Weapons Emerging to Take Up Against 'Trolls'

Federal legislation has stalled, but the patent office's expedited review system is working well.

By Darrell A. Fruth and Andrew Rodenbough, The National Law Journal

The majority of recent patent lawsuits have been filed by so-called "patent trolls," entities that often do not invent — or even use — the technology they claim to exclusively own. While federal legislation to address the issue has stalled, other developments have quietly reshaped the patent landscape in significant ways. The patent office has made it faster and cheaper to challenge patents; several states have cracked down on abusive demand letters; and the U.S. Supreme Court has made it easier both to challenge abstract and vague patents and for winning parties in patent lawsuits to recover their attorney fees. Together, these developments have given businesses new tools to combat patent trolls, and savvy companies are adjusting their strategies for responding to patent demand letters and lawsuits.

One reason it has been difficult to deal with patent trolls is that the label sometimes describes advanced research universities and inventors who license their patents instead of manufacturing products themselves; even Thomas Edison has been called a patent troll. But having too many talented inventors is not the problem. Criticisms focus on so-called "patent assertion entities" with a business model built on extracting money based almost entirely on the threat of expensive lawsuits. These entities exploit the asymmetric costs of litigation, using demand letters and lawsuits to extract settlement payments from companies that think it's cheaper to pay than to fight.

Patent trolls enjoy significant litigation advantages. Unlike companies that produce something other than lawsuits, patent trolls have no "business" to interrupt and few documents to produce. They need not worry about countersuits because they have no operations to attack. Most importantly, for a troll, it is much cheaper to send a generic demand letter — or even a thousand — than for a business to investigate and respond to each demand. Considering that it often costs millions of dollars to win a patent case, it is easy to see why many businesses simply write a check hoping to make the patent trolls go away. This dynamic quickly starts to look and feel like a racket.

Congress took some steps to address these issues in 2011 with the America Invents Act (AIA), which made it harder to sue multiple parties in a single lawsuit. Patent trolls responded by filing more lawsuits.

NEW OPPORTUNITY FOR REVIEW

Other AIA changes may have a more lasting impact. When a patent application is filed under the new AIA rules, other parties may submit information to the Patent Office during examination showing that the invention is not novel. And patents granted under the new AIA procedures will be subject to a new form of postgrant review. Because these procedures only apply to patent applications filed on or after March 16, 2013, the specific reach of these changes will take more time to play out.

However, the most significant AIA change has already made a major effect on patent litigation. Revamped rules for Inter Partes Review provide an optional way to attack a patent before becoming too embroiled in traditional patent litigation. Challenges under these streamlined procedures go to the new Patent Trial and Appeal Board. The board aims to issue a final determination within one year — significantly faster than typical civil litigation. Challengers also enjoy a lower burden of proof than in court. Although these challenges must be based on other patents or printed publications, challengers retain the right to raise other invalidation arguments in court proceedings.

"DEATH SQUADS"

The process has recently become quite popular, with monthly filing rates doubling in the past few months. Although rates had been climbing steadily for the 18 months after the new procedure became available, they really shot up after results from the first wave of hearings showed a high level of success for challengers — a majority of the board's early decisions canceled all challenged claims. Noting the high rate of success, the chief judge for the U.S. Court of Appeals for the Federal Circuit, which hears all appeals involving patents, has reportedly dubbed the board's panels patent "death squads."

Congress appeared poised in 2013 to go further in addressing patent trolls. Several bills were introduced and received serious consideration. The SHIELD (Saving High-Tech Innovators from Egregious Legal Disputes) Act would have created a fee-shifting system to force trolls losing in court to pay their opponents' legal fees. The End Anonymous Patents Act would have required disclosure of all patent interests and transfers of interests, preventing companies from "hiding" patent ownership in shell companies. Finally, the Patent Quality Improvement Act would have expanded the postgrant patent review process established by the AIA. Although the concept of patent-troll reform appeared to have bipartisan support, none of the bills made it out of committee.

With federal legislation stalled, at least a dozen states have taken steps to regulate and discourage abusive patent demand letters. Vermont's attorney general sued one particularly aggressive troll under the state's consumer protection laws, and attorneys general in Nebraska and Minnesota have also taken steps to protect their state's businesses. In Vermont, the Legislature passed a law aimed at preventing "bad faith" patent assertions. Similar legislation is being considered in other states, and recently passed in North Carolina. Complaints from business owners may lead officials in additional states to follow suit.

Recently, the U.S. Supreme Court has made it easier for the winners to recover attorney fees in "exceptional" patent cases. In *Octane Fitness LLC v. Icon Health and Fitness Inc.*, the court relaxed the definition of "exceptional" cases and reduced the evidentiary burden that parties must meet to show that the assertion they faced was "exceptionally" unwarranted. But unlike the students in Lake Wobegon, not every case brought by patent trolls — the majority of all patent cases — can be exceptional. Studies have shown that before the Supreme Court's ruling in *Octane Fitness*, litigants had filed Rule 11 motions alleging an improper legal basis in fewer than 0.5 percent of patent cases. The low rate is not surprising, considering that every issued patent is entitled to a presumption of validity under patent law.

But not every patent discloses an important invention. With more than 1 million U.S. patents issued since 2009, there is an enormous pool of legal monopoly rights to assert. Supreme Court decisions in recent months, combined with the provisions of the AIA, should help weed out many spurious patents going forward.

For example, in *Alice Corp. v. CLS Bank International*, the court pushed back against the rise in patent claims by providing a new test for rejecting patents that try to claim "abstract ideas." In *Nautilus v. Biosig Instruments*, the court set a more demanding test for patent "definiteness." These opinions may eventually make it tougher to obtain vague and overreaching patents — the type most ripe for abusive litigation.

In conclusion, while Congress recently failed to enact significant litigation aimed at discouraging patent trolls, the developments discussed above have already given business owners more tools to fight back. Down the road, look for preemption to become a hot topic as more states regulate the assertion of federal patent rights. Most importantly, when faced with a demand from a patent troll, businesses should contact experienced intellectual property counsel to advise how these recent developments could help.

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