INTELLECTUAL PROPERTY
Insurance Services Corporation

A Continued Discussion on Patent Trolls by Robert Fletcher

A 2013 report conducted by the White House notes that IP-related lawsuits brought by Patent Assertion Entities (PAEs) have tripled in the past 2 years, from 29% to 62% of all IP infringement lawsuits filed. It is likely that over 100,000 threats of infringement were made by PAEs last year.

For those not familiar with the subject of PAEs, a.k.a. "patent trolls," let's explore their foundation. The term "patent troll" was used as early as 1993 to describe entities that file aggressive patent lawsuits. The patent troll was originally depicted in "The Patents Video" (1994) and was sold to corporations, universities and governmental entities. In the video, an unsuspecting victim is surprised by the patent troll who strategically positioned himself to collect patent licensing revenue. (Patent Troll, 2013)[1]

The metaphor was further popularized in 2001 by Peter Detkin, the former assistant general counsel of Intel Corporation. Detkin used the term as a derogatory term referring to a person or a company that enforces its patents against one or more alleged infringers in an unduly aggressive or opportunistic manner, often with no intention of manufacturing or marketing its own products. The patents are characteristically not used to protect an existing market share. (Patent Troll, 2013)

A less critical expression used is Non-Practicing Entity (NPE) which describes a patent owner, who does not manufacture or use the patented invention. It was later realized that the terms patent trolls, PAEs and NPEs also include universities and research organizations having a legitimate objective to "advancing science and the useful arts." Because of this, the most restrictive term "Patent Assertion Entities" or "patent trolls" has been adopted to refer only to the more unscrupulous of the NPE's who acquire and assert patents purely for monetary gain.

The most likely environment for patent trolls to exist is in an area that has an abundance of excessively broad, easily obtainable patents, many times involving software. The U.S., Canada, India and Japan all permit software patents, but all of them are moderate to strict examination countries, so there are few overly broad patents found. After the U.S. courts held business methods and software to be patentable, there was a flood of patent applications, and the USPTO was unable to satisfactorily exam these patents. As a result, the patent troll problem in the U.S. arose.

Yet, unlike the other three countries, there appeared to be little harm in the fact that the unduly broad software patents were issued since they were knowingly vulnerable to invalidation in the courts. However, the unforeseen problem presented limited profitable investment opportunities. Investors began combining resources to purchase patents for the assertion in legal actions where the cost for an accused to defend itself in court is greater than the amount demanded by the patent holders. The risk is low, and the returns are high. The entire situation has been exacerbated by waves of PAE lawsuits that have created a burden on the economic stability of small-expending companies- the companies at the very root of economic growth.

While all branches of government have given much lip service to the patent troll problem, the only real solution is the risk mitigation vehicle provided by the IP Defense insurance. IPISC has been in the forefront of insuring its clients against all comers, including patent trolls, since the problem began. IPISC's policy holders are benefiting from the wise decision to purchase IP Defense insurance to have the funds necessary to effectively protect itself from infringement accusations, regardless of merit, made by PAEs and competitors alike.

For more information on IPISC's IP Defense Policy, please contact your insurance professional, an IPISC account representative or info@patentinsurance.com, 502.491.1144.

[1] Wikipedia, "Patent Troll", 2013, https://en.wikipedia.org/wiki/Patent_troll

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