

Developing a defensive Patent Strategy can Protect your Business From The Patent Trolls

In recent years Non-Practising Entities (NPE's) have grown significantly with one particular type – the Patent Troll - receiving a lot of notoriety in the media. But what exactly are NPE's and how do you ensure your patent strategy is best placed to protect you against these patent trolls?

NPE's are people or companies that hold patents on an invention but have no intention of exploiting the invention commercially. These can include single investors who may not have the resources to exploit the patent commercially, universities and other research institutions for example. Also in some instances smaller traditional companies will acquire patents on products similar to their own product line in order to protect their own inventions and business from larger multi-nationals who may be in a position to patent a similar product – it is important to note that these are not patent trolls.

The Patent Troll is slightly different and amasses large numbers of patents with the deliberate intention of pursuing infringement lawsuits against companies in an attempt to obtain licensing fees, which can often be considerable. Businesses of all sizes are targeted, in all business sectors, so it is not just a problem for the multinationals with large innovation programmes. A hearing in 2006 in Washington entitled "Patent Trolls: Fact or Fiction", noted that patent trolls could be characterised by four elements which are:

- They have no significant assets except patents;
- They produce no products;
- They have lawyers as the most important employees; and
- They acquire patents, but do not invent technology themselves.

In reality patent trolling is a more serious problem in the US compared to Europe. European Law has a rule of 'loser pays costs', where the US law cites that each party pays their own attorney fees, making agreements on licensing fees more palatable than going to court. The debate about the impact of patent trolls on innovation is still raging, particularly in the US. Some US patent law reformists claim that Patent Trolls damage creativity and innovation, whilst others say that there is little evidence for this. The US Government is clearly of the

view that patent troll activity is damaging to the economy. Obama has also outlined some of the actions he plans to take to encourage Congress to legislate to curb the activities of these NPE's – so the day of the patent troll may well be numbered.

However, no matter what happens legislatively, it is important that companies wanting to launch in the US protect themselves as much as possible from patent trolls, whether they have patents or not. This also applies if you are trading online and you have your goods available in the US.

If a patent troll does target you in the first instance you will receive a demand letter or notification that your business is being sued; it is imperative that you do not ignore this. As a general rule most of these lawsuits are settled out of court to avoid a lengthy process that costs lots of money. Some businesses will be tempted to just pay the requested settlement but we would say do invest in the advice of a patent attorney or a solicitor specializing in IP. It may initially be an extra cost but in the long run they could potentially reduce the amount of money to be paid or in some instances get the cost thrown out altogether because of their understanding of the situation and investigations that they can carry out. A legal opinion can help you understand the situation you are facing more clearly which in turn will help you to make a more informed choice. However, through careful planning from the outset it is possible to avoid this situation completely.

So how do you ensure that your patent strategy is best placed to protect you against patent trolls? The first place to start is to define your overall business objectives. Think about what your range of products and services are Who are your competitors? Carry out a SWOT analysis on your business (Strengths, Weaknesses, Opportunities and Threats analysis). Step two is to define an IP strategy, which supports your business objectives. In order to do this you should put together a team with business, technological and legal expertise to review these business objectives. The patent strategy follows from this strategic planning exercise and will require a complete analysis of the patent landscape in your area of expertise, including competitors and bear the following in mind:

Be sure to carry out sufficient due diligence checks, this will determine your freedom to operate. It is extremely important to understand the landscape you will be operating in. Know what patents may already exist in the same technical area and understand how your

product or service relates to these patents. Know your competitors thoroughly and try to identify in advance any trolls that may be operating in your sector, if at all possible.

Make sure you have a thorough, wide-ranging technical knowledge base so that you fully understand the scope of your patented technology and that of any competitors. If you receive a patent demand, you must have enough technical knowledge to assess whether it is a serious threat, with valid allegations, or just a speculative fishing expedition.

If it turns out that you are being targeted by a patent troll make sure you **get detailed information about the claims**; ask for a full claim chart and use your knowledge and information about the troll and their patent to determine what to do. For example in the US you may be able to invalidate the patent for inequitable conduct, although this is potentially expensive. Always ensure you get appropriate advice from your patent attorney.

Whilst the threat of trolling is greatest when you are operating in the US, it is good business practice to always **have a defensive patent strategy**, irrespective of which markets you are operating in, as you may always encounter potential infringement allegations, even from organisations and individuals with patents who are not troll-like in their behaviour. When considering a launch, for example, consider getting appropriate advice from a US patent attorney regarding your risk of infringement. This can protect you against excessive punitive damages, should you be sued for infringement in the US courts.

So while preparation and forward thinking is key when planning your IP strategy there may always be an instance where something has managed to squeeze past your radar. If a patent is causing concern, or you just want definitive advice on your general patent strategy, be sure to consult a qualified attorney.