

# Knobbe Martens

INTELLECTUAL PROPERTY LAW

## Crowdsourcing: Inciting a Mob to Battle Patent Trolls

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**T**he onslaught of non-practicing entities, or “patent trolls,” that aggressively leverage the high price of defending a patent infringement action in order to extract licensing fees, cost defendants and licensees \$29 billion in 2011. The number of such lawsuits rose to 62% of all patent infringement cases filed in 2012. The economic drain on the targets of these troll lawsuits, U.S. companies that are actually marketing products and services, has focused attention on the inability of the U.S. Patent and Trademark Office (USPTO) to weed out overly broad patents, and it has bolstered criticism of the patent system for stifling innovation by granting improper exclusivity for less-than-inventive concepts.

In part to combat the scourge of patent trolls, the recently enacted America Invents Act (AIA) increases the number of avenues available for parties to direct the USPTO's attention to more relevant references and to challenge the validity of a U.S. patent at the USPTO without incurring the high cost of litigation.

In the new AIA post-grant proceedings (*i.e.*, post-grant review, *inter partes* review, and covered business method review), the USPTO reevaluates the validity of an issued patent. The challenger (*e.g.*, the patent troll's intended prey) presents new references, arguments, or both for the USPTO to consider in revisiting the validity of the previously-issued patent. The challenger participates throughout the post-grant proceeding by countering the patent owner's arguments of validity. Based on past experience with the previously available post-grant procedures (*i.e.*, *ex parte* and *inter partes* reexamination), many practitioners expect these new proceedings to be generally favorable to the challenger's goal of either invalidating the patent or at least narrowing the patent's scope, thus improving the challenger's odds to avoid liability. However, while these proceedings are significantly less expensive than litigation, they are not cheap, owing to the large filing fees (upwards of \$23,000) and to their adversarial nature.

Another new AIA avenue, called “Preissuance Submissions,” allows anyone to submit references to the USPTO, along with a concise description of the relevance of those references, during the initial prosecution of a patent application. “Preissuance Submissions” thus have the potential to kill or to hobble significantly a patent application before it ever issues as an overly broad U.S. patent. In contrast to the post-grant proceedings, “Preissuance Submissions” do not allow the submitting party to participate in the evaluation of the patent application after the initial filing, but the procedure is quite inexpensive. Thus, “Preissuance Submissions” can be an attractive option for individuals or groups seeking to protect a technological space from overly broad grants of exclusivity.

The successful use of these new procedures depends on the relevance of the references under consideration. In long-established technologies, relevant references are generally accessible on existing databases used by the USPTO and by the public at large. However, in newer and fast-changing fields, such as software and business methods, many of the most relevant public references are not easily retrievable using conventional means. For example, product manuals, marketing materials, foreign language references and more obscure documents that have not been digitized are typically not in the available keyword-searchable databases. Without these relevant references, the USPTO has a limited basis for rejecting such patent applications, resulting in the issuance of patents of questionable validity.

Crowdsourcing holds the promise of finding these elusive references. The term “crowdsourcing” refers to the process of outsourcing tasks to the public at large, thereby accessing “the wisdom of the crowd” by presumably bringing to bear a more varied and wider range of information than would otherwise be available. As applied to patent validity, crowdsourcing the search for relevant references has the potential of accessing the collective memories and archives of many people to uncover references that are not normally catalogued in the databases used in conventional patent validity searches. In addition, since the relevance of references is based on how they are understood by people skilled in the relevant technology (often referred to as “people having ordinary skill in the art”), participation by such individuals in the crowdsourcing process may provide a better sense of a reference's contents and its relevance to the patent or patent application at hand.

The USPTO is encouraging “crowdsourcing” social media initiatives. For example, the USPTO publicly touts the “Ask Patents” social network ([www.askpatents.com](http://www.askpatents.com)) hosted by Stack Exchange as a means in which “subject-matter experts volunteer to suggest prior art for given applications, as well as to offer their input on the proposed value of those suggestions from others.” On the “Ask Patents” website, users can anonymously post calls for prior references relevant to the patentability of a patent or patent application, and anyone can anonymously contribute candidate references. The participants vote on the relevance of a contribution, and the most-relevant contributions rise to the top. Participants do not receive any money for their contributions, but they are awarded “badges” for increasing levels of participation. “Badge” reward systems have previously been used in various activities such as online gaming, in businesses such as Foursquare, and, of course, in well-known organizations such as the Boy and Girl Scouts. The calls on “Ask Patents” are primarily in the software field; the patent

applications of Microsoft and Apple are the most frequent targets.

The co-founder and CEO of Stack Exchange, Joel Spolsky, recently bragged about the website's first “confirmed kill” of a pending patent application. In that instance, the USPTO rejected a Microsoft patent application filed in 2011 using a reference that was uncovered via “Ask Patents.” The reference was a document that Microsoft published in 2008 and that Mr. Spolsky himself uncovered and submitted to the “Ask Patents” website in response to an anonymous query for references. The record does not reveal how the reference came to the patent examiner's attention, since it was not submitted by Microsoft nor by a third-party in a “Preissuance Submission.” The patent examiner may have found the reference through his own independent searching, or...perhaps he was the anonymous user that submitted the query for references on “Ask Patents.” Given the USPTO's backing, it is no surprise that patent examiners are utilizing “Ask Patents” to supplement their conventional database searches.

Describing this example as a “confirmed kill” is a bit of hyperbole. In fact, the rejection was merely a first “non-final” office action, and Microsoft has since responded by filing amendments that narrow the claims in a way that Microsoft argues is patentable over the cited reference. Microsoft may eventually convince the examiner to grant the patent, albeit with a narrower scope of exclusivity than if the USPTO did not have the 2008 document. Paradoxically, rather than lamenting the use of crowdsourcing, Microsoft probably welcomes this development, since the issued patent will arguably be stronger (and thus more immune to later challenges of validity) because Microsoft has already responded to the 2008 document during prosecution. If the 2008 document had first been discovered after the patent issued, it could have been the patent's “Achilles' heel.”

The non-monetary motivation for the “Ask Patents” contributors (*i.e.*, earning badges while contributing to the greater good) would seem to attract “do-gooders” who seek to snuff out patent applications that appear especially egregious to the technological community. Organizations such as the Electronic Frontier Foundation (EFF) are beginning to see the value of crowdsourcing. For example, EFF enlists volunteers to protect developing technologies by identifying potentially overbroad patent applications that deserve to be targets of “Preissuance Submissions” and by providing references to challenge these applications. Recently, the EFF has partnered with “Ask Patents,” law schools, and various public-service organizations to establish “Trolling Effects” ([www.trollingeffects.org](http://www.trollingeffects.org)), “a crowdsourced database of patent demand letters and a clearinghouse for information on the troll epidemic” to expose the activities and tactics of patent trolls.

A more mercenary take on crowdsourcing may be more effective in battling patent trolls. For example, the website “Article One Partners” ([www.articleonepartners.com](http://www.articleonepartners.com)) provides a platform for its clients to present target patents and applications to an online community of 27,000 registered researchers. The researchers are motivated to embark on “an Intellectual Treasure Hunt” by monetary bounties (*e.g.*, \$5,000) shared among the researchers identifying the most relevant references to the target patent or patent application. The clients of “Article One” include Philips Electronics, Microsoft, and Sony, and, to date, “Article One” has paid out more than \$4 million to its researchers. A large fraction of the targets on the “Article One” website are in the software field, but a significant number are in other technologies as well, such as medical devices and semiconductor fabrication. The targets listed on “Article One” are primarily issued patents, and many of its clients appear to be seeking ammunition to invalidate a patent asserted by a troll.

Coupling the new AIA procedures with the power of crowdsourcing to uncover previously unavailable references will likely be quite effective in selected individual cases. However, it remains to be seen whether either volunteer-based crowdsourcing, such as “Ask Patents,” or bounty-based crowdsourcing, such as “Article One,” will fulfill the potential to improve the overall quality of issued patents and to reduce the impact of patent trolls.

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