

Fighting Patent Trolls

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by David E. Rogers

I. Introduction.

When it comes to suppressing U.S. competitiveness, no one does it better than patent trolls. A 2017 study concluded that 5,100 patent infringement lawsuits were filed in 2016. Trolls account for about 67% of those.

Patent trolls account for about 67% of patent infringement lawsuits in the United States.

Eighty-eight percent of troll litigations involve patents in the information and communications technology sectors, and more than 75% of those are software patents.

About 75% of patent troll lawsuits are software related.

Trolls not only needlessly drain the coffers of large companies; they dampen or destroy the prospects of small businesses striving to create new products and jobs. Over 50% of patent troll lawsuits are brought against companies with less than \$10 million in annual revenues, and 62% of troll targets have less than \$100 million in annual revenues.

More than 50% of patent troll targets have less than \$10 million in annual revenues.

Once targeted, a company must pay a troll, engage in expensive patent litigation and/or an action at the Patent Trial and Appeal Board, abandon a new product or service, or close its doors. Patent troll lawsuits directly and indirectly drained an estimated \$80 billion from the American economy in 2015.

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Money spent paying a troll or defending a patent infringement lawsuit could have been used to develop products, pay employees, and keep manufacturing in America.

II. What Is a Patent Troll?

A patent troll¹ is a business focused on extracting money from *existing* uses of patented technology, rather than on providing products/services or developing new technology. Trolls assert patents against

¹ Sometimes called a patent-assertion entity ("PAE"), non-practicing entity ("NPE"), or non-manufacturing entity ("NME").

businesses that actually provide goods/services, and a troll often knows it has a tenuous patent infringement position. The troll uses the cost of patent litigation, and the uncertainty of litigation outcome, to extract a settlement. Below are some attributes of a patent troll:

- (1) Does not develop its own technology. Acquires issued patents at bargain prices, often from a bankrupt company, or a university or large company that has no use for the patents, and then sues or threatens to sue others that provide goods/services for allegedly infringing one or more of the acquired patents.
- (2) Does not, and has no intention to, manufacture or provide products/services.
- (3) Focuses its efforts on patent acquisition, licensing and lawsuits. It searches for patent infringement targets, as opposed to manufacturing companies that use patents against competitors.
- (4) Makes broad, generalized allegations of infringement with little or no support, sometimes by merely matching words in its patent(s) to words used by a target to describe a product/service on a website, in advertising literature, or in a published patent application.
- (5) Has no manufacturing or research base, although it may invest a small sum in research to create an air of legitimacy.

Trolls scour trade shows, the internet, advertising materials, and sometimes published patent applications for targets. With the imprecise language of most troll patents, plus creative (some would say deceptive) interpretation of that language, a troll will allege a company's product/service infringes its patent(s). After targeting a company, a troll usually offers to settle for an amount far below the potential cost of litigation and/or far below the target's potential patent infringement damages exposure. Patent litigation typically costs in the range of \$2-\$4 million or more per side, with the average defense cost being about \$3.2 million.

The average cost of defending a patent infringement lawsuit is \$3.2 million.

Just to complete the summary judgement phase of patent infringement lawsuit can easily cost over \$1 million. From a business perspective, if a company can immediately settle a troll patent infringement lawsuit for \$50,000-\$500,000, it may make no sense to potentially spend \$2-\$4 million or more to defend a patent infringement suit. That is why an estimated 87% of businesses settle troll lawsuits before trial.

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The shell-corporation, non-manufacturing status of a patent troll has strategic advantages because: (1) the troll's target cannot counter-sue the troll for patent infringement, and (2) being a shell company with no assets, the troll is usually judgment proof.

III. Some Patent Troll Models.

A. Troll Example 1: Troll from Smaller to Larger Targets.

This type of patent troll trolls in stages. Trolls sometimes refer to this, using baseball parlance, as hitting singles, doubles, triples and home runs. Trolls often start with “singles.” Singles are easy targets; small businesses that quickly settle, rather than spending significant amounts on patent litigation. A typical “singles” approach is to initiate communications with maybe a few dozen or a few hundred companies asking, as an example, for a \$250,000 fully-paid-up patent license. The troll may then settle for anywhere from \$25,000 to \$125,000, depending on the target’s size and product/service offering. During this “singles” stage, the troll’s war chest may go from zero to \$20 million. The troll then swings for “doubles,” accusing larger companies of infringing and asking for more money per settlement, but still beneath the cost of patent litigation. At this stage the troll may identify dozens of companies and offer \$500,000-\$1,000,000 settlements. Depending on the target’s size and perceived exposure, each target may settle for \$100,000 to \$350,000. If a troll receives 60 “doubles” settlements at an average of \$200,000 each, its war chest has increased to \$32 million. Now the troll may swing for the fence and take on large corporations asking for settlements of tens or hundreds of millions each, or take an intermediate “triples” step pressing for \$500,000 to \$1 million in settlement per company. Each situation is different. For the sake of this example, assume the troll settles ten “triples” for another \$15 million. Now it has a \$47 million war chest, minus the expense to build it, to do battle with 3-5 large “home run” target companies.

B. Troll Example 2: Immediately Troll Large Targets.

Trolls sometimes focus on large targets first because it is a faster way to extract large sums. Instead of hitting “singles,” or “doubles,” or “triples” first, the troll immediately targets large companies that have significant potential damages exposure, possibly including hundreds of customers that could be sued by the troll. This approach can be particularly effective if the troll has a portfolio of patents in a space occupied by the target company. By settling, the target gets a license to the troll’s entire portfolio.

C. Troll Example 3: Operating Company Troll Crushing Small Competitors.

In this example, the troll is a larger company that wants to drive a small competitor out of business, or absorb the competitor. Here’s how it works. The troll provides products or services, and has a portfolio of patents that it developed or acquired. The troll’s management decides it wants to “monetize” this portfolio and targets small businesses including start-ups that may have technology more advanced than the troll’s, and be taking market share from the troll.

The operating company troll then identifies a target and files a patent infringement suit asserting a number of its patents. To settle, the troll demands either millions in a settlement payment, or a large ownership stake in its competitor plus part of the competitor’s profits going forward. The small competitor is trapped. If it defends the lawsuit, the costs may be \$2-4 million or more plus the management time spent on litigation, which combined may drive it under. On the other hand, if the competitor gives the troll (as an example) a 20% ownership stake and 15% of profits going forward, that could also drive the competitor under. At least it would make it difficult for the competitor to attract investors or sell - except to the troll. The troll can then absorb the competitor at a discount. So, an operating company troll can stifle an upstart competitor and absorb its technology, which the troll may never even use. The troll may be satisfied to keep new technology off the market, and continue offering the same old products/services.

IV. Protecting Yourself Before You Get “Trolled.”

The best thing to do, if possible, is to stay under a troll’s radar. Once you are in a troll’s cross hairs, it may be difficult and expensive to extricate yourself. Here are some pointers for avoiding trolls:

- (1) Do not post details of your products’ or services’ functionality, or a flow chart with process steps or exploded views of products, on an internet site or in publicly-disseminated documents.
- (2) Do not disclose detailed descriptions of your products’ or services’ functionality at trade shows.
- (3) Do not engage in discussions with unknown persons wanting to understand the details of how your technology functions.
- (4) Do not engage in discussions with persons wanting to “help” you further develop your technology, especially by licensing their technology to you (which is troll vernacular for forcing you to pay a license fee or be sued).
- (5) Do not engage in discussions with a large operating company allegedly wanting to sell patents in which it no longer has interest, but before disclosing its patents wants to know the details of how your products/processes work.
- (6) One way trolls identify targets is by reviewing published U.S. patent applications. If you file U.S. patent applications and do not plan to file in foreign countries, file a non-publication request with your U.S. utility application. Then the U.S. application will never publish. Only an issued patent, if granted, would publish.
- (7) Make sure agreements with vendors have *proper* indemnification provisions for patent infringement. The vendor’s indemnification responsibility should kick in as soon as infringement is *alleged*. If your vendor is not financially capable of indemnifying you, require the vendor to carry infringement insurance naming you as an additional insured.
- (8) If it makes business sense, join a patent pool. A patent pool is an agreement, usually between two or more manufacturing companies, to cross-license patents. The pool provides its members licenses to numerous patents for less than the cost for each member to negotiate separate licenses with the other members. A patent pool helps keep its members out of expensive litigation against one another. With respect to trolls, patent-pool managers have two basic strategies: (1) if the troll is a manufacturer, encourage it to enter the pool, and possibly threaten it with a counter-infringement lawsuit asserting the pool’s patents, or (2) if the troll is not interested in option (1), offer to buy a license to the troll’s patent(s) for all pool members. The troll’s asserted patents then become part of the pool and all pool members contribute to paying off the troll.

V. Actions to Take After Being Contacted by a Troll.

The first contact with a patent troll is usually when you receive: (a) a letter with an “offer” to license one or more of the troll’s patents, or (b) a recently-filed complaint naming your company as a defendant. Here are some basic steps to take after being contacted:

- (1) Immediately consult your attorney and check for: (a) indemnification by vendors, and (b) whether you have insurance coverage for a patent infringement suit.

- (2) Analyze the patents asserted by the troll to determine the risks involved. Develop non-infringement positions.
- (3) Open communications with the troll.
- (4) If applicable, explain to the troll why there is no infringement. A troll must plead a plausible case of infringement in a complaint or run the risk of paying your attorney's fees.
- (5) If applicable, explain why damages are minimal and not worth the troll's time to pursue.
- (6) File an *inter partes* review ("IPR") with the Patent Trial and Appeal Board ("PTAB") within one year after being served with a troll complaint. In an IPR you can attempt to invalidate the troll's patents as being anticipated or obvious in view of patents and printed publications. The IPR is a relatively fast procedure (most are completed within a year) and a patent is more likely to be invalidated in an IPR because: (a) claims are given their *broadest reasonable* interpretation, (b) the burden of proof to prove invalidity is a *preponderance* of the evidence rather than the *clear and convincing* standard used in federal court, and (c) the PTAB is more accustomed to interpreting patent claims, reviewing technical prior art, and combining references to find obviousness, than most federal court judges.
- (7) Stay any lawsuits brought against your customers until your lawsuit is resolved.
- (8) If it makes business sense, offer the troll a cross license to your technology.
- (9) Drop the product/service accused of infringement.

VI. Legal Mechanisms to Use Against Trolls.

Over the past decade, case law and statutes have helped weaken the troll's most valuable leverage – the cost of, and the potential amount the troll could win – in litigation. Following are some decisions and legislation that have helped weakened trolls.

- (1) **Lost profits damages are not available to trolls.** *Rite-Hite Corp. v. Kelly Co.*, 56 F.3d 1538, 1548 (Fed. Cir. 1995) (*en banc*); *Poly-America, L.P. v. GSE Lining Tech, Inc.*, 383 F.3d 1303, 1311 (Fed. Cir. 2011) (sales by non-exclusive licensee sister company insufficient).
- (2) **Injunctions are not available to trolls.** *eBay v. MercExchange*, 547 U.S. 388 (2006).
- (3) **Trolls can no longer sue disparate entities in a single lawsuit.** 35 U.S.C. §299.
- (4) **New pleading rules place a higher burden on trolls to do their homework before filing a lawsuit.** *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (complaint must set forth facts establishing a plausible case of infringement).
- (5) **Harder for a troll to maintain venue in a plaintiff-friendly forum.** *T.C. Heartland In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008); *Surfer Internet Broad of Miss., LLC v. XM Satellite Radio, Inc.*, No. 4:07 CVO 34, 2008, WL 1868426 at *1 (N.D. Miss. Apr. 24, 2008). Consequently, fewer lawsuits can be maintained in the trolls' historically favorite venue of the E.D. TX.

(6) New mechanisms, such as post grant review and inter partes review, can inexpensively (as compared to litigation) invalidate troll patents in the Patent Trial and Appeal Board. 35 U.S.C. §§311-19 (*inter partes* review); §§321-29 (post-grant review and covered business method review).

(7) Software or business method patents are more easily invalidated. *Alice Corp. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014) (an abstract idea is not patentable just because it is implemented on a computer; step 1 is to determine whether the patent claim contains an abstract idea, such as an algorithm, method of computation, or other general principle; step 2 requires a determination of whether the claim adds “something extra” that embodies an “inventive concept”).

(8) Awards of attorney’s fees are easier to obtain for the prevailing party. *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014).

(9) It is possible for people or entities that fund trolls to be held liable for the successful defense of a vexatious troll lawsuit. *Stan Lee Media, Inc. v. Walt Disney Co.*, No. 12-CV-02663-WJM-KMT, 2015 WL 5210655, at *2 (D. Colo. Sept. 8, 2015).

VII. Conclusion.

Patent trolls will always be with us, especially in the software arts. They are the ambulance chasers of the technology world. Be careful, vigilant, and know how to battle trolls.



David E. Rogers

602.382.6225

drogers@swlaw.com

Dave Rogers is a registered patent attorney with over 20 years of experience. He practices patent, trademark, trade secret and unfair competition law, including: litigation and arbitration; trademark oppositions, cancellations and domain name disputes; preparing manufacturing and technology contracts; and patent and trademark preparation and prosecution.