

BOOK REVIEW

PATENT TROLLS: PREDATORY LITIGATION AND THE SMOTHERING OF INNOVATION

WILLIAM J. WATKINS, JR.

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It wouldn't be a stretch to compare patent trolls to the playground bully, initiating scare tactics to gain control and in the case of the trolls, revenue. Following Bill Shughart's informative foreword, William Watkins packs a good amount of information into his book about patent trolls. Watkins begins by giving the reader a brief history of patent law, explaining how trolls operate, outlines problems with the current laws and court system, as well as providing some recommendations for reform. The focal points of the book are not only the trolls themselves but also the incredibly plaintiff (troll)-friendly U.S. District Court in Eastern Texas.

At the outset, Watkins provides an informative history lesson on patent law, tracing the concept of patents back to the 1400s and

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the medieval guilds in Venice and other cities. British Parliament reformed patent law in 1623 due to abuse by Elizabeth I, and set a fourteen-year exclusive right of production to the “true and first inventor” (p. 4). The United States followed suit with the Constitution of 1787, providing exclusive rights but the codification of patent law in the U.S. arrived three years later with the U.S. Patent Act of 1790. The Act required, among other things, a full description of the invention in exchange for the fourteen-year exclusive right to utilize the invention (p. 5). Further revision to the Patent Act came in 1952, extending patents to a twenty-year term. The primary industry seeking the longer patent term was the pharmaceutical industry, which faced a long time horizon to recover its R&D investments due to the expense and time required for FDA approval through clinical trials.

Over the past several decades, the number of patents filed has seen explosive growth, only to be examined by fewer examiners at the US Patent & Trade Office (USPTO). According to the Patent Act, violation of a patent is a strict liability tort, meaning that damages can be awarded even if the offending violation was unintentional. As a result, the system has been viewed as biased toward the plaintiff. This has opened the door for the rent-seeking activities of patent trolls, which are typically a non-practicing entity (NPE), which obtains a patent on typically old, broad-based software and computer technologies in the hopes of filing suit later against some entity utilizing the technology (p. 8). Trolls typically have no intention of ever operating in the industry. Rather, they seek to profit simply by owning the patent.

Interestingly, Watkins notes that trolls will often opt for “protection money rather than jury verdicts,” (p. 13). Though Watkins doesn’t make the explicit connection, this seems to be a tactic not far flung from the Sicilian Mafia. Be it the troll or the mob, the threat of greater harm, whether it is a large jury verdict for the troll or physical harm imposed by the mafia, either circumstance tends to lead the target toward opting for a settlement or “protection money.” While Watkins paints a very strong case against trolls, he does also take the time to point out some of the supposed benefits of trolls according to the supporters, including helping the small inventors and businesses that do not have the resources to take on the likes of Google, Apple, or Microsoft for patent infringement (Watkins later illustrates the fallacy of this proposition). Moreover,

trolls have property rights to the patents they own and as such, are simply protecting their property rights. A 2011 study by Boston University researchers suggests patent infringement cases brought by trolls have resulted in losses exceeding \$83 billion annually from 2007 through October 2010 (p. 17).

As is the case with all rent-seeking activities, resources are being wasted in the legal system to capture revenue from the troll's targets through either settlements or infringement lawsuits. And the trolls are skilled at their craft, erecting puppet LLC's and aligning with local charities to play on the sympathies of jurors. It's not so hard to win a verdict against a big corporation like Apple when some of the award will be diverted to charitable causes locally. This has been the tactic in the Eastern District of Texas, which hears the most patent troll cases in the country and has historically sided with the plaintiff in an overwhelming fashion. Nearly 25 percent of all patent cases are heard in the Eastern District of Texas, with nearly 80 percent of the cases yielding a plaintiff verdict, compared to a national average of nearly 60 percent (p. 29). Watkins says the attraction to the Eastern District is the result of a combination of factors, including the lack of large corporate presence, a largely uneducated jury pool, and an older, less technologically savvy population. Moreover, this district tends to be quick with its cases, has the lowest rate of summary judgment motions in the U.S., and has judges experienced with patent law. As a result, plaintiffs prefer to file in this District, given the historical odds are in their favor for a jury trial with a positive outcome for the plaintiff (pp. 29–31).

Watkins provides a nice summary overview of a sampling of cases heard in the Eastern District of Texas from 2002 through 2010. A few cases presented are actually won by the defendant, but the majority are victories for the trolls. A common theme runs through them—that of the bully seeking rents in the form of fees, settlements, or royalty payments or having the defendant run the risk of a much larger injury at the hands of a jury unlikely to understand the nuances of the patent itself and patent law. In some cases summarized by Watkins, several large corporations entered into settlement agreements to avoid trial, while one firm rode the case out only to be handed a very expensive judgment, as well as incurring significant legal fees. In a few instances, the trolls were found to have invalid patents and lost their case.

Several suggestions for reform are offered in the book in chapter 8. One of the most intriguing is to shorten the length of the patent for software companies to a five year instead of twenty year patent. The argument rests on the nature of the industry. Pharmaceutical companies do need a longer patent window to recover their R&D expenses. The software industry, however, moves at such a rapid pace that most software is irrelevant in five years (p. 50). As such, adjusting the length of the patent to more closely match the nature of the industry such as in software would allow the inventor to capture their profit share while concurrently eliminating the likelihood of patent trolls being able to capitalize on old patents to hold firms hostage for payouts or jury verdicts. Other recommendations include allowing easier transfer across court districts to reduce the plaintiff's ability to "shop" for a friendly court. This would require plaintiffs to demonstrate they are filing in the proper venue, particularly if it is outside their locale (p. 51). A third interesting concept is to have patent cases heard by professional or specialized juries (p. 52). This would better ensure that the jury understands the cases being tried before them since they would be skilled and knowledgeable in the area being tried for patent infringement. Use of an international industry requirement rather than the ITC domestic industry requirement would require patent trolls to be active in the industry to be permitted to bring a patent infringement suit forward (pp. 51–53). This would prevent trolls from simply buying patents with no intention to ever operate in the industry. Finally, we could take a lesson from Europe. European patent law does not issue patents for computer programs, mathematical methods, business methods, and the like. As such, it is much more difficult to have a broad-based patent infringement claim. Further, the European Patent Office (EPO) allows anonymity in patent cases, which lessens the threat of retaliation for challenging a patent. Importantly, it is also significantly less expensive to file for a patent review, with the USPTO charging at least \$100,000 and the EPO cost being roughly 20 percent of that expense (p. 57).

Watkins closes by calling on Congress to change the rules for corporate residence, inviting the Federal Circuit to revisit how it establishes personal jurisdiction, and again calls upon Congress to investigate creating a special patent court system with professional jurors. A modernized court system, according to Watkins, would

greatly reduce the (rent-seeking) behavior of trolls, reduce the incidence of litigation, and would restore the incentive to innovate back to the forefront for U.S. businesses, a key component for economic growth.