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Lackenbach Siegel Client Alert

TROLLING FOR DOLLARS

☛ Are TROLL$ Bad?

Patent "trolls" may soon find some snags in the nets they have been using to sue companies across many industries, as Congress is set to pass new laws. Those non-operating entities have fished for money by accusing companies of infringing their patents. **One troll, for example, has asserted infringement by hundreds of businesses in all industries, for a one-step copy/scan-to-email-folder.** The U.S. House of Representatives has passed, and the Senate is seriously considering, legislation that would make it mo difficult for Patent Trolls to obtain unreasonable settlements in advance of protracted costly litigation.

Whether you subscribe to the dictionary definition of a "troll" (a demon or lout) or J.R.R. Tolkein's image (strong and vicious but not very bright) – to be called a "troll" is not a compliment. And in fact, the name "Patent Troll" derives not from ancient legend but from the fact that the entities trawl or troll for money – in the expansive waters of commerce. The White House has defined Trolls as those who "use patents primarily to obtain license fees rather than to support the development or transfer of technology." The President has described Patent Trolls as those who "don't actually produce anything themselves... and hijack somebody else's idea and see if they can extort some money out of them." **Others have said Patent Trolls are companies that misuse patents as a business strategy, suing other companies indiscriminately to obtain settlements, not injunctions, without actually proving their claims, or simply holding patents without planning to actually make products, just to keep other companies at a standstill. Patent Trolls often obtain settlements based on the mere threat of lawsuits, with companies that are the targets of the lawsuits paying large settlements to avoid the cost of defending themselves.**

Good Trolls?

But critics of the proposed legislative reforms point out that there are problems with the White House definition, because it could include companies like Kodak. **Kodak obtained billions of dollars in licensing fees through lawsuits, and in the course of bankruptcy sold many of its patents to companies like Apple and Google, which may never actually use those patents.** Another company, VirnetX, owned by former government employees whose compensation included ownership of their patents, won $368 million from Apple in a patent infringement lawsuit. Universities also hold patents based on their research – patents that they will never use, as do so-called garage inventors, who lack the financial and other resources to use their patents for manufacturing. So opponents of the legislation argue that the reforms will actually stifle invention by hindering the efforts of these companies, universities and individuals to obtain compensation for their inventions. The Federal Trade Commission (FTC) calls Trolls "patent assertion entities" or PAEs.

By contrast, Patent Trolls or PAEs do not manufacture anything. Thus, because they are not using any patented technology themselves, Patent Trolls are not vulnerable to infringement counter-suits. In addition, Trolls make a practice of concealing real parties in interest through shell entities, so that a defendant does not know whom to counter-sue. Finally, Trolls have no industry reputations to maintain, so they have less incentive to engage in cross-licensing or to avoid lawsuits. **The cost? One 2011 study reported that Trolls cost the U.S. economy $29 billion that year.**

Troll Control?

Patent reform is a ticklish subject, because patent rights are enshrined in the U.S. Constitution. The idea behind the lawful – and time-limited – patent monopoly is that the public will ultimately benefit because patents will encourage helpful innovation. So the fear, as Senator Richard Blumenthal of Connecticut has said, is that reform legislation may tip the balance too far, and stifle innovation in the process.

As the Patent and Copyright Clause provides, "The Congress shall have Power To … promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries…." The new law – whatever its final form – will trim the wily hair of the Trolls, or whatever politically correct name is used, and blunt some of their weapons – we hope without weakening the patent system in the process. Lackenbach Siegel has over 90 years of experience helping clients with patent applications, patent enforcement and defenses, as well as related issues.

For specific questions on the impact of the potential new law on your business, please contact by email one of our attorneys, including Howard Aronson; HAronson@Lackenbach.com

PROPOSED "PATENT TROLL" LEGISLATION AT A GLANCE:

The Senate bill, the Patent Transparency and Improvement Act, is viewed as targeting the most flagrant patent abuses, while omitting some of the more aggressive provisions of the House's Innovation Act.

Both Congressional bills contain the following provisions:

☛ **Transparency regarding financial interests and beneficial owners.**
The patent infringement plaintiff would have to identify any entity with a financial interest in the patent that is the basis of the lawsuit.

☛ **Customer stay.**
The bills would stop patent owners from simultaneously suing both the manufacturers and the end users of products.

☛ **Protection of patent licenses in bankruptcy.**
Under the legislation, a license pertaining to a U.S. Patent cannot be unilaterally terminated in bankruptcy.

Provisions in the House bill, but not in the Senate bill:

☛ **Heightened pleading requirements.**
The plaintiff would have to identify each claim of the patent that is allegedly infringed, each allegedly infringing product, and the infringing features of the products.

☛ **Fee-shifting.**
Under this section of the House bill, the loser in the lawsuit would be forced to pay reasonable attorney fees for both parties.

☛ **Discovery limits**
Discovery would proceed according to stages, as a way of limiting legal costs at the beginning of a lawsuit.

The Senate bill contains this provision, which is not in the House version:

Bad-faith demand letters.
Even before a lawsuit is filed, the FTC would have authority to target, as an "unfair or deceptive act or practice," bad faith demand letters.

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