Licensing Technology Developed with Public Funds: Should Patent Assertion Entities Receive Exclusive Licenses to Federally Owned Patents?

By Sean Reilly and Seth Waxman

Sean Reilly is general counsel of Askeladden and senior vice president and associate general counsel of The Clearing House (TCH) Payments Company, where he directs intellectual property issues. He is a registered patent attorney whose principal responsibilities include advising members of TCH's senior business team on vital cybersecurity, intellectual property, and technology law issues and transactions. Seth Waxman served as Solicitor General of the United States from 1997 through January 2001. In addition to leading WilmerHale's appellate practice, Mr. Waxman engages in a broad litigation and counseling practice, with particular emphasis on complex challenges involving governments or public policy, intellectual property, regulatory, criminal, and commercial issues.

When it passed the Bayh-Dole Act in 1980,[1] Congress aimed to "promote the utilization of inventions arising from federally supported research or development."[2] The act's better-known provisions permit universities, small businesses, and nonprofit institutions that use federal funds for research to retain title to patents on inventions discovered through that research.[3] But for patents that the United States owns, the act also explicitly authorizes federal agencies to issue nonexclusive, exclusive, and partially exclusive licenses if certain conditions are met.

The patent and patent litigation landscape has changed significantly since 1980. One transformative change is the rise of for-profit patent assertion entities. In the years since Congress enacted Bayh-Dole, federal agencies including the Army, Navy, Air Force, National Security Agency, and NASA have granted exclusive license rights covering hundreds of patents to such patent assertion entities, including the largest patent license ever issued by the Department of Defense. Once granted these licenses, patent assertion entities can use them to demand payment from U.S. companies in exchange for a sublicense, usually based on activities in which the companies are already engaged, because under U.S. law, an entity with an exclusive license to a patent has standing to file a patent infringement action based on that patent. If the companies do not agree to pay for a license, the patent assertion entity may sue for patent infringement of the government-owned patent. In one such case, for example, a patent owned by the U.S. government was used by a patent assertion entity to sue almost 90 U.S. companies over the course of five years. The patent assertion entity alleged that the companies' use of the Internet infringed Navy-owned patents.[4] Further, because the court found that the Bayh-Dole Act does not allow it, the defendants in those cases could not challenge the government's decision to issue the nonexclusive license under Bayh-Dole or seek to have it rescinded. Most therefore appear to have paid settlements to the patent assertion entity to end the litigation.

The utilization of Bayh-Dole to license government-owned patents to patent assertion entities raises interesting policy considerations. This article seeks to provide a brief introduction and overview of these issues, using some illustrative patent licenses granted by federal agencies to patent assertion entities.

History and Purpose of the Bayh-Dole Act

Following World War II, the United States made significant expenditures on science and technology, both through supporting basic scientific research conducted at universities and elsewhere and by pursuing science and technology missions within federal agencies.[5] Despite these federal expenditures, many officials believed that federal laboratories "harbored information that was not being disseminated to those who could make use of it."[6] Prior to enactment of the Bayh-Dole Act, very few patents arising from government-funded research were resulting in the development of new commercial products. Indeed, only 5 percent of the 28,000 patents held by federal agencies in 1980 had been licensed to private companies.[7]

The Bayh-Dole Act, codified at 35 U.S.C. §§ 200–212, sought to provide a greater incentive to businesses to commercialize this technology.[8] Congress recognized that granting exclusive rights would occasionally be necessary to encourage the investment required to bring an invention to practical application. It therefore authorized each federal agency to "grant nonexclusive, exclusive, or partially exclusive licenses" to federally owned inventions "on such terms and conditions . . . as determined appropriate in the public interest."[9] In the first decade following the enactment of Bayh-Dole, the government granted 981 nonexclusive licenses and 455 exclusive licenses, receiving $37.5 million in licensing income.[10]

But Congress also sought to articulate the circumstances under which exclusive licenses could be granted in the act. Section 209 specifies the conditions under which an agency may grant an exclusive or partially exclusive license.[11] Such licenses may be issued "only if . . . granting the license is a reasonable and necessary incentive to . . . call forth the investment capital and expenditures needed to bring the invention to practical application; or . . . otherwise promote the invention's utilization by the public."[12] The proposed scope of exclusivity may not be "greater than reasonably necessary to provide the incentive for bringing the invention to practical application."[13] The federal agency must find that "the public will be served by the granting of the license," and the applicant must "make[] a commitment to achieve practical application of the invention within a reasonable time."[14] Additionally, an applicant must submit a commercial development plan detailing how the invention will be brought to practical application, and if the license is granted, provide periodic reports describing utilization efforts and results.[15]

The Rise of Patent Assertion Entities

As noted above, one of the most significant developments in patent law since 1980 is the rise of for-profit patent aggregation and assertion entities. Relevant to Bayh-Dole—which requires applicants for licenses to government-owned patents to make a "commitment to achieve practical application of the invention"—patent assertion entities typically do not themselves develop, sell, or market products or services that incorporate the patented inventions they accumulate, nor do they assist others with developing new commercial products or services utilizing the inventions. Instead, the business model for most patent assertion entities is to request that operating companies make license payments for continuing to utilize technologies they have already implemented in their businesses. The Federal Trade Commission (FTC), for example, labels this activity—asserting or threatening to assert a patent seeking money damages for activities in which a company has already engaged and/or an injunction to stop the company's existing business—as "ex post licensing."[16] Ex post licensing is, in other words, asserting that a patent license was needed for activities that have happened in the past, rather than offering to license patented technology to enable a company to offer a new product or business line in the future.

Patent assertion entities state that such ex post licensing helps small inventors receive compensation for their inventions. Patent assertion entities have also stated that they exist to "create a capital market for inventions akin to the venture capital market that supports start-ups and the private equity market that revitalizes inefficient companies."[17] Even assuming that patent assertion entities' claims are correct, some would argue that these asserted benefits do not apply to inventions funded by the U.S. government, where the inventors have already been compensated with public funds for their work.

Critics of patent aggregation and assertion entities say that patent assertion entities leverage their large patent portfolios to extract payments from practicing entities with patents of questionable quality. Patent assertion entities, in the critics' view, burden productive companies and do not promote the development or utilization of new technology. Further, large operating companies can sometimes utilize patent assertion entities to help stamp out competition, by selling their patents to an assertion entity that will target small industry players that cannot afford the high costs of patent infringement litigation. Citing some of these concerns, the FTC, for example, has concluded that patent assertion entities' ex post licensing "provides no direct benefit to consumers" and only "increase[s] the manufacturer's costs and risk, deterring innovation."[18]

Patent assertion entities now account for most patent litigation in the United States. The number of infringement suits filed by patent assertion entities has nearly quadrupled in the last five years, increasing from 760 in 2010 to 2,791 in 2014.[19] By contrast, the number of suits brought by all other entities stayed relatively constant during this period, hovering at roughly 1,700 cases.[20] Patent assertion entities are now responsible for 63 percent of all new patent cases.[21]

Utilization of the Bayh-Dole Act by Patent Assertion Entities

For at least the past decade, it appears that many federal agencies have treated patent assertion entities as potential licensees under the Bayh-Dole Act, and that several federal agencies have granted patent assertion entities partially exclusive rights to federally owned patents.[22] While we have not endeavored to conduct a comprehensive study of such licenses, a limited review of Federal Register notices issued by just four agencies revealed numerous examples, as shown in the table below.

Licensor	PAE Licensee	Date	No. of Patents
National Security Agency	Intellectual Ventures	May 200623	4
Department of the Navy	NanoComm Systems LLC	March 200624	8
Bixenta Ventures LLC	June 200625	48	
Elemental Wireless, LLC	February 200826	67	
Vytral Systems Co. Ltd	August 200827	46	
ICAP Patent Brokerage28	May 201329	7	
ICAP Patent Brokerage	December 201330	9	
Department of the Air Force	Aman Data, LLC	April 200931	4
NASA	ICAP Patent Brokerage	April 201532	36
ICAP Patent Brokerage	November 201533	2	

We obtained some of the license agreements between government agencies and patent assertion entities through FOIA requests. They illustrate the forms that license agreements between federal agencies and patent assertion entities take. All of the agreements we reviewed nominally grant only "partial" exclusivity, but define that "partial" exclusivity to cover "all fields of use until each licensed patent expires."[34] However, it appears that royalty and license fee arrangements vary greatly. One Air Force agreement covering four Air Force–owned patents, for example, provided for an up-front payment of $140,000 to the Air Force, with 15 percent profit participation.[35] In effect, this means that the Air Force stands to profit, potentially by millions of dollars, from any ex post licensing in which the patent assertion entity engages. On the other end of the spectrum, the license fee in the Navy's agreement with Elemental Wireless was a single payment of $2.31 million.[36]

These agreements do not explain in detail how patent assertion entities planned to meet their "commitment to achieve practical application of the invention," which is defined in one of the agreements as "to manufacture in the case of a composition or product, to practice in the case of a process or method, or to operate in the case of a machine or system."[37] This information would presumably be contained in the commercial development plan portion of the application for a license, but these plans are exempt from disclosure under FOIA, and have remained redacted.[38]

The agreements do, however, define the term "commercial development plan" in a way that provides a snapshot of how patent assertion entities may plan to utilize federally owned patents. The definition in one agreement we reviewed indicates that the applicant's commercial development plan may contemplate (1) bundling federally licensed patents with other patents owned by the patent assertion entities that cover similar technology, and (2) sublicensing the bundled patents to practicing entities.[39] According to this plan, federally owned patents would be licensed to practicing entities along with other patents covering similar technology.

Interestingly, the government's share of the profits from such patent assertion activity is determined in part by whether, and in what detail, federally owned patents are discussed during sublicensing negotiations (i.e., prelitigation or litigation-driven settlement discussions).[40] Patents "discussed in detail" during licensing negotiation command the highest royalties, followed by patents "specifically mentioned."

Lower royalties are owed to the government for patents that are merely "in the same patent class code as one or more" patents that are specifically mentioned or discussed in detail. The lowest royalties are associated with patents that do not fit into any of the above categories. This arrangement may be beneficial in that it could incentivize the patent assertion entity not to threaten to assert government-owned patents during licensing discussions with its targets, because doing so may increase the patent assertion entity's payment obligation to the government. But this arrangement may also raise a host of transparency issues, by incentivizing the patent assertion entity not to disclose certain patents that are within its litigation portfolio. Further, it is unclear how the government, which will not be a party to the licensing discussions, could ever effectively monitor whether it is receiving the full payment to which it is entitled.

In at least one instance, a patent assertion entity has sued practicing entities based on patents the assertion entity obtained from a federal agency.[41] In the early 1990s, a scientist at the Naval Research Laboratory (NRL) developed advances in public key encryption technology. These innovations were ultimately claimed in U.S. Patent No. 5,511,122 ('122 patent). In 2004, NRL allowed the patent to lapse by failing to pay the 7.5-year maintenance fee, due to a perceived absence of any "identified commercial interest," thereby effectively dedicating that government-developed technology to the public.[42] Two weeks after the lapse, however, Network Signatures, Inc., a patent assertion entity, contacted NRL and requested an exclusive license to the '122 patent. NRL immediately petitioned the U.S. Patent and Trademark Office (USPTO) to accept delayed payment and revive the patent. The USPTO granted the petition, and NRL issued the license to Network Signatures.

Having acquired an exclusive license, Network Signatures brought a total of 89 lawsuits between 2006 and 2011 alleging infringement of the '122 patent against a diverse set of defendants, including Wal-Mart, Harley Davidson, and Goldman Sachs.[43] Nearly all of the cases were dismissed following settlement or voluntary dismissal.[44]

Policy Considerations

When Congress passed the Bayh-Dole Act in 1980, it could not have envisioned the rise of patent assertion entities. It discussed granting exclusive licenses in the context of licensing to practicing entities that would invest capital into directly bringing the patented invention to practical application, and to profit from the sale of commercial products or services incorporating the patented technology. Exclusively licensing to patent assertion entities, which seek to profit through ex post licensing and patent assertion activities, raises a host of new practical and policy questions.

For instance, some might argue that these agreements do not meet the conditions the Bayh-Dole Act places on federal agencies granting partially exclusive or exclusive licenses. To issue these licenses, a federal agency must find that "the public will be served by the granting of the license, as indicated by the applicant's intentions, plans, and ability to bring the invention to practical application or otherwise promote the invention's utilization by the public."[45] Where the patent assertion entity's business model is to engage in ex post licensing, however, the FTC has concluded that the patent assertion entity's plans inhibit, rather than promote, innovation. Further, by definition, ex post licensing does not increase utilization of patented innovations by the public. Some may likewise argue that patent assertion entities are not "mak[ing] a commitment to achieve practical application of the invention within a reasonable time"[46] as required by Bayh-Dole. Patent assertion entities generally will not practice these patents themselves nor assist others with bringing new technologies to market.

Raising these challenges, however, is difficult under current law. During the *Network Signatures* litigation, for example, one defendant, Citibank, asserted a counterclaim seeking to void Network Signatures' exclusive license from the Navy because the exclusivity granted "was not reasonable or necessary to bring the claimed invention of the Patent . . . to practical application or promote its use by the public."[47] The court dismissed the counterclaim, finding that "[t]he Bayh-Dole Act does not provide for a private cause of action to enforce its provisions."[48] Other courts have denied similar motions based on the movant's failure to exhaust its administrative remedies because the movant did not submit a comment after the agency announced its intention to grant a license in the Federal Register.[49]

In light of the significant changes that the rise of patent assertion entities has brought about in the way that patents are licensed and litigated, policymakers should take another look at the relationship between such entities and the Bayh-Dole Act. If patent assertion entities' use of U.S.-owned patents arising from government-funded research to engage in for-profit ex post licensing is determined to be inconsistent with the purpose of the Bayh-Dole Act, then policymakers in Congress could pursue any of three paths to address this activity through legislation. Specifically, Congress could (1) expressly prevent government agencies from issuing exclusive patent rights to patent assertion entities, (2) expressly authorize operating companies that are sued by patent assertion entities based on a government-owned patent to challenge the validity of the license, or (3) do both.

Preventing the issuance of exclusive patent rights to patent assertion entities in the first instance may be easier said than done. As elucidated above, some would argue that the current language of the Bayh-Dole Act already clearly prohibits federal agencies from issuing patent licenses to entities that plan to utilize the patents to profit solely from ex post licensing. Nevertheless, based on our limited research, it appears that agencies are frequently granting licenses to such patent assertion entities. To address this, Congress could revise the statute to more expressly prohibit the issuance of patent licenses to assertion entities. Alternatively, Congress could impose heightened requirements for showing that the license will lead to public utilization of the invention if the applicant does not intend to practice the invention itself. Or, Congress could require that Bayh-Dole licensees commit to making expenditures on product development and marketing sufficient to ensure that government-owned patents will not be used exclusively for ex post licensing.

But any of these approaches carries with it risk that the amendment to the statute would be more harmful than helpful. Accurately defining what it means to be a "patent assertion entity" (particularly before the entity has begun filing patent infringement actions) has proven very difficult, and amending the statute to expressly prohibit license grants to "patent assertion entities" might risk inadvertently making entities that Bayh-Dole was intended to assist (such as certain small businesses or university-related entities) ineligible for patent licenses. In this regard, many patent assertion entities claim to be developing products, and it would be challenging for agency employees to determine before litigation begins whether the prospective licensee's product development plans are substantive.[50] Similarly, the blanket imposition of heightened requirements for obtaining licenses to government-owned patents could have unintended consequences, including imposing undue burdens on startups and other small entities, which may lack the resources to meet the heightened requirements despite having an actual intention to bring nascent technology to market.

On the other hand, changing the law so that patent infringement defendants are entitled to challenge the propriety of a license to a government-owned patent issued under authority of the Bayh-Dole Act would be fairly straightforward. Section 209 could be amended to clarify that a defendant sued by a licensee for infringing a government-owned patent can challenge whether the license was duly issued under the Bayh-Dole Act. If a court determines that the license was not properly issued under the Bayh-Dole Act, and is therefore void, then the patent assertion entity would lack standing to proceed with the patent infringement action.

Finally, whether or not a patent infringement defendant is entitled to challenge an issued license under the Bayh-Dole Act, it may be advisable to mandate greater transparency into the commercial development plan and terms of proposed license agreements, in order to give interested parties a realistic opportunity to comment on agencies' intended licensing activities. Under current law, the Federal Register notice often only states an intention to grant an entity an exclusive license to a list of patents, without any description of whether the entity will seek to commercialize the patents itself or seek to sublicense to third parties.[51] Proposed license agreements themselves are not provided with the notice, and commercial development plans detailing efforts to bring the invention to practical application are shielded from disclosure under FOIA. Making these documents available, or announcing whether the applicant intended to practice the invention itself, at the time of the Federal Register notice would allow for more substantive comments from the public.

Conclusion

Congress intended the Bayh-Dole Act to "promote the utilization of inventions arising from federally supported research or development." Given changes in the patent landscape since 1980, including the rise of patent assertion entities, policymakers may wish to reassess whether the act is being utilized in the way it was intended to be. If they determine it is not, they have multiple options for addressing the issue.

Endnotes

1. Pub. L. No. 96-517, 94 Stat. 3018 (codified as amended at 35 U.S.C. §§ 200–212).
2. 35 U.S.C. § 200 ("It is the policy and objective of the Congress to use the patent system to promote the utilization of inventions arising from federally supported research or development . . . [and] to ensure that the Government obtains sufficient rights in federally supported inventions to meet the needs of the Government and protect the public against nonuse or unreasonable use of inventions[.]").
3. *Id.* § 202.
4. *See, e.g.*, Network Signatures, Inc. v. Ford Motor Co., No. 8:09-cv-00196 (C.D. Cal. Nov. 3, 2010).
5. *See*U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-98-126, TECHNOLOGY TRANSFER: ADMINISTRATION OF THE BAYH-DOLE ACT BY RESEARCH UNIVERSITIES 2 (1998), *available at*http://www.gao.gov/archive/1998/rc98126.pdf.

6. *Id.* at 3.
7. *Id.*
8. *Id.*
9. 35 U.S.C. § 207.
10. U.S. Gen. Accounting Office, GAO/RCED-91-80, Technology Transfer: Federal Agencies' Patent Licensing Activities 3 (1991), *available at*http://www.gao.gov/assets/220/213856.pdf. This study has not been updated.
11. *See* 35 U.S.C. § 209.
12. *Id.* § 209(a)(1).
13. *Id.* § 209(a)(2).
14. *Id.* § 209(a)(2)–(3).
15. *Id.* § 209(d)(2), (f). These plans and reports are exempt from disclosure under the Freedom of Information Act (FOIA). *Id.*
16. Fed. Trade Comm'n, The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition 8 (2011).
17. Nathan Myhrvold, *The Big Idea: Funding Eureka!*, Harv. Bus. Rev., Mar. 2010, *available at*https://hbr.org/2010/03/the-big-idea-funding-eureka. Myhrvold is a cofounder of Intellectual Ventures, one of the largest patent assertion entities.
18. Fed. Trade Comm'n, *supra* note 16, at 52–53.
19. RPX Corp., 2014 NPE Litigation Report 6 (2014), https://www.rpxcorp.com/wp-content/uploads/sites/2/2015/03/RPX_ Litigation-Report-2014_FNL_040615.pdf.
20. *Id.*
21. *Id.*
22. The information contained in this section was obtained through a small number of FOIA requests sent to Department of Defense entities. The authors have not attempted to perform a comprehensive study of instances in which Bayh-Dole has been used by patent assertion entities to obtain the right to enforce patents developed with government funds.
23. Notice of Intent to Grant an Exclusive License; Intellectual Ventures, LLC, 71 Fed. Reg. 26,471 (May 5, 2006). Intellectual Ventures is one of the world's largest patent assertion entities. The NSA did not produce any license agreement related to this notice despite repeated FOIA requests.
24. March 20, 2006, Partially Exclusive License for 8 patents to NanoComm Systems LLC. [Editor: The corresponding Federal Register notice appears to be (compare date with chart): Notice of Intent to Grant Exclusive Patent License; NanoComm Systems LLC, 70 Fed. Reg. 52,083 (Sept. 1, 2005).]
25. June 29, 2006, Partially Exclusive License for 48 patents to Bixenta Ventures LLC. [Editor: The corresponding Federal Register notice appears to be (compare date with chart): Notice of Intent to Grant Partially Exclusive Patent License: Bixenta Ventures LLC, 71 Fed. Reg. 19,717 (Apr. 17, 2006).]
26. February 8, 2008, Partially Exclusive License for 67 patents to Elemental Wireless, LLC. [Editor: The corresponding Federal Register notice appears to be (compare date with chart): Notice of Intent to Grant Partially Exclusive Patent License; Elemental Wireless, LLC, 71 Fed. Reg. 38,144 (July 5, 2006).]
27. August 6, 2008, Partially Exclusive License for 46 patents to Vytral Systems Co. Ltd. [Editor: The corresponding Federal Register notice appears to be (compare date with chart): Notice of Intent to Grant Exclusive Patent License; Vytral Systems Co. Ltd, LLC, 73 Fed. Reg. 29,119 (May 20, 2008).]

28. ICAP Patent Brokerage describes itself as "the global leader in intellectual property brokerage" with the ability to "leverage the talents of experienced intellectual property monetization professionals." *Company Information*, ICAP PAT. BROKERAGE, http://icappatentbrokerage.com/company (last visited Sept. 28, 2016).

29. Notice of Intent to Grant Partially Exclusive Patent License; ICAP Patent Brokerage, LLC, 78 Fed. Reg. 51,177 (Aug. 20, 2013).

30. Notice of Intent to Grant Partially Exclusive Patent License; ICAP Patent Brokerage, LLC, 78 Fed. Reg. 72,872 (Dec. 4, 2013).

31. April 29, 2009, Partially Exclusive License for 4 patents to Aman Data, LLC. [Editor: The corresponding Federal Register notice might be (covers more than four patents): Intent to Grant a Partially Exclusive Patent License, 71 Fed. Reg. 30,673 (May 30, 2006).]

32. Notice of Intent to Grant an Exclusive License, 80 Fed. Reg. 18,870 (Apr. 8, 2015).

33. Notice of Intent to Grant Exclusive Patent License, 80 Fed. Reg. 74,813 (Nov. 20, 2015).

34. April 29, 2009, Partially Exclusive License for 4 patents to Aman Data, LLC, ¶¶ 1.14, 2.1.

35. *Id.* ¶¶ 4.1–4.2 ("Licensee shall pay Licensor a non-refundable license issue fee in the amount of one hundred and forty thousand dollars ($140,000). . . . Licensee will pay Licensor a fifteen percent (15%) Profit Participation."). Profit is defined as: "the total of the Portfolio Profit that is allocated under paragraph 4.4 through 4.6 to the patents and patent applications among the Licensed Patents including in a Portfolio Monetization; plus Revenue from, minus remaining Monetization Expenses of, monetization events involving solely the Licensed Patents and which are not a Portfolio Monetization; minus any remaining IP Group Expense."

36. *See* Capt. Mark Kohlheim, SSC Pacific—A Strong Community Partner and Economic Engine . . . Yesterday, Today and Tomorrow, SPAWAR (Nov. 17, 2009), http://slideplayer.com/slide/8273584/.

37. April 29, 2009, Partially Exclusive License for 4 patents to Aman Data, LLC, ¶ 1.17.

38. 35 U.S.C. § 209(d)(2), (f).

39. April 29, 2009, Partially Exclusive License for 4 patents to Aman Data, LLC, pmbl. (noting that the "commercial development plan contemplates four (4) stages: (a) assessment of invention development, including, without limitation, patent prosecution, maintenance, reissues, continuations, and divisionals; (b) patent portfolio development through allocation of licensed patents to a portfolio of complementary patents within a technical or market area of focus; (c) portfolio supplementation and strengthening through new inventions and patent acquisitions; and (d) patent sublicensing of the developed portfolios, as determined by market research and analysis").

40. *Id.* ¶ 4.4.

41. *See* Network Signatures, Inc. v. Ford Motor Co., No. 8:09-cv-00196 (C.D. Cal. Nov. 3, 2010).

42. *See* Network Signatures, Inc. v. State Farm Mut. Auto. Ins. Co., 731 F.3d 1239 (Fed. Cir. 2013) (reversing finding of unenforceability due to inequitable conduct).

43. Interestingly, the prudential standing requirement of joining the patentee is not required for government-owned patents when the government grants the licensee the right to sue under 35 U.S.C. § 207(a)(2). *See* Nutrition 21 v. United States, 930 F.2d 862, 867 (Fed. Cir. 1991).

44. *See* Keith Goldberg, *UPS, FedEx Settle Network Signatures IP Suits*, LAW360 (Sept. 22, 2011), http://www.law360.com/articles/273342/ups-fedex-settle-network-signatures-ip-suits.

45. 35 U.S.C. § 209(a)(2).

46. *Id.* § 209(a)(3).

47. Network Signatures, Inc. v. Citibank, N.A., No. SACV 08-0718 DOC (RNBX), 2008 WL 5216032, at *3 (C.D. Cal. Dec. 4, 2008).

48. *Id.*

49. *See* S. Research Inst. v. Griffin Corp., 938 F.2d 1249, 1253 (11th Cir. 1991) ("The licensing scheme under 35 U.S.C. §§ 207 and 209 and the applicable regulations provided an avenue of administrative appeal of which SRI failed to avail itself. . . . Having failed to [object to the grant of the license during the comment period], SRI failed to exhaust a non-futile administrative remedy and thus may not obtain judicial review of the NTIS license to Griffin under 35 U.S.C. §§ 207 and 209 and the applicable regulations.").

50. During the time that it was actively litigating against dozens of companies, Network Signatures, for example, asserted that it was developing a product that embodied the patents it asserted. *SeeNetwork Signatures Retains CrowdGather for Online Marketing*, BUS. WIRE (Aug. 17, 2009), http://www.businesswire.com/news/home/20090817005283/en/Network-Signatures-Retains-CrowdGather-Online-Marketing.

51. *See, e.g.*, Intent to Grant a Partially Exclusive Patent License, 71 Fed. Reg. 30,673 (May 30, 2006) ("Pursuant to the provisions of Part 404 of Title 37, code of Federal Regulations, which implements Public Law 96-517, as amended, the Department of the Air Force announces its intention to grant Aman Data, a Limited Liability Corporation of Nevada, having a place of business at Las Vegas, Nevada, a partially exclusive license in any right, title and interest the Air Force has in [list of 65 patents].").