The voice of the Semiconductor Industry in Europe

ESIA Position on Non Practicing Entities

1. Introduction

For a long time smart patent owners have used the patent system to collect royalties for inventions they did not intend to practice. During the last decade these activities have grown to a much larger scale and today a number of companies have as a business model the sole accumulation of patents from various sources and granting royalty bearing licenses under these acquired patents. These companies are hereinafter called Non Practicing Entities (NPEs) The total value of the worldwide secondary patent market is estimated at several billions of Euros in 2011. The activities of the NPEs have become a significant fraction of patent exploitation. Regularly these impose a burden as matters of patent infringement and validity are not well established and the negotiation situation is asymmetric.

Until today the large scale activities of NPEs have been mainly confined to the United States of America. The need to obtain and enforce patents in individual countries and certain disincentives in the legal systems in Europe makes the balance between risks and benefits for NPEs less favorable than in the Unites States. Nevertheless, several NPE companies are active in Europe or have announced the intention to extend activities to Europe. With the creation of an almost EU-wide patent and a Unified Patent Court (UPC) the balance between risks and benefits will change significantly. However, in general ESIA considers the Unified European Patent system is a welcome development.

2. NPEs and the Semiconductor Industry

The semiconductor business is highly IP intensive. Hardly any other industry has a similar level of R&D investment in comparison to sales revenue. The semiconductor industry generates a relatively large number of patents in comparison to its sales volume. Also, in a typical integrated circuit a large number of innovative ideas may be used, for example relating to manufacturing, circuitry and functionality. A typical integrated circuit incorporates hundreds, even thousands, of features, making it easier for a third-party to allege that some individual feature in the IC infringes a patent. Accordingly, there is a relatively large chance that an innovation patented by a third party is used inadvertently. In addition, the semiconductor industry has short development cycles, with several generations of products within the lifespan of a patent; As a consequence, many patents may be of relevance for a given integrated circuit device, and an exhaustive patent search is hardly feasible.

In this environment ESIA feels that the balance between innovation and exploitation and therefore the stimulus on innovation which the patent system provides can be upset by the activities of NPEs. Because typically a number of patents are asserted at the same time, the normal defense of invalidity and non-infringement are very expensive and time consuming. Plus, in the asymmetric position, counter assertion with the aim to reach a balanced settlement is not available.

3. Effects of NPEs against Innovation

The funds paid to NPEs do not contribute to innovation and accordingly, they act as a tax on innovation. Defending a case normally also requires significant time of senior R&D staff, which may result in additional delay regarding innovation and progress. Accordingly, ESIA believes that the activity of NPEs is counterproductive for our business environment. Companies are created whose sole purpose is to buy and exploit patents. There is a lack of transparency around NPE ownership and investments. ESIA is concerned that these practices might lead to anti-competitive behavior and effects. Namely certain companies would be excluded from the risk of assertion by large NPEs. ESIA takes the position that the freedom for inventors and creative companies to exploit their IPR in the way that fits best into their respective business strategy should not be restricted, and that NPEs are a part of the knowledge economy. However, as stated above, often the way NPEs operate is unbalanced and ESIA is of the opinion that the unbalance needs to be addressed.

Generally speaking, the business model of the NPEs as described above places a financial burden on the technological innovation driven by companies like the ones represented by ESIA, without contributing to technological development.

ESIA estimates that NPEs will become more active in Europe, a development that will accelerate once the Unified European Patent system is up and running. A similar development could occur in other large economic areas such as China or India when the economic impact of patents increases. This is a normal consequence of the raising importance of knowledge in the economy. Care has to be taken that Europe does not create an environment that facilitates abuses by NPEs and will not lead to disadvantages by the introduction of a legal system giving NPEs an unfair advantage. ESIA has concerns when imbalances between patent owners and alleged patent infringers are not addressed.

4. Conclusion

ESIA would like to see safeguards to maintain the balance between NPEs and operating companies. The creation and enforcement of patent infringement cases without real merit should be discouraged through effective patent granting and enforcement. A possible safeguard could be a regulation establishing that an injunction should not be granted when the allegedly infringing act does not cause any irreparable harm to the patent owner; this would ensure that such injunctions do not become improper litigation leverage that harms innovation in the long run. ESIA welcomes a European Unified Patent Court, however strongly recommends limiting the UPC provisions allowing an injunction in all cases.

About ESIA

The European Semiconductor Industry Association (ESIA) is the voice of the Semiconductor Industry of Europe. Its mission is to represent, promote and defend the common interests of the Europe based semiconductor industry towards the European Institutions and stakeholders in order to ensure a sustainable business environment and foster its global competitiveness. As a provider of key enabling technologies the industry creates innovative solutions for industrial development, contributing to economic growth and responding to major societal challenges. Being ranked as the most R&D intensive sector by the European Commission, the European Semi-conductor ecosystem supports approx. 200.000 jobs directly and up to 800.000 induced jobs in systems, applications and services in Europe. Overall, micro- and nano-electronics enable the generation of at least 10% of GDP in Europe and the world.

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