

Patent Trolls – Not Just for Technology Companies Any More

08.11.11 01.07.26

Lately, we've been hearing from a number of our clients and friends in the industry of a startling increase in the number of letters and emails alleging patent infringement. As hospitality- and restaurant-industry businesses become bigger and bigger users of patentable technology, we expect we may see many more of these claims. In an effort to provide a straightforward set of guidelines to our clients and friends, I went to my litigation partner, Tom Richardson, who happens to be defending a number of alleged patent infringement claims right now, and good friend and patent attorney, Charles Moore, and asked them for a streamlined checklist of how to handle receipt of such a letter or email. Tom brings over 35 years of litigation experience to a broad range of complex cases, including anti-trust and business torts; securities; trademark, copyright and patent disputes; complex commercial contract cases; and product liability and warranty claims and risk avoidance. Charles is a patent attorney with the Portland, OR intellectual property firm of Alleman Hall McCoy Russell & Tuttle, LLP, where he represents clients in a variety of patent matters, including helping them defend against patent troll claims, and preparing and prosecuting patent applications before the U.S. Patent and Trademark Office. Charles also has over 13 years of in-house practice, most recently as Senior IP Counsel with Hewlett-Packard Company. Here are their suggestions:

Patent litigation filed by non-practicing entities, or "patent trolls," has proliferated in recent years. The business model of the typical patent troll focuses on acquiring, licensing and litigating patents, most commonly against technology-based companies. Defendants in such suits face unique challenges, as most patent trolls do not sell products, provide services or engage in traditional business activities related to their patents. Hence the plaintiff-trolls are not subject to counterclaims often available to standard patent litigation defendants, such as patent infringement, unfair competition, and antitrust claims.

More recently, patent trolls have expanded their targeting to include traditional brick and mortar businesses like hotels and restaurants that do not make or sell the allegedly infringing products. Instead, these companies simply use the products in conducting their business or providing services to guests and customers. Additionally, in most cases these companies acquired the products from third parties, and thus have no or limited knowledge of the underlying technology that is alleged to infringe.

Innovatio Suit

A recent example of a patent troll targeting brick and mortar businesses is Innovatio IP Ventures, LLC ("Innovatio"). Earlier this year Innovatio acquired a family of 30 patents allegedly covering wireless Internet ("WiFi") technology used in wireless local area network products, such as routers. The company then began

a widespread campaign asserting the patents against traditional brick and mortar businesses, such as hotels, bakeries, and grocery stores. None of these businesses make or sell the accused technology, but merely use the products to provide wireless Internet services to their customers.

In March 2011 Innovatio sued 10 hotels, restaurants and grocery stores in the Northern District of Illinois for patent infringement, asserting that wireless Internet services provided by the defendants in their establishments infringe Innovatio's patents[1]. In the suit, Innovatio is asserting 17 patents containing 340 claims. Infringement of just one of the 340 patent claims can mean liability for a defendant. Since filing this initial suit Innovatio has continued sending cease and desist letters to other retailers demanding that they take licenses to the patents. The company has also filed four additional infringement suits in various jurisdictions targeting other brick and mortar businesses, including suits in the Middle District of Florida and the District of Nevada. In May 2011 two suppliers of accused products, Cisco and Motorola, filed a declaratory judgment action in the District of Delaware for non-infringement and invalidity of the asserted Innovatio patents.[2]

Unfortunately for many of the brick and mortar businesses accused of infringement, patent litigation is unfamiliar territory. Upon receiving a cease and desist letter the business must quickly decide whether to fight the claim or pay a substantial license fee.

You're in a troll's crosshairs - now what?

If a troll accuses you of infringement, how do you protect your business while maximizing your chances of successfully ending the dispute? Here are a few suggestions:

1. **Don't Ignore.** Don't throw the letter away or delete the email because it seems preposterous or impossible to understand. Patent infringement is a strict liability legal rule. Even if your intentions are good, and you have no knowledge that any device or system in your property contains patented technology or processes (and in any event surely only the supplier of the device or system could be liable) -think again. If there is a true infringement all infringers can be held liable.
2. **Get Help.** Contact experienced litigation and/or patent counsel to evaluate the claim and patents at issue. Knowledgeable counsel can help you quickly decide whether to fight the case, take a wait-and-see approach, or pay a license fee to exit. Patent infringement litigation is particularly expensive, and costs and fees in patent troll cases are often a larger consideration than in standard cases against competitors involving core technology or business issues. When considering taking a license, you must also consider the risk of marking yourself as an easy target for future assertions.
3. **Stay Off the Radar.** Trolls often take a shotgun approach in their letter-writing campaigns, and quickly focus resources on any company that makes contact. While you should certainly perform appropriate due diligence to analyze the merits of the claim, an effective strategy often includes ignoring the troll's requests for discussions.
4. **Seek Indemnification.** Engage your suppliers of the accused technology or providers of the accused services and ask them to defend you. If your contracts include defense/indemnity provisions, tender your

claim promptly. In cases such as the Innovatio suits, suppliers of the products at issue may be highly motivated to defend their customers.

5. **Contact Competitors.** Reach out to others in your industry who have received similar letters. In troll assertions your competitors may become allies in formulating defenses and strategies. Fighting these cases together makes more sense than fighting alone. Also consider joining or forming a joint defense group to exchange information and share costs and expenses.

If you'd like additional information about patent troll litigation or any other topic covered in this blog, please feel free to [contact me](#).

[1] *Innovatio IP Ventures, LLC v. ABP Corporation, et al.*, Case No. 1:11-cv-01638 (N.D. Ill Mar. 8, 2011)

[2] *Cisco Systems, Inc. and Motorola Solutions, Inc. v. Innovatio IP Ventures, LLC*, Case No. 1:11-cv-00425 (D. Del. May 13, 2011)

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