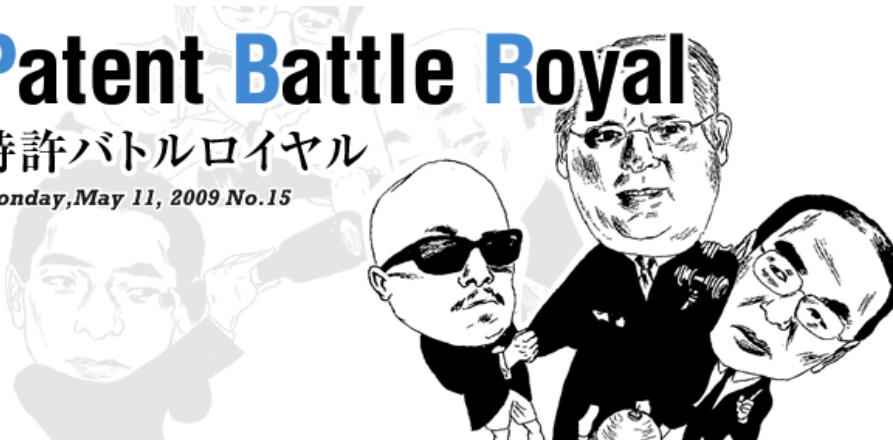


Patent Battle Royal

特許バトルロイヤル

Monday, May 11, 2009 No.15



By Etsushi Tsuru

[Part1] Searching for the most “favorable court” in the world.

A city of 25,000 populations is busy with patent lawsuits

Sharp vs. Samsung.

LG vs. Hitachi.

Lawsuits by Japanese and Korean corporations are proceeding in a small town in the U.S. 250 kilometers east of Dallas, Texas. Rows of old ranch style houses stretch out in Marshall, with a population of 25,000. In the center of town stands U.S. District Court, Eastern District of Texas (EDTX), Marshall Division.

About five years ago, attorneys who specialize in patents began appearing in this court. The patent lawsuits that were filed in EDTX, which covers seven divisions including Marshall, increased sharply to 306 cases in



Texas Judge, Ward. Mark Graham who took this photograph said, “He let me in his office during the trials and gave a friendly smile.”

2008 from 54 cases in 2003, approximately a six-fold increase. The number of lawsuits is the highest among 94 district courts for four years in row.

Why bring the lawsuit to this town? Robert Buzzby, an American Lawyer who represents NEC explained: “The plaintiff has a much better chance of winning the suits. That is why the patent holders bring the lawsuits.” The plaintiff’s chance of winning is an average of 59% in the U.S. District Courts. That rate rises to 77% in Texas. In 2008, approximately half of the patent lawsuits – 2952 cases – were concentrated in the seven District Courts that include EDTX. (Source: University of Houston, the U.S.) Marshall rose to the rank of “national level” owing to Judge John Ward who accepts numerous patent lawsuits. Ward, who practiced patent law in a neighboring town, then represented Hyundai Electronics Industry when Texas Instruments sued the company and lost. The awarded compensation was \$25.2 million dollars. In 1999, immediately after the lawsuit, he was assigned to the Marshall Division.

He seems to comply with the tradition of “strong plaintiff” after the assignment, which he personally experienced.

In the U.S., citizens participate as jury members even in patent lawsuits. Thus, it is advantageous for a plaintiff company to hire local attorneys. Michael Smith, a local lawyer says with a chuckle, “It is important to explain patent technology, a difficult subject without boring juries. In a small town, you know people and how to get their attentions.”

Overseas corporations flocked to Marshall that became a popular destination for plaintiffs. As lawsuits increase, visitors start coming and spending money in the town. “In the last five years, four business hotels went up and two bars opened where there were none before. Patent lawsuits bring good customers,” says John Hanes who works for a local hotel.

As I, the reporter entered the court, a portrait of Judge Ward approximately 1.5 meters tall and 1 meter wide caught my attention. When the door to the court opened, Ward himself sat behind the judge’s bench at the opposite end of the room, asking a chain of questions to the corporate lawyers.

At his hand, a chess clock (a clock that measures passing of time at a chess or shogi game) was present. There is a strict time limit for plaintiff's and defendant's testimony. This is Ward's special rule. "Elsewhere, ruling dates can be delayed two to three months, but at Marshall there is no change in the schedule. There is pressure for defendants who want time to prepare their defense," says Win Carter who is familiar with Marshall's situation.

Corporations today use patent lawsuits as a tool. There is a climate in the corporate world to take advantage of patent lawsuits as a pawn to negotiate a "cross license", a license where corporations use each other's license.

"The first priority is to negotiate license", says Takashi Iwata, Fujitsu Intellectual Property general manager. In reality, even if a lawsuit begins, most of the cases end up with settlements before judgment is given. Less than 4 % of the total lawsuits in the U.S. actually proceed to rulings. If a settlement is essentially winning a lawsuit, you can move negotiation to your advantage.



A sign welcoming visitors stands at the entrance of town. The town used to be affluent with oil and now is gaining popularity back. At Marshall, Texas.

Thus, corporations search all over the world for courts favorable to them. This strategy is called "forum shopping" and is the backdrop of thriving Marshall.

Truth be told, current numbers are circulating among Japanese patents lawyers that indicate, "Tokyo District Court is even more favorable than Marshall for filing patent lawsuits".

Among four Intellectual Property Departments of Tokyo District Court, one judge's 2008 statistics show the plaintiff's winning rate is 14%. However, if cases presenting the judge's intention of "which one would receive a favorable ruling" to parties are included, the resolution rate that is favorable to plaintiffs jumps up to 46%. One patent lawyer says, "the actual winning rate is 70% to 80% if lawsuits in which defeat is imminent from the beginning are excluded." This judge's average trial period is eleven months and his intention is known in approximately seven to eight months in case of settlements. Since the conclusion is speedy, there is no need for going to the U.S.

Just then, Ward's lightning fast rulings start showing wear. Owing to his popularity, he carries over 200 cases at any time and the progress of the lawsuits is slowing down. There was a time when the duration of a trial was a mere one year from filing to ruling. "Now the average is three and a half years," said Carter. The attractiveness of a short trial period is fading.

Additionally, Ward had been unwilling to give permission to defendants who want to move trials to other courts due to unfamiliarity with Texas. Last year, however, Court of Appeals for Federal Circuit (CAFC), which is equivalent to Japan's Intellectual Property High Court, denied Ward's decision. Some see it as a "serious blow to the plaintiffs who chose Marshall as a favorable court."

Meanwhile, a monster called "Troll" started appearing in Marshall.

[Part2] Monster "Troll" attacks manufacturers

Snatch up rights to collect money

"Patent Trolls" are showing up in Marshall. That's what they call corporations that do not develop nor manufacture goods but purchase patent rights to claim compensation for damages or seek injunctions against products. They are also called NPEs (Non-Practicing Entities). A Troll is a dreadful creature of Scandinavian myth. It is usually depicted like an "Oni", a Japanese mythical demon.

This is how their business works: They collect money from investors promising a high-yield return such as a 20% annually. Using the money, they purchase patents from individual inventors and corporations. With the patents they purchase, they file lawsuits against manufacturers for patent violations and distribute settlements among the investors.



Corporations try to gain patents in countries that have large markets. Japanese corporations (C) registered a number of patents in the U.S. and inevitably faced many lawsuits in the U.S. courts. In the judge's court (b) which rules favorably (a) to a patent holder like Judge Ward (A), it is not rare to encounter a troll (B). There are cases where Japanese corporations file lawsuits. Choosing a court became a basic strategy for such lawsuits.

The aim of trolls is not to win lawsuits but to collect settlements. The courts like Marshall, that tend to give favorable rulings to the patent holders quickly and add pressure to defendants, becomes the most important "stage setting" for them. Currently there are over 200 "troll" companies in the U.S. and the total number of companies sued by them ran as high as 3,500. The total number of patent lawsuits where trolls were involved was only 2% in 1998 but the rate rose over 16% in 2008.

The existence of trolls is very tricky for Asian manufacturers from Japan, Korean and Taiwan. The number of lawsuits of major corporations that are sued more than five times in a year was 156 cases for American corporations and 105 cases for Asian

corporations in 2008 and the gap has been closing over the years.

The impact on sales in the U.S. is particularly damaging if an injunction against the sales of a product is granted. The troll itself does not manufacture goods so defendants cannot countersue them by finding plaintiffs' patent violation. Some trolls present a "carrot" to defendants. If defendants fight all the way in court, their cost of lawsuits will amount to hundreds of millions yen in a year. Thus, they offer a lower settlement amount to reach the settlement quickly. Their strategy is filing lawsuits against several corporations and winning modest compensation from multiple sources.

An executive of a major electronics manufacturer says, "Though we are determined to fight, sometimes we accept a settlement if we decide in our internal meetings it is more beneficial for us than going through a lawsuit."

However, manufacturers are not sitting idly. If a troll warns about a patent violation in advance, they make preemptive move to file a suit against them to confirm the patent is not violated. In this case, they choose a court that would carefully deliberate the patent rights so that even if the troll filed a lawsuit in a court that is favorable for the plaintiff, the case would be considered as the same case and a trial would be moved to the court where the Japanese corporation filed the suit. Of course, trolls are also struggling. "Since last year, the number of trolls who suddenly filed lawsuits without warnings soared," says Fumihiko Fumiya, chief of Sony Intellectual Property Center.

A venture company who sees opportunity in this game of cat and mouse has appeared. Last November, RPX Corporation, which specializes in corporate defense from trolls, began their operation in San Francisco.

RPX investigates patents that come into the market due to bankruptcy or reorganization of companies. It purchases patents that may interest trolls prior to their purchase. The members of RPX obtain licenses to those patents. John Amster, who is the CEO of the company with experience in the industry such as patent funds says, "We will purchase patents that are worth \$100 million dollars in the first year. A major corporation can obtain membership in RPX for a maximum of \$4.9 million dollars annually. It is a lot less than the cost of paying for lawsuits or NPEs."



Court located in the center of Marshal. The lavish building is striking in the old city. It used to be a post office but it was rebuilt into a "high tech" court equipped with the latest wireless

Kyoichi Ideno, general manager of Seiko Epson License Department which became the first Japanese member of RPX last December says, “Just this morning, our lawyer in the U.S. told me that we received a complaint from a troll. If a troll is a virus, RPX’s existence is similar to a vaccination. We may not expect 100% effectiveness but if they can reduce our lawsuit risk by 10%, it would be wonderful.”

In March of this year, Panasonic became the second Japanese member of RPX.