



Houston Chronicle/Fuel Fix

May 5, 2014

Commentary: A surge in intellectual property suits looms for industry

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The energy industry is no stranger to lawsuits, but the nature of those lawsuits is changing.

Traditionally, disputes over contracts, employment issues, product liability claims, environmental events, and toxic torts have predominated. But recent trends in intellectual property (IP) litigation — and the changing nature of the energy business — suggest an increase in IP litigation is on the horizon.

Patent infringement lawsuits are rising.

New filings increased by 30% in 2012 and another 11% in 2013. Litigating these disputes can be expensive, with costs routinely ranging from \$650,000 to \$5 million, and damages awards exceeding \$1 billion in some cases. Corporate America has noted the risks: a recent survey of in-house attorneys showed a 9% increase in those identifying IP as a top litigation concern.

To explain this trend, most experts point to the rise of non-practicing entities, or NPEs. Defined as entities that own IP but do not offer products or services that “practice” their patents, NPEs accounted for roughly 60% of the patent cases filed in 2012 and 52% of those filed in 2013.

NPEs have found success: the median damages awards obtained by NPEs have averaged twice those obtained by practicing entities.

Although NPEs historically have concentrated on litigating software-related patents, they are shifting focus to the energy industry. Indeed, energy companies may see a surge of patent cases brought by NPEs, and current trends suggest that 20-30% of new cases in the next few years will be brought by NPEs.

Acacia Research—an NPE that has filed some 337 patent-related lawsuits—exemplifies this trend. In December 2013, Acacia announced its opening of a Houston office “to support the company’s focus on intellectual property partnerships in the expanding energy market.” Earlier this year, Acacia hired former manager of Schlumberger’s global IP practice, Charlotte Rutherford, to be Acacia’s Senior Vice President.

Schlumberger subsequently sued Ms. Rutherford for alleged trade secret misappropriation, signaling that energy companies intend to fight back against NPEs.

As important as NPEs’ growing interest in the energy industry is the changing nature of the industry itself. In a recent survey, 80% of oil and gas respondents described innovation as “important,” with another 39% characterizing it as a competitive necessity and 48% predicting it will be a competitive necessity in five years.

Among the areas ripe for innovation are seismic technology, environmental impact reduction, increased production methodologies, and dynamic positioning technology. Burgeoning tech-energy partnerships also exist, like GE and Chevron’s technology joint venture announced earlier this year.

An increase in energy patents has ensued.

The National Law Review reported an increase in “the number of U.S. patents filed in the traditional oil and gas sector since 2000, from just under 600 that year to more than 1,200 in 2012.” And an energy IP lawyer in the active Alberta tar sands region recently described patent litigation as a “new battleground for oil and gas companies,” noting that the industry increasingly is using patent protection as a means of securing advantages over the competition.

These trends in IP litigation and the energy industry are converging. As energy companies pursue technological innovation, NPEs pursue the energy-related patents the innovation spawns. The result is a looming rise in energy IP litigation, making it a significant concern for which energy companies and their counsel must be prepared.

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