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The Rise of the End User in Patent Litigation and Attorney Fee Shifting

Gaia Bernstein[1]

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Quick View

We usually think of two players in the patent system: the patentee and its competitor. Increasingly, however, end users – who are neither patentees nor competitors – are playing a significant role in the patent system. The attention of the press has recently turned to patent assertion entities who are suing vast numbers of customers using patented technologies in their everyday businesses. For example, one patent assertion entity has sued individual podcasters, including the Comedian Adam Carolla. End users were also principal players in some of the recent patent cases before the Supreme Court. In *Bowman v. Monsanto*,[2] Monsanto sued a farmer for re-using its patented seed technology. End users also appear as patent challengers: in *Ass'n for Molecular Pathology v. Myriad Genetics*,[3] patients and physicians sued to invalidate breast cancer gene patents. And patients and drug stores repeatedly challenge pay-for-delay agreements between patentees and competitors, claiming they undermine patients' interests in access to generic drugs. This is only the beginning: end users are likely to become even more prevalent in patent litigation, as 3D printers become more popular, making it more likely that an individual or a small business will make an infringing item that will expose them to patent liability.

All of this begs the questions what is an "end user" and how well is patent law suited to deal with this new player? In *The Rise of The End User in Patent Litigation*, which was published in the Boston College Law Review,[4] I define end users as people and companies that use a patented technology for personal consumption or in their business. I emphasize that

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[1] Professor of Law, Seton Hall University School of Law; J.S.D.. New York University School of Law; LL.M., Harvard Law School; LL.M., Tel-Aviv University; J.D., Boston University; B.A., Tel-Aviv University. Contact email: bernstga@shu.edu. This article (without footnotes) was originally published at http://patentlyo.com/patent/2014/06/litigation-attorney-shifting.html.

[2] Bowman v. Monsanto, 133 S. Ct. 1761 (2013).

[3] Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107 (2013).

[4] *See* Gaia Bernstein, *The Rise of the End User in Patent Litigation*, 55 B.C.L. REV. 1443 (2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2440914.

they are strictly users. Even if they incorporate the patented technology into a product or service they offer their customers, they do not make or sell the technology standing by itself. I explain that end users differ from competitors in three respects. First, end users usually lack technological sophistication – they are generally not technological companies and do not produce and supply the allegedly infringing technology. Second, end users usually become involved in the patent conflict relatively late in the life of the patent, after the patented technology enters the market and achieves widespread adoption. Third, end users are typically one-time players. In most cases the technology is ancillary to their business and they do not have a long-term stake.

Patent litigation is exorbitantly expensive. It is all the more expensive for end users who lack the technological expertise to challenge validity and infringement claims and cannot rely on in-house technological expertise. Because end users are often one-time players, they prefer to avoid the expense of patent litigation and settle even strong cases, making them a particularly lucrative target for patent owners. Unfortunately, even the most recent substantive patent law legislation, the America Invents Act ("AIA") fails to address the growing role of end users. I show that while the AIA attempts to address the needs of small entities, mainly by adding and changing procedures to challenge patents in the patent office, thus providing a cheaper and faster forum for contesting validity, those same novel procedures are largely unsuitable for end users because they permit expansive challenges mostly early in the life of the patent before end users are likely to be involved in the patent dispute. The procedures that allow challenges later in the life of the patent limit the grounds available for challenging the patent. Thus, unlike even small competitors of the patent holder, end users are unlikely to benefit from the enhanced patent office proceedings put in place in the AIA. The effect of this is to leave them without the very same tools that were implemented to protect small entities.

Ultimately, the rise of the end user is a complex phenomenon that needs to be addressed by a series of reforms, which I am addressing in other works in progress. Here, however, I focus on the role that fee shifting of attorney fees and litigation expenses to the prevailing party can play in end user cases because a modest change could contribute toward leveling the footing of end users in all type of end user-patentee disputes.

Fee shifting in patent litigation has been a hot topic this year. Recently, the Supreme Court decided two fee shifting cases: *Highmark Inc. v. AllCare Health Mgmt. Sys., Inc.*[5] and *Octane Fitness, LLC v. ICON Health & Fitness,*

[5] Highmark Inc. v. AllCare Health Mgmt. Sys., Inc., 134 S.Ct. 1744 (2014).

Inc.[6] In *Octane Fitness*, the Court lowered the standard for awarding fee shifting in patent litigation. Congress is also considering multiple bills advocating different versions of fee shifting. The problem is that although some of the congressional bills address PAE's suits against customers, neither these bills nor the Supreme Court decisions address the broader role that end users are now playing in our patent system. In the article, I argue that the case for fee shifting is strong where end users are implicated particularly because of the great inequality in technological sophistication between end users and patentees and because end users frequently represent many other parties who are not before the court. For these reasons, end user status should be considered as a factor that weighs in favor of fee shifting, particularly when the end user fits the paradigmatic form of a classic end user.

Cited as:

Bluebook Style: Gaia Bernstein, *The Rise of the End User in Patent Litigationand Attorney Fee Shifting*, 3 NTUT J. OF INTELL. PROP. L. & MGMT. 199 (2014).

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OSCOLA Style: G Bernstein, 'The Rise of the End User in Patent Litigation and Attorney Fee Shifting' (2014) 3 NTUT Journal of Intellectual Property Law & Management 199.

[6] Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S.Ct. 1749 (2014).