Anticompetitive Patent Injunctions

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The current approach for determining when courts should award injunctions in patent disputes involves a myopic focus on the hardships an injunction might impose on the litigants and the public. This article demonstrates, however, that courts sometimes could rely instead on a consideration far more relevant to the patent system's goal of promoting innovation: the extent to which the right to exclude was actually a necessary quid pro quo for the plaintiff's decision to bring its products to market. We illustrate the value of this approach with a critique of a recent Federal Circuit decision, *Trebro Mfg. Inc. v. FireFly Equipment, LLC,* which held that injunctive relief may be appropriate when a defendant infringes a patent that the plaintiff-competitor does not practice, and against which it lacked any legal protection when it entered the relevant downstream market. These circumstances — which are increasingly common in industries with rich markets for secondhand patents, result in the formation of what we refer to as a “diagonally integrated” nonpracticing entity (NPE) — a producer who owns a patent it does not practice, and who competes with downstream rivals who use (or would like to use) the patented technology. We develop a simple model showing that if such a firm acquired the unpracticed patent after entering the relevant product market, an injunction poses a threat to competition and consumer welfare that is not offset by any plausible benefit to innovation. Further, diagonally integrated NPEs have a perverse incentive to exclude or substantially limit all use of the patented technology, making them more likely to seek excessive licensing fees and aggressively seek injunctive relief than are conventional, “unintegrated” NPEs. This effort to foreclose all use of a technology is novel in the patent literature, but the spirit of this tactic is well known in antitrust: a dominant firm acquires patents that it has no intent to use simply in order to deny the technology to rivals, thus perpetuating its dominant position. The model’s implications also extend to a range of topics at the core of contemporary patent policy debates, including patent privateering, FRAND-encumbered patents, and preemptive patenting. It also suggests that in considering appropriate remedies the court should weigh competition concerns more seriously, particularly when there is little or no tradeoff with innovation concerns.