



PATENT TROLLS: An Uncontrolled Business Practice in the Industry

The Original Patent Proposal for Society

At its origin, the patent was designed as a tool for promoting research and development. The inventor receives exclusive rights on the patented invention for a limited period of time in exchange for public disclosure of the invention. After this period, anyone can manufacture or use the patented invention without obtaining a license from the patent owner.

This arrangement encourages inventors to invest in the use of their inventions and to share their knowledge with the public, thereby promoting advancements in technology and sciences. The patent system was a key component of the Industrial Revolution and continues to play a critical role in nurturing inventive activities today.

Patent Trolling: an oxymoron for increasing the economical value of patents?

An increasing activity, colloquially called “patent trolling,” has changed the equilibrium of the patent system. A “patent troll” (also known more blandly as a “non-practicing entity” or a “patent assertion entity”) is an entity whose core business is to make money from one or more patents on inventions that it does not manufacture, and may not have ever developed and/or used itself. Although some patent trolls were at one time functioning businesses, the majority of patent trolls usually have no research and development activities or manufacturing facilities. In many cases, the patent troll purchases or acquires rights in patents based on its prior assessment of their licensing potential and engages a team of lawyers and technical and business analysts to monetize (i.e. make money from) the patents. Many patents were acquired cheaply by patent trolls in the aftermath of the burst of the Information Technology bubble, and are still often acquired from distressed or cash-strapped companies.

The modus operandi of a patent troll almost always consists of suing or threatening to sue selected targets, often without any notice or warning. Such targets often include a company’s customers, sometimes even in lieu of the company itself. Via these and other carefully considered litigation tactics, the patent troll puts pressure on a target defendant and then demands payment of patent license fees. Even if the defendant is not infringing the patent or has relevant prior art to invalidate the patent invoked by the troll, the cost of defending against a patent infringement suit is in any case much higher (by several factors, up to seven or even eight figures) than the cost of the license fees (generally around five, six or, in unusual cases, low seven figures). Even though carefully calculated by the patent troll to be less expensive than the cost of litigation, those license fees are frequently grossly out of proportion to the contribution of the patented

technology alleged to be used by the defendant's products. Unless the defendant has the intestinal fortitude to soldier on, despite the cost and in the face of the uncertainty inherent in a jury trial, to eventually defeat the patent (and few companies ever do), this dynamic forces the defendant to settle early with the patent troll in order to save money, time and the huge dose of business distraction inherent in any litigation. Large companies with deep pockets are the favorite targets of patent trolls, but small and medium enterprises are frequently targeted. The issue is even worse for the latter, since they typically cannot afford expensive, time-consuming, and distracting lawsuits. It's easier in the end to just "pay up," and this is what patent trolls count on. Put another way, patent trolls have created a "toll" on the US service and product industries, whereby innocent companies that are threatened with baseless patent litigation are forced to pay a ransom for their peace of mind, even where the patent is not infringed or is simply invalid. The unfortunate side effect of this is that nothing is really free; these costs (or the "tolls" from the settlements of the suits) are almost certainly passed along to the consumers or customers of the company's product in some way, shape or form, meaning that we all pay the price for patent trolling.

There are theoretical means to try and defeat a patent troll's unwarranted attack without racking up huge legal fees, such as initiating *inter partes* or *ex parte* reexamination before the US Patent and Trademark Office. However, it is interesting to note that many of the current "favored jurisdictions" for patent trolls will not stay or suspend legal proceedings while a patent is in reexamination. Meaning that by the time the USPTO can render a decision, even in an expedited process, hundreds of thousands or even millions of dollars can already have been expended by the target in defending itself. (This is another reason why patent trolls now generally sue without warning; given recent case law, if they were to contact a target beforehand, they run the risk that the target may itself file for declaratory relief in a jurisdiction less favorable to the patent troll, meaning that the troll would be forced to litigate the case in a jurisdiction that might suspend legal proceedings until the USPTO has ruled on any pending reexamination request.) And since it is cheaper for any target defendant to pay the patent trolls, the lawsuit is settled out of Court and the patents basis of the action are never really confronted to the prior art such defendant may have, and which may remain confidential. Therefore, the patent troll can select the next target with the same potentially questionable (if not outright invalid) patents.

While there is nothing currently illegal in patent trolling, it must be recognized that patent trolls exploit the judicial system to achieve their ends. This practice is a growing business model based on an unfair deal. Since a patent troll is not an industrial entity practicing the underlying invention that is the subject of the patent, it has no interest in stable and recognized solutions between entities that hold (and generally practice) patents, such as beneficial cross-licensing arrangements.

Objecting to patent trolls does not call into question the utility of patents since patents help technological innovation to flourish and promote technological transfers. The problem stems, on the one hand, from the overall cost of a patent litigation, which

acts as a deterrent for a target to fairly defend itself, and on the other hand, from the questionable quality of certain patents granted.

Patent trolls and their representatives frequently attempt to rationalize their behavior by arguing that creating a secondary market for patents makes ownership of patents more liquid, which creates additional incentives to potential inventors. Patent trolls also argue that aggregating patents facilitates greater access to technology by organizing and publicizing ownership of patents in a single entity. However, neither of these arguments furthers invention as intended by patent law. Instead, the behavior of patent trolls imposes a large cost on their targets in the form of internal inefficiencies that are caused by these nuisance lawsuits by forcing the targets to spend valuable time and money to investigate and defend the patent troll's claims rather than investing that time and money in developing new products. Moreover, although the original inventor may receive some amount of money in exchange for his or her patent rights, the patent laws as originally intended are not directed towards liquidity or mere money-making schemes. Rather, these laws are specifically created to advance society's knowledge in science and technology. Even more, patent trolls have never actually shown how increased liquidity on its own benefits society.

The owner of patent rights is entitled to prevent anyone from exploiting the protected invention without his authorization or to receive a fair compensation for said exploitation but not to collect millions from a non-used patent.

Recommendations: A Call for a Global Referendum on Patent Practices and an Improved Litigation Model

This problem requires attention from international institutions and should involve cooperation between all the actors on a global scale to define a solution along one or more of the following recommended actions:

- A. **Practices** : Worldwide harmonization of patent practices
- B. **Actors** : Improved collaboration between national and regional Patent Offices to better serve patent value creation
- C. **Litigation Model**: Professionalization & legal reframing of patent infringement proceedings

A. Practices

Today each Patent Office has to follow its own national laws and practices. The situation was improved particularly with the America Invents Act but it would be beneficial to further harmonize the patent legislation, especially examination practices and supplemental examination proceedings. In addition, to decrease the risks of facing lawsuits based on questionable patents, the quality of the patents could be improved by strengthening the examination of the patent applications by the Patent Offices. One way to increase patent quality is to eliminate fee diversion – the taking of fees paid for

example to the US Patent Office for use by Congress in other ways. Ending fee diversion would facilitate the hiring of additional and well-trained patent examiners, and also help improve information technology systems for finding and cataloging prior art. The addition of well-trained and technically adept patent examiners would facilitate increased patent quality by enabling examiners to have more time to understand the invention and search for accurate and correct prior art.

B. Actors

Research and development activities are increasingly carried out worldwide, which generates foreign prior art documents that are potentially relevant for the examination of a patent application. Such prior art documents should be more widely taken into account during the examination of patent applications, particularly in the US.

A second way to improve patent quality is to urge or require the various national and regional Patent Offices to work in a more collaborative manner, such as by sharing their information and analyses of patent applications. In general, each national or regional Patent Office separately examines patent applications and decides whether to grant a patent according to the laws of that country or region.

C. Litigation Model

Early specificity and proof. Requiring patent trolls to include more specificity and proof of infringement in a complaint would make the litigation process more efficient and less costly. Currently, the pleading requirements are so minimal and vague as to leave defendants in many cases scratching their heads as to which of their offerings are alleged to infringe which elements of which patents. This results in a lot of wasted effort and expense, including otherwise needless motion practice, to try and define the alleged infringement with sufficient certainty to be able to meaningfully assess the allegations and respond. Requiring more detailed complaints would enable defendants to more accurately analyze the allegations and respond to the complaint with more certainty, as well as prepare and file earlier, detailed motions which could result in a narrowing or even a dismissal of unsupported cases before huge costs, particularly during the discovery phase, and judicial bandwidth have been expended.

Sanctions for Frivolous or Baseless Suits. In US patent litigation, motion procedures exist for a court to impose serious financial and other sanctions where another party has asserted a frivolous or baseless claim or defense. Each side in a patent case is supposed to conduct a reasonable investigation of the facts and the law surrounding any claim or defense. Unfortunately, many, if not most, federal judges are typically loathe to address these sorts of motion, generally because they believe that motions that “attack” the good faith of the adversary in bringing or defending the suit are more likely than not to generate ill will between the parties, cause the parties to become even more hostile toward one another and raise the prospect of “satellite” litigation, unaddressed to the merits. A solution that would balance the playing field between troll and defendant is to allow the court to address early on and in the middle of the case the factual and legal

bases for the troll's claim of infringement, and if it is determined that there was no reasonable investigation of the facts before suit was filed, or even if after the suit was filed it is reasonably clear that there was no or little basis to the suit (especially the facts establishing infringement), forcing the troll to pay all of the defendants' legal fees and costs.

Forcing Trolls to Pay Asymmetrical Discovery Fees and Costs. In US patent litigation, better than 60% of the fees and costs in the litigation are spent by both sides in the "discovery" phase of the case. This is that period or portion of the case - - unknown in most other legal systems - - where the troll and the defendant are each forced to disclose to the other documents and information, and make witnesses available for testimony, relevant to the case. The problem is that in a vast majority of the case, the troll has few if any documents or witnesses to make available (and so their discovery production costs are minimal), where the defendants - - being a real business with actual resources and documentation - - is forced to pour through mountains of documents and gigabytes, if not terabytes of data, to produce to the troll. The result is an entirely asymmetric discovery system, where the troll spends very little on producing documents (and/or even reviewing the adversary's documents), but the target defendant spends a fortune - often many millions of dollars, just going through the pain of discovery. Frequently, it is the threat of the discovery cost that forces the target defendant to settle, even where the case is meritless. A solution that would balance the playing field between troll and defendant is to force the troll to incur the cost of that portion of the defendants' discovery search and efforts which is disproportionate to the discovery conducted by the troll. These sorts of cost-shifting mechanisms exist in the US civil justice system, but it requires progressive and creative judges to implement their use.

Jury. Patent matters generally address complex, technology-rich issues that may be difficult for a jury of laypersons, no matter how hardworking or smart, to understand. One possible solution is to limit jury participation in patent litigation to professionals who are skilled in patent law and/or the technology in question. Such a step may help eliminate the unpredictability of decisions and awards made by juries selected from the general public, and thus remove one of the key deterrents to a target who might otherwise choose to incur the large expense necessary to litigate a patent: the uncertainty inherent in a jury trial system made up of laypersons.

Substantive Awards. Another possible solution to reduce costs is to limit the amount of awards, or even settlement amounts, for patent trolls that do not implement the patented technology. For example, any settlement amount or award based on royalties would be reduced when the patent troll is not harmed in any way by the target's alleged use of the patented technology. This is an item that can be argued early in litigation so that both parties have a better idea of the amounts at stake. One can also imagine further limiting the amount of awards if the plaintiff is a non-practicing entity and is not one of the inventors or the original assignee of the patent.

Loser Pays. Finally, a change in the current system, at least in cases brought by patent trolls, whereby the plaintiff is required to post a bond and be liable for the

prevailing party's fees and costs could go a long ways towards discouraging weak or unwarranted cases. Currently, as noted above, the system is stacked against the target, whereby it is sure to expend hundreds of thousands if not millions of dollars, with little to no hope of recovery, if it chooses the path of litigation versus paying a fraction of this cost to instead settle with the patent troll and move on. A simple "loser pays" change to the system could help restore the balance and stop what may be seen in essence as legalized extortion.

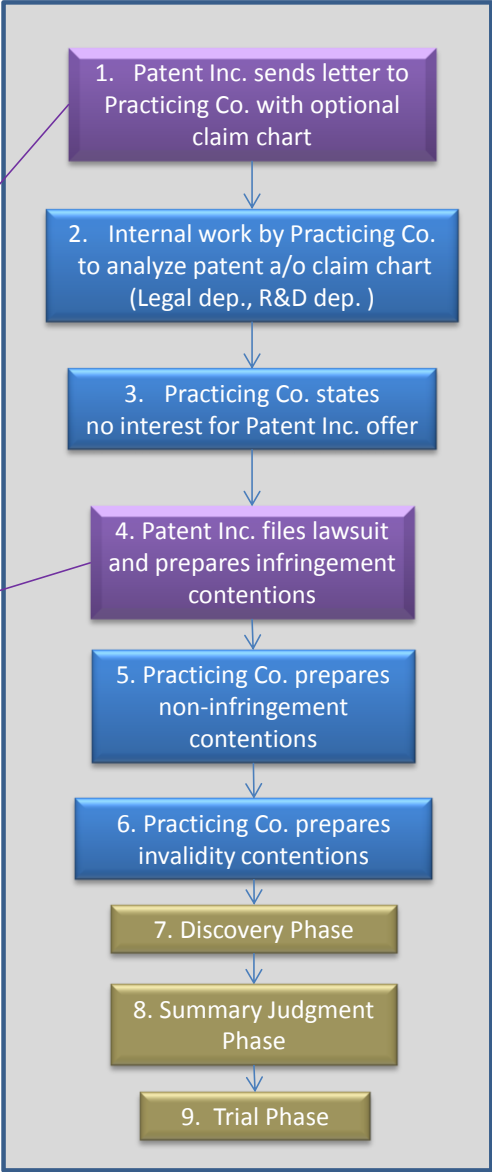
All of these recommendations could help decrease the risks of patent litigation and its associated costs while promoting legal certainty in the patent world. Harmonization of practices and cooperation among the international institutions is needed to help to define a common referential to address these issues, and to ensure a level playing field among industry actors, especially in our digital era.

About Dassault Systèmes:

Dassault Systèmes, the 3D Experience Company, provides business and people with virtual universes to imagine sustainable innovations. Its world-leading solutions transform the way products are designed, produced, and supported. Dassault Systèmes' collaborative solutions foster social innovation, expanding possibilities for the virtual world to improve the real world. The group brings value to over 150,000 customers of all sizes, in all industries, in more than 140 countries. For more information, visit www.3ds.com.

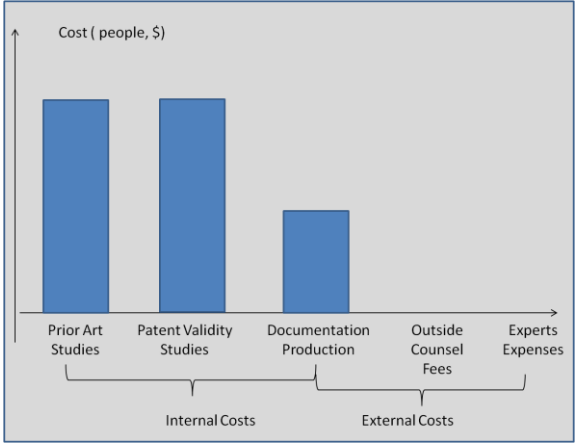
"We wish to amicably resolve this matter by licensing the patents to you and avoiding further litigation. In exchange for a single, lump sum payment, we propose an agreement that will release you and your customers from any past liability under the patents (for which the law would allow us to seek up to 6 years of past damages), and grant you and your customers a fully paid-up license until the last of the patents to expire. The costs of the paid-up license would be reasonable relative to the benefit from your past and continued use of the patented technology."

"As you know, on January 28, 2009, Patent Inc. filed a complaint against Practicing Co. in the United States District Court for the Eastern District of Texas alleging infringement of the US Patent 1,234, 567, a copy of the complaint and exhibits is enclosed for your reference. Although we have initiated litigation, our goal is to reach an amicable settlement with you. While we would have preferred to avoid litigation, US legislation left us with little alternative left to file suit to discuss the patent and the accused products."



- Patent Inc. action
- Practicing Co. action
- Both parties action

Patent Inc. vs Practicing Co. Pre-litigation Costs



Patent Inc. vs Practicing Co. Legal Action Costs

