



# Illegitimate assertions?

The term patent trolling is frequently used pejoratively by IP owners that invest heavily in R&D to create their rights. But what, in fact, are these IP asserters doing wrong?

**patent troll** (PAT.unt trohl) n. A company that purchases a patent, often from a bankrupt firm, and then sues another company by claiming that one of its products infringes on the purchased patent. — *adj.*  
— patent trolling pp.

Patent trolls have been all over the news lately. The term has become synonymous with the unfair assertion of questionable IP rights and “extortion” of licensing royalties. Intel Corp coined the term a few years ago, when it was experiencing unprecedented attacks on its patents from financial speculators who neither produce nor practise inventions.

My interest in this month’s IP Investor is not to knock owners who take advantage of weaknesses in the patent system or portfolios. I would rather explore the fine line between legitimate assertion of IP rights and those seeking a handful of royalty dollars through nuisance actions.

Fundamental to patent holders is the right to defend their rights by bringing suit. Companies with substantial patent portfolios are surprisingly vulnerable to challenge by small, independent patent owners who acquire rights for their strategic financial value. In this context, an independent’s very lack of portfolio for a defendant to target in a counter suit becomes its strength. In the early days of independent patent enforcement, individuals or small companies seldom had the resources, or hubris, to challenge the patents of major companies. Notable exceptions were submariner Gerald Lemelson, intermittent windshield wiper magnate Robert Kearns and Eugene Lang, who founded Revco in the 1950s.

These people saw that the weaknesses inherent in the patent system regarding pendency and validity could be exploited. They also saw how vulnerable many large companies’ portfolios are and how, in most cases, it made business sense for them to settle rather than litigate. Finding expert IP counsel to take their

case was no easy task. Certainly, major law firms did not wish to support them against what could be potential clients. And while it is still difficult to get a major IP law firm or practice to take on some patent assertion cases, well-funded independents today are finding it easier to get quality representation. These days, law firms are less fearful about representing smaller plaintiffs, provided they have strong patents and sufficient financial resources. Indeed, in the United States, the high cost and protracted timing of litigation may be a greater threat to innovation and return on IP (ROIP) than any of the challenges facing the USPTO.

## Word plays

The image of the patent troll has been likened to that of a highway robber waiting to accost an unsuspecting citizen. This portrayal is only partially accurate and serves more to demonise adversaries, much like plaintiffs in personal injury actions, than to help investors understand the real threat.

“The use of the word ‘troll’ in this phrase is a sly linguistic trick,” says Paul McFedries, author of Word Spy, The Word Lovers Guide to Modern Culture ([www.wordspy.com](http://www.wordspy.com)). “It contains the sense of the fishing activity in which a baited line is dragged through water, usually from the back of a slow moving boat”.

So, continues McFedries, a patent troll is, officially, someone who [bottom] fishes around for unused patents but is also, unofficially, a low, inhuman creature who only uses those patents for litigious purposes.

Large patent holders tend to paint a deeply dark picture of those who acquire patents for enforcement purposes. The implication is that companies who commercialise their own inventions and have made substantial investments in R&D are more legitimate than those who simply purchase others’ rights to generate financial returns. Only those who use rights to protect market share and ensure profitability should be able to collect damages.

The public has little trouble with real estate speculators who buy uninhabitable buildings for the valuable land. Apparently, however, acquiring and asserting the rights associated with paper inventions is akin to blackmail.

## Early citation

In an article in The Recorder, a San Francisco legal weekly, assistant general counsel at Intel

Corp said that he spends much of his time fighting off claims of patent infringement by companies that have never made a semiconductor device. In 1999 alone, the claims topped US\$15 billion. Intel hurls the epithet patent trolls at the companies that want it to pay up. “We were sued for libel for the use of the term ‘patent extortionists’ so I came up with ‘patent trolls’,” an intel attorney said.

I can see why independent assertion would infuriate patent portfolio owners. It plays on the inability of the system to issue fully qualified and thoroughly searched patents and the vulnerability of even strong, well-invested patentees. However, the last time I looked, doing business in a market based system means that all asset holders have equal right to maximum value, even if some have acquired a strategic advantage.

## Patent quality costs

The National Academy of Sciences is calling for more funding for the USPTO where 3,000 examiners handle 350,000 applications a year with an average of 17 to 25 hours to check on the validity of a patent application.

Businesses claim a lack of due diligence at this stage often results in many patents being granted that should not see the light of day. (I would certainly not expect to find any patents of this nature in Intel’s vast portfolio... ). Studies show that half of all issued US patents should not have been approved, and that the USPTO green lights over 95% of all original patent applications.

Patent quality must improve. However, it is naive to think that this alone will solve all of the ills of an eternally overburdened but inherently reliable patent system. Patent holders, regardless of size, financial commitment or commercialisation strategy, have the right to prevent unauthorised use of their inventions. Unfortunately, regarding patents as financial assets is a more difficult concept for some than others.

**Next month:** where does patent trolling end and responsible IP management begin?

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