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Patent Trolls: Legit Enforcers or Harrassers?

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Since the turn of the century, 'patent trolls' have emerged as one of the most topical debates among patent holders. However, nearly ten years later, stakeholders are still unable to reach consensus as to the 'right' or 'wrong' of 'trolls'. Against this backdrop, our debates open with the landmark case of Blackberry between RIM and NTP to provide thoughts as to whether NTP is considered a troll. Then there is a focus on some conceptual issues surrounding 'patent trolls', and its origin citing relevant mini-cases. This column also lays out the fierce arguments for or against patent trolling among scholars and practitioners and reasoning for the trolling existence. The debates end with some reflections on the implication of patent trolling phenomenon on patent systems, particularly the US structure, subsequently, proposing some relevant solutions.

Keywords: Patent troll, non-practicing entity, patent squatter, patent pirate, non-manufacturing patentee, patent shark, patent asserter, patent dealer

NTP vs *RIM* – A Landmark case arousing Heated Debates for or against Patent Trolling

The *NTP* vs *RIM* case[1] has its origin in 2000 when the US-based company – NTP Inc requested a patent licensing deal from Research in Motion (RIM), Canada – the maker of BlackBerry, for wireless email technology patents. With no response to the request, NTP subsequently filed a patent lawsuit against RIM at the US District Court for the Eastern District of Virginia.[2] As background information, NTP is an inventor established patent holding firm based in Virginia and holds a patent portofolio of over 50 wireless technology inventions. With this court proceeding, the jury found RIM infringed the ownership right of NTP patents and Judge Spencer made a verdict that RIM should pay nearly $ 50 million to cover damages, legal fees and cease infringement. Regardless of the direct damage compensation, this court verdict would have caused RIM to completely shut down its BlackBerry operations in the US. Thus, RIM appealed in the Superme Court in 2005, but was refused a hearing and the case was returned to a lower court. In March, 2006, however, the two firms settled all disputes, had the litigation dismissed against RIM in court, with a widely-known settlement at US$ 612.5 million.

The BlackBerry case was influential for two reasons: the large settlement outside court and the trigger for heated discussions as to the right and wrong of and wide attention to the phenomenon of patent licensing 'trolls'. In this case, NTP is considered a patent troll, that is a so called non-practice entity for patents.

Patent licensing trolls are overwhelmingly a US phenomenon. According to *Managing IP* magazine, a number of companies present typical troll behaviour[3]: *Acacia Technologies*, which controls 160 US patents and has licensing deals with MNEs all over the world; *Forgent*, which has profited over US$ 105 million from licensing its coding system software; *Burst.com*, which is involved in audio- and video-on-demand technologies, and has earned US$ 60 million from Microsoft in 2005 and also sued Apple, iTunes and QuickTime for software infringement. The latter company appears to realize the drawbacks of its troll reputation and claims to be re-orienting itself towards development.

However, in order to understand why patent trolls are debatable, there is a need to go back to the history, beyond the case itself and examine the pros and cons of trolls, and its relationship with the patent system.

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Concepts and Brief History

Searching any dictionary for the word 'troll', three meanings stand out. One is to 'fish in by trailing a baited line behind a slow moving boat'. The second is to 'wander about' and 'search for someone or something'. Finally, it also depicts in the Scandinavia myth the super natural dwarf/giant living in a cave or a mountain. Given the relevant meanings, patent trolls in literary sense can describe those who wander around, buy out patent rights cheaply, and await others to use them, coerce these users into licensing deals, otherwise litigating for monetary gains.

The pejorative term 'Patent troll' was coined in the early 1990s in a Forbes article[4] to describe the Japanese as patent trolls, who take a defense stance for their creations out of political and cultural interests. The phrase was popularized by former Intel assistant general counsel Peter Detkins in 2001. Intel, the semi-conductor giant is reputed for being quick to sue than settle with their legal opponents to defend their patent ownership. Thus, he defined: "A patent troll is somebody who tries to make a lot of money off a patent that they are not practicing and have no intention of practicing and in most cases never practiced".[5]

Although the name was coined in this modern era, in reality, the so-called patent trolling phenomenon has too long a history to be traceable. However, a few examples in history demonstrate the 'troll' existence. One of the most prolific inventors, Thomas Edison, dedicated his entire life to invent with a purpose of improving people's life. With a name as the 'father of light bulbs', people tend to associate him with the original invention of electric bulbs. However, he was credited this title only because he had tremendously improved the invention by many inventors through buying out their patents, and combining the strengths to extend light bulbs life. Meanwhile, with his prolificacy in inventions, and nature of his work to run probably the first industrial research laboratory, he was also well known to license his patents to corporations for commercialization so that he could 'make money for more inventions'. If 'practicing' refers to commercializing, Thomas Edison should also be considered a 'troll'.

The landmark case between Kodak and Polaroid from 1976 to 1985[6] is also an early example of patent trolling. Edwin Land, the American inventor and physicist has revolutionized the development and printing in photography with his impactful invention - the instant camera, which was first sold in 1948.[7] As the founder of Polaroid Corporation, he once described his company as 90% of the assets of Polaroid get in their cars and drive home at night. It is a clear indication that his assets were human capital with knowledge and creativity embedded within these employees. Edwin Land subsequently founded the Polaroid Corporation to manufacture his new camera.

On 26 April 1976, one of the largest patent suits involving photography was filed in the US District Court of Massachusetts. Polaroid Corporation, the assignee of numerous patents relating to instant photography, brought an action against Kodak Corporation for infringement of 12 Polaroid patents. Nine years later, after vigorous pretrial and trial, seven Polaroid patents were found to be valid and infringed. The court ordered Kodak to compensate Polaroid at US$ 873.2 million, but the actual payment was nearly US$ 910 million. This is because Kodak was out of the instant picture market leaving customers with useless cameras and no film. Kodak offered camera owners various compensation for their loss. Regardless of the payment, this was a landmark case in history due to drawing wide attention to the general public as to the significance of IP.

Although patent trolls are often associated with small firms consisting of patent attorneys and independent inventors, large firms also admit that they are trolls, such as General Electric and Amgen.[8] It is understandable that all firms have their vision and mission, thereby ultimate focus. This means that they cannot possibly 'practice' every patent they invent, and they also sometimes buy out patents for the purpose of strategic defense to related products and processes. As a result, multiple patent holders can often be categorized as trolls for the patents that they are not practicing.

Patent trolling also sounds similar to the stick strategy companies exercise to exert their ownership rights for patent. That is, companies monitor their own and competitors' patent activities, and identify infringement and force the infringer into a licensing contract, otherwise facing court proceedings. For example, when Jerry Junkins, the late former CEO of Texas Instrument (TI) succeeded in 1985 with a declining company due to fierce competition, unlike his predecessors, he focused on patent portofolios, the source of Texas Instrument's emergence as a technology giant and global firm.

Through competitive intelligence, he found out his rivals, Casio, for example, had been using the TI portfolios for technological development without permission. His legal team therefore collected evidence and asserted IP rights by demanding royalties from their rivals. By the early 1990s, the Texas Instrument collected US$ 1.5 billion.[9] Although TI is a large firm practicing many patents, it does not mean it commercializes every single patent within its entire patent portfolio. Does this mean that for the patents they are not practicing, Texas Instrument is considered trolling?

Patent trolling also sounds similar to the marketing strategy that small firms, independent inventors or universities adopted by selling their patented inventions to a larger firm due to their limited capacity to commercialize. For example, The ARM Holdings now has grown into one of the leading providers of microprocessor solutions by collaborating with large firms like Intel, Texas Instrument, and Apple over the years. As one may know, microprocessors are imporant for electronic applications. However, at the start of this firm in 1985, it had nothing but 12 engineers, microprocessor technology, and related intangibles embedded within each engineer. Without their licensing with giant firms, they would not have emerged and become a high-tech firm as it is now with the board members even exceeding 12 people.

It seems that the so called patent trolls are more prevalent in the software and financial services industries where firms buy out patents cheaply (e.g. from bankrupt firms or independent inventors), make no move to develop or commercialize these patents by themselves. Instead, hold them, awaiting related production or development from others, who they then try to force into lucrative licensing deals, by threatening to sue for infringement. Given the high costs of infringement litigation, this strategy often succeeds in securing a licensing deal. NTP is considered a typical troll because it holds over 50 inactive patents relating to wireless communications.

Now, with the origin and concept visited, it appears still confusing as to what can be considered a troll, what scholars and practitioners think about them. The rest of this debate focuses on the pros and cons of patent trolling, and reasoning before reflecting on the discussions, and possible solutions.

Debates for or against Trolling and Reasoning the 'Trolling' Phenomenon

Patent trolls are much more criticized than defended initially, but experts and practitioners now seem to take a firm but equal stance on either camps . The pro-trolls view that trolls are market void fillers, buying low and selling high, and making legitimate business that allows independent inventors and R&D institutions to sell their output rapidly. In other words, trolls have bridged opportunities for these financially vulnerable originators of inventions to be compensated for their creative endeavours. It is argued that trolls hasten the commercializing process by targeting companies with un- or under-used patents in hand, and persuading them to release patents back onto the market. The activities of patent trolls also make the untouchable multinationals and large high-tech firms feel ill at ease and fearful for infringement. They also create opportunities for small firms to profit from large firms. As a result, it vitalizes the market with less sense of monopoly predominated by large firms and incentivizes small firms and individuals to be innovative.

In addition, such actions are in line with the patent system to foster innovative endeavors. That is, patent systems grant rights to exclude others from making, using, or selling related products so that they can have opportunity to get compensated for their creatitivity during the protective period. Such a right of exclusion has not precluded the right of selling, using, etc. in addition to making.

Given the arguments, pro-trolls believe that the patent troll label should be abandoned for good. It is 'prejudicial, imprecise, and subjective' a term with no substance, and a euphemism for problems with the current patent system.[10] Even Detkins himself admits that the patent troll lawsuits are exaggerated.[10] For such reasons, some companies like NTP, and Acacia are self-declared trolls taking pride in what they are doing. The term should be abandoned also on the ground that all patent holders are, to some extent, trolls, relative to a particular patent or patents because companies do not have the capacity to commercialize all patents, even they have, they still need to consider the focus and vision of the firm for their development. Therefore, it is impractical and unlikely to practice all patents.

On the other hand, the anti-trolls argue that patent trolls increase the costs of manufacturing. This is because royalty payments and development costs

result from the need to give much attention to watching relevant patents for fear of infringement and any resulting actions. Eventually, such burden falls on consumers in the way of higher price.

Four factors can be considered as causes of the patent troll phenomenon: patent thickets, junk patents, the fear of court proceedings and the anxiety of business loss. The *patent thicket* refers to the overwhelming number of similar patents that have reached the extent that firms have to cut through too many barriers (the thicket) to commercialize a technology. These thickets make the process of granting patents too long (up to three years in the US) and too costly to keep in force (US$ 50,000 to 100,000).[11] The existence of the problem implies that a simpler high-quality patent system would motivate innovation better. In recent years, patent applications have grown dramatically. For example, US patent applications are growing at a rate of nine per cent; in China the growth rate is even higher at nearly 35 per cent.[12]

However, training an examiner takes, for example, up to 8 months in the US, and they need time to gain experience before they are fully proficient. These time-scales, however, do not keep pace with the speed and complexity of applications. The existence of such impediments to granting results in experts questioning the quality of processing and granting procedures. The patent troll phenomenon in the US is more significant than in other parts of the world because the US has probably the most flexible patent conditions, for example, the industrial applicability is left to the discretion of the USPTO. In addition, it has a width of patent protection that is not supported in most other countries: thus software and business method patenting which exist in the US, are also the two areas that have the most trolls. As a result, *junk patents* (patent with little value) are accumulating that trolls can buy cheaply, and hold on to them while they await their prey to generate income. Meanwhile, it is clearly costly and lengthy to go through the court proceedings, and victims would prefer to settle their businesses privately - the result would be an enforced licensing deal. Settlements will be attractive to victims who fear that court injunctions could lead to their business being partly or entirely shut down.

Reflections and Proposing Solutions

It is an overstatement that trolls threat patent systems and US economy, but the constant patent wars associated with 'patent trolling' affect the efficiency and effectiveness of the system because frivolous law suits only create 'fat' income for patent lawyers, but cost others time, effort and money, and in the long run impeding innovative efficiency and effectiveness.

While we respect the views on both debate camps, it is necessary to clarify the term: non-practicing entity. 'Practicing' as part of the term is broad and leave much room for intepretation. It may be broadly understood as including patent development, manufacturing, and commercializing. However, the current term appears to have excluded the commercializing part, thus a cause for confusion. This inevitably leads to a pro-troll argument: if large firms are allowed to trade patents, why not small firms, the so called trolls to force large firms into licensing deals?

Given the US patent system of a liberal approach to allow broad patents and application without providing 'utility' evidence, a long term strategy that can help develop an efficient patent system would be to think of the patent thickets, intensify patent examiner training, increase the quality of granting by narrowing down the scope of patents, make stringent examination of injunction requests, reduce the fees for court proceedings and enhance integration with other countries to prevent duplicate patenting. According to the US patent office annual report, the USPTO has adopted an 'aggressive hiring goal', aimed at recruiting at least 1,200 new examiners between 2007 and 2012.

For firms, strategies should be adopted to avoid trolling or being trolled.[13] In addition to choosing the right judge, and declaring judgement and validity in court for non-infringement and resolutions, it would be helpful for firms to focus on inventing around to avoid any infringements. Requesting re-examination would help to clarify the patent claims and defend own turf, joint forces with competitors would help to reduce costs and litigations. Finally, firms may also seek opportunities to cross-license patents to develop patent portfolios and accelerate patent utilization rather than going to courts. Such actions may be particularly effective in the sensitive patent areas like software, electronics, and financial services where patents might be bundled together.

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