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IP FRONTIERS

Throwing patent trolls over the bridge

On June 4, spurred by increased attention that the topic has received in recent weeks, the White House issued a press release providing various legislative and executive recommendations to address the issue of patent trolls.

Patent trolls — also referred to as non-practicing entities or patent assertion entities — are individuals and entities that obtain patents not for the purpose of protecting their own intellectual property or contributing toward the innovative ecosystem, but rather, as part of a business model that revolves around the aggressive and opportunistic enforcement of those patents against others.

It is common for trolls to acquire patents for the sole purpose of threatening and/or bringing thousands of infringement actions against various defendants, from large companies, to small businesses and end users. Faced with the imminent and intimidating legal costs associated with defending a patent infringement suit, defendants often license technology from, or settle with patent trolls before infringement suits are fully litigated, thereby giving the troll exactly what it was looking for — the defendant's money.

By ERICA M. HINES
Daily Record Columnist

Patent trolls have injurious and widespread negative repercussions on both innovation and economic growth in the U.S. Estimates suggest that patent trolls threatened over 100,000 companies with patent infringement in 2012 alone.

Indeed, the oppressive nature of trolls' activities has caused development to stagnate in some fields. Further, at least one study found that the financial gain received by trolls amounted to less than 10 percent of the share value lost by defendants, indicating that patent troll litigation results in considerable net losses to society.

The crippling extent of patent trolling was recently unveiled in a study that was released in April. Strikingly, the study found that, as of 2012, a majority of patent litigations filed in the United States were brought by patent trolls. Further, the study's findings suggested the possibility that individuals and entities are increasingly applying for patents with the sole intent of filing lawsuits based on the patents, as opposed to applying for patents that cover innovative technologies that the applicants are commercially interested in.

With the pervasiveness of patent trolling at an all-time high, there has been a profound recent bipartisan movement to confront the trolling problem. Included in the movement are various recently-introduced congressional bills that seek to tackle patent trolls. The Saving High-Tech Innovators from Egregious Legal Disputes Act (Shield Act), introduced in February, applies to patents in all technology areas, and aims to require a patent troll to pay defendants' litigation costs if the troll's infringement suit turns out to be unsuccessful.

The Patent Quality Improvement Act, introduced in May, aims to expand the scope of post-grant review provisions for challenging patents. Other bills have been introduced over the past month or so that aim to make it easier to determine the real party in interest behind a patent (e.g., by requiring that patent ownership information be recorded with the U.S. Patent and Trademark Office), by shifting the greater cost burden of litigation onto patent trolls, and by heightening patent litigation pleading requirements.

In the wake of the recent legislative stand against patent trolls, the White House's June press release strongly reiterates and reinforces the anti-patent troll movement. In the press release, the White House issued five executive actions and seven legislative recommendations designed to protect innovators from frivolous litigation and to ensure the highest-quality patents in our system.

The actions and recommendations include, for example, requiring patent applicants and owners to regularly update ownership information so as to identify the real party-in-interest (thereby thwarting a common troll tactic involving setting up shell companies to hide their activities); providing new targeted training to patent examiners to help improve the quality of claims in issued patents; permitting more discretion in awarding fees to prevailing parties in patent cases; expanding the U.S. Patent and Trademark Office's transitional program for post-grant review of covered business method patents; and protecting off-the-shelf use by consumers and businesses.

Between the emergent bipartisan Congressional movement and the backing from the White House, it is very possible that numerous steps will be taken in the near future to address the pervasive patent troll issue, for the betterment of the U.S. economy as a whole.

Erica M. Hines is an associate with the law firm of Heslin Rothenberg Farley & Mesiti PC. She can be reached via email at emh@hrfmlaw.com, or at (518) 452-5600. The previous statements are for information purposes only and do not constitute legal advice.