



Feds Use Fortress-Backed NPE Suit To Encourage Injunctions

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The federal government acted in line with the administration's strong pro-patent owner policies when, seemingly out of nowhere, it stepped into a little-known Texas patent case and promoted injunctions for nonpracticing entities, attorneys say. But there are suggestions that it may not be so random, as the patent owner may have ties to the nominee for [U.S. Patent and Trademark Office](#) director.

Much of the patent community was surprised Tuesday when the USPTO and the [U.S. Department of Justice](#)'s antitrust division filed an unprompted [statement of interest](#) in Radian Memory Systems' infringement suit against [Samsung Electronics Co.](#) Ltd. But it also stands alongside an administration vocal in trying to protect patent owners from infringers and challengers.

The agencies [advocated](#) for normalizing patent injunctions, which became extremely rare after the Supreme Court's 2006 eBay Inc. v. MercExchange LLC decision called for a more nuanced analysis than the blanket grants in the past.

The justices had made it so there was no presumption of either granting an injunction or denying one, but in the two decades since, case law has made it so patent owners face a huge uphill battle to receive an injunction, according to [Robins Kaplan LLP](#) partner Aaron Fahrenkrog. This is the patent office calling for a return to normal, he said.

"If this is a signal that the pendulum swings back to 'Just apply eBay. Don't make presumptions one way or the other,' then I think that's a very important point for our patent system in general, patent litigation and the value of patent rights in the United States," Fahrenkrog said.

But many attorneys are focusing more on how the government is explicitly advocating for nonpracticing entities, or NPEs, to access injunctions.

A Different Kind of NPE

Radian sued Samsung for infringement in December, asserting a series of patents tied to memory storage. Briefing on Radian's request for a preliminary injunction finished on June 5.

The government said it was stepping into the case due to competition concerns arising from smaller companies not being able to break into markets based on the conduct of dominating ones, particularly when standard-setting organizations that bring many industry players together are involved.

Radian, in particular, tried to sell products covered by its patents, but was unable to break into the market due to companies like Samsung, which one attorney said separates this case from what people determine to be the nefarious elements of NPEs.

"Radian is not just a typical NPE in the sense that it doesn't practice, but it tried to practice," said [Haynes Boone](#) partner Stephanie Sivinski. "This isn't an investment firm that's buying a patent and asserting it at the end of its life and then wanting to make money off of it, which is what I was afraid was going to be the case when I saw the opinion."

That could be the same reason why the case caught the DOJ's attention, Sivinski said.

"If you take at face value the DOJ's interest in this from an antitrust perspective, certainly the story of a little guy, an American innovator, who was shut out of the market — that's a much more compelling story ... from an antitrust perspective than your typical NPE," she said.

Partiality Concerns

There is one factor that is complicating Radian's status as the little guy. The patent [assignment records](#) list Radian as the assignee, followed by the address of [Fortress Investment Group](#)'s New York headquarters.

The nominee for USPTO director, John Squires, helped form the multibillion-dollar intellectual property arm of Fortress. Squires has claimed that he hasn't worked with the group since 2016 or 2017, but the relationship has been repeatedly questioned, including at his [nomination hearing](#) and again in [written comments](#) from Senate Judiciary Committee members.

Representatives for Fortress didn't immediately respond to requests for comment on its relationship with Radian, but they had recently [addressed the use of its office](#) in situations like this in an unrelated trial.

At the May trial, [Intel Corp.](#) [successfully persuaded](#) a Texas federal jury that Fortress controls VLSI Technology and [Finjan Holdings](#), which has implications for a larger licensing fight. One argument Intel kept returning to was VLSI and Finjan signing legal documents with the same Fortress headquarters address.

When Fortress employees explained the address in litigation where jurors ruled quickly against them, they said it is no different from a client citing the address of a law firm, and that their role was as an administrator for the investors funds that own VLSI and Finjan.

Return To eBay

Injunctions are generally only given in patent cases if there is irreparable harm that can't be solved by monetary damages. But the USPTO and DOJ said damages have become so unpredictable that they can cause irreparable harm for the patent owner.

They pointed to the often huge divide between royalty rates stated by the patent owner versus the alleged infringer, which could lead to an unfairly low royalty rate.

[Saul Ewing LLP](#) partner Brian Landry noted that the government pointed to the recent en banc Federal Circuit [decision](#) in *EcoFactor v. Google*, where the court ordered a new damages trial for a \$20 million verdict, based on the unreliability of damages testimony. That's part of a [multiyear pattern](#) of large verdicts being overturned on appeal.

"They kind of turn that Federal Circuit skepticism of damages awards into a ground for granting injunctions," Landry said.

[Sterne Kessler Goldstein & Fox PLLC](#) director Will Milliken similarly said, "They seem to be saying that the inherent difficulties in valuing patent rights, and the nature of the injury of the right to exclude that occurs when one's patent is infringed, counsel more strongly in favor of an injunction in the patent context than the considerations might counsel in other cases."

There has in recent years been a shift on interpreting eBay from following a concurrence Chief Justice John Roberts wrote for the unanimous decision, and one written by former Justice Anthony Kennedy, he said. Justice Roberts strongly favored injunctions across the board, while Justice Kennedy said he would have limited injunctions for patent owners who exist to get patent fees.

The bigger problem, however, is eBay's case law has taken a path that strays from the court's holding overall, and that the original plan has been forgotten, said Robins Kaplan's Fahrenkrog. In particular, the holding says there shouldn't be a specific rule for any one category — such as one kind of patent owner.

The four factors that should be evaluated are whether there would be irreparable injury, if there's inadequate legal remedies, how the balance of hardships are between the parties and whether the public interest would be harmed with an injunction.

Overlapping Concerns

The second Trump administration has featured significant efforts to protect patent owners from those who may infringe or challenge their patents. Most specifically, acting USPTO Director Coke Morgan Stewart has significantly [limited](#) when parties can challenge patents at the [Patent Trial and Appeal Board](#), including with a [holding](#) that after a certain amount of years having a patent, the owner should be able to assume they're safe.

The USPTO is not a party in the Radian case, so its position is more a statement of intent about the policy it plans to pursue.

"It would be surprising to me if they file this one brief and then never say anything about this again," said [Honigman](#) LLP partner Sarah Waidelich. "I would expect it's going to come up in other contexts."

The possibility of injunctions becoming a standard part of review in the Eastern District of Texas, where Radian is playing out, has raised questions about the relationship between the PTAB and district courts.

One of the main reasons Stewart has been denying petitions is because litigation in the Eastern District moves quickly, so trials will likely take place before a final written decision would be due.

But the court has an "aggressive and meaningful case schedule," and this would add the possibility of additional hearings and briefing that make it slower, according to [Arnold & Porter Kaye Scholer LLP](#) partner Dina Hayes.

"From a practical sense, I'm curious to know what the end game was," Hayes said.

Waidelich said there's a possibility it could end up saving resources in the long run, given that there would be fewer instances of reversals on damages.

Sterne Kessler's Milliken said the courts could keep their fast schedules while fighting over injunctions, and that the administration could keep denying PTAB petitions as it's doing now.

"You essentially end up in a world that looks a lot like the pre-eBay world, where there were not easy administrative routes to try to invalidate patents after they're granted, and it's easier to get injunctions," he said. "That's a much friendlier world for patents than we've had since the America Invents Act was passed and since eBay."

A representative for the USPTO declined to comment on the brief and didn't immediately respond to a separate request for comment on the Fortress discussion.

Representatives for the DOJ, Fortress, Radian and Samsung didn't immediately respond to requests for comment Friday afternoon.

The case is Radian Memory Systems v. Samsung Electronics Co. Ltd. et al., case number [2:24-cv-01073](#), in the [U.S. District Court for the Eastern District of Texas](#).