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COUNSEL COMMENTARY

IP: Don't feed the patent trolls

WANT SOMEONE TO BLAME FOR THE SCOURGE OF PATENT TROLL SUITS? TRY LOOKING IN THE MIRROR.

The literature of the legal and business professions, both print and online, is replete with articles about who's to blame for the scourge of patent trolls. You're familiar with the plot: From a lofty perch on high, the writer heaps scorn upon a diverse cast of stooges, villains and accomplices, from the feckless examiners of the Patent and Trademark Office (PTO), who grant patents useful only as licenses to extort, to the allegedly plaintiff-friendly judges, who hold the trolls' coats while they rummage through the pockets of innocent passersby, to the dastardly trolls themselves. While these rascals may be the usual suspects, I hope to persuade you that someone else shares the blame too. Unfortunately, that someone is us.

But why, you protest? Simple: We feed the trolls. Their food is money and too often, we don't do enough to make them earn it. Let's consider the natural history of the patent troll and a couple of underutilized strategies to put them on a diet.

1. Trolls are often ambush predators, and the best defense to an ambush is awareness: The antelope that keeps its head down in the grass is far more likely to end up on the menu than the one that spends some time looking around. If we do not expend the resources and effort beforehand, our first awareness of a troll may come with the demand letter or the complaint, when it may be too late to consider our positions deliberately and thoroughly without the burden of litigation expenses and short deadlines.

So how can you improve your awareness of potential threats from trolls? One of the best ways is to talk with counterparts at other companies, especially within industry groups, or with outside litigation counsel about threats on the horizon. In addition, make it a practice to regularly monitor legal goings-on, either through news accounts of lawsuit filings or by deliberately monitoring suits filed by or against particular parties or, more generally, in certain jurisdictions, either through a monitoring service or using outside counsel. Trolls want to surprise us, so keep informed, or risk being rushed into settling too high when the troll comes knocking.

2. Trolls want to pick off stragglers, so defend by sticking together: the antelope that sticks with the herd is better off than the one that goes it alone. Sticking together facilitates the sharing of information. Indeed, the two activities are synergistic: Sharing information among similarly situated parties about a common threat is a great way to build trust and encourage cooperation.

Under certain circumstances, a very powerful way to facilitate cooperation is to participate in a joint defense group (JDG). To continue my now perhaps-tedious analogy: The antelope herd that sticks together has an entire forest of horns available if it has to turn and fight. In the same way, a JDG collectively benefits from the specialized skills of all counsel working for the co-defendants and from the leverage of shared resources.

Indeed, absent a cost- and responsibility-sharing arrangement like a JDG, it is all too common for defendants to individually decide the costs are too high and settle the case.

Even if the endgame for the defendants is not victory in court, a JDG can still permit its members to share information, lower overall costs and delegate responsibility for litigation tasks.

In appropriate cases, a JDG can initiate *ex parte* or *inter partes* re-examinations in the PTO, as well as the new post grant review and *inter partes* review proceedings instituted by the America Invents Act (AIA), after these provisions become effective later this year. Sharing the burden amongst the group for some or all of these tasks can free up valuable time and resources for all the defendants.

Even if a JDG is unfeasible or unnecessary based on the circumstances of a particular case, informal cooperation and information sharing can help defendants avoid the bad (or at least uninformed) decisions that isolation can foster. A favorite troll tactic (thankfully now somewhat limited by the amendments to 35 U.S.C. § 299 in the AIA) is "divide and conquer": sue dozens (or even hundreds) of defendants, then settle with them one by one or group by group, with each remaining ignorant as to what deal the others were getting.

Isolation and uncertainty enhance the psychological pressure that comes with notice of each succeeding settlement and the fear that you will be the last holdout—fear that a troll will threaten to increase the settlement price for the uncooperative. Trolls want to run down their prey one by one, so stick together and share information whenever feasible.

To summarize, before we rightly condemn the PTO, the courts and the plaintiff's bar for the rising tide of troll litigation, we should ask ourselves if we are feeding the trolls. The strategies of maintaining awareness, sharing information and cooperating with co-defendants when possible may not turn back the tide, and they may be more expensive, in the short run, at least, than simply settling cases without a fight. Even so, resistance is not futile, even if we only succeed in making ourselves less-appealing targets.

The contents of this article are not intended as, and should not be taken as, legal advice, legal opinion, or any other advice. Please contact an attorney for advice on specific legal problems.

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