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Do Non-Practicing Entities (aka, 'Patent Trolls') Hinder Innovation?

From the Experts

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Corporate Counsel | April 9, 2012

The United States has been referred to historically as the land of opportunity; a place where a person with a great idea would have the freedom to utilize his knowledge and achieve a level of success denied him elsewhere. One great guarantor of this belief was the U.S. patent system. Beginning with the first patent, awarded in 1790, the U.S. patent system's guidelines were designed to foster invention by giving credit and financial rewards for the innovative ideas of individuals and companies.

For over 200 years, the U.S. patent system has supported visionaries with the recognition necessary to make an original idea a viable and useful invention. More recently, however, the proliferation of software patents and the inconsistency of their enforcement have created an environment of increased litigation.

One of the causes of this unpredictable atmosphere has been the Non-Practicing Entity (NPE), more commonly referred to as the "patent troll." (An NPE is a company that produces nothing itself, but operates purely as a collector of patents. After acquiring these patents, NPEs then make a profit licensing their patents to companies that need them, or in many cases, by suing companies for infringement of their intellectual property.)

The U.S. Patent and Trademark office (PTO), the federal agency responsible for the issuance of patents, rarely issued patents for software prior to the 1980s. Beginning in the 1990s there was an increase in software patenting. Unfortunately, the PTO's relative inexperience in this sector caused many of the new patents to be overly generalized and broad. This resulted in numerous patents with language that could be easily manipulated to fit the narrow legal arguments of the patent's owner.

The software's lack of tangibility also made the software more difficult to visualize, and as a result many respectable companies ignored the innovative potential of patenting software until it was too late. In addition to this, when patents were filed, they would often overlap, and some could even be argued to cover every component of many modern devices, including, but not limited to, the Internet, smartphones, and tablet devices.

The uncertainties inherent in the software patent field fueled the creation of NPEs. For example, RPX Corporation took advantage of this to generate huge profits. In 2011, RPX had an initial

public offering of upward of $150 million dollars. This value was based purely on the purchase and licensing of patents that they had no hand in creating.

The most disturbing aspect of the rise of NPEs is the back-room deals that frequently put companies with a legitimate desire to purposefully use the invention at a disadvantage. Some companies feel forced to bid on "protection" from NPEs to avoid having them sue at a later date. This is especially common for small software providers, which don't have the money to go toe to toe with an NPE in court. Forced to pay for protection, small software companies instead find themselves stagnating, constrained by their inability to adequately invest in their own growth.

In addition to paying for protection, many of the bigger companies in the software business have also found themselves spending millions of dollars in order to acquire "defensive patents," with the explicit purpose of defending themselves against being sued. Of course, the great expense of court cases means that many companies have been forced to change their spending patterns.

Money unnecessarily spent on courtroom expenses is simply money squandered. These funds could be used in a variety of more productive ways: to streamline business by reducing waste; to prompt growth through timely and practical investment; or to encourage further research and development of new technology. The unfortunate move toward more and more litigation has forced companies to scale back otherwise attainable goals, and instead focus their time and money on fighting for survival.

Despite the attempts of companies to defend themselves against legal action, many of the heavy hitters in the software industry have increasingly found themselves in the courtroom, most often the victims of an NPE lawsuit. There were more than 300 lawsuits submitted by NPEs from January 2010 to December 2011. This was approximately 70 percent of all patent-based lawsuits filed in the United States during that time. The list of defendants reads like a who's who of the most important players in the corporate world. Naturally, high-tech companies like Intel and Google are mentioned, but the list also includes mobile handset makers Samsung, HTC, and Research in Motion (maker of the Blackberry), airline company British Airways, camera makers Eastman Kodak and Canon, shoe maker Nike, and a wide variety of other companies, including Apple, Verizon Wireless, Bank of America, and the Ford Motor Company.

Unfortunately there doesn't seem to be light at the end of the tunnel. While the recently enacted America Invents Act has brought reform to the PTO, it has failed to stop the encroaching power of the patent troll. Lawmakers' inability to see how the threat of a lawsuit can discourage the filing of new patents--and as a result curb innovation--needs to be addressed and rectified. In order to do this, major reforms need to be proposed and passed.

In an ideal world, the PTO would be taken back to its roots. This could be achieved by clearly stating that patents can and will only be used by their authors for the promotion of progress through the use of the exclusive rights granted to them by the PTO. In other words, any use by an entity whose sole purpose is to exploit rights without using the invention for its intended purpose would be banned from the patent system. In short, NPEs should be prohibited from abusing the system for no higher purpose than their own financial gain. The future of innovation and facilitative competition in the U.S. depends upon it.

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