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Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Patent Trolls: A Selective Etymology

Thursday, Mar 20, 2008 --- Once upon a time near a tiny Norwegian village grazed three billy goats named “Gruff” who often climbed into the hillsides to graze. On the way up, they had to cross a small wooden bridge over a cascading stream. Under the bridge lived a green little ugly troll, with eyes as big as saucers, large warts and moles covering his distorted face, a nose as long as a carrot, and teeth as crooked and sharp as a parrot’s beak...[1]

Trolls in Nordic mythology and folklore were often represented as simple, devious creatures that lived underground in caves, hills, or mounds often pestering travelers, merchants, and billy goats, for safe passage.

In contrast, modern usage of the term has become an epithet for certain patent holders. Is this clever formulation having more influence than it should?

The term “patent troll” was first coined by a former Vice President and Assistant General Counsel for Intel, who defined it as “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, have never practiced.”[2]

Since then, increasingly negative publicity from defendants’ counsel, media coverage, and representatives of Congress has vilified companies whose sole purpose is to acquire and enforce patent rights without any intention of practicing the invention.

The threat of patent litigation, with injunctions and treble damage awards, has enabled patent trolls to collect substantial amounts of licensing fees.

In response, defendants and those who perceive themselves as potential defendants have taken their complaints to the media and Congress, which is considering patent reform that would lessen the threat of litigation by so-called trolls.

As a result, the epithet is now commonly bandied about in courts and the halls of Congress.

Mainstream media coverage has brought the term “patent troll” into the popular lexicon with negative connotations.

Recently, when the Supreme Court decided eBay Inc. v. MercExchange LLC, 126 S. Ct. 1837 (2006), the San Jose Mercury News reported that “[t]he Supreme Court Monday sided with eBay - and against ‘patent trolls’ - in a closely watched ruling.”[3][4]

The very next day, a San Jose Mercury News editorial proclaimed that "[t]he ruling should stunt the growth of a booming cottage industry of firms whose only reason to exist is to file or acquire patents and then sue companies whose products may violate those patents. The tech industry has labeled those firms 'patent trolls.'"[5]

In 2007 alone there were approximately 224 references to patent trolls in print media,[6] with a majority of these articles treating patent trolls with disdain (e.g. "Nokia, for its part, appears to see Qualcomm as a 'grubby little patent troll'" Morris, Anne, Total Telecom, May 1, 2007; "Patent trolls are the principal threat.

These are patent-holding companies that do not have a business other than a patent portfolio" Tucker, Katheryn, The Recorder, "GCS Draw Line in the Sand Over Changes to Patent Law," Dec. 14, 2007).

On Feb. 26, 2008, The Recorder published a front page article entitled, "'Troll Tracker' Tracked to Cisco IP Staff." According to the article, Richard Frenkel, a director in Cisco Systems' intellectual property group, is the author of Patent Troll Tracker, a formerly anonymous blog that reported on companies that held patents solely to sue for infringement.

The Troll Tracker provided a resource for patent defendants to learn more about the trolls that were pursuing them. According to the Troll Tracker, "[w]hen I started the blog, I did so mainly out of frustration. I was shocked to learn that a huge portion of the tech industry's patent disputes were with companies that were shells, with little cash and assets other than patents and a desire to litigate, and did not make and had never made any products. Yet when I would search the Internet for information about these putative licensors, I could find nothing."

The blog reports that it "fulfilled a long-felt need - the need for people to share information about the entities asserting patents." The Troll Tracker was unmasked by an anonymous email threatening to reveal the author if he didn't reveal himself.

A Forbes magazine article focused on the new tendency of hedge funds and institutional investors to back patent infringement lawsuits, a practice that it noted "[s]ounds a lot like patent trolling, a much-vilified practice in which contingency lawyers or small companies with no operations sue businesses to extort money."[7]

CNET News reported online that "patent trolls ... seek to quietly acquire significant patent portfolios with the intent of threatening lengthy and costly patent infringement lawsuits against operating companies."[8]

The anti-troll lobby has tried to persuade Congress to curtail the ability of patent trolls to file in virtually any district in the United States.

Complaints concerning the proliferation of patent lawsuits by patent trolls in so-called “plaintiff friendly districts” have been a major impetus for amending the Patent Act.

Congresswoman Zoe Lofgren of California recently argued in support of H.R. 1908 before the Committee of the Whole House on the State of the Union that “filings in eastern Texas went from 32 cases a year four years ago to over 234 cases last year with a projected eight% increase this year. Patent holders win 27% more often there, and the awards are much bigger ...

"It has led to the creation of entities that exist solely to bring patent cases. For example, the Zodiac Conglomerate is formed of several smaller companies. None of the companies create any technology. They don’t produce any products. All of those companies are incorporated in either Texas or Delaware.

"They exist for one purpose only, to bring patent cases. So far, the Zodiac Conglomerate has sued 357 different companies, mostly in the Eastern District of Texas.”[9]

Media coverage of these congressional debates further shed negative light on patent trolls. The San Francisco Chronicle noted that “[b]ig players, such as Cisco or Intel, claim ‘patent trolls’ target their products with long shot claims over a small part in a router or computer chip.

"A Palm Treo or BlackBerry can carry thousands of patents, making such gizmos inviting targets.”[10] Given the growing outcry against “patent trolling,” on Sep. 7, 2007, the House of Representatives passed H.R. 1908 by a vote of 220-175.[11]

Patent trolls have also slowly crept into published opinions. Judge Paul Cassell, a U.S. District Court judge in Utah, addressed the issue of whether “patent trolls should be subject to more general jurisdiction, perhaps as a way of deterring coercive baseless litigation.”[12]

Despite ruling in favor of the patent troll dismissing the motion to dismiss for lack of personal jurisdiction under existing law, the Court stated that “[p]atent trolls can more easily thrive in the environment that the Federal Circuit’s precedent has created, for they can threaten litigation against a potential infringer in a foreign forum without fear of being subject to suit themselves in that forum.

"This is an unintentional ‘benefit’ that might make it reasonable to hold that patent trolls are subject to personal jurisdiction in a foreign forum suit based solely on cease-and-desist letters. Such a change in precedent might well help stem the tide of coercive patent litigation.”[13]

In Taurus IP, LLC v. Daimler Chrysler Corporation et al., 20007 WL 3023615 (W.D. Wis. Oct. 15, 2007), Judge Barbara Crabb of the U.S. District Court, Western District of Wisconsin characterized patent trolls as “NPEs” or

"non-practicing entities" that "do not manufacture products, but instead hold licenses to numerous patents, which they license and enforce against alleged infringers."[14]

Most recently, recognizing the growing negative connotations associated with the term "patent troll" and the impact it may have on a jury, Rambus Inc., successfully won a Motion in Limine to Preclude Derogatory Characterizations of Patents and Patentholders against Hynix Semiconductor Inc., Samsung Electronics Co. Ltd., Nanya Technology Corporation and a host of related parties as they head to trial on Jan. 29, 2008.[15]

Rambus argued that terms like "patent troll" conjured negative stereotypes about those who seek to obtain and enforce patents and that the invocation of these terms at trial would improperly invite the fact finder to assume that Rambus fit those stereotypes.

Rambus further argued that the term "patent troll" suggests that the pursuit and enforcement of patents is somehow unfair or even unlawful if the accused infringer is taken by surprise and that such conduct is neither unfair nor unlawful.

Rambus requested that the Court exclude the term "patent troll" under Federal Rule of Evidence 403, since its probative value is substantially outweighed by the danger of unfair prejudice. Judge Ronald M. Whyte granted Rambus' motion in limine and precluded the use of the term "patent troll" at trial.[16]

Judge Whyte's Order tacitly accepts the implication that patent trolls carry such a negative connotation that its use would prejudice a fact finder.

Perhaps it would encourage more reasoned debate if another word were used, but it seems that trolls will continue to be a part of our patent discourse for some time to come.

The use of such an epithet – which could cover, for example, a university researcher who patented a cure for cancer but did not have the resources to exploit that patent – seems to shed much more heat than light.

--By Ronald S. Katz, Shawn G. Hansen and Omair Farooqui of Manatt, Phelps & Phillips LLP

Ronald Katz and Shawn Hansen are partners at Manatt, resident in Palo Alto, and Omair Farooqui is an associate with the firm in Palo Alto.

[1] Asbjørnsen, Peter Christen and Moe, Jørgen, "De tre bukkene Bruse som skulle gå til seters og gjøre seg fete," Norske Folkeeventyr, translated by George Webbe Dasent in Popular Tales from the Norse, 2nd edition (London: George Routledge and Sons, n.d.), no. 37, pp. 275-276. Translation revised by D. L. Ashliman, 2000.

[2] Brenda Sandburg, Trolling for Dollars, Recorder, July 30, 2001, at 1.

[3] Ackerman, Elise, Supreme Court Sides With eBay, San Jose Mercury News, May 15, 2006.

[4] Yahoo! Inc., filed an amicus curiae brief in eBay defining patent trolls as "entities whose primary purpose is to prey on innovators who actually produce societally valuable products – abuse the patent system by obtaining patents for the purpose of coercing settlements from such innovators." eBay Inc., v. MercExchange LLC, 126 S. Ct. 1837 (2006)

[5] Editorial, 'Patent Trolls' Get Their Just Desserts, San Jose Mercury News, May 16, 2006.

[6] Westlaw Search Results, Query "Patent Troll" & DA(last 1 year), Database "Allnews"

[7] Vardi, Nathan, Patent Pirates, Forbes, May 7, 2007.

[8] Beyers, Joe, Rise of the Patent Trolls, CNET NEWS, October 12, 2005.

[9] 153 Cong. Rec. H10270-01 (Friday, Sep. 7, 2007)

[10] Editorial, The Laptop vs. The Pill Bottle, San Francisco Chronicle, Aug. 5, 2007, E4.

[11] As passed by the House of Representatives, H.R. 1908 states that "Any civil action for patent infringement or any action for declaratory judgment relating to a patent may be brought only in a judicial district--

(1) where the defendant has its principal place of business or is incorporated, or, for foreign corporations with a United States subsidiary, where the defendant's primary United States subsidiary has its principal place of business or is incorporated;

(2) where the defendant has committed a substantial portion of the acts of infringement and has a regular and established physical facility that the defendant controls and that constitutes a substantial portion of the defendant's operations;

(3) for cases involving only foreign defendants with no United States subsidiary, according to section 1391(d) of this title"

[12] Overstock.com Inc. v. Furnace Brook LLC, 420 F.Supp.2d 1217, 1218 (D. Utah 2005).

[13] Id. at 1222.

[14] Taurus IP, LLC v. Daimler Chrysler Corporation et al., 20007 WL 3023615 (W.D. Wis. Oct. 15, 2007).

[15] Rambus Inc. v. Hynix Semiconductor Inc., et al., (C-05-00334 RMW) Document No. 463, Dec. 7, 2007.

[16] Id., Document No. 1107, Jan. 25, 2008.

