Are there any Valid SEPs?
Portfolio Licensing’s Dirty Little Secret
Patent Validity

A Pink Unicorn?

Or a close call?

What are the odds?

• According to PwC plaintiffs in US cases, ignoring patent type, have on average 33% chance of success
• It lowers to 27% chance for telecom
SEPs in the US

• RPX 2014 Study
  • Plaintiffs won on 12% of Alleged and Declared SEPs if patents that were dropped or that lost prior to a verdict are taken into account.

• Prof Lemley 2018 draft study
  • 80% of SEPs were found valid for practicing entities
  • 88% were found valid for NPEs
  • Infringement rate 42% for practicing entities
  • Infringement rate 21% for NPEs
  • Results seem suspicious;
    • Low infringement rates with US presumption of validity likely means validity perfunctorily addressed or considered moot
What about Germany?

• Overall The nullification rate in the German Federal Patent Court is 79.08% in total.

• The rates for Software and Telecom patents is 88.11%.
Validity Jihad?

Did portfolio killing lead to:

• Informing judicial predisposition to SEP invalidity?
• Clogging the Federal courts?
• Creating the Chinese efficient infringer playbook?
Why are SEPs so Vulnerable?  1 of 2

• Ubiquity?
  • Smartphone patents represent around 12% all U.S. Patents
    • Over 250,000 out of 2.1M active US patents pertain to smartphones in 2012\textsuperscript{1,2}
    • Globally, estimated over 200,000 patent families are declared to technical standards

• More often litigated?
  • Lack of discovery in civil law jurisdictions biases toward SEPs for high tech litigation

• Poor Patent drafting?
  • Earlier SEPs tend to be poorly drafted (short spec; awkward claims)
  • Standardization process encourages quick technical disclosure w/little time for proper drafting
  • 15 year sweet spot impacted by older claiming styles and most companies’ drop-box approach to foreign filings
  • Proportionality concerns and/or lack of internal IP resources lead to a rush to file and lack of consideration how claims will work in litigation

\textsuperscript{1} http://www.project-disco.org/intellectual-property/one-in-six-active-u-s-patents-pertain-to-the-smartphone/#.WpRl-edOlGB
\textsuperscript{2} https://patentlyo.com/patent/2012/05/how-many-us-patents-are-in-force.html
Why are SEPs so Vulnerable? 2 of 2

• Easy to find prior art?
  • Relatively easy access to early standards and large volume of SSO meeting minutes, drafts, and technical proposals
  • Most ex-US nullity actions rely on draft or old SSO documentation for invalidity
  • Most SEPs are incremental improvements on earlier standards
  • The core technology utilized pre-dates most specifications, e.g., CDMA dates from the 1940s (but was fully developed in the 80s) and standardized only in 1993

• NPE Owner’s Relative Lack of Sophistication & Industry Knowledge?
  • Judicial Bias against NPEs?

• Resources imbalance in the “Sport of Kings”?
  • External litigation funding for patent litigation is VERY expensive and often rapacious

• What does the recent Philips [2018] EWHC 1224 (Pat) decision portend?
  • The “Patenator” found an SEP valid?? (Don’t worry he killed the other two …)
  • Are attitudes changing?
    • Brexit, UPC?