

By Alain Strowel, 2 April 2014

## Are non-practicing entities (NPEs) aka 'patent trolls' operating in Europe?



Extracted from a betanews post entitled Apple is a patent troll now

*Hee-Eun Kim, an associate with Covington & Burling LLP, where I work as Of Counsel, has prepared a very useful survey of the last developments involving non-practicing entities (NPEs), more widely known as "patent trolls, in Europe. Paul Belleflamme has addressed the trolling problems in several posts: [Beware! Privateers patrol these patent waters](#), [What to think of 'patent trolls'? The return](#) and (in French) [Patent trolls et marché des brevets](#), but this is a legal update on the situation in Europe.*

There have been lots of developments in Europe concerning non-practicing entities (NPEs) after the post "[Will 'Patent trolls' soon appear on the European market?](#)" that Alain Strowel posted on ipdigit. Since then, some NPEs have filed patent cases with European courts. Also, both industry and policymakers are raising their voice about NPEs in Europe, particularly on the prospects of NPEs litigating in Europe's upcoming unitary patent system.

The question of the status of NPEs in Europe is taking on increasing importance. Will 'patent trolls' soon appear on the European market? Or have they longlanded on this continent? To find out, we need more rigorous evidence-gathering. Hopefully, the European Commission's [study](#) will shed some light at least on NPEs in the semiconductor industry. But a lot of homework lies ahead.

*What did industry and policymakers say about the prospects of NPEs in Europe?*

- 25/02/2014: As you remember from our [previous post](#), on 26 September 2013 a coalition of manufacturing and non-manufacturing companies sent a letter to the Preparatory Committee of the Unified Patent Court (UPC) expressing concern about certain procedural aspects of the UPC. On 25 February 2014, the coalition sent [another letter](#) recommending to the Committee to incorporate **"guidance to the judiciary from the outset on the issues of bifurcation and injunctions when validity is raised, including when to issue a stay of an infringement action and when to issue injunctions."** Without this guidance, the letter points out that **"the potential exists for a court to order an injunction prohibiting the importation and sale of goods even though the patent may ultimately be found invalid"** (emphasis added, as elsewhere in this post)."
- 21/02/2014: Benoît Battistelli, President of the European Patent Office (EPO) stated on an [EPO blog](#) that "... some users, mainly US, expressed their concerns regarding the potential extension to Europe of [these] patent troll phenomena [of the U.S.] The legal framework defined by the treaty on the UPC, integrating the European legacy, and the on-going implementing and procedural work done by the Preparatory Committee give **all reasons to believe that it will not be the case. This new litigation system will be well balanced and fit for the purpose.**"
- 08/01/2014: EU Internal Market Commissioner Michael Barnier [responded to the European Parliament](#) that the Commission *"fails to see how the recent Union legislation on patents, namely Regulations 1257/2012 and 1260/2012, could increase the activity of so called 'patent trolls' in Europe."*
- 09/12/2013: EU Competition Commissioner Joaquín Almunia mentioned in his [speech on IP and competition policy](#) that "[f]or a variety of reasons, **patent trolls have been less active in Europe than in the U.S. However, this could change in the future. (...) We are watching this space very carefully.**"

*In Europe, we are also seeing interesting developments in patent and antitrust cases involving NPEs.*

- 10/03/2014: **Unwired Planet** [announced](#) that it sued Google, HTC, Huawei and Samsung in London and Düsseldorf alleging infringement of patents related to wireless communications. Unwired Planet acquired nearly 2,000 patents from Ericsson in January 2013, most of which cover mobile communication technology.
- 28/02/2014: The Mannheim Regional Court dismissed **IPCom's** two lawsuits against Apple and one against HTC concerning standard-essential mobile technology patents. IPCom had claimed €1.6 billion (\$2.2 billion) in damages from Apple. IPCom is a German-based NPE that acquired Bosch's wireless patent portfolio in 2007.

- 24/02/2014: In a standard-essential patent (SEP) dispute filed by **Vringo** against ZTE, Vringo announced that the Karlsruhe Higher Regional Court denied ZTE's motion to stay the lower court's injunction order until the EU Court of Justice concludes on the legality of injunctive relief based on SEPs in [Huawei v ZTE](#).
- February 2014: The European Commission apparently closed an antitrust case against **InterDigital** shortly after Huawei withdrew its complaint against the company. In December 2013, the two settled most of their patent disputes.
- 09/12/2013: French sovereign patent fund **French Brevets** [announced](#) that it sued LG and HTC in Germany and in the U.S. for infringement of patents related to NFC technology.

*The topic of NPEs in Europe is under study, and more such efforts would be welcome!*

- 16/01/2014: The European Commission launched a "[Study on the changing role of intellectual property in the semiconductor industry - including non-practicing entities](#)," dealing with changes in IP strategy and patenting practices in the semiconductor industry due to concentration and specialization, the emergence of '[foundries](#)' and '[fabless](#),' technological developments in the sector and the appearance of NPEs. A Dutch consortium of TNO and CWTS is conducting the study. The Commission expects the result to be released in April 2014.
- 02/12/2013: Erich Spangenberg, founder of **IPNav** explained in an [interview with Intellectual Asset Management \(IAM\)](#) why his firm favors the patent litigation system of Germany to that of the U.S. The benefits which he mentioned include bifurcation, speed, limited discovery and expertise of judges.
- 26/09/2013: An academic [study](#) by Prof. Christian Helmers and others concludes that NPEs are responsible for 11% of all patent suits filed in the U.K. between 2000 and 2010. This study notes that "**NPEs litigating in the U.K. overwhelmingly assert high-tech patents** - even more so, in fact, than their U.S. counterparts - despite higher barriers to software patentability in Europe. (...) We see evidence that the **U.K.'s loser-pays legal regime deters NPEs from filing suit, while at the same time encouraging accused infringers to defend claims filed against them.** U.K. NPE suits are initiated by potential infringers more often than by NPEs; rarely end in settlement; very rarely end in victory for NPEs; and, thus, result in an attorney's fee award to the potential infringer more often than a damages award or settlement payment to the patentee. Together, these findings (...) may serve to quell concerns that Europe's forthcoming Unified Patent Court will draw NPEs to Europe."

This blog will keep monitoring NPE developments in Europe.

By Hee-Eun Kim, Covington & Burling LLP

