Slicing Patent Rights

Jonathan Masur

What if the judges of the Federal Circuit or the Justices of the Supreme Court decided that a twenty-year patent term was too long? That is, what if there were some inventions where patents would be useful in encouraging innovation, but the static deadweight loss from those patents was such that the optima patent term length was much shorter—on the order of two or three years, rather than twenty. What options would be available to the courts? Which levers could they pull? The length of the patent term is governed by statute. It can only be amended through an act of Congress. This would seem to lock the federal courts into a rigid binary: either they can allow patents on this type of invention, for a duration of twenty years, or they can disallow patents on this type of invention, in effect creating a term of zero years.

There is, however, another option. The courts could create what amounted to a random doctrine governing this area of law: a set of rules that would invalidate some patents (chosen largely at random) and uphold others. By adjusting the invalidation rate, the courts could set the expected duration of a given patent at whatever level the courts chose. For instance, if the courts invalidated 85% of patents, the expected duration of any given patent would be 15% of twenty years, or three years. By effectively rolling dice with patents, the courts could adjust the patent term on their own, without waiting for Congress.

This idea may seem far-fetched. But as this article will demonstrate, this is precisely what the courts have done via the doctrine of patentable subject matter. Software, business method, and medical process patents are now upheld or struck down by the courts on an apparently random basis, with little to distinguish the patents the courts deem valid and invalid. Because patent owners cannot predict the result of a given lawsuit, they face what amounts to a roll of the dice: a 15% chance of a valid patent, with an 85% chance that the patent will be invalidated. This cashes out as a patent with an effective three-year term, as the article will show. It is not clear that the Federal Circuit intended this outcome, though there is some evidence that it was intended. But whether intended or not, the effect is that a court has unilaterally shortened the patent term, something that most observers would have believed impossible.