

On Patent Trolls and Other Patent Myths

The fear of the unknown channeled through the creativity of the human mind begot many legends and myths that make up the folklore of nations. Before any scientific knowledge of the Enlightenment had a chance to dispel ignorance, the latter produced wonderful stories in which people were demonized by the forces of nature, which had been vivified by the unbridled imagination of the frightened mind. The enchanted world of demons and trolls, witches and warlocks, fairies and elves, gnomes and imps... Had Greeks known science as well as philosophy, much of our literature would never have been written. And thank God for the Dark Ages! In the age of nanotechnology, the literary genius continues to feed on the fear of unknown. And what is more frightening than being sued by a patent holder these days? And what is more misunderstood than the arcane world of intellectual property?

Many myths are told in the patent wonderland. Nowadays, corporate dads read their children scary stories before kissing them good night, the stories about patent trolls that terrorize the noble business folks. Instead of nursery rhymes the corporate dads read their children the Ballad of The Patent Troll:

On the road of innovation

Sits an ugly Patent Troll.

From the largest corporations

He extorts a Patent Toll.

Armed with mighty patent claims,

Claiming willfulness and tort,

Treble damages and pains

He drags infringers into court.

Faster than a Rocket-docket

Sticks his hand into your pocket.

Troll, disguised as an inventor,

Will deprive you of your splendor.

First ignore him, then DJ him,

Try to motion him to death.

At the end you'll have to pay him.

Troll will share in your wealth.

Casting wide a patent net,

All infringers he will get.

Faced with permanent injunction

Ask for Rule 11 sanction!

Raise your laches and estoppel,

102 and 103...

Your defenses Troll will trample –

You will end as licensee.

Your resistance is futile

Patent Troll is strong and vile.

Wielding claim as an ax

He'll exact his patent tax.

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 without mercy so that the children can sleep at night without fear.

Patent is an Exclusionary Right

So long as we are going to talk about patent trolls, it wouldn't hurt to give a definition of this term. Peter Detkin, who coined the expression during his tenure as Intel's patent counsel, defined the patent troll as someone who buys a patent for enforcement purposes but does not practice the patented invention. This definition implies that to be a legitimate patent owner, among other things, the owner must practice his or her invention.¹

Myth #1. Patent is needed to practice the invention.

Many inventors believe that they need a patent in order to practice their invention. In fact, nothing can be further from the truth. Firstly, nobody needs a patent in order to practice their invention and², in fact, most companies produce goods for which they do not have a patent or the patent has expired. Secondly, 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? Well, a patent troll is someone who does not practice the invention protected by the patent he owns (since no female trolls have ever been sighted, we will dispense henceforth with the politically correct "he or she" with respect to trolls), 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.³

In fact, the noble corporate folks sue each other on paper patents without any hesitation. A patent infringement lawsuit brought by Kodak against Sun Microsystems is a recent example of this phenomenon. Kodak sued Sun for infringing Java patents that

¹ At the IPO Conference on Patent Trolls, Peter Detkin denied such implication and stated that this was not what he meant by his definition of a patent troll.

² One only needs to make sure that one doesn't infringe the patents of others.

³ 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.

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*.⁴

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. In fact, corporate folks sue each other for patent infringement like it was going out of style. 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.

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.

Patent value

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 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

⁴ They condemn what they do not understand

wizardly math and then, by slight of hand, substitute the patent for the technology it protects. Well, anything goes in the patent wonderland. This, however, is nothing short of absurd no matter how wizardly. Both in law and economics, a patent is a monopoly 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. This is another illustration that whether or not the patent is practiced is irrelevant to the right to assert the patent right.

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.

Equity

Myth #4. 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. With the median cost of patent litigation exceeding \$2 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. 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 paper monopoly, the State, however, breaches its promise of a limited monopoly for the patentee. 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 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 put it, Justice is indeed color-blind – it sees only one color – green.

Are there patent trolls?

As previously noted, Peter Detkin defined a patent troll as 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 bad or not?

As I wrote above, the patent law does not distinguish between a patent that is practiced and a paper patent. 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, but they don't fall into the definition of a patent troll. Submarine patents are the prime example; but they are hardly a threat today. Firstly, they were depth charged 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 statutory life. Moreover, 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.⁵ Similarly, patent owners who frivolously assert their patents without any 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 get 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.

Is a patent a tax on innovation?

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

⁵ 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.

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 classical free rider problem. A free rider problem is often solved by levying taxes. 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.

As I wrote above, 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.

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