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Trouble for Trolls? Federal Circuit Moves to Reign in Non-Practicing Patent Plaintiffs

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The Federal Circuit has issued a strongly-worded opinion requiring a non-practicing plaintiff in a patent infringement lawsuit to pay more than $600,000 to reimburse the defendant's legal fees for defending a "baseless" infringement suit. *Eon-Net, L.P. v. Flagstar Bancorp*, Fed. Cir. No. 2009-1308 (July 29, 2011). The opinion is important reading for any defendant that is accused of infringing a patent, especially if the plaintiff is the type of serial-litigator commonly known as a patent troll. **What is a Troll?** The term "troll" is used as a common euphemism for a company whose only business is suing for infringement of its intellectual property rights. Trolls are also known by the more polite term "non-practicing entities" because they do not actually "practice" the intellectual property themselves by offering goods and services in the marketplace. Instead, the non-practicing entity's ("NPE's") sole business model is to obtain intellectual property rights (usually patents), and then file infringement claims. In most cases, the NPE offers to settle the litigation early if the defendant agrees to pay a licensing fee that is substantially less than the cost of continuing the litigation. From an economic perspective, it's "a deal you can't refuse," and most defendants end up agreeing to pay the fee, even when they have excellent arguments that they do not infringe the patent in question, or that the patent is invalid. ***Eon-Net v. Flagstar*** Eon-Net fit the description of an NPE perfectly, having a business model that focused exclusively on filing patent infringement suits and then collecting license fees in return for licensing its patents. The Federal Circuit noted that Eon-Net had "filed over 100 lawsuits," almost all of which resulted in early settlements. The license fee was calculated to be "far lower than the cost of litigation," typically between $25,000 and $100,000. Unlike most defendants Eon-Net had targeted, Flagstar chose not to pay the license fee, believing that the claim was baseless. Instead, Flagstar pursued the case through the stage at which the court determines how broadly or narrowly the claims of the patent are to be interpreted (typically referred to as "claim construction" or the "*Markman*" process). Once the claims were construed, and the court agreed that Flagstar did not infringe, Flagstar moved the court to award sanctions against Eon-Net for filing a "baseless" lawsuit. In doing so, Flagstar sought sanctions both under the Patent Act (as an "exceptional case") and also under Rule 11 (a procedural rule used by federal courts to protect against frivolous filings). The trial court granted the motion and awarded Flagstar more than $600,000 to reimburse the cost of defending the lawsuit to that point, and the Federal Circuit has now upheld that award. **What Eon-Net Did Wrong** The Federal Circuit agreed both that this was an exceptional case under the Patent Act and that Eon-Net was subject to sanctions under Rule 11. The court's reasoning largely focused on two aspects of the case: Eon-Net's litigation tactics (including filing a lawsuit based on an unreasonable interpretation of the meaning of the patent claims, destroying documents that could have been relevant to the litigation, and not participating in the claim construction process in good faith), and Eon-Net's failure to properly investigate Flagstar and compare the accused product to the patent claims prior to filing suit in the first place.   In particular, the court cited Eon-Net's failure to do an objective comparison of reasonably construed patent claims against Flagstar's system as part of its pre-filing investigation. The court also discussed with some disdain the unfair advantage NPE's have in the litigation process, especially in discovery. While a patent defendant will typically have to produce "millions of pages" of documents relating to its development and sales of the accused product, the NPE has very little to produce because it does not sell products or services itself. It seems pretty clear that this discovery imbalance, together with the serial-litigation business model, were significant in the court's decision-making process. **Lessons Learned** There are a number of take home lessons in this case that are worth remembering if you ever receive a demand letter asserting an infringement claim, or are ever named in infringement litigation: The plaintiff has to do an objective and reasonably detailed investigation before filing suit. If the information the plaintiff needs is not publicly available, consider offering to allow the plaintiff to review the accused product or process, under a reasonable non-disclosure agreement. If the plaintiff fails to take you up on that offer, and files anyway, you could be able to recover your attorneys' fees in the end. Work hard to keep discovery (especially e-discovery) in check until the claims of the patent have been construed. In this case, Flagstar successfully moved the court to stay all discovery that did not relate to claim construction. Once that construction was entered, Flagstar was able to immediately obtain summary judgment. The court noted that, had full discovery been allowed, the cost of defense would have been substantially higher than $600,000. Consider taking the fight to the troll. As the court noted, most defendants aren't willing to risk the cost of litigation in order to obtain a summary judgment. However, if you are confident that you clearly do not infringe, or the patent is clearly invalid, there is reason to believe that you may be able to recover the cost of defending the litigation if the plaintiff persists.

Authored By

William Giltinan

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