

FRANCE BREVETS: A STATE-OWNED PATENT TROLL, HARMFUL... AND ILLEGAL?

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Today, the intellectual property law is dangerously diverted from its principles by patent trolls. These funds buy thousands of patents to blackmail innovative companies on a legal basis. While public authorities around the world are trying to curb this phenomenon, from the U.S. Congress to the European Commission, the French government created a true public patent troll with taxpayer money in 2011. Welcome to the Kafkaesque world of France Brevets.

The existence of France Brevets is not only detrimental to innovation, but it could also spark a protectionist spiral by encouraging other countries to create similar State-owned companies. We believe that France Brevets infringe state aid EU law and we encourage European companies to bring an action against it in front of the European Commission.

1. THE DEVIL OF INTELLECTUAL PROPERTY LAW: THE PATENT TROLL

A patent is an ownership right on “useful” inventions. It confers a right of exclusion that prohibits third parties from using the patented invention. Any person can acquire a patent.

Patent trolls, also called Patent Assertion Entities (“PAEs”), are entities created for the sole purpose of acquiring patents (sometimes thousands) in order to afterwards (i) grant licenses to third parties or (ii) introduce legal actions on the basis of a breach of its patents. While acknowledging that patent trolls can offer benefits by implementing a market protection to individual patents, adverse effects on innovation have been widely reported. Not only do they create a perpetual legal threat to companies, but they also voluntarily carry out destructive strategies.

The fight against patent trolls has been properly waged by Governments. In February 2013, President Obama clearly denounced their practices¹. The United States House of Representatives has recently voted, with a very large majority², the Innovation Act, a legal device aiming to eliminate these patent trolls. The

¹ White House Task Force on High-Tech Patent Issues, <http://goo.gl/GzDx4>

² 325/91. Cf Le Concurrentialiste, Antitrust Letter #7, 10 January 2014, <http://goo.gl/hZBdR2>

Federal Trade Commission seems to be eager to push the matter further as many of its commissioners keep raising the issue³. Last December, Joaquín Almunia, Vice President of the European Commission and European Commissioner for Competition, has warned Nokia not to act as a patent troll⁴. And only a few weeks ago, Michel Barnier, Commissioner responsible for internal market and services, ensured that reforms that will intervene in patent law will not encourage the creation of trolls⁵.

2. FRANCE BREVETS: THE CREATION OF A... PUBLIC PATENT TROLL!

2.1 France Brevets: a true patent troll!

France Brevets is a French investment fund created in March 2011 and is jointly owned by the French government and the *Caisse des Dépôts et Consignations*. The fund, initially worth € 100 million euro, is registered as a simplified joint-stock company (Société par Actions simplifiée, also said "SAS").

France Brevets aims to create a coherent patent cluster by acquiring public and private patents and giving licenses⁶. More specifically, the mission of France Brevets is to "manage a portfolio of patents and intellectual property rights, purchased on the market, which will be grouped into clusters aiming to: - buy French companies owning interesting patents before foreign funds acquire them; - to serve as a facilitator in the transmission of capital; - being an embryonic European market in a context of increasing securitization of intellectual property rights"⁷.

This presentation of France Brevets' activities raises legitimate concerns. The *Commission parlementaire des affaires culturelles et de l'éducation* openly questioned the activities of France Brevets in mid-2012⁸. In fact, under the

³ J. BRILL, Introductory Remarks of Commissioner, « Patent Litigation Reform: Who Are You Calling a Troll? », 2014 International CES CEA Innovation Policy Summit, 8 Janvier 2014 : « Because PAEs do not manufacture products, they are not subject to countersuit, and have less incentive to cross-license patents » <http://goo.gl/B7up4l>

⁴ Joaquín Almunia, « Intellectual property and competition policy », 9 December 2013, <http://goo.gl/jaiy45>

⁵ Michel Barnier, 8 janvier 2014, <http://goo.gl/r82dpn>

⁶ Assemblée nationale, 14^{ème} législature, Question N° : 1206, <http://goo.gl/5V6s1A>

⁷ Comptes rendus de l'office parlementaire d'évaluation des choix scientifiques et technologiques, Mercredi 15 juin 2011 <http://goo.gl/KOB3Pt>

⁸ Commission des affaires culturelles et de l'éducation ,24 July 2012 Compte rendu n° 07, <http://goo.gl/SXfKxz>

pretext of improving French innovation, France Brevets meets all the characteristics of a patent troll:

- It buys wide quantities of patents as it recently did on the Near Field Communication (“NFC”) market by acquiring 300 of them⁹.
- It has a profitability target. France Brevets aims to acquire patents that companies would be unable to defend themselves. In other words, instead of giving companies the mean to defend these patents, France Brevets transforms innovation into a potential source of public revenue. Everything is, of course, funded by the taxpayer.
- It used the legal threat. Its leader, Rémy de Tonnac, was recently explaining in the context of NFC technology that “France Brevets has pockets deep enough to allow us to go to litigation if necessary”. The use of judicial blackmail is now a new official tool of the French government.

In addition, France Brevets, as its name indicates, only buys French patents, which is confirmed by many sources¹⁰. This is a thinly disguised form of protectionism. Under the guise of protecting French inventors, France Brevets does not act differently from its private counterparts, with the same destructive effects on innovation.

2.2. France Brevets does... everything that is doomed

It is highly instructive to note the similarities between the language used by France Brevets to describe its activity¹¹, and the one used by courts and other competition authorities to condemn trolls practices. Here are some examples:

- France Brevets: “The main objective of France Brevets is to aggregate consistent group of patents, called patent clusters”¹².
 - In its report on the pharmaceutical sector, the European Commission did not fail to note that an important objective of patent clusters was to “delay or block the entry of generic drugs on the market”¹³.

⁹ M. REY, « Avec France Brevets, des PME pourraient toucher le gros lot », L’Entreprise.com, 26 July 2013, <http://goo.gl/UVpm6n>

¹⁰ A. BARBAUX, « France Brevets mode d’emploi », L’Usine Nouvelle, 12 September 2012, <http://goo.gl/S8yYbX>.

¹¹ See France Brevets status on [societes.com](http://www.societes.com) (<http://goo.gl/msp2aE>), as well as its website at www.francebrevets.com

¹² Article 3 point (i) of France Brevets status

¹³ COMMUNICATION FROM THE COMMISSION Executive Summary of the Pharmaceutical Sector Inquiry Report

- France Brevets: “When there is an interest in pooling resources and rights, France Brevets can also implement the necessary means to structure and manage a Patent Pool”¹⁴.
 - If patent pools may be pro-competitive, they also have adverse effects on competition. Let us note that a report jointly published by the Federal Trade Commission and the Department of Justice in 2007¹⁵ raised concerns that patent pools holders may agree among themselves on the pricing of licenses, and therefore, paralyze the entire market. The report also notes that patent pools are likely to discourage innovation. All entities licensing a patent pool license exchanged them at minimal prices. Therefore, interest in innovation is necessarily reduced.
- France Brevets: “When the valuation of patents involves active participation in standardization entities, France Brevets can offer its expertise to strengthen the position of these patents in these organizations. Thus, while ensuring visibility of research organizations, France Brevets deploys a strategy to ensure the best possible use of your patents”.
 - This imposes to tackle the very sensitive matter of standardization bodies, which serve to ensure the adoption of a single production standard for all firms. Patent trolls are accustomed to implement many strategies to divert these standardizations. It may, for instance, be a “patent ambush” where the patent holder does not reveal the existence of the patent, waits for a standard containing its patent to be adopted, and then reveals its existence to obtain a license at exorbitant prices¹⁶. This is precisely what doomed the European Commission¹⁷ and an American Court of Justice¹⁸ in the Rambus case. Then, what exactly is this “strategy” evoked by France Brevets? Nobody knows. Do we want to take the risk that France Brevets carries out similar practices? Certainly not.

¹⁴ Article 3 point (i) of France Brevets status

¹⁵ <http://leconcurrentialiste.files.wordpress.com/2014/01/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition.pdf>

¹⁶ Patent ambush in the US and the EU : How wide is the gap ? (New Frontiers of Antitrust Conference – Paris, 11 Feb. 2011), <http://goo.gl/VQi44H>

¹⁷ European Commission, COMP/38.636, 9 décembre 2009, <http://goo.gl/KEXmgl>

¹⁸ Rambus Inc. v F.T.C., 522 F.3d 456 (D.C. Cir. 2008), <http://goo.gl/JBCM0U>

- France Brevets: “By offering you to exploit your patents in other industries outside of your business market, France Brevets explores new opportunities for the development of your patents. These uses, sometimes distant from the professional field, are in fact covered by the broad spectrum of the patent and may interest other companies in other sectors”.
- If there isn't here anything clearly redeemable, let us note that France Brevets offers companies who hold wide range patents to extort licensing fees to companies operating in other sectors. In other words, France Brevets diverts part for which the patent was issued: to stimulate innovation. The patent is here exploited to reallocate capital from company B to A. Is this really the purpose of intellectual property?

2.3. Creation of a strong international legal risk

France Brevets claims to be the “First investment and valuation patents fund in Europe”. There is yet nothing to brag about!

Indeed, the risk is strong that other countries of the European Union, faced with this French initiative, will decide to create equivalent entities. Indeed, how can we truly think that our European neighbors will agree to let it go and will not wish to protect their companies by attacking French ones? Now that the first lawsuits have been initiated by France Brevets, the infernal spiral could be engaged very quickly¹⁹. And the situation could very rapidly become the following: entities such as Germany Patents, Italy Patents, Poland Patents etc, will paralyze foreign companies by forcing them to invest great money in legal actions that often take several years to end. Is that the great innovation defense plan of the French government? Once again, the very protectionist short-term approach of our political leaders is going against innovation.

It appears from this study that if patent trolls can foster innovation in only very specific circumstances, a State-owned patent troll will most likely trigger a protectionist spiral, to the detriment of European innovation.

3. IS FRANCE BREVETS ILLEGAL?

We can also wonder about the legality of France Brevets activities. Indeed, European law prohibits State aid incompatible with the internal market. "The

¹⁹ A. BOURDU, « France Brevets, fonds d'investissement au service de l'innovation ? », Le Cercle des Echos, 9 January 2014, <http://goo.gl/n5QvLM>

help" created by France Brevets to companies could, in our view, constitute a prohibited State aid.

Article 107 of the TFEU provides that "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."²⁰

Only companies as defined by the European law are subject to the state aid regulation. The Court of Justice defines "company" as any entity engaged in an economic activity, regardless of the legal status and the funding of the entity²¹. As to the definition of an economic activity, it appears to be any activity consisting in offering goods or services on a given market. France Brevets is therefore an undertaking within the meaning of European law²².

The criterion of Member States trade effect is, in the case of France Brevets, potentially questionable. However, we note that because of the introduction of legal actions, one of the activities of France Brevets, the company is appreciably affecting trade between Member States. Indeed, the support of France Brevets to some companies may have a restrictive effect on companies outside the area and looking to establish themselves in France. In addition, this may have the effect of discouraging companies to give licenses.

The criterion of an aid granted by the State or through State resources is also met. Indeed, the statutes of France Brevets indicate that the company is 50% owned by the *Caisse des Dépôts et Consignations* and 50% by the Caisse des Dépôts et Consignations "acting on behalf of the State."

The criterion related to competition distortion "by favoring certain undertakings or certain products " is also filled. Indeed, France Brevets aims to help companies in their legal actions or before standardization bodies. France Brevets writes on its website: "You can entrust France Patents to enhance your patent through licensing". And the company also helps "to acquire a right of exploitation". France Brevets is then an entity funded by the state that helps companies to enhance their assets by paying expenses normally incurred by these companies. These expenses usually include seeking to acquire a license to find all patent holders or to license its patents. In sum, France Brevets tends to ensure the

²⁰ THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>

²¹ CJCE 23 April 1991 aff 41/90, Höfner et Elser

²² CJCE 16 June 1987 aff. 118/85, Commission c/ Italie

"development" of companies for which it takes advantage at the expense of others who aren't helped by France Brevets²³.

To assess whether France Brevets distorts competition, it must also be considered for the economic benefits it provides to companies. "Public interventions in favour of companies can be considered free of state aid within the meaning of EU rules when they are made on terms that a private operator would have accepted under market conditions (the market economy investor principle – MEIP). If the MEIP is not respected, the public interventions constitute state aid within the meaning of the EU rules (Article 107 of the Treaty on the Functioning of the European Union – TFEU), because they confer an economic advantage on the beneficiary that its competitors do not have"²⁴. In this respect, note that, in 2012, France Brevets generated a net profit of minus 4,589,700 euros²⁵. It will be hard, in these circumstances, to justify the presence of the French government in a company with such a large deficit.

When the French government helps French companies to the detriment of European companies, an incompatible state aid with the common market is potentially characterized. France Brevets seems to only help national enterprises. The agreement signed between the State and the National Research Agency in 2010 provides that "France Brevets activity will be devoted to the purchase and maintenance of intellectual property rights from the national public research and marketing"²⁶. It is also specified that "France Brevets occurs selectively taking into account the strategic value of patents and the expectations of French actors of innovation".

Moreover, it says that "France Brevets gives an overall consistency in the management of intellectual property in France by proposing the creation of public-private portfolios / and by increasing international capacities. The project is a component of the construction of a new economy of intellectual property that allows France to play a leading role in Europe infrastructures". An information report of the *Assemblée Nationale* (French parliament) confirms that the objective of Patents France is to "preserve the intellectual heritage that could come under the control of foreign players"²⁷. In sum, the objective of France

²³ Patents France says on its website to intervene « selectively »

²⁴ Voir par exemple « State aid: Commission takes two decisions on incompatible state aid granted by France to SNCM », http://europa.eu/rapid/press-release_IP-13-1126_en.htm

²⁵ Last available stats, <http://goo.gl/coQd40>

²⁶ Investissements d'avenir, convention Etat-ANR Action : « Valorisation – Fonds national de valorisation », <http://goo.gl/vqmdwT>

²⁷ Assemblée nationale, rapport d'information enregistré à la Présidence de l'Assemblée nationale le 13 July 2011, <http://goo.gl/Ko5meJ>

Brevets "is to offer French innovative actors a higher valued offer, based on a critical mass in an international dimension". The first legal actions took by France Brevets also show that its objective is to protect French companies at the expense of the European area²⁸. Legal actions recently launched in the United States and Germany by France Brevets confirmed this²⁹.

Each time France Brevets helps a French company, a prohibited State aid is potentially created, and France violates European law.

Now, it should be noted that a legal action against prohibited state aid can be introduced by "any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations"³⁰. An online form is available on the website of the European Commission³¹: let's hope that some European companies will challenge France Brevets!

CONCLUSION

France Brevets is a public patent troll which, under the guise of protecting French innovation, creates well-documented destructive effects on R&D. In sum, France Brevets reproduces the illusion of protectionism in the field of intellectual property.

In addition, its public nature reinforces the risk to see European states fight against each other, which would be extremely damaging to the European innovation. Plus, we believe that the creation of France Brevets is not only harmful, but illegal.

The initial endowment of France Brevets was conducted as part of the "future investment program". Indeed, if the future is to kill innovation in Europe, France Brevets is a terrific investment.

²⁸ Voir M. REY, « Avec France Brevets, des PME pourraient toucher le gros lot », L'Entreprise.com, 26 July 2013, <http://goo.gl/UVpm6n>

²⁹ « France Brevets assigne LG et HTC en contrefaçon », 9 December 2013, <http://goo.gl/xbCgY6>

³⁰ COUNCIL REGULATION (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty article 1, point h <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:204:0015:0022:en:PDF>

³¹ State Aid control Online complaint form http://ec.europa.eu/competition/forms/sa_complaint_en.html

