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Obama on patent trolls: will they be kept at bay in Europe?

Miquel Montañá (Clifford Chance) · Thursday, June 13th, 2013

Patent trolls, also called “non-practicing entities” (“NPE”), a rather more elegant name, have become a serious threat to the patent system, particularly in the IT arena in the United States (“U.S.”). As readers will know, patent troll is the expression normally used to designate companies that simply hold patents for the purpose of forcing third parties to obtain a licence under a threat of litigation. Due to the vast amount of patent portfolios that they normally own and their complexity, quite often third parties prefer to pay a low royalty than embarking into the ocean of time, cost and complexity that delving into the validity and infringement analysis requires. However, when third parties are not agreeable to the idea of paying, litigation comes to the fore. According to some sources, litigation involving patent trolls already exceeds 50 % of the patent cases before the U.S. Courts. Although this figure might not be totally accurate, as sometimes the fine line between abusive patent troll litigation and legitimate litigation blurs, it does illustrate the gigantic dimensions of this phenomenon in the U.S. According to the same sources, litigation involving patent trolls generates annual legal of fees around 30.000 million USD. Although this author is a bit sceptical as to how reliable this figure may be, it does show that this phenomenon has become a really very big thing.

Against this background, it was no surprise that last week President Obama became personally involved to announce a crusade against patent trolls. The measures suggested to fight against them include obliging patent owners to disclose their identity to the defendants, sanctions in the case of vexatious litigation and new rules on legal costs. With these proposals, the aura of patents have come back to the presidency of the U.S., 148 years after a patent lawyer held the post now in the possession of the master of “yes, we can”. This patent lawyer, called Abraham Lincoln, went on to grace the pages of history as a result of his later job.

Moving to this side of the Ocean, patent trolls are not an unknown phenomenon in Europe, although certainly much less frequent than in the U.S. The unavailability of software and business method patents in Europe might be one of the reasons. Other reasons may include a less litigious culture, the higher risks assumed by patent trolls in terms of legal costs if they lose the case, and less developed and sophisticated litigation-funding schemes. All in all, it would be reasonable to predict that patent trolls will be kept at bay, or at least reduced within reasonable bounds, in Europe, in the near future.

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