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The Surprising Resilience of the Patent System

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The patent system seems in the midst of truly dramatic change. The last twenty years have seen the rise of a new business model – the patent troll – that grew to become a majority of all patent lawsuits. They have seen a significant expansion in the number of patents granted and a fundamental change in the industries in which those patents are filed. They have seen the passage of the most important legislative reform in the last sixty years, a law that reoriented legal challenges to patents away from courts and toward the Patent and Trademark Office (PTO). And they have seen remarkable changes in nearly every important legal doctrine, from patent eligibility to obviousness to infringement to remedies.

These changes have prompted alarm in a number of quarters. From the 1990s to the 2000s, as the number of patents and patent troll suits skyrocketed, technology companies and academics worried about the “crisis” in the patent system – a crisis of overprotection that might interfere with rather than promote innovation.³ By 2015, as patent reform took effect and the Supreme Court undid many of the Federal Circuit’s expansions of patent rights, it was

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³ See, e.g., Dan L. Burk & Mark A. Lemley, **The Patent Crisis and How the Courts Can Solve It** (2009); Adam Jaffe & Josh Lerner, **Innovation and Its Discontents** (2004); James Bessen & Michael J. Meurer, **Patent Failure: How Judges, Lawyers, and Bureaucrats Put Innovation at Risk** (2008); Internet Association letter to Congress supporting patent reform, July 16, 2015, available at http://internetassociation.org/wp-content/uploads/2015/07/Letter_from_Internet_CEOs_InnovationAct.pdf

patent owners who were speaking of a crisis in the patent system – a crisis of underprotection that might leave innovators without adequate protection.⁴ Depending on one’s perspective, then, the sky seems to have been falling on the patent system for some time.

Despite the undeniable significance of these changes in both directions, something curious has happened to the fundamental characteristics of the patent ecosystem during this period: very little. Whether we look at the number of patent applications filed, the number of patents issued, the number of lawsuits filed, the patentee win rate in those lawsuits, or the market for patent licenses, the data show very little evidence that patent owners and challengers are behaving differently because of changes in the law. The patent system, then, seems surprisingly resilient to changes in the law. This is a puzzle. In this article, I document this phenomenon and give some thought to why the fundamental characteristics of the patent system seem resistant to even major changes in patent law and procedure. The results pose some profound questions not only for efforts at patent reform but for the role of the patent system in society as a whole.

In Part I I briefly review the changes to the patent system in the past 35 years. In Part II, I discuss the pendulum swings between perceived overprotection and perceived underprotection and the concerns lawyers have raised in both directions. In Part III, I present

⁴ See, e.g., Hon. Maureen K. Ohlhausen, *Patent Rights in a Climate of IPR Skepticism* (working paper 2016); John R. Harris, *The Patent System is Under Assault – Startups, Should You Care? Ten Things About Patents That Startups Need to Consider*, 44 *AIPLA Q.J.* 27 (2016); Adam Mossoff, *The Trespass Fallacy in Patent Law*, 65 *Fla. L. Rev.* 1687 (2013); Gene Quinn, *Fixing the Patent System Requires a Return to Strong Patent Rights*, *IP Watchdog*, Sept. 15, 2015, <http://www.ipwatchdog.com/2015/09/15/fixing-the-patent-system-requires-a-return-to-strong-patent-rights/id=61684/>; David Kappos, *An Open Letter to Abraham Lincoln From David Kappos*, <http://www.managingip.com/Blog/3334558/Guest-post-An-open-letter-to-Abraham-Lincoln-from-David-Kappos.html>.

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