

Abusive Patent Litigation (Including NPEs/PAEs): Best Practices to Combat Abusive Patent Litigation

Over the last ten years, governments and authorities in various WSC member countries and regions have devoted, and continue to devote, significant focus and effort to the study of the impact of abusive litigation practices, including the impact of non-practicing patent entities (NPEs) and patent assertion entities (PAEs) on the economies and national legal systems of their jurisdictions.

The WSC, for its part, adopted in 2014 a series of specific recommendations addressing this issue, encouraging governments and authorities to adopt appropriate and balanced policies and legislative measures to regulate abusive litigation by patent holders, in order to help advance innovation and improve overall patent systems. In recent years, various governments/authorities have issued official statements of policy; proposed legislation; conducted economic studies; and enacted legislation directed at the economic and legal impact of such entities. The approach of different countries and regions, however, has varied, and not all countries and regions have fully implemented the WSC's recommendations.

Given this uncertain state of development and the continued harmful impact of abusive patent litigation practices (including NPEs/PAEs) on the semiconductor manufacturing industry, it is in the WSC's interest to share "best practices" in dealing with this issue. In its 2016 Chairman's Summary, the GAMS invited the WSC to undertake such an effort:

GAMS . . . invites WSC to share best practices on this issue {continuing problems caused by abusive patent litigation (including NPEs/PAEs)} and to report on these at the next GAMS meeting.

(Government/Authorities Meeting on Semiconductors, Chairman's Summary, Berlin, Germany, Oct. 20, 2016)

In response to the GAMS' invitation to share "best practices" on this issue, the WSC recommends the following best practices to reduce the potential for harm from abusive patent litigation conduct (including by NPEs/PAEs):

1. Timing of Damages and/or Permanent Injunction: Practices to ensure that damages and/or permanent injunction is not granted before both infringement and invalidity proceedings on a patent are concluded. Avoids abusive patent practices of trying to collect damages or having permanent injunctions granted on an invalid patent.

2. Standard for Injunctions: Injunctions should not be granted unless the plaintiff can show that it will suffer irreparable injury, the remedies available at law are inadequate to compensate for that injury, the balance of hardship between the parties favors the grant of an injunction, and the public interest would not be disserved.

3. “Forum Shopping”: Practices that prevent abuses in which plaintiffs “forum shop” to select “patentee-friendly” courts in which the plaintiff is more likely to ultimately prevail or at least obtain a preliminary injunction. Such initiatives may include, where practicable and effective, establishing courts with specialized patent expertise or addressing inequalities in venue selection that lead to abusive “forum shopping.”

4. Fee Shifting with Bonds: Practices that, in addition to encouraging fee shifting, require up front bonds or alternatively provide for other sufficient evidence to ensure the plaintiff could pay fee shifting costs should they apply. Otherwise, abusive patent litigators underfund themselves and simply declare bankruptcy if hit with paying the other side’s fees.

5. Means to Challenge Patent Validity: Practices that provide a fair, speedy, and cost-efficient means to challenge patent validity, such as the use of *inter partes* review (IPR) or other post-grant review procedures.

6. Publication of Pleadings and Opinions: Practices that require publication of non-confidential copies of pleadings and opinions, with a process for redacting any sensitive and/or confidential information belonging to the parties.

7. Defense Collaboration: Practices that encourage lawfully permissible collaboration among defendants being sued by the same plaintiff under the same patent, e.g., under a joint defense agreement, to ensure that the best defense possible is developed.

8. Real Parties in Interest: Practices that require the disclosure of the appropriately defined real parties-in-interest in litigation (see, e.g., WSC 2014 Joint Statement recommendation for greater patent ownership transparency in lawsuits).

9. Discovery Burden and Cost Asymmetries: Practices that encourage case management procedures to address discovery burden and cost asymmetries in NPE/PAE litigation (see, e.g., WSC 2014 Joint Statement recommendation to implement appropriate revisions and limits to discovery procedures).

10. Sufficiency of Pleadings: Practices that provide procedures to challenge the “plausibility” of pleadings in patent cases and to ensure that patent infringement complaints provide sufficient notice to accused infringers (see, e.g., WSC 2014 Joint Statement recommendation for heightened pleading requirements for patent lawsuits).

The WSC appreciates the invitation of the GAMS to identify the above best practices on the issue of abusive patent litigation (including NPEs/PAEs) and welcomes the opportunity for further discussion with GAMS on the most effective means to implement these best practices.