

Disclaimer: The views expressed in this webinar do not necessarily reflect those of any particular entity. In fact, some of the views expressed may not even reflect the views held by the presenters, their clients, or even their acquaintances. Moreover, the term "troll" used throughout this webinar is not intended to be pejorative, but rather a means of describing a type of patent enforcer.

WEBINAR OUTLINE

WHO OR WHAT IS A TROLL?

- It is difficult to define a troll:
 - While some trolls are non-practicing entities ("NPE"), not all NPEs are trolls. For example, think about businesses that practice a fraction of their patents and universities.
 - While some trolls buy patents merely to assert them, most people wouldn't consider Apple, Microsoft or RIM to be trolls. Yet these three companies combined to buy Nortel's patent portfolio for \$900 M.
 - While many trolls assert patents they didn't invent, we've also met "trolls" who "invented" the patents they were asserting (e.g. ArrivalStar, Ronald Katz, and Walker Digital).
 - Nathan Myhrvold, CEO and Founder, Intellectual Ventures, claims that a troll is merely "[s]omeone you don't like who owns patents."
- Recognizing trolls:
 - Judge Rader, Chief Judge of the Court of Appeals for the Federal Circuit, recently suggested that a troll can be defined as "[a]nyone who attempts to enforce a patent far beyond its actual value or contribution of the prior art." He also recognized that the usefulness of the definition was limited by its hindsight application.
 - Anyone who tries to cheaply monetize their investment in patents.
- Identifying whether you are dealing with a troll matters. Why?
 - Patentees may be motivated by lots of needs and desires. Trolls are merely looking to monetize their patent(s) and maximize their overall return in doing so.
 - As a result your focus in dealing with a troll should probably differ significantly from your focus when dealing with other types of patentees.

WHAT DO YOU WHEN YOU FIRST MEET A TROLL?

- Usually trolls write or call with a soon-to-be filed complaint for patent infringement in hand. Occasionally you hear from a client that a troll is shaking them down. Sometimes, you'll receive a soft cease and desist letter.
- First steps once you meet a troll (probably (but not necessarily) with the assistance of patent lawyer):
 - Check the patent (claim 1, filing date, expiration date).
 - Investigate company knowledge of invention.
 - Investigate potential infringement target.

PATENT LAW BASICS

- Patent infringement is an absolute liability tort.
- Infringement is when you make, use, sell, offer to sell, or import a patented invention (35 U.S.C. § 271(a)).
- “Patented invention” means a claim.
- Patents may have as few as one claim and could have hundreds of claims. Each represents a potential infringement.
- Patents also have a title, an abstract, drawings, and a description. Don’t confuse any of these with the claims. THEY ARE DIFFERENT.
 - Read the claims.
 - Does your company make, use, sell, offer to sell, or import anything that has all of the elements of claim 1 (or any other claim)?
 - If you don’t make the product, can you get help from supplier?
 - Can you determine whether the product is unimportant?
 - Does your company have any prior art?
- Patent law provides the problem and the solutions.
 - First aid from patent law: raise the risk of invalidity with the troll.
 - Ask for private meeting regarding uncovered invalidity issues.
 - Request an *ex parte* reexamination at the PTO.
 - Assert invalidity in litigation (may lead to early summary judgment).
 - Four major invalidity theories:
 - Anticipation (total eclipse) (35 U.S.C. § 102).
 - Obviousness (combine references to form a total eclipse) (35 USC § 103).
 - Non-patentable subject matter (35 USC § 101).
 - Indefiniteness (lack of written description) (35 USC § 112).
 - Narrow construction of claims.
 - Avoid even the appearance of willfulness:
 - Willfulness is a jury issue that could result in up to treble damages.
 - Behaving badly in litigation is a ground for finding willfulness.
 - Disrespecting the patent system is the main ground for finding willfulness.
 - Disrespecting the troll may be mistaken for disrespect for the patent.

HOW DO YOU GET ACROSS THE BRIDGE (WITH OTHER) “GOATS”?

- Working with others:
 - Consider being the loudest goat!
 - Minimize defense expenses.
 - Find common ground.
 - Maximize joint defense opportunities.
 - Consider joint representation.
 - Make joint defense agreements.

HOW DO YOU DEFEND YOURSELF FROM TROLLS?

- Unless your business stops making or doing everything, you will be the target of a troll sometime if not lots of times.
- Excluding the option of becoming so skinny the trolls won't bother to eat you, how can you defend yourself?
- Be less interesting/inviting:
 - Avoid even the appearance of willfulness.
 - “Push back” on each troll:
 - Search prior art.
 - Consider reexamination.
 - Be proactive in litigation.
 - Seek attorneys' fees at the end of the road.