MAINE CERNOTA & RARDIN
ADVOCATI RES MENTIS

PATENT TROLLS

WHAT IS A PATENT TROLL?

Patent trolls are people or entities that do not create or produce anything, who own at least one patent, more typically a portfolio, which they leverage against others in an attempt to secure licensing fees. Often times these licensing fees are calculated based on the value to the accused of avoiding litigation, and without taking into account the value of the technology itself.

Many of these trolls attempt to have a presence, for litigation purposes, in areas where courts are more plaintiff friendly, such as the United States District Court for the Eastern District of Texas, where patent plaintiffs succeed almost 25% more often than the national average. Trolls are also frequently characterized by their aggressive litigation tactics, such as identifying a class of potential infringers and sending of cease and desist letters to many of them simultaneously, without individualized investigation, sometimes threatening lawsuits against thousands of companies at once, creating shell companies in an attempt to hide their true identities, and asserting patents that are extremely broad, but arguable, using the uncertainty of litigation to their advantage.

WHERE DID THE NAME "PATENT TROLL" COME FROM?

The term "Troll" originated in Norse mythology. It was a term to describe a mythical being that dwelled alone or in small groups and was of a generally unsavory nature. These trolls were often depicted as impeding people in many ways and were typically associated with a number of negative characteristics, ranging from laziness to dim-wittedness.

One classic example of troll behavior was exacting a toll from people wanting to cross an isolated bridge that the troll did not in fact build. Modern patent trolls earned their name from the perception that they generally stand in the way of progress, by way of abusive tactics reliant on the hard work of others, in much the same way as trolls of legend.

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The modern term is generally attributed to former Intel Assistant General Counsel Peter Detkin. Detkin is said to have come up with the term in 2001, before largely abandoning it, allegedly because of the realization that Intel itself was asserting patents against others that they had not commercialized.

HOW DO THEY OBTAIN THESE PATENTS?

Patent trolls generally obtain their portfolio of patents at auction from bankrupt technology companies. A recent example is RockStar Bidco's (now RockStar Consortium) purchase of approximately 4,000 patents at auction, which were originally held by Nortel Networks.

WHAT TOOLS DO THESE TROLLS HAVE TO WIELD?

Patent trolls have many tools in their arsenal. Typically, they will pressure an alleged infringer to license their technology by threatening litigation. Many companies cannot afford the expense, or tolerate the risk, of such litigation, which may cost millions of dollars, even if the alleged infringer mounts a successful defense. Trolls may also seek to ban the importation of allegedly infringing goods, through the International Trade Commission (ITC), or seek an injunction, preventing the alleged infringer from use or sale of the technology.

WHAT ELSE ARE PATENT TROLLS REFERRED TO AS?

Patent trolls are sometimes also called patent assertion entities (PAEs), non-practicing entities (NPEs), patent monetization entities (PMEs), patent sharks, patent licensing companies, patent holding companies, patent pirates, or just plain trolls. Some of these names also refer to lesser forms of patent use and abuse.

WHERE ARE THE GRAY AREAS?

As alluded to above, not all companies seeking to license their patent portfolio neatly fit the common definition of a patent troll. One example is InterDigital, a company of engineers that innovates, primarily in cellular data technology, but does not actually produce any products. Instead, much like trolls, they attempt to license their patents, sometimes emulating the abusive techniques of true trolls. Another recent example is RockStar Bidco (now RockStar Consortium), a consortium of technology producers including Microsoft, Apple, BlackBerry, Ericsson, and Sony. This is a consortium of some of the largest producers of technology worldwide, but RockStar itself reverse engineers others products looking for infringement of their patent portfolio, acquired from Nortel Networks, which Nortel had intended to be defensive in nature.

WHY NOW?

Patent trolls, although popularized in the last decade, are nothing new, as evidenced by the below quote from 1878:

"[A]mong a host of dormant patents, some will be found which contain some new principle… which the inventor, however, had failed to render of any use in his own invention. And some other inventor, ignorant that such a principle had been discovered... had the genius to render it of great practical value … when, lo! the patent-sharks among the legal profession, always on the watch for such cases, go to the first patentee and, for a song, procure an assignment of his useless patent, and at once proceed to levy black-mail upon the inventor of the valuable patent."- Senator Issac Christiancy, (R – Michigan) 1878.

Periods of patent abuse have historically followed periods of fast-moving, complex technical change. These periods create uncertainty as to the novelty and non-obviousness of claims to the average professional, or person having ordinary skill in the art, in USPTO parlance, and also tend to result in claims of highly variable breadth. In the late 19th century, technology in the railroad industry was progressing rapidly, and was the focus of much of the patent trolling of that day. This situation is very similar to today's patent climate with regard to software patents.

Recent studies have also disputed the perceived increase in the prevalence of patent trolls. While the White House report on patent trolls (http://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf) cites a tripling of suits brought by such entities in just the past two years, the Government Accountability Office (GAO), an independent and non-partisan agency working for Congress, recently released their own study (http://www.gao.gov/assets/660/657103.pdf) showing only a one-third increase in litigation. The GAO attributed this increase to changes in joinder rules enacted by the America Invents Act (AIA). Essentially, the AIA prevented patent litigants from joining multiple defendants to the same proceeding simply by asserting infringement of the same patent against all of them. Instead, suits must now be brought separately against each alleged infringer, raising the total number of suits required to engage in litigation against a similar number of defendants.

WHAT IS BEING DONE?

It is likely that patent trolling will largely disappear on its own, as it has in the past. In the aforementioned period of patent trolling of the late 19th century, industries banded together to fight back against trolls rather than settling, and, as the technology became better understood, patent claims became both narrower and clearer, making it more difficult for them to be broadly asserted. The United States Patent and Trademark Office also cracked down on claim breadth during this time. It is likely that similar

events will gradually occur, causing the patent troll business model to become unprofitable yet again.

However, some are not waiting for such change to occur naturally, resulting in a bill recently introduced in the House of Representatives, which seems to have bipartisan support and a real chance of passage. It is called The Innovation act of 2013, and proposes many changes to patent practice, and especially litigation, aimed at eliminating patent trolls. One change would institute heightened pleading requirements, where patent holders would have to provide more information up front about the nature of the potential litigation. Another change is fee shifting, where, by default, unless special circumstances dictate otherwise, the losing party would be forced to bear the cost of litigation. Yet another change would require transparency in litigation, by forcing the real party in interest, the party standing to benefit from the litigation, to disclose itself, to combat the current practice of using shell companies to hide the true identities of today's trolls. Still another change would require customer suits to be stayed until after the conclusion of suit(s) against the manufacturer. Still another change would limit discovery until after the court had an initial look at the claims of the patent. This would allow the court to throw out frivolous cases before costly and potentially harassing discovery. There are also many other additional changes proposed under this act.

Companies are also taking the lead in the battle against patent trolls by standing up to them in court. Although many companies are intimidated by the often huge costs of patent infringement litigation, and opt to settle, some companies, like Newegg, are fighting back. Although it may cost them more in the short term to fight, it is of value to the industry as a whole, and can enhance the public image of the company standing up to these trolls.

SPREAD THE WORD!

This is just one small example of how, here at MCR, we keep the community informed of the changing legal landscape. Please contact me or anyone here for more information. And please pass this along to anyone you know that may be interested, or in need of intellectual property legal services.

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