

The need to control patent trolls



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domains, we should be rapidly entering into a new paradigm of a smart Internet, where information finds you.

Unfortunately, much of the relevant Internet foundation technology is infested with patent trolls. Patent trolls are a problem in many technology sectors, not just the Internet, and are multiplying by the dozens.

Some trolls are simply patent-holding litigation entities controlled by trial attorneys that know a good “business” opportunity. Others are owned by business venture capitalists. It is a simple model—an arguably infringed patent can often be purchased for thousands or tens of thousands of dollars.

Since it often costs millions of dollars to defend against an infringement claim, with potential tremendous downsides, it is rational to pursue a settlement that costs less than the cost of defense, even if there is little merit to the patent itself or to the claim of infringement. Every day, patent trolls obtain large six-figure costs of defense settlements from technology companies for their stakeholders, and they retard the growth of technology companies in the most promising technology areas.

I suggest four solutions to cure the common troll:

- Create a compulsory licensing mechanism for patents whose owners are not making competitive use of the technology. Patent owners should be required to declare the areas or products that incorporate the patented technology. All other non-practiced areas should be subject to a compulsory license fee. Given the vast number of patents issued, an accused party should have 60 days within which to pay the license. Compulsory licenses are authorized by the treaties we have entered into, and we have significant experience with compulsory licenses of copyrighted works from which to develop an analogous patent mechanism.
- Cap damages at \$1 million and eliminate the possibility of obtaining injunctive relief for infringement of patents that are not in use, or not used commercially, by the patent owner.
- A mandatory fee-shifting provision should be put in place where the plaintiff is required to pay the defendant’s reasonable defense fees if the plaintiff does not obtain a better recovery than what was offered by the defendant. (Presently, there is such a cost-shifting mechanism in place; however, the relevant costs typically are a tiny fraction of the legal fees in a case.)
- Require that domestic defendants bring patent suits in the venue where the defendant’s primary place of business is located.

These remedies would provide fair compensation mechanisms for inventors and patent owners who have not commercially exploited their patents, would de-incentivize the current parasitical non-practicing-entities business model, and would lower the risks and burdens that small technology companies presently face, freeing capital for hiring and expenditures.

The White House Business Council expressed an interest in these ideas. Several of the business owners voiced frustrations with the current enforcement system at the meeting as well and agreed with me that this issue needs to be addressed.

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When I traveled with a group of business leaders from the Raleigh and Research Triangle Park region on Jan. 12 to meet with the White House Business Council, I expected and received an informative and engaging exchange focusing on what the federal government could do better to assist business growth.

To my pleasant surprise, there was strong support from the business leaders and from the WHBC as well regarding my concerns and proposed solutions to problems with our current patent litigation system.

As might be expected, those of us from the business community at the meeting expressed frustration with regulatory “headwinds” and the lack of available capital from local banks. There appeared to be a consensus among the business leaders that Sarbanes-Oxley and Dodd-Frank were causing too much harm. There was much concern expressed about a widespread lack of confidence in the economy, which stems in large part from the still dysfunctional housing market.

Amid these criticisms, the WHBC staff, led by Ari Matusiak, were gracious, responsive, and informative. They explained the Obama administration’s view on the economy and on policy solutions for job growth. They said that complaints of undue regulatory burdens were a common refrain from the business community.

While I was interested in participating in this forum to learn more about the issues confronting other businesses in our region and to see up close how the White House viewed these issues, I also wanted to discuss how intellectual property law hindered or advanced business growth. Specifically, I wanted to share my concerns regarding how our current system of patent enforcement poses serious problems for many startup and technology companies.

There have been efforts to address this issue over the last decade or so. For one, the American Inventors Protection Act of 1999, together with the yeoman work of Director David Kappos, brought the U.S. Patent and Trademark Office into the 21st century. But those improvements only address half the equation—the prosecution and grant of patent rights.

The AIPA minimally addressed enforcement issues, particularly the most troubling one of all: patent “non-practicing entities,” more affectionately known as “patent trolls.” Here is how they work

Tech companies in certain sectors, particularly in mobile telephony and in Internet-related fields, enter a market sector mined with hundreds of thousands of patents. It simply is not feasible for a new or small company to review and clear the field of potentially relevant patents when launching a new technology venture. For example, our patent enforcement system is retarding progression of the Internet and corresponding business growth.

The Internet created an entire new and worldwide industry and revitalized old industries. Yet it was largely the brainchild of and continues to flourish.

The Internet presently is a static network. You move around it, like a spider navigating a giant web looking for what it wants. The Internet is not “smart” — not yet.

But with the current state of data analytics, parallel processing capabilities and the forthcoming rollout of countless new Internet