



GENERAL PATENT
CORPORATION

Efficient Infringement



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Efficient Infringement

2

- When it is rational to infringe...
- What is a license?
- Infringe or license?
- Pre-EBay
- Post eBay pre AIA
- Post AIA
- Game-theoretical approach to patent legislation

What is a license?

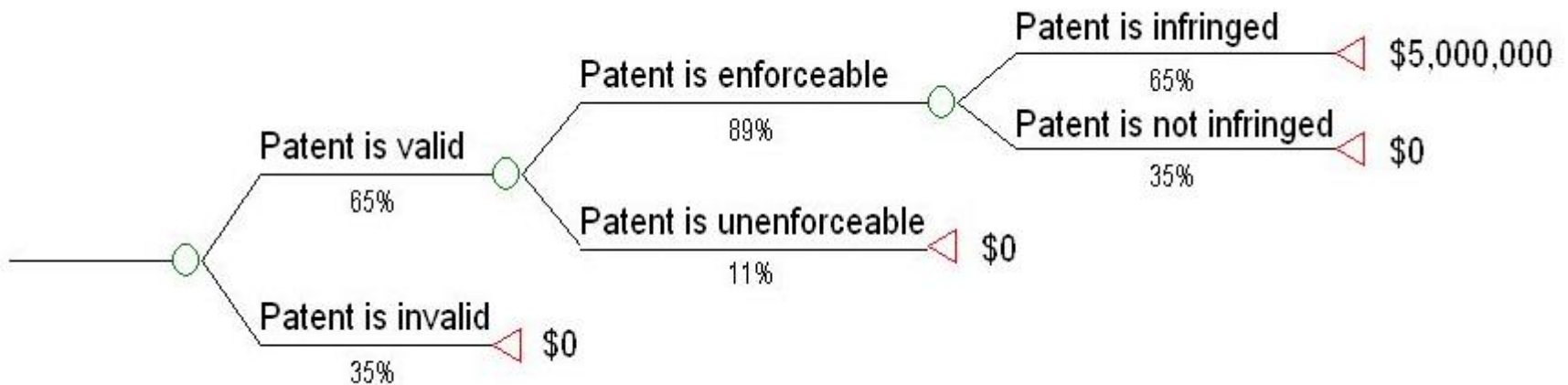
3

- A non-exclusive license is a covenant not to sue
- A licensor sells to a licensee a covenant not to sue
- The licensee buys from the licensor peace
- If a lawsuit is unlikely, why take a license?
- When patent litigation costs millions, most small entities cannot afford to sue
- Universities rarely sue... why worry about it?
- For corporate infringers, it is rational to adapt the MO, “We’ll worry about it if and when we are sued. We can always decide to take a license then.”

Infringe or license—Decision-tree analysis

4

- What are the chances we'll get sued?
- If we are sued, what is our risk exposure?



- License or infringe?

Pre-EBay

5

- In the days when the patent system was as it was intended by the framers of the Constitution, the threat of injunction was the biggest motivation to take a license.
- Most patent owners did not sue for infringement due to lack of funds or other reasons.
- It was rational to wait to be sued before taking a license
- It was rational to take a license after being sued

Post Ebay, pre AIA

6

- After the EBay decision by the Supreme Court, which took away the right to exclude from the non-practicing patent owners, it no longer pays to take a license... well, most of the time.
- When after the lawsuit—win or lose—the infringer is no worse than taking a license before the lawsuit, why take a license?
- ...Unless the pre-litigation license is deeply discounted

Post AIA

7

- AIA introduced IPR, CBM, PGR and other ways to invalidate a patent on a budget
- Today, a small patent owner, not only does not get an injunction, the patent owner rarely gets a day in court!
- When there are so many ways to kill a patent, why license?
- AIA is a free get-out-jail card for infringers

Game-theoretical approach to legislation

8

- Human behavior is fairly predictable.
- According to the game theory, creating an environment where “good” behavior has economic incentives and vice versa is the surest way to achieve the desired result.
- A good legislation creates a legal regime that makes the right path the easiest and the least expensive, thereby encouraging “good” behavior.
- The current patent regime in the U.S. does not encourage licensing, it encourages infringement.
- Only a patent system with injunction encourages licensing or designing around patents, not infringing them.