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PERSPECTIVE

A Clarion Call to Action?

The concept of a "loophole" often seems to apply to issues in a species of law practiced by few, which has the potential to impact many — namely tax law. As life-long patent attorneys, and freshly-minted technology lawyers, we have both been trained to read and understand the law. This includes questioning legal conclusions which, on their face appear to be challenged. We take this seriously and firmly believe it to be a foundation of democratic society. In writing this note, we examined many sources. Our research began with a foundational source of common knowledge - a dictionary. According to the New Webster Encyclopedic Dictionary of the English Language, a "loophole" is:

"A small aperture in the wall of a fortification through which small arms are fired at an enemy; a hole that gives a passage or the means of escape, [or] an underhand or unfair opportunity of escape or evasion."

Loopholes are generally shunned by those they disadvantage, but are fervently supported by those who take profit through them. For instance, environmental loopholes often favor large oil and gas companies at the expense of local communities and their long term water supplies. Such familiar loopholes are generally created through the calculated and well-funded use of lobbyists at the state and federal level. Every so often, though, a loophole is inadvertently created by the judicial branch. These unintentional feats are usually summarized by the old lawyer's adage: "bad facts make bad law." When such narrowly-intended, judicially-created precedents are leveraged by unintended beneficiaries, major chaos can ensue. Unfortunately, such bedlam and dissonance can then be quelled by only one of two arms: Congress or the judiciary.

This note offers for consideration the question of whether the U.S. Court of Appeals for the Federal Circuit will rationally manage the loophole inadvertently created by the *Autogenomics Inc. v. Oxford Gene Technology, Ltd,*. 566 F.3d 1012 (Fed. Cir. 2009) case, which ostensibly gives "trolls" (or, put in politically correct phraseology, "non-practicing entities") a "hall pass" from being haled into Court, even where their enforcement conduct would subject a normal defendant to jurisdiction. The U.S. Court of Appeals for the Federal Circuit or our Congress must heed this clarion call to action, and remove such unfair advantages that have inadvertently been given to the "trolls."

The same pundits who we have heard waxing on about patent reform need to take the bull by its horns this time. The U.S. Patent and Trademark Office remains backlogged and improperly staffed, and in lieu of driving positive change, Congress seems to have forgotten that the most important stimulus package we can hope for needs to start with our own economy. The need for legislative change to re-balance the playing field has never been more obvious.

If non-players (i.e., trolls) are allowed to dash the hopes and dreams of legitimate businesses with impunity, with our federal court system as cover, investing in R&D shall continue to be a challenged proposition. What better opportunity to incentivize high-technology and essential business exists than reigning in the trolls? Next time someone asks for political support, or a campaign contribution, what is the harm in reminding them that a cancer is spreading among our court system — which must be excised else the co-morbities shall control?

Perhaps the U.S. Court of Appeals for the Federal Circuit needs to take a long hard look at its own precedent, else real business owners should cower in fear that this loophole allows trolls an unfettered avenue to extort money and fl ee from the state without being subject to its courts

During the times when monopolists threatened to squash other businesses unfairly, Congress stepped-up and passed the Sherman Act. The troll conundrum is no different, in that the few who benefit are not likely to foster innovation or revitilize the economy. We need to wake-up our representatives in government and express our understating of how not only charity, but also fairness and good business practices begin at home.

In deciding *Autogenomics*, where a foreign defendant in a declaratory judgment action was relieved from having to answer to the Court's jurisdiction, the U.S. Court of Appeals for the Federal Circuit seriously departed from both the spirit and meaning of at least about 27 years of precedent, and eviscerated one of the main reasons for its existence in the first place. To this point, the legislative history of the U.S. Court of Appeals for the Federal Circuit makes clear that elimination of "forum shopping" and uniformity of patent laws were prime objectives of this specialized patent Court, to be managed by technically-literate judges.

Instead of supporting the rational growth of actual businesses which help the economy, the U.S. Court of Appeals for the Federal Circuit chose to immunize trolls from having to answer for their ongoing misfeasances. The sleight of hand here is that many trolls are virtual entities. Traditional notions of jurisdiction are obviated when such a troll threatens businesses in, defends other lawsuits in, and garners more than 90 percent of its licensing income from a jurisdiction where it cannot be sued. If having no physical presence in any one state immunizes trolls (as *Autogenomics* suggests), real businesses need to understand that when trolls come hunting in their state, the Court's guidance clears its docket at the expense of ignoring its original charter.

Perhaps the U.S. Court of Appeals for the Federal Circuit needs to take a long hard look at its own precedent, else real business owners should cower in fear that this loophole allows trolls an unfettered avenue to extort money and flee from the state without being subject to its courts. Once and for all, the U.S. Court of Appeals for the Federal Circuit needs to affirmatively conform its approach to jurisdiction with that contemplated by the Constitution and notions of Due Process. Its case law should align with a fair and rational application of the laws for all — not just today's bullies on the playground — the trolls.

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