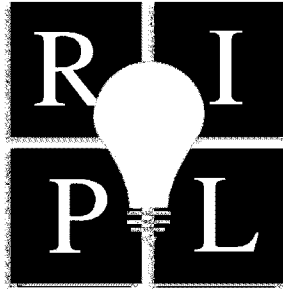


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



THE TROLL NEXT DOOR

JENNIFER KAHAULELIO GREGORY

ABSTRACT

The term Patent Troll is increasingly permeating news headlines. This comment explains where the term came from and how the changing landscape of patent enforcement has contributed to the evolution of the Patent Troll. Some have suggested that segregating Patent Trolls from other patent enforcers will solve many of the patent system's woes. This comment analyzes proposed ways of distinguishing Patent Trolls and reveals them all as prejudicial and ineffective. The use of the term Patent Troll is a mask for underlying fears based on real shortcomings in the patent system, which need to be addressed.

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THE TROLL NEXT DOOR

JENNIFER KAHAULELIO GREGORY*

INTRODUCTION

An alarming problem has surfaced in the headlines lately: “Patent Troll Menace,”¹ “Lawmakers want ‘Patent Troll’ Crackdown,”² “Patent Troll Bites Google.”³ It sounds scary, but what does it really mean? Although it has no official definition, the label “Patent Troll” is used with increasing frequency in a vague and subjective manner.⁴

Patent Troll is a derogatory term used to describe a unique type of patent enforcer that has emerged over the past decade.⁵ Assistant general counsel for Intel, Peter Detkin, coined the term in 2001.⁶ He defined a Patent Troll as an entity that makes money from a patent solely through litigation or licensing and not from manufacturing or developing the patented invention.⁷ Recent definitions of the term Patent Troll have become sharply critical. Yahoo!, Inc. defined Patent Trolls as “entities whose primary purpose is to prey on innovators who actually produce societally valuable products – abuse the patent system by obtaining patents for the purpose of coercing settlements from such innovators.”⁸

The term Patent Troll is used as a verb in some cases, but is most commonly used as a subversive and ugly label.⁹ Patent trolling, as a verb, is used to describe the action of hunting down and acquiring unused patents to enforce against any company using similar technology to

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¹ Zachary Roth, *Patent Troll Menace*, WASH. MONTHLY, June 2005, at 12.

² Erica Werner, *Lawmakers Want “Patent Troll” Crackdown*, USA TODAY.COM, June 9, 2005, http://www.usatoday.com/tech/news/techpolicy/2005-06-09-patent-troll_x.htm?csp=34.

³ Francis Till, *Patent Troll Bites Google*, NAT’L BUS. REV., Dec. 29, 2005, http://www.nbr.co.nz/home/column_article.asp?id=13937&cid=3&cname=.

⁴ ANTITRUST MODERNIZATION COMMISSION, PATENT LAW REFORM 3 (2005), available at http://www.amc.gov/commission_hearings/pdf/Statement_Detkin.pdf (asserting that the phrase “patent troll” is now used as “a placeholder for all the ills perceived in the patent system”).

⁵ Brenda Sandburg, *Trolling for Dollars*, RECORDER, July 30, 2001, at 1. Brenda Sandburg was speaking with Peter Detkin, assistant general counsel at Intel, who said he came up with the term “patent troll” because he was sued for libel after using the term “patent extortionists.” *Id.*

⁶ ANTITRUST MODERNIZATION COMMISSION, *supra* note 4, at 3. Detkin recently stated that he was trying to garner attention when he gave the colorful name “patent trolls” to patent claimants who were “asserting patents of dubious value and seeking nuisance value settlements, often threatening injunctions along the way.” *Id.* Interestingly, Peter Detkin is now the managing director of Intellectual Ventures, L.L.C. *Id.* Intellectual Ventures is a company whose stated mission is to “invent, and invest in invention.” *Id.*

⁷ Sandburg, *supra* note 5, at 1. Detkin’s definition is: “A patent troll is somebody who tries to make a lot of money off a patent that they are not practicing and have no intention of practicing and in most cases never practiced.” *Id.* Detkin spent much of his time at Intel fighting claims of patent infringement coming from companies outside of the semiconductor industry. *Id.* Detkin stated that in 1999 alone, Intel had received claims of patent infringement totaling over fifteen billion dollars. *Id.*

⁸ Brief of Amicus Curiae Yahoo! Inc. in Support of Petitioner at 2, *eBay, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006) (No. 05-130).

⁹ See ANTITRUST MODERNIZATION COMMISSION, *supra* note 4, at 3.

the patent.¹⁰ Patent trolling is also used to describe situations where a patent holder accuses infringement and threatens injunctive action against many companies that might pay a licensing fee, then sits back and waits for a payoff.¹¹ When used as a label, Patent Troll conjures images of an archaic ogre-like monster and vilifies a type of patent enforcer that threatens businesses with unfounded patent infringement litigation solely for the purpose of monetary gain.¹²

The most disparaged type of Patent Troll is one who purchases a patent for a reduced price at a bankruptcy auction, while having no intention to manufacture a product or to innovate further with the invention.¹³ This type of Patent Troll then seeks out corporations that appear to be infringing on their newly acquired patent and sends demand letters threatening the companies with injunctions in order to extort licensing fees.¹⁴

Companies are compelled to pay the fees because injunctions can have extremely severe economic consequences and can significantly damage reputations.¹⁵ For instance, in *Polaroid Corp. v. Eastman Kodak Co.*, Polaroid sued Kodak for infringement on its instant camera patents and obtained an injunction.¹⁶ Kodak argued that the injunction would cause the loss of 4,500 jobs, \$200 million in plant and equipment costs, and would injure Kodak's customers and goodwill.¹⁷ However, the court was not persuaded by these arguments, and it upheld the injunction against Kodak.¹⁸

¹⁰ Joe Beyers, *Rise of the Patent Trolls*, CNET NEWS, Oct. 12, 2005, http://news.com.com/Rise+of+the+patent+trolls/2010-1071_3-5892996.html?tag=nl (“[P]atent trolls . . . seek to quietly acquire significant patent portfolios with the intent of threatening lengthy and costly patent infringement lawsuits against operating companies.”).

¹¹ *Patent Law Reform: Injunctions and Damages: Hearing on H.R. 2795 Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Jonathan Band); see also Brief of Time Warner, Inc. et al. as Amici Curiae in Support of Petitioner at 2, *eBay, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006) (No. 05-130). The licensing fee demanded by the troll rarely reflects the true technological value of the patent they are asserting. *Id.* at 7. Since the alleged infringer has already built a manufacturing process and marketable product incorporating the patent, the troll attempts to extort close to the cost that the company would incur by redesigning manufacturing of their product around the patent, not the probable cost of licensing the patent before the company had built their manufacturing process. *Id.* at 23.

¹² Brief of Time Warner, Inc. et al., *supra* note 11, at 19.

¹³ See Bruce Berman, *Illegitimate Assertions?*, INTELL. ASSET MGMT., October/November 2004, at 22; THE FEDERAL TRADE COMMISSION, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY 31 (Oct. 2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

¹⁴ See Jeffrey D. Sullivan, *Vanquishing the Patent Trolls*, NEWS XCHANGE, April/May 2005, at 6, <http://www.bakerbotts.com/files/Publication/46c75843-6976-45d4-982f-2e4f4c217a03/Presentation/PublicationAttachment/8c0532c0-b1b0-4b7b-bd1b-36683a5ecd90/LESBI%20April%202005.pdf>. “[A] cottage industry has sprung up wherein opportunistic individuals form holding companies for the principal purpose of acquiring, and asserting, broadly (if vaguely) worded patents against entire industries, with the goal of extracting license fees from multiple defendants.” *Id.*

¹⁵ See Brief of Time Warner, Inc. et al., *supra* note 11, at 5.

¹⁶ *Polaroid Corp. v. Eastman Kodak Co.*, Civil Action No. 76-1634-Z, 1985 U.S. Dist. LEXIS 15003, at *5 (D. Mass. Oct. 11, 1985).

¹⁷ *Id.*

¹⁸ *Id.* at *6. “[T]he harm Kodak will suffer [by the injunction] simply mirrors the success it has enjoyed in the field of instant photography.” *Id.*

I find that the public interest will not be disserved by issuance of an injunction . . . and that the public interest to be served by protection of the nation's patent system outweighs any temporary inconvenience or one-time costs associated with staff training or other costs associated with change-over to another model.

Id. at *8-9 (quoting *Shiley, Inc. v. Bentley Labs., Inc.*, 601 F.Supp. 964, 971 (C.D. Cal. 1985)). See generally ADAM B. JAFFE & JOSH LERNER, *INNOVATION AND ITS DISCONTENTS* 113 (Princeton University Press 2004) (noting that The Supreme Court refused to hear the appeal of this ruling and Kodak still had to endure a trial to determine damages for past infringement, which lasted ninety-six days and ended with the court assigning damages for Polaroid of \$909 million in lost profits, reasonable royalties, and interest).

It can also be extraordinarily expensive to litigate a patent infringement claim.¹⁹ The American Intellectual Property Law Association estimates that litigation costs to each party range from \$500,000 to over \$4 million, depending on the amount of money at stake in a given case.²⁰ The larger the damage award sought by the patent holder, the greater the chance that the litigation will be lengthy and expensive.²¹ For example, the *Polaroid* case was litigated for more than nine years, culminating in a settlement of \$925 million.²² Even if the Patent Troll's targets decide to put time and money into litigating the claim, the troll has usually acquired the patent for a nominal fee and has far less at stake than its opponent in a typical suit.²³ If the court finds no infringement or even invalidates the patent, the Patent Troll may nonetheless retain licensing fees previously collected from others for the patent.²⁴

Commenting on the proposed Congressional patent reforms of 2005, Congressman Howard Berman of California spoke about the "unclean hands of patent trolls," but failed to define the term Patent Troll clearly.²⁵ Manufacturing giants that deal with numerous infringement claims from many types of patent holders contend that Patent Trolls are abusing the current patent system.²⁶ Lawyers and politicians have suggested many types of patent reform to deal with these weaknesses, but the problem of how to distinguish a Patent Troll from a legitimate patent enforcer undermines the proposed effectiveness of the reforms aimed at stopping the Patent Trolls.²⁷

This comment focuses on characteristics and behaviors that are commonly attributed to entities labeled as Patent Trolls. Part I describes the current state of the U.S. patent system and focuses on shortcomings that Patent Trolls are accused of exploiting. Part II analyzes the different

¹⁹ BOARD ON SCIENCE, TECHNOLOGY, AND ECONOMIC POLICY, NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, A PATENT SYSTEM FOR THE 21ST CENTURY 12 (Stephen A. Merrill et al. eds., The National Academies Press 2004).

²⁰ *Id.* at 58. (stating that median costs to each party of a patent infringement suit are at least \$500,000 when stakes are modest, and rise to four million dollars for each party when more than twenty-five million dollars is at risk).

²¹ *Id.* at 112.

²² JAFFE & LERNER, *supra* note 18, at 114.

²³ Brief of Amicus Curiae Yahoo! Inc., *supra* note 8, at 2; *see also* ANTI-TRUST MODERNIZATION COMMISSION, *supra* note 4, at 5. Detkin gives an example of a patent troll anecdote:

In one of Douglas Fuey's early business ventures he provided phony new vehicle titles for stolen cars. His partner Larry Day is a one-time Blackjack dealer in Las Vegas. Together, the two men have found a more active line of work suing cell phone companies for patent infringement. Earlier this year their company got \$128 million in damages from Boston Communications.

Id. at 5.

²⁴ Roth, *supra* note 1.

²⁵ 151 CONG. REC. E1160 (2005). Congressman Berman described the following motivation for change:

We have learned of countless situations in which patent holders, making no effort to commercialize their inventions, lurk in the shadows until another party has invested substantial resources in a business or product that may infringe on the unutilized invention. The patent troll then steps out of the shadows and demands that the alleged infringer pay a significant licensing fee to avoid an infringement suit.

Id.

²⁶ Brief of Amicus Curiae Yahoo! Inc., *supra* note 8, at 2.

²⁷ Brief for Respondent at 49, *eBay, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006) (No. 05-130) (arguing that granting injunctions based on whether the patent holder practices the patent or exclusively license it is not an equitable standard and cannot be used as an effective test); *see also* Lorraine Woellert, *eBay Takes on the Patent Trolls*, BUS. WK. ONLINE, Mar. 30, 2006, at 2, available at http://www.businessweek.com/technology/content/mar2006/tc20060330_581975.htm?chan=technology_technology_y+index+page_internet (asserting that a change in the system will not only affect patent trolls, it will affect everyone). Philip Johnson, chief patent counsel for Johnson & Johnson, said, "If we start watering down the patent system . . . I'm worried about the future of our country . . . Beware of what you ask for, you might get it." *Id.*

proposed ways of distinguishing a Patent Troll and examines whether the courts can use these tests effectively to quiet the trolls and still leave the basic aims of the patent system intact. Part III proposes that there is no effective way to differentiate a Patent Troll, and that the attempt to do so is a poor substitute for addressing underlying concerns about the patent system.

I. BACKGROUND

The recent proliferation of Patent Trolls has been spurred on by certain features of the current patent system and has changed the landscape of patent enforcement.²⁸ Some proposed reforms to the patent system would require a court to create tests in order to distinguish a Patent Troll from a non-troll.²⁹ It is questionable, however, whether the courts can make such distinctions and what effect such distinctions and reforms will have on the patent system as a whole.³⁰

A. Patent System Roots and Holes for Trolls

Patent law has its roots in the Constitution, which allows Congress the 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.”³¹ The current law governing patents is set out in the Patent Act of 1952.³² Congress intended this Act to create a delicate balance that gives the public access to new ideas in exchange for the inventor’s exclusive right to the patent.³³

One frequent accusation associated with Patent Trolls is that there are too many patents of questionable quality that have been granted in the recent past, giving the trolls an opportunity to acquire and enforce vague patents against countless companies.³⁴ Activity in the United States Patent and Trademark Office (“USPTO”), including patent applications received and patents issued, increased by 80% from 1990 to 2000 and increased by 250% from 1980 to 2000.³⁵ Patent system critics commonly complain that the USPTO does not have a sufficient number of technically skilled patent examiners to effectively research and grant only truly innovative patents.³⁶ A look at the statistics reveals that the number of patents granted in the United States

²⁸ Brief of Amicus Curia Yahoo! Inc., *supra* note 8, at 4.

²⁹ Beyers, *supra* note 10. Joe Beyers, the IP-licensing chief at Hewlett-Packard, asserts that it is time for big industry to fight back against the patent trolls. *Id.* His recommendation is to create a “standardized definition of a patent troll with guidelines to distinguish trolls from operating companies seeking fair value for their inventions.” *Id.*

³⁰ See Brief for Respondent, *supra* note 277, at 49. “[D]istinguishing between licensors of patents on the basis of whether they license exclusively (apparently upstanding behavior) or whether they license non-exclusively (apparently ‘troll-like’ behavior) makes no sense: courts should not adopt an equitable rule that disfavors those who license freely.” *Id.*

³¹ U.S. CONST. art. I, § 8, cl. 8.

³² The Patent Act of 1952, 35 U.S.C. § 1 (2006).

³³ DONALD S. CHISUM ET AL., PRINCIPLES OF PATENT LAW CASES AND MATERIALS 1 (Robert C. Clark et al. eds., 2nd ed. Foundation Press 2001) (1998) (“[P]atent law seeks to strike a balance between the promotion of technological innovation and the dissemination of its fruits.”).

³⁴ Jason Kirby, *Patent Troll or Producer?*, FIN. POST, Jan. 14, 2006, at 1.

³⁵ CRAIG HOVEY, PH.D., THE PATENT PROCESS A GUIDE TO INTELLECTUAL PROPERTY FOR THE INFORMATION AGE 1 (John Wiley & Sons, Inc. 2002).

³⁶ JAFFE & LERNER, *supra* note 188, at 12. The organization of the patent office accentuates the debilitating effect of the recent patent avalanche. *Id.* The PTO is chronically strained for resources and qualified examiners are

was growing at approximately 1% per year from 1930 to 1982 and then jumped to a growth rate of 5.7% per year from 1983 to 2002.³⁷ Currently, the USPTO receives about 350,000 patent applications per year and grants about 177,000 a year.³⁸ At the same time, the increase in patent examiners has not kept up with the number of patents applied for, which some argue results in the USPTO granting too many broad or vague patents.³⁹ This allows an owner of a broad or vague patent to make infringement allegations against any user of similar technology across a wide range of industries.⁴⁰

The explosion of new patents, coupled with the presumption that a granted patent is valid,⁴¹ creates an uphill battle for those wishing to challenge a patent holder that is asserting a claim of infringement.⁴² In 1982, Congress created the Court of Appeals for the Federal Circuit (“CAFC”), which provides a centralized forum for patent appeals.⁴³ Before the CAFC, the federal appellate courts found that a patent was valid and infringed in less than thirty percent of cases, varying widely by circuit.⁴⁴ Between 1982 and 1986, CAFC holdings in favor of the patent holder increased to sixty-eight percent of the cases.⁴⁵ The CAFC has created an environment where patent holders, trolls or otherwise, have a greater chance of succeeding in getting damages for an infringement claim.⁴⁶

As stated earlier, another common criticism of Patent Trolls is that they threaten the use of an injunction against accused patent infringers, which is an inappropriately severe remedy in some cases.⁴⁷ With the grant of a patent from the USPTO, the patent holder obtains the “right to

difficult to find, especially in the areas of software, financial methods, and biotechnology. *Id.* There was also a change made to the PTO in the early 1990s, that changed the USPTO from an agency funded by tax revenues into one funded by the fees it collects. *Id.* at 2. A consequence of this change is that the USPTO must serve the patent applicants to retain its funding, and what patent applicants want is for their applications to be granted. *Id.* The USPTO’s attempt to serve its customers has resulted in a perceived decline in the rigor of reviewing patent applications and thus has encouraged more people to apply for dubious patents. *Id.* at 11.

³⁷ *Id.* at 11.

³⁸ *Id.* at 12.

³⁹ *Id.*

⁴⁰ See Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard-Setting*, in 1 INNOVATION POLICY AND THE ECONOMY 119 (Adam B. Jaffe et al. eds., MIT Press 2001). The explosion in the number of patents granted in new technology areas and the fact that highly technical products incorporate many patents has been termed the “patent thicket.” *Id.*

⁴¹ 35 U.S.C. § 282 (2006) (stating that a patent shall be presumed valid and the burden of establishing invalidity of a patent or any claim thereof rests on the party asserting invalidity).

⁴² Brief for Amicus Curiae Computer & Communications Industry Association in Support of Petitioners at 9, *eBay Inc. & Half.Com, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006) (No. 05-130) (“[Patents are cloaked in an] artificially enhanced presumption of validity, so that challengers must show by ‘clear and convincing’ evidence that the patent should not have been granted.”).

⁴³ CHISUM, *supra* note 333, at 25.

⁴⁴ JAFFE & LERNER, *supra* note 188, at 99. Before the CAFC, the appellate courts of the various circuits interpreted patent law very differently and the Supreme Court was reluctant to hear appeals in patent-related cases. *Id.* This led to widespread “forum shopping” in patent cases. *See id.* Congress created the CAFC because they perceived these factors to be undermining the effectiveness of patent protection and threatening U.S. technological and economic strength. *Id.* at 100. *But see* Brief of Petitioners at 48, *eBay Inc. & Half.Com, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006) (No. 05-130) (asserting that forum shopping still continues even after the creation of the CAFC). “[D]espite the creation of the Federal Circuit, choice of forum continues to play a critical role in the outcome of patent litigation.” *Id.* (quoting Kimberly A. Moore, *Forum Shopping Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 891 (2001)). The town of Marshall, Texas, has a population of 25,000, but patent cases filed there almost doubled from 2003 to 2004 and the number is still rising. *Id.* *But see* Allen Pusey, *Marshall Law*, DALLAS MORNING NEWS, Mar. 26, 2006, at 1D (giving more background about the appeal of Marshall, TX to intellectual property litigators and the connection to “patent trolls” and “patent pirates”).

⁴⁵ JAFFE & LERNER, *supra* note 188, at 106.

⁴⁶ *Id.*

⁴⁷ Brief for Computer & Communications Industry Association, *supra* note 422, at 6.

exclude others from making, using, offering for sale, or selling the invention throughout the United States.”⁴⁸ The Patent Act also provides that courts may grant injunctions to prevent the violation of any right of the patent holder.⁴⁹ The consequences of an injunction can be so grave that many companies feel coerced into paying a Patent Troll’s requested licensing fee.⁵⁰ An injunction is such an extreme remedy that some argue it should not be available to a Patent Troll.⁵¹ For many years, the courts granted an injunction to virtually any patent holder that prevailed in infringement litigation.⁵²

In May 2006, the standard for granting a permanent injunction in a patent case was clarified by the Supreme Court in *eBay, Inc. v. MercExchange L.L.C.*⁵³ The Court rejected the CAFC rule that “a permanent injunction will issue once infringement and validity have been adjudged.”⁵⁴ The Supreme Court also denounced the District Court’s contention in that case that any patent holder willing to license its patents and having a “lack of commercial activity in practicing the patents” categorically cannot qualify for injunctive relief.⁵⁵ The rule is that any patent holder satisfying the four factor test for injunctive relief will be granted a permanent injunction.⁵⁶ This case and other multimillion dollar disputes have focused a great deal of attention on the issue of whether Patent Trolls should be distinguished from other patent holders.⁵⁷

B. Development and Landscape of Patent Enforcement

The primary value of holding a patent is the right to exclude others from the manufacture, use, or sale of the patented article.⁵⁸ The U.S. Supreme Court has said that exclusion is “of the very essence of the right conferred by the patent.”⁵⁹ However, in the patent system’s early days, it was woefully difficult for an inventor to enforce the right to exclude others.⁶⁰

Some inventors, like Eli Whitney and Robert Kearns, spent the better part of their lives trying to enforce patent rights against notorious infringers.⁶¹ Kearns patented the intermittent windshield wiper in 1967, and he fought until 1990 to negotiate his first settlement with Ford Motor Company for infringement.⁶² The courts ignored Eli Whitney for ten years when he

⁴⁸ The Patent Act of 1952, 35 U.S.C. § 154 (2006).

⁴⁹ *Id.* § 283. The Patent Act states: “The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.” *Id.*

⁵⁰ Brief for Computer & Communications Industry Association, *supra* note 42, at 6.

⁵¹ JAFFE & LERNER, *supra* note 188, at 112 (asserting that courts historically refused to grant an injunction to shut down an infringing firm when the patentee was not itself manufacturing the patented product, but the CAFC has “shown more flexibility in this regard, thereby handing individual inventors a powerful weapon”); *see also* Brief of Amicus Curiae Yahoo!, Inc. *supra* note 8, at 3.

⁵² *eBay, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1841 (2006). “From at least the early 19th century, courts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases.” *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1841.

⁵⁵ *Id.* at 1840.

⁵⁶ *Id.* at 1839.

⁵⁷ *See generally* Beyers, *supra* note 10.

⁵⁸ Donald G. Richardson v. Suzuki Motor Co., Ltd., 868 F.2d 1226 (Fed. Cir. 1989).

⁵⁹ Cont’l Paper Bag Co. v. E. Paper Bag Co., 210 U.S. 405, 429 (1908).

⁶⁰ *See* Mike Hofman, *Patent Fending, INC.*, Dec., 1997, at 113.

⁶¹ *Id.* Kearns set up a business specifically to litigate his patent infringement claims, and the corporate office was located across the street from the federal courthouse in Detroit. *Id.* Kearns was ordered to pay sanctions after his son, Dennis, obtained confidential documents by dating a paralegal at one of the firms representing the several automakers being sued. *Id.* Kearns ended up winning more than thirty million dollars from Ford and Chrysler. *Id.*

⁶² *Id.* at 113.

accused others of infringing his cotton gin patent.⁶³ In a letter to a friend in 1803, Whitney wrote, “I have a set of the most Depraved villains to combat and I might almost as well go to *Hell* in search of *Happiness* as apply to a Georgia-Court for Justice.”⁶⁴ Whitney eventually collected nearly \$90,000 in patent royalties, but he only had a few thousand dollars left after paying his legal bills for the ten-year struggle.⁶⁵

A middle ground emerged in patent enforcement when some attorneys began to take patent infringement cases on a contingent fee basis.⁶⁶ One such attorney was Gerald Hosier, a so-called “maverick” attorney, who represented Jerome Lemelson beginning in 1989 in a lawsuit against Mattel Toys.⁶⁷ A jury awarded Lemelson \$24.8 million and the judge adjusted the award to \$71 million to include interest.⁶⁸ Unfortunately for Lemelson, the CAFC reversed the finding of infringement and he and his attorney received nothing.⁶⁹ Paul Ware had a more successful venture into contingent fee patent representation.⁷⁰ Ware patented his identification card system invention in 1987, but failed to generate any revenue from it until Acacia Research Corporation called him in 2004 and offered to help.⁷¹ Acacia contacted Ware when they noticed that a portion of his patent covered the use of a unique number to identify each credit card transaction.⁷² Acacia successfully collected millions of dollars in licensing fees from about thirty companies for Ware.⁷³ Ware claims that without Acacia’s help, he never would have been able to afford to enforce his patent against the alleged infringers.⁷⁴

The problems with the patent system coupled with the increasingly lucrative business of enforcing patents have contributed to the rise in the number of Patent Trolls.⁷⁵ This comment discusses whether a distinction between a Patent Troll and other patent holders presents an effective solution to the patent system’s woes. To answer this question, different traits that commonly characterize Patent Trolls are considered individually to determine which ones might be useful in segregating the Patent Troll from other patent enforcers.

II. ANALYSIS

⁶³ Stephen Yafa, *The Man Who Made Cotton King*, INVENTION & TECH., Winter 2005, at 50 (detailing Eli Whitney’s struggle against rampant infringement of his cotton gin patent and the frustration of being turned away from the courts).

⁶⁴ *Id.* at 52 (emphasis in original).

⁶⁵ *Id.* at 57.

⁶⁶ See Joseph N. Hosteny, *Who Says Contingent Fee Lawyers Are the Biggest Money-makers?*, INTELL. PROP. TODAY, August 2005, at 18.

⁶⁷ Adam Goldman, *A Great Inventor, or a Big Fraud*, LOS ANGELES TIMES, Aug. 21, 2005, at 1 (discussing how Lemelson attorney, Hosier, gambled and took patent cases on contingency in 1989, and it was considered a new and unusual arrangement).

⁶⁸ *Lemelson v. Mattel, Inc.*, 968 F.2d 1202, 1206 (Fed. Cir. 1993).

⁶⁹ *Id.* at 1208 (finding that “no reasonable jury” could find that Lemelson’s patent was valid and infringed); Goldman, *supra* note 67, at 1. Before the CAFC ruling, Mattel offered Lemelson a twenty million dollar settlement, which he and his attorney refused. *Id.* In June 1992, the CAFC issued a unanimous decision in favor of Mattel. *Id.*

⁷⁰ Kirby, *supra* note 344, at 1 (detailing Ware’s attempts to market his identification card and transaction system, including that the patent was granted in 1987 and his attempts at marketing included contacting Donald Trump and Ted Turner’s son-in-law, but to no avail).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* Mr. Ware calls Acacia his “saviour.” *Id.* He said, “Many patents have referenced my patent, but I couldn’t afford to litigate. Without Acacia, it would have been infringed on by all these big companies.” *Id.* Some companies that paid licensing fees include Exxon Mobil, Gap, Giorgio Armani, and RadioShack. *Id.*

⁷⁴ *Id.*

⁷⁵ Beyers, *supra* note 10.

The most heavily criticized characteristics of Patent Trolls are that they do not practice the patent they hold,⁷⁶ and that they make frivolous allegations of infringement.⁷⁷ Some critics argue that patents should not be enforced like traditional property rights, but should only be enforced when doing so serves the public good.⁷⁸ Part A of this section analyzes whether isolating Patent Trolls on the basis of whether they are “practicing” the patents they hold is feasible. Part B of this section analyzes whether making frivolous allegations is a useful basis for defining who is and who is not a Patent Troll. Part C of this section examines whether enforcing patents only for the public good can help differentiate a Patent Troll from other patent holders.

A. Non-practicing Entities

A 2003 report by the Federal Trade Commission used the term “non-practicing entities” (“NPEs”) to refer to Patent Trolls.⁷⁹ This term highlights the characteristic most frequently used to identify a Patent Troll; whether or not the patent holder practices the patent.⁸⁰ In *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, the Supreme Court stated that a patent holder has “the privilege of any owner of property to use or not use it, without question of the motive.”⁸¹ Nevertheless, one of the main complaints made by defendants in infringement actions is that the patent holder is not using or “practicing” the patent.⁸²

The term “practicing” a patent can refer to product manufacture or new product development, but merely licensing or litigating is not included.⁸³ The CEO of Rates Technology is the inventor of the patents the company holds, but because Rates is not making any products,

⁷⁶ See Brief of Petitioners, *supra* note 444, at 24 (expressing concern about “non-practicing entities”); Brief for Computer & Communications Industry Association, *supra* note 422, at 14 (“Easily asserted patents, endowed with automatic injunctive relief, become potent weapons in the hands of non-producing patent firms, sometimes referred to as ‘trolls.’”); Brief of Research in Motion, Ltd. as Amicus Curiae in Support of Petitioners at 2, *eBay, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006) (No. 05-130).

Ever growing numbers of companies are acquiring patent portfolios and using these patent portfolios to extract royalties from existing products and services. These patent assertion companies do not use their patents and know-how to make new products or services available to the public . . . their sole activity is to identify existing products or services in the marketplace against which they can assert their patents.

Id. at 2.

⁷⁷ See Berman, *supra* note 13, at 22 (stating that the term patent troll has become synonymous with the unfair assertion of questionable IP rights).

⁷⁸ Brief of Malla Pollack et al., Supporting *eBay Inc., et al.*, at 17, *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006) (No. 05-130).

The United States Constitution defines the public interest goal of patent statutes as the distribution of new technology. A patentee who does not practice his or her invention within the United States is undermining the public interest which founds legal recognition of personal patent rights. Therefore, a patent holder who is neither practicing the infringed invention nor making a good-faith effort to prepare to practice the invention should be presumed to fail the public interest prong [of the test to determine whether a patent holder can obtain an injunction when their patent is infringed].

Id. at 17.

⁷⁹ THE FEDERAL TRADE COMMISSION, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY 31 (Oct. 2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

⁸⁰ *Id.*

⁸¹ *Cont'l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 429 (1908).

⁸² See Brief of Malla Pollack, *supra* note 78, at 17.

⁸³ THE FEDERAL TRADE COMMISSION, *supra* note 13, at 17.

commentators still refer to the company as a Patent Troll.⁸⁴ Rates Technology's main business is licensing, and it has arranged licensing agreements for its patents with over 700 companies and has also sued Google for infringement.⁸⁵ Because Rates Technology has no other corporate activity besides IP litigation and licensing, the media sees them as an NPE and has labeled them a Patent Troll.⁸⁶

A contrasting example is Eastman Kodak Co., a company which recovered nine-two million dollars from Sun Microsystems for infringement on a patent that Kodak had inherited and was not using.⁸⁷ No one has ever called Kodak a Patent Troll, even though it was not "practicing" that particular patent.⁸⁸ Many large manufacturers create a strategic advantage by holding unused patents in their patent portfolio, and forcing competitors to come to them for licenses in order to use the patented technology.⁸⁹ Also, many individual inventors hold patents on their inventions, but they have neither the expertise, nor the money to manufacture them.⁹⁰ They could also be called NPEs and would be excluded from enforcing their patent rights if this characteristic were used to identify and weed out Patent Trolls.⁹¹

An identifying feature of an NPE is that the majority of revenue coming into the company is from licensing patents.⁹² One example is NTP, Inc., a small Virginia corporation formed by one inventor and one lawyer, whose sole lucrative business practice has been to license the patented technology of the inventor.⁹³ In March 2006, NTP negotiated a \$612.5 million dollar settlement

⁸⁴ Till, *supra* note 3.

⁸⁵ *Id.*

⁸⁶ *See id.*

⁸⁷ Martin Lueck et al., "Patent Troll: A Self-Serving Label that Should be Abandoned," Sept. 28, 2005, http://www.rkmc.com/Patent_Troll_A_Self-Serving_Label_that_Should_be_Abandoned.htm.

⁸⁸ *Id.* (stating that under many definitions of a patent troll, Kodak would appear to be engaging in improper conduct, when in fact they are merely operating within the rules of the system). Individuals and organizations enforcing patent rights, whether invented or acquired, whether a manufacturer of patented technology or not, are exercising a legal right, and that constitutional right should not be denied. *Id.*

⁸⁹ JAFFE & LERNER, *supra* note 188, at 57. An early example is Texas Instruments, who had "virtually no licensing revenues when it decided to assert a number of the patents in its portfolio against its competitors in the mid 1980s. This strategy was so successful that by 1999, the firm was estimated to be earning \$800 million from patent licensing revenues, which represented more than 55% of Texas Instrument's total net income." *Id.*

⁹⁰ Lueck et al., *supra* note 88.

⁹¹ *U.S. Debates Restriction of "Patent Trolls"*, TAIPEI TIMES, Mar. 21, 2005, at 11, available at <http://www.taipetimes.com/News/biz/archives/2005/03/21/2003247222>. Peter Detkin stated, "the term 'patent troll' [should not] apply to all patent owners who demand royalties from others without making the product themselves. Thomas Edison never made any products. We have to be careful because a lot of the behavior we're talking of curbing would have curbed Thomas Edison." *Id.* Edison had more than 1000 patents and founded a company that later became General Electric, Co., the world's second-biggest company by market value. *Id.*

⁹² *Everyone Sick of BlackBerry Patent Battle*, ASSOCIATED PRESS, Nov. 21, 2005, <http://www.foxnews.com/story/0,2933,176239,00.html>; see also William M. Bulkeley, *Patent litigants pose growing threat to business*, WALL ST. J., Sept. 14, 2005, at A1; Chris Carson, "Patent Trolling" Firms Sue Their Way to Profits, MSNBC.COM, Mar. 18, 2006, <http://www.msnbc.msn.com/id/11860819/from/RSS/>. An example is Forgent Networks, with thirty employees and a law firm, who made eighty percent of their revenue in the last quarter of 2005 from licensing deals on just one digital image patent it obtained years ago in an acquisition. *Id.* The company's CEO, Dick Snyder, says, "This country was built on innovation, and in the Constitution there is a provision in there to protect innovation through patenting. It's the American way, and we're just doing what we believe is the right thing to gain value from what we own." *Id.* But see JAFFE & LERNER, *supra* note 18, at 57 (noting Texas Instruments makes fifty-five percent of revenue from licensing, but has not been labeled a patent troll).

⁹³ See *Everyone Sick*, *supra* note 92. NTP was co-founded by Thomas J. Campana, Jr. and a northern Virginia attorney, Don Stout to protect the patent obtained by Campana for a system to send e-mails between computers and wireless devices. *Id.*

from Research in Motion Ltd. for the Blackberry device's infringement on NTP's patent.⁹⁴ The settlement constituted the vast majority of NTP's income, and they were consequently labeled a Patent Troll by the media.⁹⁵

However, the revenue earned from a patent cannot reliably be used to determine who is an NPE or a Patent Troll. For instance, in 2000, IBM earned \$1.7 billion solely from licensing its patents.⁹⁶ Since that was only about fifteen percent of their profits, commentators do not vilify the company as they do Patent Trolls.⁹⁷ With more manufacturers and technology companies generating revenue from their intellectual property holdings, any line drawn based on revenue from patents is sure to lump together legitimate and useful licensing activity along with alleged Patent Trolls.⁹⁸

From these examples, it is clear that diminishing patent enforcement rights for entities that do not practice their patent or that earn the majority of their income from patents is not an equitable solution to the Patent Troll dilemma.

B. Frivolous Claims

A common assertion by victims of Patent Trolls is the infringement claims made against them are frivolous.⁹⁹ Philip Swain, a Boston lawyer who frequently defends parties in patent infringement lawsuits, believes that "[c]ompanies who do the costly grunt work of actually developing and marketing new technologies are being held ransom by tiny outfits whose only assets are 'kooky and vague' patents."¹⁰⁰ One such instance involves a travel agent turned inventor who procured two patents for browser operations.¹⁰¹ He claimed that his patents were infringed by any web site containing information vaguely described as being "from various textual and graphical information data sources."¹⁰² He filed suit against eleven small companies, including a small family-owned business, selling their products online.¹⁰³ Some of the defendants found the claim absurd and joined together to fight the patent holder in court, resulting in the court invalidating the patent.¹⁰⁴

⁹⁴ Richard Drew, *Settlement Reached in BlackBerry Patent Case*, Mar. 3, 2006, <http://www.msnbc.msn.com/id/11659304>.

⁹⁵ Bruce T. Neel, *Patent Trolls Patent Owners Holding Tech Companies Hostage*, ARIZ. BUS. MAG., May-June 2005, at 43.

⁹⁶ See Pete Barlas, *IBM Cashing In Patents Via Web*, INVESTOR'S BUS. DAILY, Aug. 6, 2001, at A6.

⁹⁷ *Id.*

⁹⁸ *U.S. Debates*, *supra* note 911, at 11.

⁹⁹ Sullivan, *supra* note 14.

¹⁰⁰ Kirby, *supra* note 344, at 1.

¹⁰¹ Roth, *supra* note 1; Sam Costello, *Company Claims Patent On "Millions" of e-Commerce Sites*, INFOWORLD, May 15, 2002, <http://www.infoworld.com/articles/hn/xml/02/05/15/020515>

[hnpangea.html](http://www.infoworld.com/articles/hn/xml/02/05/15/020515_hnpangea.html). When the president of Dickson Supply received notice that his e-commerce website infringed on Lawrence Lockwood's patent, he thought, "If they're going after us . . . they have to be going after everybody in the whole U.S. with a web site." *Id.*; see also Paul Davidson, *Patents Out of Control?*, USA TODAY, Jan. 13, 2004, at 2B (noting that Lawrence Lockwood sued fifty small e-commerce companies, many of which settled for one-time fees of less than \$30,000 rather than pay the costs of litigation).

¹⁰² Costello, *supra* note 101. The allegedly offending defendants had also infringed Lockwood's second patent when they used an "automated financial transaction processing system" where a computer can "acquire credit rating data relating to the applicant from the credit rating service." *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

Another much more prolific enforcer of allegedly frivolous claims was Jerome Lemelson.¹⁰⁵ Lemelson received more than 500 patents in his lifetime and the foundation he created to enforce his patents has earned \$1.5 billion in licensing fees.¹⁰⁶ However, some say that he was more of a “science fiction writer” because most of his patents were so broad and vague they were effectively nonsense.¹⁰⁷ In September 2005, the CAFC affirmed a decision in favor of the multiple defendants sued by Lemelson’s corporation for infringement on seventy-six asserted patent claims.¹⁰⁸ The court ultimately found that Lemelson’s patents were invalid for lack of written description and enablement.¹⁰⁹ While explaining how frivolous some claims of infringement are, David Simon, chief patent counsel of Intel, referred to an accusation of infringement Intel received from the owner of a patent for a drill used to make a hacksaw blade that he believed Intel was infringing upon.¹¹⁰ Simon resented the time he had to spend explaining to the patent holder that Intel had absolutely nothing in their products or processes that even vaguely resembled his patented hacksaw blade drill.¹¹¹ It may be true that some Patent Troll infringement claims are frivolous, but the validity of a claim is determined in court and there is no way to distinguish in advance whether a Patent Troll or any patent holder is making a frivolous claim before the court makes its ruling.

The final determination of frivolity of the claim comes from the court.¹¹² The court can impose Federal Rule of Civil Procedure 11¹¹³ sanctions and Federal Rule of Appellate Procedure (“FRAP”) 38¹¹⁴ sanctions, respectively, for bringing frivolous claims or appeals. In 1996, the CAFC imposed FRAP 38 sanctions against S. Bravo Systems (“Bravo”) and its attorneys for filing

¹⁰⁵ Daniel S. Burges, *Lemelson Patents Ruled Invalid, Unenforceable and Not Infringed*, PHOTONICS BUSINESS WORLD, Mar. 2004, available at <http://www.photonics.com/content/spectra/2004/March/business/67917.aspx>; see also Goldman, *supra* note 69, at 1.

¹⁰⁶ Burges, *supra* note 105.

¹⁰⁷ Goldman, *supra* note 69, at 1. Robert Shillman, chief executive of Cognex Corporation, who sued Lemelson’s foundation after they initiated litigation against many Cognex customers for infringement of Lemelson’s patent. *Id.* Goldman states that Lemelson’s detractors claim his patents were in fact worthless and he was one of the great frauds of the twentieth century. *Id.* The machine vision patent at issue was a 150 page patent application filed on Christmas Eve in 1954 by Lemelson. *Id.* It contained diagrams showing how a robot could perform a variety of fantastic tasks during industrial production, such as riveting, welding, and transport. *Id.* It also showed how a robot, armed with a camera, could serve as the quality control inspector and mange jobs that the human eye could not. *Id.* This is the same patent that was overturned because the court found that no one could have built current machine vision technology from the fanciful sketches in the 1954 patent, and it lacked enablement. *Id.*; see also Burges, *supra* note 105. Lemelson received more than 500 patents over his lifetime, the first for an improvement on the propeller beanie in 1953; his foundation holds more than 180 of his unexpired patents and pending claims. *Id.*

¹⁰⁸ *Symbol Technologies, Inc. v. Lemelson Med., Educ. & Research Found.*, 422 F.3d 1378, 1382 (Fed. Cir. 2005) (stating that Lemelson had waited eighteen to thirty-nine years to file the infringement claims in this case).

¹⁰⁹ *Id.* at 1381–82; see also Burges, *supra* note 105. Lemelson and his attorney were able to collect royalties for the machine vision and bar-code scanning patents from 979 businesses in a multitude of sectors before these patents were found invalid. *Id.*

¹¹⁰ *U.S. Debates*, *supra* note 91, at 11.

¹¹¹ *Id.*

¹¹² Lueck et al., *supra* note 87. “To the extent anyone knowingly abuses the patent system, by bringing frivolous suits to obtain nuisance settlement agreements, there are already remedies in place to address such situations, including sanctions under Rule 11 and the recovery of attorneys fees under 35 U.S.C. § 285.” *Id.*

¹¹³ FED. R. CIV. P. 11(b)(2). An attorney or unrepresented party is certifying that “the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument.” *Id.*

¹¹⁴ FED. R. APP. PROC. R 38. “If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.” *Id.*

a frivolous appeal.¹¹⁵ In *S. Bravo Systems, Inc. v. Containment Technologies Corp.*, Bravo had filed suit against Containment Technologies Corporation (“CTC”) for infringement of a patent on a secondary containment system leak-signaling device, and the district court granted summary judgment in favor of CTC on all claims.¹¹⁶ The Court of Appeals noted, “[t]he infirmities of Bravo’s appeal as filed were exacerbated by representations made in Bravo’s briefs and in oral argument that lacked legal or factual support.”¹¹⁷ Some patent infringement claims are frivolous, but only a court can make that determination and there are existing sanctions when parties attempt to waste the court’s time in this manner.¹¹⁸

Some of the most infamous Patent Trolls have had their claims of infringement validated by the courts, so they cannot be called frivolous claims.¹¹⁹ Notorious Patent Troll NTP had its patent infringement claim validated in court.¹²⁰ Even though the media vilified NTP as a small Patent Troll trying to bring down the useful and popular Blackberry device, the judge found that the Blackberry device did infringe on NTP’s patent.¹²¹ Therefore, frivolous claims cannot be used as a useful characteristic to identify a Patent Troll in advance of litigation.

C. Are Patents Property?

Some commentators suggest that the key to taking the bite out of Patent Trolls is to limit the rights conferred by a patent and to treat it as a different type of property.¹²² A patent is now treated the same as other property, so a patent holder can exclude others from using the invention no matter what the circumstances or motivation for doing so.¹²³ One current proposal for patent system reform is to allow a patent holder to exclude others from using the patented invention only when it serves the public good.¹²⁴

According to current U.S. patent law, patents have the “attributes of personal property.”¹²⁵ In *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, the Supreme Court stated “it was decided that patents are property, and entitled to the same rights and sanctions as other property.”¹²⁶ However, in the dissent of *Special Equipment Co. v. Coe*, three justices agreed that it is inconsistent with the Constitution and patent legislation to treat a patent as a form of private property.¹²⁷ They went on to cite an earlier case suggesting that a patent is a privilege “conditioned by a public purpose.”¹²⁸

¹¹⁵ *S. Bravo Sys., Inc. v. Containment Technologies Corp.*, 96 F.3d 1372, 1373 (Fed. Cir. 1996). Rule 38 sanctions were imposed against Bravo and its counsel, with joint and several liability. *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1377.

¹¹⁸ Lueck et al., *supra* note 87.

¹¹⁹ Nathan Myhrvold, *Inventors Have Rights, Too!*, WALL ST. J., Mar. 30, 2006, at A14.

¹²⁰ *Id.*

¹²¹ *Id.* The judge in the case also mentioned that the Blackberry maker’s litigation tactics were “egregious” and “fraudulent,” even though the party was painted as the victim by the media. *Id.*

¹²² Brief of Business Software Alliance, et al. as Amic Curiae in Support of Petitioners at 19, *eBay, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006) (No. 05-130).

¹²³ DONALD S. CHISUM, CHISUM ON PATENTS, VOLUME 8 § 22.01 (Matthew Bender & Company, Inc. 2006) (stating that patents are subject to general legal rules on the ownership and transfer of property).

¹²⁴ Brief of Business Software Alliance, et al., *supra* note 122, at 29.

¹²⁵ 35 U.S.C. § 261 (2006).

¹²⁶ *Cont’l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 425 (1908).

¹²⁷ *Special Equip. Co. v. Coe*, 324 U.S. 370, 381 (1945).

¹²⁸ *Id.* at 382 (citing *Mercoid Corp. v. Mid-Continent Co.*, 32 U.S. 661, 666 (1833)).

Reserving the privilege of enforcement only for patents that have a public purpose is a very vague standard by which to judge. Certainly Eli Whitney's cotton gin would be considered to serve a public purpose, but what about the Blackberry communication device? It may be used by teenagers to email their friends, but it is also used by the government to communicate with contractors and private parties.¹²⁹ Ultimately, the very basic public purpose of protecting an individual's intellectual property is served by all patent licensing or litigation activities.¹³⁰

The trend toward recognition of intellectual property as a valuable asset was spurred on greatly in 2003, after many internet start-up companies went bankrupt.¹³¹ Many of the companies that went out of business had valuable patents that could be enforced against large corporations that had built on the technology.¹³² The treatment of patents as property is culminating in the formation of a bank that will insure, sell, appraise, and leverage intellectual property just like any other asset.¹³³ The patent's fate of being treated like traditional property appears to be sealed in the economic sector.¹³⁴ If only certain types of patent holders could enforce their intellectual property rights, the value of a patent would change depending on who owned it. As a result, this

¹²⁹ Brief of Business Software Alliance, et al., *supra* note 122, at 29. The Department of Justice filed a statement of interest in the Blackberry/RIM litigation explaining that the government had a substantial interest in ensuring that any injunction entered would not interfere with government users. *Id.* at 30. The Justice Department further stated that "the federal government may have a further interest in this case to the extent that it is vital for it to be able to communicate in real-time with private parties, including government contractors, through Blackberry™ devices." *Id.*

¹³⁰ Brief of Biotechnology Industry Organization as Amicus Curiae in Support of Respondent at 8, eBay, Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837 (2006) (No. 05-130).

A general rule enjoining infringement of valid patents promotes the public interest. Stopping such infringement of valid patents serves as the economic incentive to create the new and non-obvious subject matter that, once publicly disclosed via the patent, permits that advance in technology to be further refined, extended and improved.

Id. Brief of Amicus Curiae Pharmaceutical Research and Manufacturers of America in Support of Respondent at 6, eBay, Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837 (2006) (No. 05-130). "Courts have consistently concluded that the public interest almost always receives greater benefit from a functioning and reliable patent system." *Id.*; *see also* Brief of Rembrandt IP Management, LLC as Amicus Curiae in Support of Respondent at 5, eBay, Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837 (2006) (No. 05-130) (asserting that "non-practicing entities play a key role in a system designed to promote progress by protecting invention").

The exclusive property right created by the patent has several public benefits. It assures the inventor compensation for the work of successful invention. It allows the inventor to disclose the invention to the public and to potential investors without the fear of unlicensed imitation or appropriation. And it encourages investors – which could be the patent-holder himself, his licensee, or outside financiers – to risk capital in bringing the invention to market. Without the incentives and protections afforded by the patent grant, far fewer inventions would be disclosed to the world in the same timeframe. None of these critical functions could be performed effectively if the patent right, like any property right in a capitalist system, were not freely transferable.

Id. at 5.

¹³¹ Lisa Lerer, *Going Once?*, IP LAW AND BUSINESS, Oct. 1, 2005, at 45.

¹³² *Id.* (stating the director of intellectual property law at Altera Corporation, Derek Minihane, asserted that storage and e-commerce are hot areas, so those type of patents sell for unusually high prices at bankruptcy auctions).

¹³³ *Id.* (explaining the vision of Ocean Tomo, a new type of IP bank, which likens itself to a nineteenth-century merchant bank, employs fifty-five engineers, lawyers, and business people that will use intellectual property as valuable leverage for financing).

¹³⁴ Kirby, *supra* note 344, at 1. "James Malackowski, Ocean Tomo's president and CEO, said he sees the value of patents following the same course as home mortgages have over the past 20 years. . . . [I]ntellectual property is becoming an investable asset for the first time." *Id.*

would severely limit the ability to freely trade and sell rights in patents.¹³⁵ This law would be as ludicrous as a law that a person owning a home purely as an investment could not sell it for as much as a person who also occupied the home they were selling. It should be up to each patent holder whether to practice the invention or sell the patent rights, and that choice should not be taken from them by an arbitrary determination of whether a patent holder is serving the public good.

III. PROPOSAL

Patent Troll is a prejudicial, imprecise, and subjective label.¹³⁶ Commentators have largely used it as a euphemism for problems with the current patent system.¹³⁷ Rather than cowering in fear of the imagined troll, it is better to examine the actual underlying issues that the troll embodies. Part A of this section explores fears about the patent system that form the basis for discrimination against NPEs. Part B of this section discusses fears about the quality of patents granted by the USPTO, which are the basis of allegations that Patent Trolls make frivolous claims. Part C of this section examines the fear of injunction, which is the underlying motivation for a push to only allow enforcement of patents for the public good.

A. Fear About Changes in Patent Enforcement

Use of the term NPE sums up the prejudice that exists against patent holders that do not practice the patents they hold.¹³⁸ This animosity stems from the angst of large manufacturers and high tech companies, who used to be essentially untouchable by individual patent holders accusing them of infringement.¹³⁹ Large entities are accustomed to using their considerable resources to outlast an individual inventor in court by dragging out the litigation for decades.¹⁴⁰

With the advent of contingent fee patent representation, individual inventors can enlist the help of companies and law firms specializing in the area to match the resources of a large corporation's intellectual property division.¹⁴¹ Also, companies with large patent portfolios traditionally could use their patent holdings as a shield against other large companies in their

¹³⁵ Brief of Rembrandt IP Management, *supra* note 130, at 2; *see also* ANTITRUST MODERNIZATION COMMISSION, *supra* note 4, at 8.

¹³⁶ Lueck et al., *supra* note 87; *see also* Kirby, *supra* note 34, at 1 (quoting the chief executive of Acacia referring to the label "patent troll" as a term with no substance).

¹³⁷ ANTITRUST MODERNIZATION COMMISSION, *supra* note 4, at 3 (asserting that the phrase "patent troll" is now used as a placeholder for all the ills perceived in the patent system).

¹³⁸ *Id.* at 8 (asserting that it is important that proposed patent legislation is evaluated based on real data, not hyperbolic anecdotes). Detkin states that he understands the frustration of his colleagues in large technology companies, but the impact of patent troll lawsuits is exaggerated. *Id.*

¹³⁹ Brief for Respondent, *supra* note 27, at 48 (stating that injunctive relief for the small entity is still appropriate even if a large-company infringer is discomfited when sued by a small-entity patentee that cannot be threatened with a patent countersuit).

¹⁴⁰ Myhrvold, *supra*, note 119, at A14; *see also* Hofman, *supra* note 60 (detailing legal struggles of patent holders against large corporations).

¹⁴¹ Kirby, *supra* note 344, at 1. One industry watcher asserts that these IP representation firms are at the "forefront of an evolution of intellectual property . . . acting as brokers between the idea generators and the product developers." *Id.*

industry, so when they are accused of infringement, they accuse the other company of infringement in return.¹⁴²

However, the shield is useless against a non-practicing entity, so these large companies are refocusing their efforts on spreading Patent Troll myths and arguing to “weaken patent laws for the little guy.”¹⁴³ The landscape of patent enforcement is changing and although change is scary for some, the end result is that all patent holders now have a better opportunity to enforce the intellectual property rights they are entitled to.¹⁴⁴

Preliminary results of a recent study indicate that of patent infringement lawsuits filed in the last five years, NPEs filed about two percent.¹⁴⁵ This is a very small percentage to have inspired so many to cry “troll.” Rembrandt IP Management, a proudly self declared NPE, argues that NPEs “play a valuable role in a system of free enterprise in which all property rights, including intellectual property rights, are (and must remain) freely tradable.”¹⁴⁶ Since NPEs focus solely on realizing the value of the patent through licensing and enforcement on behalf of the inventor, the inventor spends more time focusing on inventing.¹⁴⁷

A distinction drawn between practicing and non-practicing entities does not make sense as a basis for discrimination because almost all patent holders are non-practicing to some degree.¹⁴⁸ This could be because the inventor lacks the resources to practice the invention or it may not be practical to do so. Also, many companies hold patents that are part of clusters of related patents

¹⁴² Myhrvold, *supra* note 119, at A14.

¹⁴³ *Id.* (asserting that big tech companies would rather campaign to weaken patent laws for the little guy than to pay out a small fraction of their huge profits to a legitimate patent holder).

¹⁴⁴ *Id.*; see also ANTI-TRUST MODERNIZATION COMMISSION, *supra* note 4, at 6. Detkin coins another colorful term in his written testimony, “patent squatters:”

In sharp contrast to the anecdotal arguments about patent trolls, real data shows that ‘patent squatters’ are an actual and growing problem. A person who moves into a house or apartment without the permission of the owner is called a squatter and is not tolerated. . . . Yet this is precisely what happens in the intellectual property world. Witnesses for high-tech companies freely admit that they do not perform any patent clearance studies before releasing their products. . . . The current ‘head in the sand’ approach that is the current standard operating procedure should not be viewed as acceptable to anyone. Companies that market products without patent clearance routinely ignore the valid patent property rights of others, demanding that an inventor go to litigation rather than provide fair compensation for the invention short of litigation.

Id. at 6.

¹⁴⁵ ANTI-TRUST MODERNIZATION COMMISSION, *supra* note 4, at 9; see also Myhrvold, *supra* note 119, at A14 (asserting that of the two percent of patent lawsuits brought by non-practicing entities, the vast majority are perfectly legitimate companies or universities).

¹⁴⁶ Brief of Rembrandt IP Management, *supra* note 130, at 1.

¹⁴⁷ *Id.*; see also Lueck et al., *supra* note 87. “[S]ociety as a whole benefits from the licensing and enforcements efforts of many, for they allow the distribution and use of patented technology.” *Id.*

Efforts of patent licensing companies, small companies, non-manufacturing companies and others have three key benefits: (1) they reward inventors; (2) they provide opportunities for small inventors; and (3) they prevent large companies from poaching innovation from small companies or individual inventors. These three benefits support the underlying goal of the U.S. Patent System – fostering innovation.

Id.

¹⁴⁸ Brief for Respondent, *supra* note 27, at 14. “Virtually all patent holders are ‘non-practicing’ to a degree, and even if it were possible to distinguish between ‘good’ and ‘bad’ non-practicing entities, such distinctions not only have little, if any, basis in the facts of this case, but also involve policy judgments more appropriately left to Congress.” *Id.*; see also Lueck et al., *supra* note 87. Another reason that a distinction between practicing and non-practicing entities is unnecessary is that the court already addresses this difference in the remedies available to the patent holder for infringement. *Id.* A patent holder who is manufacturing a patented product may receive lost profits, but a patent holder not doing so can only get a reasonable royalty, which is usually much less. *Id.*

and even companies practicing some patents are unlikely to be practicing all the patents that they hold.¹⁴⁹

The Supreme Court in the recent *eBay* case rejected the idea that different standards should be used for an NPE as opposed to a practicing entity.¹⁵⁰ The Court asserted that all patent holders could be entitled to an injunction and they named NPEs, such as university researchers or self-made inventors that could meet the test set forth for an injunctive remedy.¹⁵¹

Whether called non-practicing entities or Patent Trolls, every holder of a patent should be able to fully enforce all of the legal rights conferred by it.¹⁵² Simply because some large companies are not used to facing patent holders with the ability to enforce their patent rights is no reason to take rights away from all NPEs.

B. Fear of Too Many Patents and Rampant Enforcement

Allegations of frivolous claims brought by Patent Trolls against other companies are a mask for uncertainty about the quantity and quality of patents granted with the thin resources of the USPTO.¹⁵³ These patent concerns should be addressed by proposed changes in the structure of the USPTO, not by taking rights away from a certain class of patent holders.¹⁵⁴

Some industries, like biotechnology and pharmaceuticals, are diligent about performing patent studies so that they do not lose years of research on a product that is infringing on someone else's patent.¹⁵⁵ However, in fast moving industries like electronics and software, being the first to market with the newest technology has often taken precedence over meticulous patent studies.¹⁵⁶ A witness from a high-technology company before Congress freely admitted that these companies usually do not perform any patent clearance studies before releasing their products.¹⁵⁷

Simply because there are so many patents synthesized into high-technology products is no excuse to overlook anyone's legitimately obtained patent rights.¹⁵⁸ One industry insider claims that many of the largest companies in the computer industry have a policy that prevents engineers from reading patents or performing prior art searches to determine whether their work infringes on a patent.¹⁵⁹ The reason given for this is patent studies are expensive and a "distraction" that might slow down the time to market of products.¹⁶⁰ The CEO of Intellectual Ventures asserts, "weakening patent laws, whether in the Supreme Court or Congress, is no more than a government bailout of the infringement problems big tech companies deliberately made for themselves."¹⁶¹

¹⁴⁹ Brief for Respondent, *supra* note 27, at 49.

¹⁵⁰ *eBay, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1844 (2006).

¹⁵¹ *Id.* at 1840.

¹⁵² Myhrvold, *supra* note 119, at A14. "Without full [enforcement] rights there is no way for a small inventor to get a big infringer to the table to settle. Instead, they'll stall and drown the little guy with legal fees." *Id.* at 2.

¹⁵³ See ANTITRUST MODERNIZATION COMMISSION, *supra* note 4, at 9.

¹⁵⁴ *Id.* at 6.

¹⁵⁵ Myhrvold, *supra* note 119, at A14.

¹⁵⁶ *Id.*

¹⁵⁷ ANTITRUST MODERNIZATION COMMISSION, *supra* note 4, at 6.

¹⁵⁸ *Id.* (asserting that some high tech companies argue that full product clearance is not possible either because the products are too complex or because so many patents issue long after the technology is integrated into their products). "While these are valid criticisms, they do not excuse a complete lack of effort. The current 'head in the sand' approach that is the current standard operating procedure should not be viewed as acceptable to anyone." *Id.*

¹⁵⁹ Myhrvold, *supra* note 119, at A14.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

The menacing troll stories are a sign of the fear some companies have about changing their entire business model to incorporate respect for the intellectual property holdings of others.¹⁶² Requiring companies across all industries to perform more prior art searches before producing a product can not be called anything but a step in the right direction.¹⁶³

C. Fears about Being Enjoined from Production

There is an argument that patents are a property right, subject to the caveat that the courts only enforce them to protect the public good.¹⁶⁴ This is a position maintained by companies who are scared that they will be enjoined from doing business by one rogue patent holder who has nothing to lose by dragging them to court.¹⁶⁵ However, this distorts the actual rights conferred by a patent and is an exaggeration of the threat posed by a patent holder suing for infringement. The American patent system has rules in place to balance the public interest against enjoining a profitable company from doing business and courts should be trusted to adhere to those rules when deciding whether to grant an injunction.¹⁶⁶

From the early nineteenth century until *eBay* in 2006, an injunction was practically automatic upon a finding that a valid patent was being infringed.¹⁶⁷ During that time, however, some courts refused to grant injunctions when doing so was not in the public interest.¹⁶⁸ These exceptions included not enjoining use of an infringing railroad brake in use on 15,000 cars and not enjoining operation of a city water treatment plant.¹⁶⁹ After *eBay*, the standard for granting an injunction in a patent case gives even more weight to the public interest than before.¹⁷⁰ The common thread is that the Court has always recognized the need to balance the public interest in determining what remedies are appropriate in patent infringement cases. Any additional restrictions placed on patent enforcement related to the “public good” are unnecessary on top of these already equitable standards.

It is precisely for the promotion of the public good that we protect a patent holder with the right to exclude others from using, making, selling, or offering for sale the patented invention.¹⁷¹ So far, the American patent system has been extraordinarily successful at fostering innovation.¹⁷²

¹⁶² *See id.*

¹⁶³ *Id.* Myhrvold asserts that the crux of the debate about Patent Trolls is differing corporate cultures and attitudes about the patent system. *Id.*

In some industries, like pharmaceuticals or biotech, patents are crucial to the business model, so they support and respect patent rights. Tech companies, on the other hand, win by muscling their way to sufficient market share to become a de facto standard (some would say monopoly). Because patents don't figure in this business model, tech companies don't hold the patent system in high regard. Patents are simply not a priority for many tech companies. Ebay, for example, has only 11 issued patents.

Id.

¹⁶⁴ Brief of Amicus Curiae Pharmaceutical Research, *supra* note 130, at 4.

¹⁶⁵ *See* ANTITRUST MODERNIZATION COMMISSION, *supra* note 4.

¹⁶⁶ *eBay, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1839 (2006).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1841.

¹⁶⁹ *City of Milwaukee v. Activated Sludge*, 69 F.2d 577 (7th Cir. 1934); *Nerney v. New York*, 83 F.2d 409 (2d Cir. 1936).

¹⁷⁰ Jonathan Muenkel and Eric Lee, *The eBay Effect*, IPL NEWSLETTER, Fall 2006, at 15.

¹⁷¹ Lueck et al., *supra* note 87.

¹⁷² *Committee Print Regarding Patent Quality Improvement: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 133 (2005) (statement of Richard

The patent grant, conferring intellectual property rights in an invention, provides incentives to U.S. inventors and allows the U.S. patent system to grant patents for ten times as many significant inventions as the rest of the world combined.¹⁷³

Fear over effects of the growing number of Patent Trolls has led many to jump to the conclusion that the United States must limit the right to enforce a patent only where it serves the public good.¹⁷⁴ The existing standards to determine when an injunction will issue already take the public good into account, and it is excessive to suggest further stringent requirements on certain patent holders. All patent holders are a vital part of the successful American patent system, and they deserve to retain the full spectrum of patent rights the system has to offer.¹⁷⁵

IV. CONCLUSION

The Patent Troll label is an inflammatory and offensive term that has no real meaning. It is useless in defining any one type of patent holder based on behavior or characteristics.¹⁷⁶ Large companies who have never felt so threatened by individual patent holders have simply used it as a retort.¹⁷⁷ The term is also useless in defining a group of patent holders whose rights to enforcement should be limited. Enforcement of a patent must be available to all holders of patents, regardless of who they are or what their business goals are.¹⁷⁸ When this right is secure, the patent system can continue to retain and even increase the incentive to invent, which has been the core aim of the system since its inception.¹⁷⁹

Levin, President, Yale University), available at <http://judiciary.house.gov/media/pdfs/printers/109th/20709.pdf>. “High rates of technological innovation, especially in the 1990s but continuing to this day, suggest that the patent system is working well and does not require fundamental changes.” *Id.*

¹⁷³ Lueck et al., *supra* note 87.

¹⁷⁴ Brief of Business Software Alliance, et al., *supra* note 122, at 29.

¹⁷⁵ *Committee Print Regarding Patent Quality Improvement: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 133 (2005) (statement of Nathan Myhrvold) at 140. Small inventors “do the bulk of America’s inventing and they deserve our support.” *Id.* at 140.

¹⁷⁶ ANTITRUST MODERNIZATION COMMISSION, *supra* note 4, at 3.

¹⁷⁷ Philip Mann, *Patent Holding Companies Unfairly Trashed*, Nov. 19, 2004, <http://www.iplitigationblog.com/patent-lawsuit-news-patent-holding-companies-unfairly-trashed.html>. Mann characterizes the bashing of patent trolls as disdain that large companies exhibit toward small patent holders. *Id.* He says, “I think what’s really being said here is that companies could rush their products to market faster if they didn’t need to worry about such niceties as not infringing patents, particularly those belonging to others.” *Id.*

¹⁷⁸ See Myhrvold, *supra* note 119.

¹⁷⁹ *Id.*

The patent system exists to give economic incentive to create inventions – not products. After all, profit is the incentive to create and sell products. In order to have a level playing field, inventors must have a full set of rights, regardless of whether they are big or little, or whether they make products or just invent.

Id.