

Identification and Procedural Regulation of Speculative NPE Patent Malicious Litigation

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Abstract

Regulating speculative NPE patent litigation is crucial for promoting technology transfer and balancing proprietary rights with public interests. Currently, such litigation is surging, eroding market fairness and diverting judicial resources. Although legislation and judicial measures already exist to regulate this, four major shortcomings remain: vague conditions for dismissal, inadequate pre-trial review and pre-trial injunctions, insufficient counterclaim penalties, and the absence of rights to sue for unfair competition. A comprehensive regulatory framework should be established from a procedural perspective: pre-litigation preventive mechanisms (such as strict injunction reviews), defendant defense rights during litigation, and post-litigation disclosure and public notification systems. These measures can effectively curb malicious litigation, uphold judicial fairness and market order, and play a crucial role in improving the intellectual property protection system.

Keywords

Speculative NPE, patent malpractice litigation, malicious identification, program regulation.

1. Introduction

The expansion of intellectual property litigation has highlighted the issue of malicious patent litigation. Speculative non-practicing entities (NPEs) acquire patents to initiate infringement lawsuits or make threats, seeking illegal settlement funds and compensation. This not only infringes on the rights of others but also wastes judicial resources and undermines judicial authority. Typical cases reveal procedural loopholes: The Li Mouwen case in Shanghai exposed deficiencies in patent review (fabricating subject qualifications to delay a company's IPO)[1]; the Infinite Future v. Sony case reflected deficiencies in patent quality review (the involved patent was invalidated); and the case of Beiliao v. Gaode highlights defects in the dismissal system (the lawsuit was immediately dismissed after the patent was invalidated)[2].

Although the Patent Law and judicial interpretations have established regulations to address malicious litigation, existing rules still have significant shortcomings: the provisions are broadly worded and lack operational specificity, the criteria for determining "malicious intent" are unclear, the mechanisms for pursuing legal liability are undefined, and there is a lack of differentiation in identifying the motives behind litigation. Academic research often draws on foreign experiences, which are disconnected from China's practical circumstances. Therefore, this paper is grounded in domestic typical cases, deeply analyzes the identification logic of speculative NPE malicious litigation, and constructs applicable rules from a procedural perspective, providing references for improving China's regulatory framework for patent malicious litigation.

2. The Legal Basis for Speculative NPE Patent Malicious Litigation

2.1. Viewing speculative NPE patent malice litigation from the perspective of rights-based integrity

Speculative NPE malicious litigation can be categorized into two types based on the integrity of the rights basis: The first type involves defects in the rights basis, where NPEs are aware that the patent may be invalid (such as “problematic patents” obtained through review loopholes) but still file lawsuits by exploiting the institutional flaw that separates patent invalidity reviews from infringement litigation. The second type, where the validity of the patent is not in question, is more covert. Here, the NPE knows the other party has not infringed the patent but chooses to file a lawsuit at critical junctures such as corporate financing or IPO, using threats to damage the company's reputation to pressure it into paying a settlement. Since the patent rights in this case are legally obtained, the threshold for determining “malicious intent” is extremely high, and judicial practice rarely classifies such cases as malicious litigation, highlighting the regulatory challenges[3].

2.2. Elements and Identification of Malicious Litigation

To establish infringement, the four elements of infringement must be satisfied (unlawful act, damage, causation, and subjective fault), with “malice” specifically referring to the direct intent of the perpetrator to actively pursue litigation despite knowing that it would inevitably or possibly cause damage. This limitation helps to balance the protection of the right to sue with the suppression of frivolous lawsuits[4].

Identification should focus on the basis of rights and the means of acquisition:

Defective type: Combine knowledge of underlying defects (such as problematic patents), abnormal pre-litigation behavior, and subsequent invalidation of the patent to infer bad faith, but this should be supplemented by factors such as the defendant's identity and professional background:

Acquired patents: It must be proven that the defendant knew of the invalidity of the rights prior to filing the lawsuit or had a special relationship with the original rights holder; forging evidence (such as fabricating a license) directly constitutes bad faith; Comprehensive approach:

The timing of the lawsuit, NPE status, adverse litigation outcome, or subsequent invalidation of the patent cannot be used as sufficient conditions for determining bad faith. Patent invalidation is a technical judgment and can only be used as an auxiliary consideration. The core issue is whether the actor's primary purpose was to exert pressure through litigation for profit rather than to win the case.

3. Analysis of the Dilemma of Regulating Speculative NPE Patent Litigation

First, the conditions and review criteria for dismissing a lawsuit are unclear. The low threshold for dismissing a lawsuit under the Civil Procedure Law leads to a “request granted upon application” situation, with courts conducting lenient reviews. Speculative NPE entities exploit this to maliciously dismiss lawsuits after patent invalidation or settlement, harming rights and wasting resources. [5]The system fails to consider the negative consequences of dismissing lawsuits and urgently needs to optimize review mechanisms to restrict abuse of rights.

Second, the provisions on pre-trial review and pre-litigation injunctions are insufficiently detailed. Pre-trial evidence review is weak, particularly in terms of addressing defects in rights[6]. Pre-litigation injunctions rely on unilateral applications and provide delayed relief, which may lead to irreversible harm and be abused as a tool for coercion. Current rules lack necessary reviews and detailed adversarial procedures[7].

Third, the compensation under the counterclaim system is insufficient. The scope of compensation under the counterclaim system is narrow. Although the Supreme Court's 2021 "Reply" supports the claim for attorney's fees, the compensation rate remains low due to the ambiguity of the standards for extrajudicial expenses. The litigation cost rules do not cover the substantial expenses incurred by the defendant, thereby weakening the effectiveness of the system[8].

Fourth, there is a lack of a legal framework for confirming the right to sue for unfair competition. Existing laws lack systematic regulation of NPE malicious litigation. The Anti-Unfair Competition Law does not clearly define the nature of the behavior, the elements required, or the rules for the right to sue[9]. Legislation is needed to establish the defendant's right to sue, allocate the burden of proof, and specify penalty measures.

4. Conclusion: Procedural Regulations for Speculative NPE Patent Malicious Litigation

First, establish a pre-litigation prevention mechanism to reduce the number of problematic patents entering the litigation process. Strictly review pre-litigation injunctions: focus on reviewing the applicant's qualifications and the authenticity of evidence, and assess the stability of patents that have not undergone substantive examination in conjunction with evaluation reports. Introduce a hearing and debate procedure to protect the right of both parties to cross-examine evidence, and grant the right to appeal to a higher court. Improve case filing reviews: comprehensively consider subjective factors such as the basis of rights, litigation objectives, and timing, and reference the U.S. system to establish a procedure to block malicious litigation. For cases in doubt, dismiss the lawsuit. Expand the application scenarios for declaratory judgments of non-infringement.

Second, conduct strict review during litigation and grant the defendant the right to defend. For cases suspected of being malicious, grant the defendant special defenses such as patent neglect, antitrust, or compulsory licensing. If the defense is established, dismiss the plaintiff's claims for compensation and cessation of infringement, effectively curbing abusive litigation.

Third, establish a punitive counterclaim system to break through the limitations of the existing counterclaim system. Break through the limitations of the existing counterclaim system by drawing on U.S. practices to analogize malicious litigation with intentional infringement and introduce punitive damages. When determining malicious intent, apply up to three times the damages within a reasonable range to compensate for intangible losses and strengthen deterrence.

Fourth, disclose malicious litigation behavior post-litigation and establish a patent litigation disclosure mechanism. Incorporate malicious litigation into the credit punishment system: publicly list NPE entities involved in litigation and restrict their access to financing support. Establish an information-sharing platform between judicial authorities and the public to promptly disclose litigation filing information, enabling social oversight to identify problematic patents and malicious leads.

References

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