Understanding and Dealing with Patent Trolls

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Topics

• What is a Patent Troll?
• Patent Troll Litigation
• Strategies for Dealing with Patent Troll Suits
• Reforms addressing Patent Trolls
• Patent Troll Debate
What is a Patent Troll?

- Class of nonpracticing entities (NPEs) that do not develop or manufacture products based on their patents.
- Patent Trolls buy patents from others and assert them against companies for monetary profit (damages, licensing fees).
- Such litigation is risky, costly, disruptive to defendants.
- Other terms:
  - Patent assertion entities (PAEs)
  - Patent Monetization entities (PMEs)
Rise of Patent Trolls

- Notice Failure, particularly in the IT sector:
  - Patent claims have “fuzzy” boundaries making infringement determination uncertain.
  - Search of existing patents economically unfeasible or irrational due to “patent thicket”.

Rise of Patent Trolls

• **Uneven Bargaining Power** - asymmetry of costs and risk:
  ➢ High litigation costs and no way to dispose of weak suits early;
  ➢ the risk of potentially debilitating liability for defendants; and
  ➢ the lack of any major risk or disincentive for PT plaintiffs to litigate.

Common Characteristics of a Patent Troll Litigation

- **Patent Troll**

  - Seek injunctions
  - Shell company formed to hold/monetize patents
  - Perception that Patents of questionable validity
  - Target downstream customers
  - Sue in plaintiff-friendly venues
  - Possess few records; immune from suit
  - Capitalize on asymmetric discovery burdens on defendants
  - Claims and damages model undeveloped
## Examples of Patent Trolls

<table>
<thead>
<tr>
<th>Company</th>
<th>U.S. Patents and Apps (Est.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intellectual Ventures</td>
<td>15,000</td>
</tr>
<tr>
<td>Round Rock Research LLC</td>
<td>3,652</td>
</tr>
<tr>
<td>Rockstar Consortium LLC</td>
<td>3,428</td>
</tr>
<tr>
<td>Interdigital</td>
<td>2,955</td>
</tr>
<tr>
<td>Wisconsin Alumni Research Foundation</td>
<td>2,556</td>
</tr>
<tr>
<td>Rambus</td>
<td>1,696</td>
</tr>
<tr>
<td>Tessera Technologies</td>
<td>1,375</td>
</tr>
<tr>
<td>Acacia Technologies</td>
<td>1,316</td>
</tr>
</tbody>
</table>

*Business Insider, Tech’s 8 Most Fearsome “Patent Trolls” (November 25, 2012)*
Strategies for Dealing with Patent Trolls

• Call your lawyers
• Build knowledge
• Team up
• Analyze Validity
• Settle Early
Addressing Patent Troll Litigation

A variety of
- legislation,
- executive,
- judicial, and
- administrative

actions have been implemented and proposed to address proliferation of patent troll law suits.
Legislative Action

• America Invents Act (2011)
  
  ➢ No joinder of unrelated defendants –
    – plaintiffs required to file separate lawsuits against each individual defendant, raising the cost and procedural burdens (35 U.S.C. § 299(a)(1))

  ➢ Post-Grant Review proceedings
    – processes offered by the USPTO to challenge validity of patent
    – designed to be quicker, cheaper and more efficient than protracted district court litigation. (35 U.S.C. §§ 321-329)
Common Characteristics of Proposed Legislation

• Increase litigation costs for patent trolls
  ➢ Shift attorney fees to losing plaintiff
  ➢ Plaintiff required to post-bond if determined to be patent troll

• Limiting early discovery – postpone expenses

• Heightened pleading requirements
  ➢ reduce unfounded patent suits
  ➢ success rates of patent trolls lower than others (8%, 24%)

• Require identification of Real-Party-In-Interest

• Extensions of post grant review proceedings
Federal Proposed Legislation

Innovation Act, H.R. 3309 (Rep. Bob Goodlatte, R-Utah)

- Passed House December 6, 2013
- Heightened pleading requirements
- Attorney-fees to the prevailing party
- Limited discovery - postponing the expense of extensive discovery until after the potentially dispositive claim construction process
- Transparency of Ownership
- Stay for Customer Suits - if both a manufacturer and its customer are sued for infringing the same patent, the customer suit would be stayed so long as the customer agrees to be bound by the results of that case
Federal Proposed Legislation

Patent Transparency and Improvements Act of 2013 (S.1720)

- Targets against abusive patent demand letters
- Any demand letter must include a statement of
  - (A) the patent asserter’s identity;
  - (B) the patent being asserted; and
  - (C) the reasons for the assertion.
Federal Proposed Legislation


- Bill introduced in February 2013
- Would require a patent troll that loses case on validity or infringement of any patent to pay the accused infringer’s legal expenses
- Would introduce process for early court determination whether plaintiff is patent troll and thus required to post a bond to cover accused infringer’s anticipated legal expenses


- Bill introduced in May 2013
- Would expand transitional post grant review for CBMs to any business method patent
- Would extend program beyond 2020

**End Anonymous Patents Act, H.R. 2024 (Rep. Ted Deutch, D-Fla.)**

- Bill Introduced in May 2013
- Would require owners of patents and applications to advise USPTO of real-party-in-interest and update with ownership changes, with damages limited by compliance with requirement
Federal Proposed Legislation


- Bill introduced in May 2013
- Would require detailed pleading of infringement claim and amend Form 18 of FRCP
- Would require fee shifting for discovery beyond “core evidence”
- Would mandate award of legal expenses to prevailing party absent “exceptional circumstances” or losing party’s position and conduct were “objectively reasonable”


- 38-page draft of comprehensive anti-troll legislation circulated in House and Senate Judiciary Committees in May 2013
- Would require detailed pleading of infringement claim and amend Form 18 of FRCP
- Would require fee shifting for discovery beyond “core evidence”
- Would require owners of patents and applications to advise USPTO of real-party-in-interest and update with ownership changes, with damages limited by compliance with requirement
- Would create process to incentivize settlements in patent cases and expand the post-grant procedures created by the America Invents Act
Federal Proposed Legislation


- Bill introduced in July 2013
- Would require detailed pleading of infringement claim
- Would require stay of discovery in suits against producers pending motion to dismiss or transfer or claim construction ruling against
- Would require stay of litigation against users pending resolution of suits against producers


- Bill introduced in July 2013
- Would expand and extend transitional post grant review for CBMs to any business method patent like S. 866
Comments on Legislative Reform

- Changes that increase costs to plaintiffs (e.g., loser pay model) may prevent small plaintiffs from filing meritorious suits against large corporations.
- Potential loop-hole in “negative” definition patent troll in SHIELD Act.
- Question on how bond requirement would work in practice.

State Anti-Troll Measures

VT Legislation (May 2013) created a right to sue a patent holder for making a “bad faith assertion” of patent infringement

Statutory factors supporting claim based on sending demand letter:

• Lacks patent number, information about patent owner, or detailed basis of claim
• Failure to conduct pre-publication investigation of claim
• Demanding license fee payment or response within an unreasonably short time period
• Claim is objectively and subjectively baseless
• Claim is misleading or deceptive
• Prior offenses
State Anti-Troll Measures

VT AG sued MPHJ Technology Investments LLC on May 8, 2013

- Complaint alleges MPHJ mass mailed demand letters to VT small businesses and non-profits who “were unlikely to have the resources to fight patent-litigation”
- Demand letters claimed that patent covers using a scanner to scan and send document via email and demanded a royalty of $1,000-1,200/employee

NE AG sent cease and desist letter to MPHJ in July 2013

- Asserted that demand letters violated Minnesota consumer protection laws
- “Infringement assertions are unsubstantiated and contain false, misleading or deceptive statements”

Minnesota AG sued MPHJ in state court

- Suit alleges that MPHJ attempted to bully small businesses into taking patent licenses
- Settlement reached on August 20 under which MPHJ agreed paid a $50,000 fine and to cease sending letters to Minnesota residents without prior consent from the AG’s office
Judicial Actions Affecting at Patent Trolls

- Employing case management techniques to flush out weak cases
- Sustaining *Daubert* challenges to suspect damages theories
- Denying injunctive relief to patent trolls under *eBay* standards
- Imposing sanctions or declaring cases exceptional with increased frequency where Plaintiff takes unreasonable position
- *MedImmune* (2007) decision expanded defendant’s ability to file preemptive declaratory judgment lawsuits
Potential Judicial Action – “Fuzzy Claims”

- Standard for clarity or definiteness for claims is a low bar:
  - "insolubly ambiguous" standard to determine if patent claims complied with the definiteness standard of 35 U.S.C. § 112, ¶2 (Federal Circuit 2001)

- Supreme Court agreed on January 10, 2014 to hear an appeal by Nautilus Inc. challenging the test used by the Federal Circuit to determine when a patent is invalid as indefinite
Private Action Aimed at Trolls

- Intermediaries exist that acquire patent rights from patent trolls for benefit of “member companies” (e.g., RPX and Allied Security)
- These intermediaries are sometimes called “anti-trolls”
- Provide “patent risk protection” to member companies
- Member may still negotiate directly with patent trolls
Patent Troll Debate – Strong Negative Sentiment

Their business plan is simple: trolls (intellectual-property lawyers use less evocative terms like “non-practicing entities” and “patent-assertion entities”) make money by threatening companies with expensive lawsuits and then using that cudgel, rather than the merits of a case, to extract a financial settlement.”

“[Patent trolls] don’t actually produce anything themselves. They’re just trying to essentially leverage and hijack somebody else’s idea and see if they can extort some money out of them... [O]ur efforts at patent reform only went about halfway to where we need to go and what we need to do is pull together additional stakeholders and see if we can build some additional consensus on smarter patent laws.”

“A patent troll buys patents (sometimes thousands) with the aim not of making the patented product or process or licensing it to others to make but of finding companies or individual inventors that the troll can claim with more or less plausibility are infringing one or more of his inventory of patents.”


President Barak Obama Feb. 14, 2013

# Patent Troll Debate - Detractors

<table>
<thead>
<tr>
<th>Detractor</th>
<th>Response</th>
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<tbody>
<tr>
<td>Impede innovation and harm business due to the cost of potential and actual litigation (estimated $29 Billion in 2011)</td>
<td>• PT’s defenders claim they promote invention by increasing liquidity and managing risk of investment (1, 2)</td>
</tr>
<tr>
<td></td>
<td>• Remains unclear the extent of the imbalance of costs and benefits (1)</td>
</tr>
<tr>
<td>Responsible for increase in patent litigation – patent law suits doubled between 2010 and 2012</td>
<td>Study showed nearly all of the increase due to changes in joinder rules effected by the AIA (3)</td>
</tr>
<tr>
<td>Assert low quality patents</td>
<td>• Study showed that quality of PT patents on not drastically different that other patents (2)</td>
</tr>
<tr>
<td></td>
<td>• Perhaps low PT success due to overly broad interpretation of claim coverage (1)</td>
</tr>
</tbody>
</table>

## Defenders of Patent Trolls

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<tr>
<th>Defense</th>
<th>Response</th>
</tr>
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<tbody>
<tr>
<td>Create patent markets - markets enhance investment in start-up companies by providing additional liquidity options.</td>
<td>Evidence does not support a theory that patent trolls incentivize investment by providing a market for patents (2)</td>
</tr>
</tbody>
</table>
| Help businesses crushed by larger competitors—competitors who infringe valid patents with impunity | • Unlikely that patent trolls are vindicating the rights of small companies forced out of business by infringers. (2)  
• Very few of the initial owners of patent troll patents failed, and the patents were held for a long time before they were asserted (2) |
| Allow individual inventors to monetize their inventions                | Evidence does support that patent trolls provide a better way for individual inventors to enforce their patents than bringing lawsuits themselves (2) |
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