Re-Appraisal of Adequate Regulation on Intellectual Property Demand Letters: Perspective from the Application of the Fair Trade Act and U.S. Anti-Patent Troll Legislations

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Abstract

Ever since 1997 when the Fair Trade Commission (FTC) enacted the intellectual property infringement demand letter guidelines, the FTC has consistently required the issuers of those letters to follow one of the three pre-issuance procedures, otherwise it may consider them to be in violation of the Fair Trade Act. This view is continuously upheld in court decisions and even in the Grand Justice Interpretation, but a substantial number of academic commentators take an opposite view. Those commentators consider the pre-issuance procedure incompatible with the nature of the demand letters, which is an important way for the intellectual property owner to exercise its right to exclude. They also contend that those procedures are overtly formalistic and fail to achieve their stated goals, which are to provide a credible basis for infringement allegations or sufficient information for receivers of the letters to determine whether the infringement exists. In light of past cases in Taiwan and the experience of anti-patent troll legislation in the United States, regulation that is solely focused on demand letters is prone to circumvention through directly resorting to civil or criminal court proceedings. To replace the procedural approach that the courts and the FTC have long embraced, this paper proposes a substantive approach which regulates three different types of demand letters in correspondingly different manners, and further recommends constraining the advantages that the issuer of imprudent demand letters may obtain in infringement litigation to disincentivize them. Hopefully, the contemplated proposal may well help to resolve this long-standing issue in Taiwan competition law.

Keywords: Warning Letter, Unfair Competition, Restraint of Competition, Patent Troll, Infringement Suit, Infringement Notice.

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