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Buying Patents To Thwart 'Trolls' Is A Tricky Strategy

By **Ryan Davis**

Law360, New York (November 03, 2014, 3:23 PM ET) -- Groups offering to help combat abusive lawsuits by buying up patents before they can be acquired by so-called patent trolls offer a creative approach to the contentious issue, attorneys say, but the protection they offer their members is necessarily limited and can come at a high price.

The groups, known as as defensive patent aggregators, include RPX Corp., Unified Patents Inc. and Allied Security Trust, all of which have formed in the last several years and have somewhat different business models. The basic concept of each one is that companies join the group by paying membership fees, which the group uses to acquire patents they deem likely to be used in abusive suits.

For companies that are concerned about being sued for patent infringement, the organizations are worth looking into, since they can neutralize some potential lawsuits before they are filed, said Gene Quinn of Zies Widerman & Malek. However, no matter how many patents the groups acquire, they can never be a panacea, he said.

"There's no way they can possibly buy up all the patents that could be used against a given company," he said. "They're not taking all of them out, so members might ask, 'am I paying all this money for protection they really can't ever give?'"

The question for any company considering joining a defensive patent aggregator is whether the scope of protection the groups can provide is worth the membership fee, attorneys say. Membership to RPX can range from \$85,000 to \$7 million per year, depending on the size of the company, while membership costs for the other groups have not been made public.

The cost of joining one of the groups can be compared to insurance, but it's not insurance against all potential patent lawsuits, Adam Sanderson of Reese Gordon Marketos LLP said. Instead, membership can provide protection for some suits, but members can still be sued over any patent the group hasn't acquired.

"You have to weigh your risk of being sued against the benefits of joining," he said. "It may be cost-prohibitive to join more than one, and if you're a small company, it may be cost-prohibitive to join even one."

Since the cost of defending a single patent infringement suit can reach into the millions of dollars, companies may feel that joining a defensive aggregator that can potentially head off some such suits is a worthwhile investment, Sanderson said.

"At the end of the day, it's a risk management decision, somewhat similar to buying

insurance," he said. "Companies need to make a true assessment of their risk of being sued in a patent suit."

Even if the organization could purchase all of the patents that could potentially be used in a problematic suit, "it's a snapshot in time," Quinn said, since new patents are issued every day and the groups have to continue monitoring what is out there and acquiring more.

The groups could provide a viable solution to abusive litigation by offering an alternative market for patents that might otherwise be acquired by nonpracticing entities, including patents held by individual inventors or defunct companies, William Munck of Munck Wilson Mandala LLP said.

"It's very different for any company to say they're going to protect you from all suits, because they can't," he said. "It's a solution, but it's a costly solution, although it may be less costly for major companies that facing all of these suits."

It's too early to tell how much of an impact the groups will have on patent litigation, since the three largest defensive aggregators have had a relatively brief history, attorneys say. RPX and Allied Security Trust were founded in 2008, while Unified Patents was created in 2012.

RPX is the best-known of the organizations, and according to its website, it had 178 members as of March and has invested over \$800 million to acquire more than 4,300 U.S. and international patent assets. In addition to acquiring patents, it offers advisory services on patent issues and a form of insurance to help pay for the cost of patent litigation.

"The open market is the most effective form of risk management, preventing litigations from ever starting, and our efforts here have removed many assets of high relevance and risk for our members," RPX says on its website.

Allied Security Trust, which says on its website that it currently has 28 members, uses a bidding system where only members that are interested in purchasing a patent contributes to the cost of acquiring it. The group says its goal is to cut down on threats from "adversarial patents" and that it assists members in "purchasing efforts to minimize such disruptions to their business."

Unified Patents says on its website that it has 60 subscribers, and groups its members into "zones" covering specific technology and defends members against nonpracticing entity suits related to the zone. It says that it occasionally purchases patents that pose a risk to the zone, but also often challenges the validity of relevant patents in proceedings at the Patent Trial and Appeal Board.

Most of the groups count major tech companies like Google Inc. and Intel Corp. among their members. Such companies are frequent targets of patent suits and have deep pockets, making strategies to mitigate the risk of suits attractive.

The advantages for smaller companies are less clear, said Rudolph Telscher of Harness Dickey & Pierce PLC. That is particularly true since if the group buys up potentially problematic patents to keep them from falling into the hands of trolls, that helps companies that aren't even members of the group, he said.

"If you're not a member, you benefit just as much as if you are a member," he said, adding that "these companies have a good idea, but I don't know how viable it is."

Companies thinking of buying into the aggregators may be wary of the possibility that they may eventually start using the patents they have acquired to file lawsuits themselves to

generate money from their patents.

Controversial patent licensing firm Intellectual Ventures Management LLC once said it would only acquire patents for defensive purposes, but years later started filing infringement suits, leading former investors like Google to brand it a "patent troll."

The aggregators have pledged not to sue over their patents, and some hold patent for only a short time. Still, concerns about helping a company acquire patents that can one day form the basis of infringement suits may weigh on the minds of potential members, since history has shown that "it can be a very difficult decision not to go down that path," Quinn said.

While patent troll litigation has been much in the news in recent years and has attracted the attention of many in Congress, recent court decisions could make a significant dent in such suits, which in turn could make the idea of paying to join a defensive aggregator less attractive, Telscher said.

This year, the U.S. Supreme Court cleared the way for judges to award attorneys' fees to prevailing parties in a greater number of patent cases, increasing the risk for patent trolls that bring weak suits, while also making it easier to invalidate computer-related patents that only cover abstract ideas.

Those rulings should cut down on suits by nonpracticing entities, which have traditionally favored broad, vague patents near the end of their lifespan, and reduce the number of weak patents that the defensive aggregators could purchase, Telscher said.

"If the concept is, we're buying up these patents from the 1990s so they can't be asserted, that business model seems more questionable to me, since the day and age of those patents is starting to fall by the wayside," he said.

--Editing by John Quinn and Emily Kokoll.

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