The Surprising Resilience of the Patent System

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The Patent Crisis Crises

• Lots of changes in the patent system over the past 40 years
• Major changes in patent law
• The overprotection “crisis” of the 2000s
• The underprotection “crisis” of 2016
Utility, Plant and Reissue Patent Applications Filed per Fiscal Year (through March 2016)

Data Source: www.uspto.gov/dashboards/patents/main.dashxml

Sources:
For FY 1937-2013: Administrative Office of the U.S. Courts, Annual Reports of the Director, Table C-2 (1940–2013);
Patents in force calculated based on U.S. Patent Office Annual reports and online application date data (see text)

Patents in force (million)
Defendants in NPE suits by year filed
Cumulative District Court Patent Damage Awards

Inflation Adjusted Compensatory Awards (in Millions)

Lost Profit

Royalty

2008: n=42
2009: n=39
2010: n=37
2011: n=44
2012: n=57
2013: n=65
2014: n=89
2015: n=78

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Litigation Outcomes

• Validity win rate
  – 1982-1994 – 58% (Dunner 1995)
  – 2010-2014 – 57% (Allison et al. 2015)

• Patentee overall win rate
  – 2002-2004 – 25% (Janicke & Ren 2006)
  – 2010-2014 – 26% (Allison et al. 2015)
What’s Going On Here?

• Selection effects?
  – Are suits a function of uncertainty, not strength? [perhaps, but no systematic pattern]
  – Are trolls driving out practicing entities? [no; practicing entity suits unchanged]
  – Are licenses being replaced with lawsuits? [hard to observe, but licensing still significant]
What’s Going On Here 2?

• Broader economic trends?
  – Patent filing and economic growth?
  – Cyclical vs. countercyclical trends?
FIGURE 16
What’s Going On Here 3?

• Are patent reforms irrelevant? Maybe they are not as significant we think
• Are the merits irrelevant?
  – Many reasons to obtain patents that are unrelated to enforcement
  – Many types of litigation driven by something other than expected outcomes
• Is it all pointless?
  – Can the resilience of the system itself point the way towards reform?