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WHO IS REALLY UNDERMINING THE PATENT SYSTEM – “PATENT TROLLS” OR  
CONGRESS?

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## ABSTRACT

“Patent troll” has entered the legal lexicon, stirring up heated debates over fundamental issues of patent rights. This article discusses the etymology of the term “patent troll” —from its beginnings as a deliberately derogatory term thrust forward as a defense to weaken the enforcement of patents against large corporations to its current manifestation as a call for patent reform. Interestingly, statistics show the “patent troll” problem is grossly overstated compared to the contentions of the corporate world. Moreover, enforcement of patents stimulates small business growth, innovation, and dissemination of knowledge to the public. This article suggests Congressional diversion of PTO funding as a more pressing issue burdening an already overworked system, increasing the duration of patent prosecution and diminishing overall patent quality. Resolution of these issues will better serve to “promote the useful arts” than a misguided effort against “patent trolls.”

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## WHO IS REALLY UNDERMINING THE PATENT SYSTEM – “PATENT TROLLS” OR CONGRESS?

RAYMOND P. NIRO\*

### I. WHAT IS A “PATENT TROLL”?

Wikipedia defines a patent troll as follows:

[A] pejorative and controversial phrase attributed to former Intel assistant general counsel Peter Detkin. It was originally meant to describe entities that purchase patents at low prices from inventors, and then broadly assert these patents across an industry for the purpose of generating nuisance value settlements. According to Detkin, instead of having invented, or actively developing, a technology, a patent troll would acquire (“troll for”) a patent in order to enforce the patent against potential infringers, and pursue opportunities for license agreements. When the patent troll is unable to reach a licensing agreement with a company, it might threaten to sue for patent infringement. To avoid litigation, companies might choose to settle by purchasing a license.

Today, patent troll is used more generally to describe a variety of businesses [using similar patent strategies] . . . .<sup>1</sup>

The popular media now editorializes about villainous “patent trolls,” analogizing them to those nasty pirates of the high seas. This includes The New York Times:

[P]rofiters, including lawyers and hedge funds, have turned the very purpose of patent rights – to encourage people to invent and produce – on its head, using them to tax, blackmail and even shut down productive companies unless they pay high enough ransoms. These so-called patent trolls have emerged as the villains in this intellectual property debate.<sup>2</sup>

And the Denver Post:

There’s a new bogeyman haunting corporate America alongside the crusading white-collar prosecutor and the zealous class-action attorney. The latest predator to terrorize boardrooms is a creature called the “patent troll.” This is a patent-holding company that collects licensing fees from users of its technology and sues those who won’t pay.<sup>3</sup>

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<sup>1</sup> Wikipedia.org, Patent troll, [http://en.wikipedia.org/wiki/Patent\\_trolls](http://en.wikipedia.org/wiki/Patent_trolls) (last visited Feb. 1, 2007).

<sup>2</sup> Editorial, *Patently Ridiculous*, N.Y. TIMES, Mar. 22, 2006, at A24.

<sup>3</sup> Greg Griffin, *Trolling for Patents: The latest terror of corporate America is the “patent troll,” a fearsome entity that can sue a company using its patent for millions, or threaten a shutdown*, DENVER POST, Mar. 12, 2006, at K-01.

And even The Wall Street Journal has weighed in on the issue:

Patents are supposed to protect intellectual property and spur innovation, and once upon a time in America they did. But like everything else the legal system touches nowadays, U.S. patent law has been hijacked so that it now operates nearly in reverse, deterring research and penalizing innovation.<sup>4</sup>

“Hijacked”; “villains”; “predator”; “terrorize”; “blackmail” are the very harsh words now being used so casually by the national media to describe persons who share only one thing: they each own and enforce their exclusive rights to patented inventions. For balance, this is what an independent inventor had to say in response:

As an independent inventor, I was outraged by your editorial. According to what you imply, then an inventor such as Chester Carlson would not have had a right to his Xerography patent because he offered it for license instead of manufacturing copiers himself. The real issue is the lengths large companies will go to in order to avoid paying independent inventors for their creations. If you are truly concerned about spurring innovation and improving the patent system, you should advocate jail for patent thieves.<sup>5</sup>

And Nathan Myhrvold, CEO of Intellectual Ventures,<sup>6</sup> also took umbrage at the “derogatory phrase”:

Perhaps the biggest myth is the danger of “patent trolls” – people who supposedly manipulate the patent system in a shady way. It does happen, but apart from some anecdotes, no evidence has been offered that patent trolls are a major problem. Court records show that only 2% of all patent lawsuits are due to plaintiffs that have no ongoing product business. Of that 2%, the vast majority are perfectly legitimate companies or universities. A tiny minority of patent suits are due to bad actors, but it’s hardly a crisis. . . .

. . . .

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. America needs to have future generations of inventions and technology. We can’t mortgage our future by taking away the rights and incentive of our inventors.<sup>7</sup>

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<sup>4</sup> Editorial, *Patently Absurd*, WALL ST. J., Mar. 1, 2006, at A14.

<sup>5</sup> W. Alan Burris, Letter to the Editor, *Patent Law, Injunctions and the Public Interest*, WALL ST. J., Mar. 10, 2006, at A19.

<sup>6</sup> Intellectual Ventures, Who We Are, <http://www.intellectualventures.com/about.aspx> (last visited Feb. 10, 2007).

<sup>7</sup> Nathan Myhrvold, *Inventors Have Rights, Too!*, WALL ST. J., March 30, 2006.

Mr. Myhrvold speaks from personal experience; he was Microsoft’s Chief Technical Officer before starting his own company, Intellectual Ventures.<sup>8</sup> Putting all this rhetoric aside, what is the truth? Are “patent trolls” really so dangerous that legislation is needed to reform the patent system?<sup>9</sup> Or, is the now over-used term “patent troll” just a way to disparage individual inventors and the attorneys who take their cases? Worse, is it even possible that the phrase “patent troll” embodies subtle public relations, in which perpetrators of infringement collectively claim to be the victims?

One way to think about it is this: Suppose someone wanted to bash big-time lawyers whose clients hired them to defend patent infringement lawsuits, claiming an inventor’s patent is invalid, not infringed and procured through inequitable conduct. Let us create a disparaging name for them. How about “Patent Bloodsuckers,” e.g., an animal, such as a leech, that sucks blood? Seem too harsh? The American Heritage Dictionary defines “leech” as follows: Any of various chiefly aquatic bloodsucking or carnivorous annelid worms of the class Hirudinea, of which one species (*Hirudo medicinalis*) was formerly used by physicians to bleed patients and is now sometimes used as a temporary aid to circulation during surgical reattachment of a body part.<sup>10</sup> So, how about “Leech”? No? Then what about “parasite”? “Parasite” is defined as: An organism that grows, feeds, and is sheltered on or in a different organism while contributing nothing to the survival of its host.<sup>11</sup>

Okay: Let us call them “patent parasites.” They feed on inventors, contribute nothing to innovation, and depend for their survival on the millions of dollars in fees they extract from their clients.<sup>12</sup> So maybe “patent parasite” fits. And maybe we can even create a cartoon of the “patent parasite”— a Dracula-looking character, consumed by a bare desire to attack helpless inventors, he will destroy patents and the innovation they protect all while we, as a Nation, slide gradually toward technical mediocrity. Bad image, yes? If enough people start saying it, some people may start believing it—essentially following the circuitous route that led to the derogatory term “patent troll.”

## II. WHO CREATED THIS INVENTOR-BASHING EXPRESSION IN THE FIRST PLACE?

Trolls are mythological figures originating in Scandinavian folklore.<sup>13</sup> But what is the origin of the term “patent troll”? One of the first mentions of the term occurred in July 2001, when Brenda Sandburg authored the article, “Trolling for Dollars,” published in an American Lawyer publication called *The Recorder*.<sup>14</sup> Page one of “Trolling for Dollars” contains two photographs: The first picture is of Intel Corporation’s then Assistant General Counsel, Peter Detkin, holding a

<sup>8</sup> See Intellectual Ventures, Bio, <http://www.intellectualventures.com/bio.aspx?id=e26036be-aefc-4333-98da-822bb698318e> (last visited Feb. 10, 2007).

<sup>9</sup> See generally Erica Werner, *Lawmakers want ‘patent troll’ crackdown*, USA TODAY, June 9, 2005, [http://www.usatoday.com/tech/news/techpolicy/2005-06-09-patent-troll\\_x.htm?csp=34&POE=click-refer](http://www.usatoday.com/tech/news/techpolicy/2005-06-09-patent-troll_x.htm?csp=34&POE=click-refer) (discussing proposed legislation that would make it harder for patent holders to obtain a court order against possible patent infringements).

<sup>10</sup> THE AMERICAN HERITAGE DICTIONARY 999 (4th ed. 2000).

<sup>11</sup> *Id.* at 1276.

<sup>12</sup> See generally AIPLA Report of the Economic Survey, 1–109, 1–110 (2005) (citing the latest AIPLA Economic Statistics reporting the average cost of a patent infringement suit through trial is between two and six million dollars).

<sup>13</sup> Scott Trimble, *Scandinavian Mythology and Folklore*, ¶ 13, <http://www.stslocations.com/Archives/Scandinavian/Folklore/> (last visited Feb. 1, 2007).

<sup>14</sup> See Brenda Sandburg, *Trolling for Dollars: Patent Enforcers are Scaring Corporate America, and They’re Getting Rich – Very Rich – Doing It*, THE RECORDER, July 30, 2001.

small troll doll, while the second photograph shows Gerald Hosier next to one of his airplanes.<sup>15</sup> On the second page, there is a picture of me with the caption: “Patent Power.”<sup>16</sup> The accompanying article begins with the “once upon a time” claim that:

In the sleepy village of Santa Clara, there lived a very wealthy but very frightened giant named Intel. Intel was plagued by a fearsome band of evil trolls -- “patent trolls,” to be exact -- who wanted a glittering pot of gold in exchange for doing absolutely nothing. And they were very powerful because they said they owned the patent on some of the magic Intel used to become rich.<sup>17</sup>

Poor Intel; terrorized by evil trolls and suddenly a victim because it had been sued for not only patent infringement, but also defamation after publicly calling our client an “extortionist.”<sup>18</sup> So Detkin coined the term “troll” to avoid more lawsuits:

“We were sued for libel for the use of the term ‘patent extortionist’ so I came up with ‘patent trolls,’ Detkin said. 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.<sup>19</sup>

Detkin’s words now reverberate with irony because he is currently the managing director of Intellectual Ventures.<sup>20</sup> Intellectual Ventures is a company in the business of purchasing patents by the hundreds, with no intention of ever actually practicing any of them.<sup>21</sup> Eventually, like the companies Detkin once maligned, Intellectual Ventures may well accumulate not only a large number of patents, but also large profits. Indeed, profits attained, in part, by forcing either licenses or investments from most of the corporate world.

Intellectual Ventures’ founder, Nathan Myhrvold, stated, “If giant corporations are making billions of dollars off my ideas, I want something for it.”<sup>22</sup> These “ideas,” however, are not all Myhrvold’s. Actually, they are the ideas of hundreds of individual inventors who sold their patents to Intellectual Ventures.<sup>23</sup> A Newsweek article defined Intellectual Ventures’ business model as follows:

With this large bankroll, the company is out buying existing patents in droves. (Myhrvold won’t comment on these activities, but sources say he has already purchased about 1,000 patents.) The strategy is to set up a sort of patent marketplace. Patent owners get money upfront for the dusty ideas sitting on their shelves, the investors get

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<sup>15</sup> Sandburg, *supra* note 15.

<sup>16</sup> *Id.*

<sup>17</sup> *See id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Intellectual Ventures, <http://www.intellectualventures.com/bio.aspx?id=03a52426-0419-449e-84b3-1f25d9c1d546> (last visited Feb. 9, 2007).

<sup>21</sup> *See* Tomas Kellner, *Patent Stalker*, FORBES, Nov. 14, 2005, at 166, available at [http://www.forbes.com/free\\_forbes/2005/1114/166.html](http://www.forbes.com/free_forbes/2005/1114/166.html).

<sup>22</sup> Brad Stone, *Factory of the Future?*, NEWSWEEK, Nov. 22, 2004, at 60.

<sup>23</sup> *See id.*

the rights to use the ideas without being sued and Myhrvold gets to rent those same ideas to other companies that need them to continue creating products.<sup>24</sup>

Perhaps in an attempt to conceal Intellectual Ventures’ identity and intentions, Detkin has reportedly bought patents for Intellectual Ventures through shell companies.<sup>25</sup> And some inventors are complaining about the tactic:

Detkin was offering cash for a handful of Donnelly’s patents. By December they had a deal, and by March \$1.8 million was deposited in Net Perceptions’ bank account. Then Detkin disappeared. “I never even met him,” says Donnelly. The U.S. Patent & Trademark Office has no record of Thalveg Data Flow. Nor does California’s business registry. The only mention of the company is in Net Perceptions’ SEC filings. Thalveg, it turns out, is a shell company, sister to others with names like Orange Computer, Purple Mountain Server and Maquis Techtrix. They are all controlled by a venture capital firm called Intellectual Ventures, based in Bellevue, Wash. Donnelly never questioned Detkin’s credentials or his interest in the patents, but lately a lot of people in high-tech circles are beginning to wonder what Intellectual Ventures is up to.<sup>26</sup>

It seems Intellectual Ventures’ business model Detkin himself helped create satisfies Detkin’s own definition of a “patent troll.”<sup>27</sup>

### III. THE TRUTH ABOUT THE INTEL SUIT

Famous criminal defense lawyer, Percy Foreman, once claimed that he focused his trials on the bad acts of the victims of heinous crimes to divert the juries’ attention from his clients’ own bad acts.<sup>28</sup> This tactic begot the name “victimology” and maybe, at some point, the juries in Forman’s cases actually thought the victims deserved to die—victimology at its extreme. Examples of victimology abound, including the Menendez brothers’ defense: “We had to kill our parents when we became adults because, as children, they abused us,”<sup>29</sup> and, as O.J. claimed, “The system is out to get me: I was rushed to judgment.”<sup>30</sup> Like O.J. and the Menendez brothers, Intel had to make itself appear the victim to divert attention from what was really happening.

The following facts provide the true origin of the “patent troll” label. In January, 1998, our client, TechSearch, purchased a patent from a company called International Meta Systems, Inc. (“IMS”). IMS did not have the resources needed to either license or enforce its patent, but did

<sup>24</sup> *Id.*

<sup>25</sup> See Kellner, *supra* note 23, at 166.

<sup>26</sup> *Id.*

<sup>27</sup> See *Trolling for Dollars: Has the Enemy of Patent Trolls Become One?*, CIO INSIGHT, Dec. 5, 2005, available at <http://www.cioinsight.com/article2/0,1540,1902291,00.asp>.

<sup>28</sup> MICHAEL DORMAN, KING OF THE COURTROOM: PERCY FOREMAN FOR THE DEFENSE 1 (Delacorte Press 1969) (quoting the paragraph opening the chapter).

<sup>29</sup> See generally Rachel Pergament, *The Menendez Brothers*, COURT TV CRIME LIBRARY, [http://www.crimelibrary.com/notorious\\_murders/famous/menendez/trial\\_16.html](http://www.crimelibrary.com/notorious_murders/famous/menendez/trial_16.html), ¶ 11 (last visited Feb. 9, 2007) (reporting that the defense intended to prove that the Menendez brothers were not at fault, but the parents of the brothers who were killed).

<sup>30</sup> See generally Thomas L. Jones, *O.J. Simpson*, COURT TV CRIME LIBRARY, [http://www.crimelibrary.com/notorious\\_murders/famous/simpson/do\\_7.html](http://www.crimelibrary.com/notorious_murders/famous/simpson/do_7.html), ¶ 22 (last visited Feb. 9, 2007) (indicating that O.J. Simpson painted himself as a black man being victimized by the white legal system).

retain an interest in the patent in the hope of paying off its debts and having a little something left over for its owners and employees.

The IMS patent was an outgrowth of IMS's own creative efforts to develop a microprocessor chip that would match Intel's fastest chips—indeed, emulate them. Unfortunately, IMS failed to obtain funding to continue its operations and after some business failures, was forced to file for Chapter 11 bankruptcy protection.<sup>31</sup> IMS believed that the principal reason it failed was that prospective partners in the industry, e.g., Compaq, were unwilling to help IMS because Intel had threatened to not only cut chip allocations, but take other measures against any company that supported competing technology. Since IMS was not yet capable of supplying chips at high volumes, those companies simply could not risk being cut off by Intel. Lee Hoevel, the former President of IMS, was scheduled to testify as an FTC witness at a legal proceeding the FTC brought against Intel for allegedly engaging in such predatory practices.<sup>32</sup>

Shortly after TechSearch acquired the patent, it notified Intel that certain Intel products infringed. Intel refused a license and TechSearch filed suit alleging that Intel's Pentium Pro and Pentium II lines of products infringed.<sup>33</sup> Intel's public filings revealed that the chip-manufacturer accumulated approximately eight billion dollars yearly in revenues from these two products.<sup>34</sup>

Understanding the gravity of the lawsuit, Intel responded defensively, hiring both the inventor of the IMS patent and his attorney to elicit testimony that the patent was invalid. Then, the inventor—several days after testifying under oath that he did not know whether an alleged critical prior art publication was, indeed, prior art—tried to recant his testimony by changing an unfavorable answer in his deposition about the allegedly invalidating prior art. He wanted to change his original statement, “That’s right. I don’t know [that it is prior art],” to “That’s not right. Under that definition, I would consider it prior art.”<sup>35</sup> There was clearly some gamesmanship going on.

Intel also tried to buy the patent for itself through a shell company it secretly formed in the Cayman Islands.<sup>36</sup> The shell company, Maelen Limited, filed a motion asking a federal bankruptcy court to approve bringing an avoidance action against TechSearch to recover the patent for the estate.<sup>37</sup> In an avoidance action, the bankrupt estate may recover an asset that was transferred within the prior year if it can show that the purchaser of the asset paid less than a reasonably equivalent value for the asset.<sup>38</sup> The IMS estate had no funds. Maelen offered to pay administrative costs of the trustee and to fund costs of litigating the avoidance action with TechSearch. Maelen also proposed that if the estate recovered the patent, it would be auctioned and Maelen would make a minimum bid of \$325,000 for it.<sup>39</sup> A copy of Maelen's motion was sent to all IMS creditors.<sup>40</sup>

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<sup>31</sup> *Intl. Meta Systems Inc.—Files Chapter 11 Petition*, STANDARD & POOR'S DAILY NEWS, Mar. 4, 1998, available at 1998 WLNR 754622.

<sup>32</sup> See generally David Carney, *Summary: FTC v. Intel, Administrative Antitrust Action*, TECH LAW J., <http://www.techlawjournal.com/agencies/ftc-intc/Default.htm> (last visited Feb. 9, 2007) (summarizing the Antitrust litigation between the FTC and Intel and indicating that a tentative settlement was reached in March 1999).

<sup>33</sup> *Business Roundup: Intel sued on Pentium patent*, WASH. TIMES (D.C.), Aug. 4, 1998, at B6.

<sup>34</sup> INTEL CORPORATION, INTEL 2006 FOURTH-QUARTER NEWS RELEASE (2007), available at [http://download.intel.com/intel/finance/earnings/2006Q4\\_Earnings\\_Release\\_Final.pdf?iid=InvReltQ42006earnings](http://download.intel.com/intel/finance/earnings/2006Q4_Earnings_Release_Final.pdf?iid=InvReltQ42006earnings).

<sup>35</sup> Deposition of Henry Lee Scantlin, *TechSearch v. Intel*, No. C98-03484 (N.D. Cal Jan. 14, 1999) (on file with author).

<sup>36</sup> Kellner, *supra* note 23, at 166.

<sup>37</sup> *Id.*

<sup>38</sup> See generally Michael L. Cook & Alesia Ranney-Marinelli, *Understanding the Basics of Bankruptcy & Reorganization 2006*, in PREFERENCE LITIGATION 2006, 293 (PLI Com. Law and Prac. Course, Handbook Ser. No. 890, 2006), available at WL, 890 PLI/Comm 293 (discussing preference avoidance law in bankruptcy).

<sup>39</sup> See Dean Takahashi, *Intel's bold steps to thwart foe in patent case*, WALL ST. J., Apr. 16, 1999, at B1. (“Maelen guaranteed in court papers it would bid a minimum of \$250,000 for the patent if it was recovered”). *But*

After investigation, IMS and the creditors learned that Maelen was a Cayman Island shell corporation (note the parallel approach used by Intellectual Ventures) that was owned of record by a nominee of Bank of America for the account of Intel.<sup>41</sup> Intel had acquired Maelen in August, 1998, shortly after TechSearch sued Intel for patent infringement. Thus, Intel created Maelen strictly for the purpose of acquiring the patent from the IMS bankruptcy estate. The officers and directors of Maelen were all Bank of America employees, Maelen had no income or other operations, and its only asset was the \$100 used to capitalize itself.<sup>42</sup> Maelen’s “offices” were a file cabinet.<sup>43</sup> In fact, Maelen’s corporate witness knew of no reason for Maelen’s existence, other than to disguise Intel’s identity as the real party in interest.<sup>44</sup> What really happened is Maelen received instructions from Intel’s in-house counsel and was told that the patent was worth a great deal more than what TechSearch paid for it.

Through discovery, TechSearch trained a particularly powerful light on Intel’s motives in forming Maelen. Essentially, Maelen was formed not only to keep its identity secret from TechSearch, the bankruptcy court, and the creditors, but also to manipulate the bankruptcy court into taking action that would undermine TechSearch’s ability to prosecute the patent infringement case against Intel.

Maelen’s motion to bring an avoidance action finally reached Judge Monroe in the bankruptcy court in Austin, Texas.<sup>45</sup> TechSearch’s attorney argued that Maelen’s failure to disclose to the court and the creditors that it was a “front” for Intel was fundamentally improper since Intel had an adverse interest to the estate.<sup>46</sup> In bankruptcy court, Maelen claimed that the patent was worth far more than TechSearch paid for it;<sup>47</sup> while in the patent case, Intel argued the patent was clearly invalid and threatened TechSearch with sanctions if it did not abandon its lawsuit. In an extraordinary action, the U.S. Trustee (who had not been told of Intel’s involvement with Maelen) made an appearance before the Court in support of TechSearch’s position, stating: “That lack of disclosure I think is fatal to the trustee and Maelen going forward with the motion. I think the creditors are entitled to know about the relationship. It’s a significant fact and it was not clearly disclosed at all.”<sup>48</sup>

After hearing all the testimony and arguments, Judge Monroe issued his ruling denying Maelen’s motion and finding that Intel was being deceptive:

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*see* Kellner, *supra* note 23, at 166 (stating a different figure; “Maelen sought to acquire for \$325,000 a chip patent owned by a bankrupt company that was in litigation with Intel over infringing the same patent.”).

<sup>40</sup> Motion by Trustee Randolph N. Osherow for Approval of Agreement Regarding Prosecution of Avoidance Action and Auction of Patents at 5, *In re Int’l meta Sys., Inc.*, No. 98-10782-FM (Bankr. W.D. Tex. Mar. 16, 1999) [hereinafter *Osherow Motion*].

<sup>41</sup> *See* Takahashi, *supra* note 42, at B1.

<sup>42</sup> *See id.* (“Michael Carney, a Bank of America employee in the Cayman Islands, testified in a telephone deposition that Intel was the sole owner of Maelen, which had assets of \$100.”); Keller, *supra* note 27 (explaining Intellectual Ventures has also engaged in the business of buying patents through shell companies).

<sup>43</sup> *See* Osherow Motion, *supra* note 40, at 10, 83. The court noted “Maelen is apparently a shell or a front for Intel.” *Id.* at 83.

<sup>44</sup> *See* Josh Goldberg, *Patent-buying firm sues Intel for defamation over news article*, CHICAGO DAILY LAW BULLETIN, Apr. 21, 1999, at 3 (“Intel bought Maelen in August for the sole purpose of keeping Intel’s name out of the Texas court, where Maelen attorneys argued that IMS’ creditors didn’t make enough money off the sale of the patent to TechSearch, according to the Chicago suit.”).

<sup>45</sup> Osherow Motion, *supra* note 40.

<sup>46</sup> *Id.* at 9–11.

<sup>47</sup> *See id.* (“Intel bought Maelen in August for the sole purpose of keeping Intel’s name out of the Texas court, where Maelen attorneys argued that IMS’ creditors didn’t make enough money off the sale of the patent to TechSearch, according to the Chicago suit.”).

<sup>48</sup> Osherow Motion, *supra* note 40, at 18.

I would submit that neither Maelen nor Intel give a damn what this estate gets out of that [avoidance] litigation if, as and when it's brought, and that their sole interest is in defending the [patent infringement] lawsuit in California, and that they are using this estate in an attempt to bring leverage upon TechSearch in the litigation in California. That is so clear from this evidence that I can't reach any other result or conclusion.<sup>49</sup>

Judge Monroe concluded that Intel (and its "shell," Maelen) had an actual conflict of interest in representing the estate, which was so "clear and pervasive" as to require disclosure and, when disclosed, to require that its proposed agreement with the estate not be approved.<sup>50</sup> So, Intel was caught doing something very deceptive.

In a Wall Street Journal article that followed, Intel was taken to task for its arguably unethical tactics, which produced the "patent extortionist" (now "patent troll") defense:

Initially, Intel didn't disclose its involvement in International Meta's bankruptcy case. But after Intel admitted its ownership of the Cayman company in court, Judge Frank R. Monroe, who was overseeing the proceedings, concluded that Intel and the Cayman company had portrayed themselves as trying to help the bankrupt debtor when they were in fact really out to undermine the patent case. They are using this estate in an attempt to bring leverage upon TechSearch and the litigation in California," the judge said, describing the maneuver as "totally inappropriate."<sup>51</sup>

Chuck Mulloy, an Intel spokesman, acknowledged the company's use of the Cayman company, but said Intel used "tactics appropriate to the plaintiff in this matter."<sup>52</sup> He called TechSearch a "patent extortionist."<sup>53</sup> Charles Wolfram, a Cornell University law professor and an ethics expert, noted Intel appeared to disclose its role only when a "gun was to their heads," under the pressure of discovery rules.<sup>54</sup> "I am distressed by this," Prof. Wolfram said, "What is a big company like Intel doing sneaking around like this?"<sup>55</sup>

In context, maybe the evil trolls were not so evil after all. Companies like TechSearch were labeled "patent extortionists" (later, "trolls") as a justification for Intel's tactics. Tactics, as commentators and judges point out, that are ethically borderline at best.<sup>56</sup> TechSearch, in turn, was at least trying to help a company that had been driven out of business by Intel. TechSearch later granted rights to an Intel rival that needed the IMS patent to defend itself against a series of infringement suits brought by Intel.

So, the term "patent troll" emerged out of this web of facts, essentially spawning from Intel's justification for trying to secretly buy the very patent it proclaimed invalid.

#### IV. SINCE WHEN ARE NON-MANUFACTURING INVENTORS BAD?

<sup>49</sup> *Id.* at 83.

<sup>50</sup> *Id.*

<sup>51</sup> *See* Takahashi, *supra* note 42, at B1.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *See id.* Ethics expert Stephen Gillers called Intel's strategy "tactically risky, but not illegal." *Id.* According to Geoffrey C. Hazard, a law professor from the University of Pennsylvania, "Intel underestimated TechSearch, which smelled a rat and found one. At the same time you could say that Intl used an improper method to defeat a kind of blackmail. Some might say the devil take both of you." *Id.*

Consider the names of some individual inventors who ultimately formed companies to exploit their ideas, but who initially manufactured nothing: Westinghouse (air brake), Ford (car), Gillette (razor), Hewlett-Packard (oscillation generator), Otis (elevator), Harley (motorcycle shock absorber), Colt (revolving gun), Goodrich (tires), Goodyear (synthetic rubber), Carrier (air treatment), Noyce (Intel), Carlson (Xerox), Eastman (laser printer camera), Land (Polaroid), Shockley (semiconductor), Kellogg (grain harvester), DuPont (gun powder), Nobel (explosives), the Wright brothers (aircraft), Owens (glass), Steinway (pianos), Bessemer (steel), Jacuzzi (hot tub), Smith & Wesson (firearm), Burroughs (calculator), Houdry (catalytic cracker), Marconi (wireless communication), Goodard (rocket), Diesel (internal combustion engine), Fermi (neutronic reactor), Disney (animation), Sperry (Gyroscope), Williams (helicopter), even Abraham Lincoln who was granted U.S. Patent No. 6,469.<sup>57</sup> These are individuals who, in most cases, worked alone, without government or corporate support, yet created not just new inventions, but whole new industries that employ millions of people today.

It can be argued, of course, that most of these inventors ultimately led to the creation of manufacturing companies, whereas companies that merely buy patents from individual inventors contribute nothing. But what about small companies that are struggling to compete against corporate giants and need a strong patent system to level the playing field? As the inventor of the MRI scanning machine, Dr. Raymond Damadian, observed, it is often the small companies that provide the economic spark for new jobs:

Few Americans realize that the great majority of new jobs created for the public are provided by small companies with fewer than 500 employees. From 1981 to 1988, companies with fewer than 500 employees contributed 11.7 million new jobs to the economy. In this period, America's small companies generated two thirds of all new employment . . . . Unless new job-generating companies can emerge through patent enforcement, employment can only decline. Only enforced patents and the temporary monopolies they provide can ensure the emergence of these companies and their prospering.<sup>58</sup>

Can anyone cite what section of the Constitution or the patent law reserves the right to obtain and enforce patents exclusively for large manufacturing companies? And how can individual or small companies compete against a large company's decision to copy without concern for the cost or risk of litigation?

#### V. THE MISINFORMATION THAT SUPPORTS THE PENDING LEGISLATION

David Simon, Intel's chief patent counsel, apparently forgot Intel's tactics in the TechSearch v. Intel case had this to say in his recent testimony before Congress:

“If someone buys a patent for 50,000 bucks and their business model is suing people, should they be able to get an injunction?” That's the situation Intel faced several years ago when TechSearch, a patent-holding company in Northbrook, Ill., acquired a patent for \$50,000 and then sued Intel, demanding \$5 billion to settle the case. Simon cited this case in testimony before an April 21 Senate hearing on patent reform. While Intel

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<sup>57</sup> Manner of Buoying Vessels, U.S. Patent No. 6,469 (filed Mar. 10, 1849).

<sup>58</sup> Raymond Damadian, *America's Forgotten Asset; Patent Law Enforcement*, SAT. EVENING POST, May 1994, at 58.

had won summary judgment in that case, Simon testified that there are many district courts where judges are less likely to grant summary judgment. He cited one forum, which he didn't identify, where all the verdicts issued over an eight-year period were in favor of the plaintiffs.<sup>59</sup>

I suppose if Intel had bought the IMS patent, as it tried to do, and then sued its competitors seeking damages and an injunction, that would be acceptable because it is a manufacturer. With such misinformation, it is unsurprising that Representative Lamar Smith, a Texas Congressman, who introduced the patent reform bill in the House, said, "I think patent trolls are abusing the system."<sup>60</sup> Yet, ostensibly, this is the same Congress that voted to divert more than \$700 million in Patent and Trademark Office user-fees to projects of dubious worth: including the building of two bridges in Alaska, e.g., \$229 million for a bridge connecting Gravina Island (population 50) to the town of Ketchikan (it would be cheaper to buy each inhabitant of Gravina Island their own Lear Jet to make the trip) and \$223 million for an alternate bridge (one already exists) between Anchorage and a nearly deserted port.<sup>61</sup> So, are "patent trolls" destroying the patent system? Or, is it the senseless diversion of resources from the PTO, not "patent trolls," that are undermining the patent system? As the American Intellectual Property Law Association ("AIPLA") stated in an amicus brief filed in *Figueroa v. United States*:

The diversion of funds from the PTO leads to increased patent officer burdens and examiner workloads and decreased patent quality. Diversion punishes instead of rewards patent applicants by making it more difficult to obtain a valuable patent right. It takes longer for patents to issue and the quality- therefore the likelihood that others will respect the grant of patent rights- is reduced.<sup>62</sup>

AIPLA further observed in its brief:

While Congress has been diverting funds from the USPTO, the pendency of patent applications has increased and patent quality has increasingly become suspect. Patent fee diversion is harming the USPTO, the patent system and this country's economy. AIPLA asks this Court to hold that the fee diversion in this case does not "promote the Progress of . . . useful Arts."<sup>63</sup>

The patent bar has focused much attention on the fact that for the past several years the fees collected from patent applicants and patent holders have exceeded Congressional appropriations to the USPTO by a substantial margin. Approximately \$638 million in revenue over 10 years and an estimated \$100 million in fiscal year (FY) 2004 have been spent on other governmental activities . . . . The patent system serves

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<sup>59</sup> Brenda Sandburg, *A Modest Proposal*, THE RECORDER, May 9, 2005, at 4.

<sup>60</sup> Erica Werner, *Congress Set to Clamp Down on 'Patent Trolls'*, ME. INDEP. J., June 9, 2005.

<sup>61</sup> Cagw.org, *CAGW Reacts to Axing of Alaska Bridges*, Nov. 16, 2005, <http://www.cagw.org/site/News2?page=NewsArticle&id=9432>.

<sup>62</sup> Majorie Sterne, *A Constitutional Challenge Against Diversion of Patent Fees*, LAW & ENTREPRENEURSHIP NEWS, Oct. 4, 2004, [http://entrepreneur.typepad.com/news/2004/10/is\\_diversion\\_of.html](http://entrepreneur.typepad.com/news/2004/10/is_diversion_of.html).

<sup>63</sup> Brief Amicus Curiae of The American Intellectual Property Law Association at 1-2, *Figueroa v. United States*, No. 01-457C (Ct. Fed. Cl. Sept. 13, 2004).

the broad public purpose of stimulating technological innovation. Its budget should be determined on the basis of what resources are needed to perform the function well.<sup>64</sup>

In the end, the real question remains: Who decides who is abusing the patent system? Did Xerox abuse the patent system when it obtained hundreds of patents on copier designs it never intended to make? What about IBM, which reported \$1.7 billion in licensing revenues in its 2002 Annual Report, or Qualcomm with \$836 million in annual licensing revenues, or Texas Instruments, which expects one billion dollars in licensing fees from a single patent license?<sup>65</sup> And what about a Congress that diverts millions in fees inventors pay the PTO?<sup>66</sup> Is not that abusive of the Constitutional goal?

An individual inventor or small company that lacks the financial resources to take on the “big guy” in high-stakes litigation should not be forced to grant compulsory licenses because big companies call them “patent trolls.” The voices saying the current system is unfair have yet to identify a single example where the issuance of an injunction for a non-manufacturer was inappropriate under the circumstances.

Moreover, who is really burdening the PTO? Statistics for 2004 show forty-nine percent of all issued patents going to foreign companies, nearly seven times the number issued to individuals (87,193 to 15,173).<sup>67</sup> Also, more patents were issued to the top ten companies—IBM, Matsushita, Canon, Hewlett-Packard, Micron, Samsung, Intel, Hitachi, Toshiba and Sony (a total of 17,857)—than were issued to all individual American inventors combined (15,173).<sup>68</sup>

## VI. COMPULSORY LICENSES WILL UNDERMINE THE PATENT SYSTEM

The right to exclude is the essence of property. Without it, the playing field can never be leveled. Who fears a compulsory license? It is certainly not a corporate giant who can protract a lawsuit by as much as four to six years and afford to pay two to ten million dollars in fees. The “big guys” want a compulsory license because it eliminates the threat of an injunction and accordingly results in a “heads, I win; tails, you lose” situation. But as the former Federal Circuit Chief Judge Howard Markey observed, “[an] infringer would have nothing to lose, and everything to gain if he could count on paying only the normal, routine royalty non-infringers might have paid.”<sup>69</sup> Indeed, the “heads, I win; tails, you lose” approach drips with inequity because an infringer that lost at trial should not be treated like willing licensee.

<sup>64</sup> *Id.* at 8 (quoting COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS IN THE KNOWLEDGE-BASED ECONOMY, NATIONAL RESEARCH COUNCIL, A PATENT SYSTEM FOR THE 21ST CENTURY 107–08 (Stephen A. Merrill et al eds., National Academies Press 2004) (ellipses in original)).

<sup>65</sup> 2002 IBM ANN. REP. 52; 2002 QUALCOMM ANN. REP. 47; *Texas Instruments and Hyundai in Pact to End Lawsuits*, N.Y. TIMES, May 25, 1999, at C4.

<sup>66</sup> *See, e.g.*, Dale L. Carlson & Robert A. Migliorini, *Past as Prologue for Patent Reform: Experience in Japan with Oppositions Suggests an Alternative Approach for the U.S.*, 88 J. PAT. & TRADEMARK OFF. SOC’Y 101, 115 (2006) (stating that from 1990 to 2000, the PTO has had about one-half billion dollars in user fees diverted by Congress to other parts of the government). *But see* Press Release, U.S. Dep’t of Commerce, Commerce Department FY 2007 Budget Maintains Commitment to Job Growth and U.S. Competitiveness (Feb. 6, 2006), available at <http://www.uspto.gov/web/offices/com/speeches/02-06-06commerce.htm>. (announcing for the third year in a row, President Bush is recommending that the PTO not divert any fees)

<sup>67</sup> U.S. PAT. & TRADEMARK OFFICE, OFFICE OF ELEC. INFO. PRODS., PAT. TECH. MONITORING DIV., PATENTING TRENDS CALENDAR YEAR 2004 (2005), available at [http://www.uspto.gov/web/offices/ac/ido/oeip/taf/pat\\_tr04.htm](http://www.uspto.gov/web/offices/ac/ido/oeip/taf/pat_tr04.htm).

<sup>68</sup> U.S. PAT. & TRADEMARK OFFICE, OFFICE OF ELEC. INFO. PRODS., PATENTING BY ORGANIZATIONS 2004 (2005) p.B1–1, available at [http://www.uspto.gov/go/taf/topo\\_04.pdf](http://www.uspto.gov/go/taf/topo_04.pdf).

<sup>69</sup> *Panduit Corp. v. Stahl Bros. Fibre Works*, 575 F.2d 1152, 1158 (6th Cir. 1978).

By eliminating injunctive relief, or making it more difficult to obtain, a mandatory license, in effect, is being granted. And the “little guy,” no matter how it gets sugar-coated, will suffer. Ironically, this proposed “reform” will actually increase and not decrease the burden on the judiciary because infringers (willful or unwitting) will have little or no incentive to negotiate a settlement.

Also forgotten in these debates about “patent trolls” is the important role played by trial judges. Injunctions are discretionary, not mandatory.<sup>70</sup> So, too, are increased damage awards after a jury’s finding of willfulness.<sup>71</sup> If there is something amiss, the trial judge can fix it by granting JMOL, denying an injunction, or refusing to increase damages.<sup>72</sup>

## VII. DIMINISHING NON-MANUFACTURING PATENTEE RIGHTS WILL ACTUALLY HURT CONSUMERS

The “patent troll” label relegates non-manufacturing patent owners to a different class than manufacturing patent owners. Why? Perhaps it is to diminish the rights of the non-manufacturing class. In Nathan Myhrvold’s words, it is to provide “a government bailout of the infringement problems big tech companies deliberately made for themselves.”<sup>73</sup> Any such bailout could create serious unintended consequences because the full value of a patent—and by extension, of the patent system—depends on the benefit of exclusivity it gives its owner, no matter who that is.

The U.S. Constitution expressly calls patent rights “exclusive rights.”<sup>74</sup> When commentators complain about patents causing higher consumer prices, or otherwise “terrorizing boardrooms,” they forget that society has already benefited from the fact that innovators and their sponsors receive property rights, exclusive rights, in their invention.<sup>75</sup> Two economists recently wrote that these benefits always accrue in the face of society’s desire to “free ride on the innovative efforts of others.”<sup>76</sup> They stated:

An inventor may bear all the cost of an innovation, but everyone benefits (possibly to varying degrees) from a discovery, and thus everyone has an incentive to free ride on the innovative efforts of others . . . . [A] competitive market system [without patents] may be expected to provide an inefficiently low level of innovations. Intellectual property rights in general, and patents in particular, address this problem by attacking the non-appropriability of knowledge that lies at the heart of this market failure. Specifically, by endowing innovators with property rights on their discoveries, patents

<sup>70</sup> See *Gillette Co. v. Energizer Holdings, Inc.*, 405 F.3d 1367, 1370 (Fed. Cir. 2005).

<sup>71</sup> See, e.g., *Group One, Ltd. v. Hallmark Cards, Inc.*, 407 F.3d 1297, 1308–09 (Fed. Cir. 2005) (awarding attorneys’ fees is within discretion of trial judge).

<sup>72</sup> See, e.g., *Wechsler v. Macke Int’l Trade, Inc.*, No. CV-00-00296 CAS (BQRx), 2005 U.S. Dist. LEXIS 31101, at \*\*21–23 (C.D. Cal. Jan. 4, 2005) (finding that enhanced damages were not warranted even though jury found willful infringement).

<sup>73</sup> Myhrvold, *supra*, note 7, at A14.

<sup>74</sup> U.S. CONST. art. I, § 8, cl. 8. Congress has the power “[t]o 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.” *Id.*

<sup>75</sup> See *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141, 150 (1989) (“The applicant whose invention satisfies the requirements of novelty, nonobviousness, utility, and who is willing to reveal to the public the substance of his discovery and ‘the best mode . . . of carrying out his invention,’ 35 U.S.C. § 112, is granted ‘the right to exclude others from making, using, or selling the invention throughout the United States,’ for a period of [20 years].”).

<sup>76</sup> Corinne Langinier & GianCarlo Moschini, *The Economics of Patents: An Overview* 2-3 (Ctr. for Agric. & Rural Dev., Iowa State Univ., Working Paper No. 02-WP 293, 2002).

are a legal means of affecting the excludability attributes of an otherwise pure public good.<sup>77</sup>

The same economists explain that society benefits from exclusive rights in patents because patents can promote new discoveries, patents can help the dissemination of knowledge, patents can avoid wasteful innovation efforts, and patents can help technology transfer and commercialization.<sup>78</sup> The last point, helping technology transfer and commercialization, is crucial. If would-be purchasers of patent rights cannot count on exclusivity, they simply will not purchase them at all:

Specifically, to put a value on information a would-be purchaser needs to have the information, but at that point, if the seller does not have property rights on the information, the would-be buyer has no more incentive to pay for it. Patents, therefore, can play a crucial role in reducing transaction costs of licensing innovation and, more generally, in technology transfer . . . [W]ithout an exclusive license backed up by patent rights, firms would not be interested in expensive development work required to transform an invention into a new product.<sup>79</sup>

This is the core of the problem. Diminish small entity patent rights, and you diminish the incentive to invent or commercialize. In turn, if you diminish the incentive to invent, markets become less competitive, fewer innovations get made, and society’s welfare suffers.

Of course, no one has yet come up with a snappy public relations catch-phrase that will get these points across, correct as they are. It is much easier for people to react to ad hominem that “patent trolls” make consumer prices go up. But it is just not true.

## VII. LOOKING AHEAD

So where is all this going? No doubt, the enforcement of patents can become abusive if a good-faith basis to assert a patent or defend against a lawsuit does not exist. But that threshold applies to every party, large or small, whether they make products or not. And those who accept cases on a contingent-fee basis would be foolish to take questionable cases that are destined for failure. In my experience, such law firms take extraordinary care before accepting any case on contingency for just that reason.

At any rate, no one benefits when people use derogatory terms like “patent troll” or “patent parasite.” Individual inventors and small companies that cannot afford to commercialize their inventions should not be defamed for choosing to enforce their patents, nor should the lawyers who defend large companies in patent infringement suits.

I say stop the “patent troll” and “patent parasite” talk and debate the merits of patent enforcement without all the name-calling.

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 3–6.

<sup>79</sup> *Id.* at 6–7.