

Battling Patent Trolls

John S. Hillery

May 2006

In the past year, stakeholders in patent reform efforts in Congress and infringement litigation in the courts have frequently and derisively acknowledged the influence of patent trolls. Trolls are patent speculators who obtain patents solely for the purpose of extracting royalties, often by filing infringement actions and frequently also by pursuing injunctions in order to coerce hefty settlements. Trolls are said to lie in wait until a firm begins practicing a technology in a commercial space covered one of its patent claims. The troll then pounces, revealing its previously unknown prior art, and demands that the company take a license or sues for damages and an injunction.

This was most recently the unhappy experience of Blackberry manufacturer Research In Motion, which was compelled to settle for over \$600 million dollars with a troll firm, NTP. It was also the experience of eBay, in which the alleged troll obtained an injunction against eBay, only to have the Supreme Court, in *eBay v. MercExchange*, order the lower courts to reconsider the ruling.

The term ‘patent troll’ originated in 2001 during a case brought by TechSearch, LLC against Intel. However, there was little attention to the troll phenomenon until 2005. There does not appear to be any empirical evidence on the number of trolls, the number of patents controlled by trolls, or the revenue that trolls are bringing in, although numerous anecdotes suggest the growth of troll activities. The troll business model emerged in a more cynical, post-IT bubble environment. Yet the growth of trolls is likely propelled by an increasing awareness that it is easy to game the system.

Trolls’ opportunistic behavior exploit weakness across the whole terrain of the US patents system. Most all of these weaknesses were areas addressed in the sweeping but now stalled Patent Reform Act of 2005.

In the Patent Office, trolls manipulate continuation procedures, lack of limits to the number of claims, and general quality and workforce issues at the USPTO which result in the granting of obvious and broad patents. Additionally, during litigation, an embattled company can request that the Patent Office review the validity of a troll’s patents. However, the backlog for reviews results in a jury verdict before any action by the USPTO and rulings by the Patent Office cannot undue jury verdicts on validity and infringement.

Similarly, in the courts there are a myriad of ways for trolls to game the system. One is via the near-automatic nature of injunctions in infringement cases. This was the central question before the Supreme Court in eBay’s case, and the court dealt a slight blow to trolls by suggesting that an injunction need not be mandatory. However, that the plaintiff is a troll cannot be a consideration in the issuance or non-issuance of an injunction. Another tool leveraged by trolls is forum shopping. Under current law, plaintiff trolls can sue corporate business defendants for patent infringement anywhere the defendant is

subject to personal jurisdiction. Given well-known disparities in results in district courts, trolls chose venues in which juries have favored plaintiffs, have a history of high damage awards, and rarely if ever find patent claims invalid.

Patent reform in the Congress stalled last year because of disagreement between the software and computer industry and the biotechnology and pharmaceutical industry. The software and computer industry is seeking changes to infringement, damages, and injunctions rules in order to lower the high litigation risk which is inherent to their technology areas. On the other side, the biotech and pharmaceutical community is interested in maintaining a strong litigation environment given their greater business reliance on patent protection.

The problem of trolls requires policy responses and it now appears that a comprehensive action is not likely to emerge this year. In its absence, piecemeal reforms are desirable. The Patent Office has begun to consider regulatory changes to continuations. Legislation on a smaller scale than the Patent Reform Act could serve to close some of the open doors through which trolls have been expanding their pursuit of corporations.