

On Patent Trolls and Other Patent Myths

By Alexander Poltorak

Fear of the unknown fueled by the human imagination has spawned legends and myths that make up the folklore of nations. So, too, does the folklore of the modern corporation have its myths. Few images are more frightening than an injunction-threatening, damages demanding patent holder. The arcane and oft misunderstood world of intellectual property casts expressionistic shadows on ravages of patent enforcement.

Many myths have been told in the patent wonderland. Today, corporate fathers read their children scary stories before kissing them good night, the stories about demon patent trolls that terrorize the noble business folk. Instead of nursery rhymes the corporate dads read their children the *Ballad of the Patent Troll*. It goes something like this:

*On the road of innovation
Sits an ugly Patent Troll.
From the largest corporations
He extorts a patent toll.*

*Your resistance is futile
Patent Troll is strong and vile.
Wielding claim as an ax
He'll exact his patent tax.*

*Armed with mighty patent claims,
Claiming willfulness and tort,
Treble damages and pains
He drags infringers into court.*

*Corporations, be united!
He who slays the Patent Troll,
By the Queen he will be knighted
And exalted by us all.*

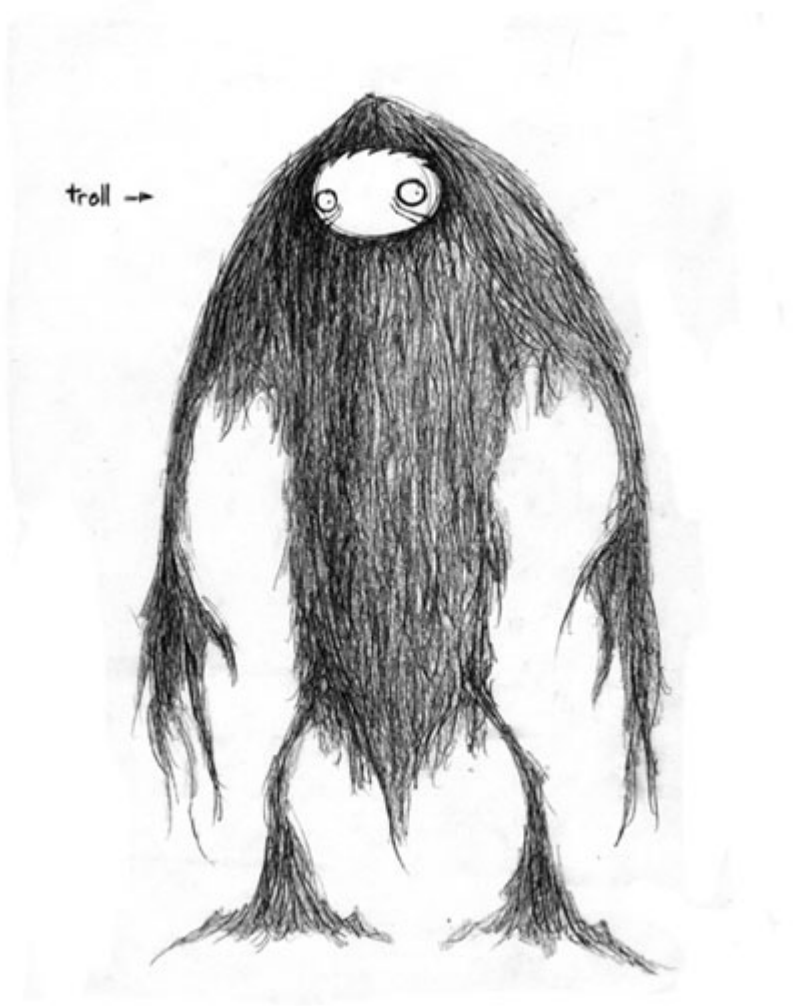
As much as I find this stories enthralling and despite the protest of the poet in me, I will debunk these myths so that children can sleep at night without fear.

A Patent is an Exclusionary Right

It is useful to review the definition of patent trolls. Peter Detkin, who coined the expression during his tenure as Intel's patent counsel, which he has since modified, defined the patent troll as someone who buys a patent for enforcement purposes but does not practice the patented invention. "We were sued for libel for the use of the term 'patent extortionists' so I came up with 'patent trolls,' Detkin said. 'A **patent troll** is somebody who tries to make a lot of money off a patent that they are not practicing and have no intention of practicing and in most cases never practiced.'"¹ Other terms used are patent *vulture*, bottom feeders, pirates and *terrorist*, not to mention *canis filius*.¹) This definition implies that to be a legitimate patent owner, among other things, the owner must practice his or her invention. The term patent troll also implies, as Bruce Berman

¹ It means "son of a female dog" but sounds a whole lot better in Latin.

points out in its *IP Investor* column “ Illegitimate Assertions?” an image of a sub-human species who “bottomfishes” by dragging its hook low in the water or casting its net widely thereby trolling the waters in the hope of landing practically anything of value. In real estate, equities and other areas of tangible investment, wise bottomfishers, like Warren Buffett, are considered heroes.



1 Self-portrait in pencil and charcoal

Myth #1. “A patent is needed to practice the invention.”

Some inventors believe that they need a patent in order to practice their invention. In fact, nothing can be further from the truth. Nobody needs a patent in order to practice their invention. In fact, most companies produce goods for which they do not have a patent or the patent has expired. A patent does not give the patentee the right to practice the patented invention. It confers no positive rights. A patent is strictly a negative or exclusionary right. A patent gives the patentee the right to *exclude others* from using, making, selling, offering for sale or importing the patented invention.

How does this myth affect the notion of the patent troll? A patent troll is someone who does not practice the invention protected by the patent he owns, it implies that a patent owned by someone who practices the invention differs from a so called “paper” patent owned by someone who does not practice the teachings of the patent. Since a patent does not confer on the patentee the right to practice his own invention, the patent right has nothing to do with whether or not the inventor practices his invention. Consequently, the whole notion of a “paper” patent has no basis in patent law.²

Moreover, patent system, a *sine quo non* of information exchange, was meant to be an inducement for dissemination of ideas to “promote the progress or useful arts” in the language of the Constitution. Patent is a quid-pro-quo for invention disclosure, not for practice on an invention. Once an inventor discloses her invention to public through a patent application she has upheld her end of the bargain. If the invention is novel and non-obvious, she will be rewarded with a patent. None of this has anything to do with the practice of the invention. A preposterous notion of a “paper” patent is simply a derogatory label invented by the noble corporate folks to belittle patents owned by independent inventors – the common folks – who are now called “patent trolls.”

In fact, the noble corporate folks sue each other on paper patents as they are going out of style. A patent infringement lawsuit brought by Kodak against Sun Microsystems is just one example of this phenomenon. Kodak sued Sun for infringing Java patents that Kodak inherited from Wang Laboratories. Kodak itself, as it is well known, is not in the software business. This fact did not stop Kodak from collecting \$95 million from Sun. So much for the nobility of the corporate folks.

Myth #2. “It is not ‘nice’ to sue for patent infringement.”

As an exclusionary right, a patent is nothing but a license to sue or an option to bring an action for infringement. It has no other function. Consequently, to blame inventors for suing infringers of their patents is at best disingenuous – that is what patents are for! As the ancient said, *damnant quod non intellegunt*. (i.e. They condemn what they do not understand.)

Moreover, a corporate officer or director who is aware of an infringement of some patents owned by his or her company and who fails to enforce these patents may be held liable for breach of the duty of care with respect to the management of corporate assets.ⁱⁱ In fact, corporate folks sue each other for patent infringement as there was no tomorrow. Corporate attorneys schooled in Latin take the position enunciated by the Romans, *Quod licet Iovi, non licet bovi*, i.e. “What Jupiter may do, the ox may not”. To this the inventor not schooled in classics cleverly retorts, what is good for the goose is good for the gander.

² Only in the measure of damages does the law differentiate between the patentee who practices the patented invention, who may under certain circumstances be entitled to lost profits, and a patentee enforcing a paper patent who is only entitled to reasonable royalties.

Patent licenses are of two kinds: the so-called carrot (voluntary) licenses and stick (compulsory) licenses. The former are lately exalted by the gurus of management consulting as the way to monetize their intellectual assets. They proudly announce that IBM alone derives one billion dollars in licensing revenues annually. This is deemed a good thing. Stick licensing, on the other hand, is held to be a bad thing. Truth be told, however, every carrot license is a stick license in disguise. (In the patent wonderland these disguises are quite common.) Indeed, who would ever license a patent (and pay for it) if not for the fear of a possible patent infringement suit? If good fences make good neighbors, good patents make good partners (licensees and licensors).

In the good ol' days, the noble folks use to duel over such deplorable offences as the theft of intellectual property. Back then, ideas were held in high esteem. Nowadays people go to court. Sabers are changed for patents and pistols – for legal briefs. It may be less romantic but no less noble. If we do it more often, perhaps ideas will be held in high esteem once again.

Myth #3. “The value of a patent is the same as the value of the patented technology.”

Many patent valuation consultants make the not-so-subtle mistake of equating the value of the patented technology (the invention or any products derived from it) with the value of the patent that protects it. Like the wizards of old, they start with valuing a patent, distract your attention for a moment with wizardly math and then, by slight of hand, substitute the patent for the technology it protects. Anything goes in the patent wonderland. This is nothing short of absurd no matter how wizardly. Both in law and economics, a patent is a state-sanctioned monopoly granted in exchange for disclosure and its value is the incremental value of the enhanced cash flows resulted from that monopoly.

Indeed, the patent and the product covered by the patent live two separate lives. The patent has little to do with the patented product, besides protecting the monopoly afforded to the product by virtue of the patent; and the product has little to do with patent that protects it. A strong patent does not necessarily reflect a successful invention; and many successful inventions are covered by patents that are not worth the paper they are printed on. Many products are introduced to the marketplace well before the patents protecting them issue from the patent office and many continue their commercial life well after the patent expire. The value of the technology is mainly determined by its desirability and competitive advantage, i.e. market demand. The value of the patent, on the other hand, depends on completely different factors, namely, how broadly are claims crafted, have they been amended during the prosecution, are there any estoppels in the “file wrapper,” how vigorously the patent is enforced, how easily its validity may be challenged, and how easy it is to design around. This is another illustration that whether or not the patent is practiced is irrelevant to the right to assert the patent. In fact, some

“paper” patents may be worth a whole lot more than some “practiced” patents, which are not worth the paper they are printed on.

The value of a patent depends on the willingness and ability of the patentee to enforce it. The owner of an infringed patent who hesitates to enforce it reduces the value of the patent to zero. It is incumbent on inventors and corporate managers alike to enforce their infringed patents.

Myth #4. “The patent system is fair.”

A patent is a bargain between the State and an inventor wherein the inventor is induced to disclose his invention by the promise of a limited monopoly (20 years from filing). With the median cost of patent litigation exceeding \$4 million, this promise is of little value to a small inventor.

Ironically, the law (35 U.S.C. §112) requires an enabling disclosure from a patentee. This means the patent disclosure must be sufficiently detailed to *enable* a person with ordinary skills in the art to practice the invention without undue experimentation. However, it does nothing to *enable* the patentee to enforce his exclusionary rights. The inventor upholds his end of the bargain by disclosing his invention in the patent application, thereby forfeiting a possibly valuable trade secret. By failing to provide the impecunious patentee any *effective* means of enforcing the patent rights, the State, however, breaches its promise of a limited monopoly for the patentee. (Inventors in R&D departments of companies inevitably “assign” their rights to the company which is in a much better position not only to commercialize inventions by to enforce the rights associated with them.) Independent inventors inevitably get the short end of the stick in this bargain. So much for equity and justice in the patent wonderland.

Aided by this tilted playing field, the noble corporate folks infringe patents owned by helpless independent inventors with impunity. In the good ol’ days it would have been considered vulgar to speak of money among the noble folks. Today, as *US News and World Report* put it on a different occasion, “American justice is the best justice your money can buy.” Or, as the late Johnnie Cochran said, “Justice is color-blind – it sees only one color – green.”

The only chance inventors have to see justice is to find a law firm or a patent enforcement organization who would take their case on a contingency. To some, these agents, who are seen as patent trolls by the corporate folks, are seen as the angels of hope or the white knights rushing to the risqué of the lonely and downtrodden inventors.

Do patent trolls really exist?

As previously noted, the accepted definition of a patent troll is someone who buys a patent for enforcement purposes but does not practice the patented invention. It would be silly to argue about a definition. After all, a patentee can be his own lexicographer (i.e., they speak in their own language in the patent wonderland). The question is, is this activity wrong or not? As indicated above, patent law does not distinguish between a patent that is practiced and a patent that is not. Therefore, this notion of a paper patent has no basis either in the law or in economics.

Having said that, there have been some instances of patent misuse and abuse that do not fall into the definition of a patent troll. Submarine patents are the prime example; but they are hardly a threat today. First, depth charges were dropped on them in 1995, when the term of a United States patent was changed from 17 years from the date of issue to 20 years from the effective date of filing. It is no longer profitable to delay issuance of patents as that diminishes their remaining life. Last year the Fed. Circuit ruled them unenforceable on the theory of prosecution laches. By and large, submarine patents are a thing of the past.

Those patentees who, like trolls, sit on their patents waiting for damages to accumulate are shooting themselves in the foot. Laches is an effective defense against a patentee who lurks hidden in the bushes (or under the bridge, as trolls do) while an infringer's sales continue to grow.³ Similarly, patent owners who frivolously assert their patents without any real evidence of infringement, hoping to exact nuisance value settlements, can be sanctioned under Rule 11.

The law has already addressed the difference between a patentee who practices the patented invention and one who doesn't. The difference is not in the right to assert the patent – they share the same right – but in the remedies available to them. A market participant may be entitled to receive lost profits, while a paper patent holder can receive only reasonable royalties, which, typically, are a fraction of the lost profits.

Just as trolls are mythological figures in Scandinavian folklore, patent trolls are nothing but mythological figures of the corporate folklore.

Are patents a tax on innovation?

Myth #5. "A patent is a tax on innovation."

A patent is an intangible asset. Information contained in the patent, once published, can be readily copied and used. This presents what is known in economics as the classic "free rider" problem. A free rider problem is often solved by levying taxes.

³ How many patent trolls does it take to change a bulb? – None. A patent troll would not change the bulb; he would sit in darkness waiting for the damages to accumulate.

The army, the police and your municipal services are all supported by our taxes. The patent system was in part created to solve the free rider problem.

A patent is a bargain between the State and an inventor wherein the inventor discloses his or her invention to the public in exchange for a limited monopoly. The inventor can share this monopoly by way of licensing the patent in consideration of royalty payments – a tax if you will. A patent may, therefore, be viewed as a form of tax. However, a patent is not a tax on innovation (it is not the inventor who is taxed) – it is a tax on the *exploitation* of innovation created by others. This is not merely semantics. Think of a patent as a road toll on the highway paved by the inventor to a commercialized invention or product. If the manufacturer of the product wants to get from point A to B via this highway, it is only fair to pay the toll to reward those who have build the road.

From the high vantage point of the noble corporate folks this highway looks different. Remember the ballad they sing to their children at night?

*On the road of innovation
Sits an ugly Patent Troll.
From the largest corporations
He extorts a patent toll...*

...After all, they think all roads and all land belongs to them.

In the patent wonderland there are many myths. Don't scare your children with them. Just kiss them good night.

ⁱ Brenda Sandburg, "Inventor's lawyer makes a pile from patents," *The Recorder*, July 30, 2001.

ⁱⁱ See more on this topic in A. Poltorak and P. Lerner, *Corporate Officers and Directors may be Liable for Mismanagement of Intellectual Property*, *Patent Strategy & Management*, May and June 2000.