

Are Patent Trolls Now Targeting The Energy Industry?

Law360, New York (April 04, 2014, 5:50 PM ET) -- Based on our informal survey and analysis of patent lawsuits filed over the past few years, energy companies will probably see both a significant increase in lawsuits filed by patent trolls and will find that a decreasing percentage of their defensive patent litigations are against competitors.

To date, the complaints about patent trolls — also known as nonpracticing entities and patent assertion entities — have primarily come from technology and retail companies that have been embroiled in patent litigation against them. However, energy companies will now likely join that debate as they deal with the significant costs and frustrations associated with defending against patent cases filed by NPEs, which we define as entities, other than universities, that do not manufacture anything and do not provide any services, without the opportunity for cross-licensing, which cases against competitors often present.

Energy companies should therefore take this possible trend into account when revising and implementing their risk mitigation plans as well as their patent litigation and licensing strategies and budgets.

The Survey

Overall, patent cases have nearly doubled in the past decade, from about 2,500 in 2003 to more than 5,000 cases filed in 2013.[1] The energy industry constitutes about 20 percent of the total number of patent cases filed.[2] Our survey first sought to quantify, within the patent cases filed against energy companies, whether the number of cases filed has increased or decreased in recent years.

Based on an analysis of patent cases from 2006 to 2013 in the Lex Machina database, we reviewed each case where Lex Machina categorized one of the defendant parties as an energy company. We then reviewed each case to confirm whether the company involved was indeed an energy company and, from there, determined whether the plaintiff was an NPE in each of those cases against energy companies.

The results supported our hypothesis: Patent litigation against energy companies is seeing an increase in the total number of NPE cases filed and a corresponding decrease in competitor suits. What may be more significant is the rate at which the energy industry is being targeted by NPEs. The total number of cases filed in the energy industry increased in a nonlinear fashion last year, with filings by NPEs in 2013 almost doubling the number from 2012.

Consequently, the percentage of cases filed by an NPE saw a meaningful increase in 2013. That is, almost 30 percent of all energy patent litigation cases were filed by NPEs. For energy companies, NPE

cases have increased from an average of 8 percent from 2006-2012, to 26 percent in 2013. This trend alone likely means that: (1) more NPE suits will be filed against energy companies in the future and (2) a larger portion of energy companies' patent litigation dockets will be composed of NPE lawsuits, as opposed to competitor lawsuits.

Other trends in the industry also appear to be driving factors behind this push by NPEs to target energy companies. These trends include an increased reliance on and use of computer-based technologies in the energy industry (e.g., down-hole exploration), more energy companies selling their patents to monetize their investments in research and development, as well as NPEs continuing to look for untapped licensing (and litigation) targets.

Whatever the underlying reason for the increased attention, at least one well-known NPE, Acacia Research Corp., has unambiguously stated its intent to acquire and assert a portfolio of patents against those companies that call the "energy corridor" their headquarters.[3] Combined with an uptick in the percentage of patent cases filed against energy companies, these factors likely point to a new patent litigation trend and dynamic for the industry.

Practical Considerations

With NPEs targeting the energy industry, companies in this sector should take practical steps to prepare for the possibility of patents being asserted against them. These steps include the following:

- explore indemnity and insurance options and sources;
- assess, with experienced counsel, the merits and exposure of the case in its early stages and develop a litigation roadmap/risk management plan based on that early case assessment;
- do not ignore threat letters, but discuss them with counsel before responding;
- consider obtaining an opinion letter from counsel on invalidity or noninfringement;
- investigate the NPE and its litigation history;
- form joint-defense groups early and share information with other NPE targets — and possibly share counsel as a way to save litigation costs;
- take the necessary steps to preserve relevant data and be prepared to comply with any early disclosure rules on discovery and invalidity contentions to ensure that the case is decided on the merits and not through sanctions motions.

Many other practical considerations — such as seeking broad contract language for all intellectual property licenses, considering IP insurance, seeking broad indemnification language from suppliers and contractors and even considering cross-licensing patents — can be effective strategies to respond to the patent litigation threats and lawsuits brought by NPEs. Of course, the overall strategy should be tailored for the company's specific business needs and should consider the risk and expense that the company is willing to accept.

Conclusion

Our survey points to an increase in the number of cases filed by NPEs in the energy industry. In fact, our survey, and the other data points discussed above, suggests that energy companies should expect upward of 30 percent of all patent cases filed in the energy industry in 2014 — and in the next few years — to be brought by NPEs.

Although the total number of patent cases has not yet increased substantially, it appears that the volume, as well as the percentage, of cases that the industry will face against NPEs will increase over the near-term. Energy companies should therefore prepare for this shift in the mix of patent cases and implement practical and strategic plans that are designed to address suits filed by NPEs.

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[1] Chris Barry, Ronen Arad, Landan Ansell, & Evan Clark, “2013 Patent Litigation Study: Big cases make headlines, while patent cases proliferate”, PricewaterhouseCoopers LLP (June 2013), available at <http://www.pwc.com/us/en/forensic-services/publications/2013-patent-litigation-study.jhtml>.

[2] Id.

[3] Press Release, Acacia Research Corp., Acacia Research Launches Houston Office and Energy Practice (Dec. 9, 2013), available at <http://acaciaresearch.com/wp-content/uploads/2013/12/120913-Acacia-Houston-Office-Release.pdf>.
