-benefit ratio affects those small plaintiffs because the scorched-earth litigation strategy that the article claims is not available to defendants is, in fact, all too prevalent in patent litigation. While a plaintiff may not have many documents to produce, it must generally prove its case through discovery from the alleged infringing defendant. To put it mildly, the defendant has tools available to it that will scorch the earth quite well, thank you very much.

Efficient rules and speedy trial settings are the remedy for a small defendant who has a valid defense on the merits but simply cannot afford to litigate it. As the article notes, courts in the Eastern District of Texas have become national leaders in patent litigation, because they provide a relatively quick system for resolving patent disputes, which reduces the cost of preparing a case for both sides. This efficiency is due in part to several of the judges' use of special rules for patent cases and their continuation of the district's tradition of early, firm trial settings. Some lawyers perceive speedy trial settings and discovery limitations as benefiting plaintiffs, but in expensive commercial litigation, they work in small defendants' favor as well.

Also, the claim that a quick docket is a gun to a defendant's head in a patent case is demonstrably false. A recent confidential survey of Eastern District patent practitioners, now posted on the Eastern District Web site at www.txed.uscourts.gov/, made clear that most defense counsel do not perceive the court's quick trial settings as harmful. In fact, the settings provide a way of defending a case on the merits that would otherwise cost too much, and one that is far less disruptive than the government determining who can and cannot possess intellectual property rights. A small patent defendant that thinks it can defend the case on the merits should want to be in the Eastern District, where it will have possibly the cheapest path to a trial setting anywhere in the nation.

On the topic of jury trials, the name-calling of jurors, especially rural jurors, should stop. What basis exists for claiming that a jury's technical sophistication or lack thereof benefits the party that doesn't have the burden of proof? One would think it would work the other way. A jury is a jury, and the claim that jurors are too dumb to understand one side of a case is, and always has been, an excuse for either poor lawyering or poor facts. So, it's time to stop the jury-bashing.

The reality is that most patent litigators don't look like Johnny Depp. And patent litigation really doesn't resemble the buccaneers' paradise that Tyler portrays.

At the conclusion of a trial, a judge typically instructs the jury that a corporation is entitled to the same treatment as an individual. Let's keep it that way. It's called equal protection.

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