Just as technology evolves, so do patent remedies evolve

1. Damages
2. Injunctions
Just as technology evolves, so do patent remedies evolve

1. Damages

Upward Pressure on Patent Litigation – RPX

the number of NPE litigations is on pace to nearly double from 2011-2012

Source: RPX Corporation Investor Presentation @ 2012 RPX Corp.
Upward Pressure on Patent Litigation – Lex Machina (Feldman, Jeruss, Walker)

Upward Pressure on Patent Litigation

Smartphone Competitor Patent Suits

Google v. HTC, Samsung, Motorola & Google

Apple v. HTC

Microsoft v. Motorola

Oracle v. Google

Nokia v. Apple

Samsung v. Apple

Motorola v. Apple

HTC v. Apple

LG v. Apple

Google v. Motorola

Microsoft v. Apple

Oracle v. Google

Nokia v. Apple

Samsung v. Apple

Motorola v. Apple

HTC v. Apple

LG v. Apple

Google v. Motorola

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Motorola v. Apple

HTC v. Apple

LG v. Apple

Google v. Motorola

Microsoft v. Apple

Oracle v. Google

Nokia v. Apple

Samsung v. Apple

Motorola v. Apple

HTC v. Apple

LG v. Apple

Google v. Motorola

Microsoft v. Apple

Oracle v. Google
Upward Pressure on Patent Enforcement – Privateering (Rockstar Bidco)

Downward Pressure on Patent Damages

Damages
Uniloc USA, Inc. v. Microsoft Corp., 632 F.3d 1292 (Fed. Cir. 2011)
ResQNet.com, Inc. v. Lansa, Inc., 594 F.3d 860, 869 (Fed. Cir. 2010)
Oracle v. Google (N.D. Cal 2012)
Apple v. Motorola (N.D. Ill 2012)
Downward Pressure on Patent Damages

Reaction from investor-interviewee: “[G]reater judicial scrutiny of damages and the increasingly difficult climate for enforcement “has caused big ticket litigation funders to flee patents,” (in particular, the rejection of the entire market value rule and increased need for damages experts and surveys to prove damages) – Chien, Startups and Patent Trolls (2012)

2. Injunctions
Downward pressure on injunctions at the district court

Chien & Lemley (2012)

Downward pressure on injunctions

Post-Ebay District Court Injunction Rate

Chien & Lemley (2012)
Downward pressure on injunctions at the district court

**eBay “5th factor” Causal Nexus (Apple Samsung)**

RAND Injunction Jurisprudence

- Practicing Company: 79%

Upward Pressure on ITC Litigation – Chien Testimony 2012

**Patent Assertion Entities**

- 28% of inv.
- 47% of resp.

2011-1H12
Upward Pressure on ITC Litigation from PAEs—Chien Testimony + Facts and Trends Report, ITC 2012

Patent Assertion Entities/NPEs

- 28% of inv.  (ITC NPE: 19%)
- 47% of resp. (ITC NPE: 43%)


- 7% Resp. 10% Inv. (2006)
- 19% Resp. 41% Inv. (2011)

Percentage of Investigations/Respondents brought by NPEs
Downward pressure on injunction at the district court but not the ITC

*Interview with contingent fee patent lawyer:* “[when] you are asking people to write [checks that] are sufficiently large [] they can’t write them without the Sword of Damocles of a jury verdict or [an] ITC injunction hanging over their heads.” David Schwartz, *The Rise of Contingent Fee Lawyer Representation in Patent Law,* __Ala. Law Rev._ ___ (forthcoming 2012)

Section 337, not eBay, governs whether the ITC should grant an exclusion order

“May grant”
4 Equitable Factors (eBay)

“Shall direct...unless”
4 Public Interest Factors (§ 1337(d)(1))
Downward pressure on exclusion orders at the ITC

DOJ/Others: Use the public interest factors!

Patent remedies drive the economic value of the patent
But transaction costs also matter

Assertion Makes Sense Because the Cost To Defend or Negotiate, and therefore the Likely Settlement Fees, Exceed the Cost To Assert (Adapted from Shavell and Rosenberg)

Downward pressure on cost of defense and upward pressure on cost of offense

Assertion Makes Sense Because the Cost To Defend or Negotiate, and therefore the Likely Settlement Fees, Exceed the Cost To Assert (Adapted from Shavell and Rosenberg)
May be working ... with fewer total defendants named in suits

Growing Frequency of NPE Assertions

- NPE Suits Filed
- Unique Defendants

Thank You!

Some of the Papers/Data Referenced in This Presentation (available on SSRN)

*The ITC and Patent Disputes*, July 18, 2012 Congressional Testimony to the House Subcommittee to the Judiciary

*Reforming Software Patents*, 2012 Houston Law Review


(with Mark A. Lemley) *Patent Holdup, the ITC, and the Public Interest*, 98 Cornell Law Rev. ____ (2012)