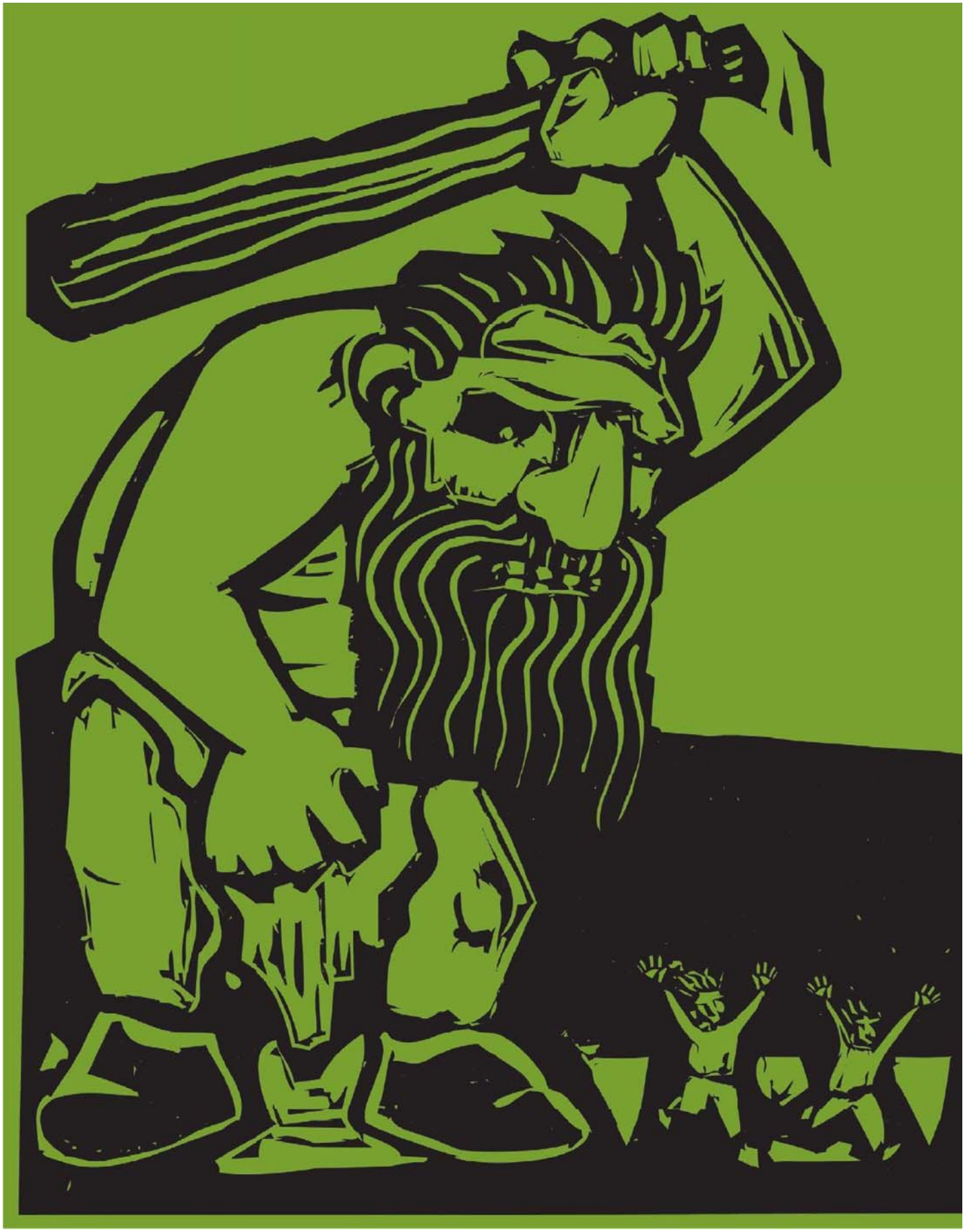

THE INCREASING IMPACT OF 'PATENT TROLLS'

There are very practical and understandable reasons why patent trolls have taken hold in the US. One reason is the legal system. Paul J. Sutton investigates.

Much has been written about patent trolls, which are also known by the less pejorative terms 'non-practising entities' (NPEs) and 'patent assertion entities' (PAEs). This US jurisdictional column has at times included observations regarding the status of NPEs and the impact they have had upon US businesses. The outrage fuelled by NPEs' aggressive tactics has given rise to efforts by state legislators to rein in and blunt their ability to operate as freely as in the past. Never before have there been so many attacks by patent trolls.

There has always been a difficulty in defining what constitutes a patent troll with any degree of specificity. Many well-established companies that own patents which do not cover any of their products or services make them available for licensing. These companies are not normally thought of as patent trolls. A patent troll is more commonly known as an entity that does not market products or services, but whose business plan is the acquisition of patent portfolios for the principal purpose of extracting licence fees from alleged infringers.

An increasing number of investors have shown interest in financing the acquisition of patent portfolios to be used as licensing assets. Some entities have obtained financing through public offerings. And then, of course, there are the inevitable shades of grey that cause a mislabelling of well-intentioned entities trying lawfully to exploit their patent and IP rights.

The very word 'troll' carries negativity with it. However, as distasteful as some of their aggressive tactics may be, patent trolls that in good faith seek to obtain licence fees from alleged infringers of the patents they have acquired are not engaged in unlawful or illegal activities. The targets of patent trolls may not like it, but all owners of valid and infringed patents have the right to enforce such patents. This, of course, is not to excuse the filing of lawsuits that have no merit. However, the blame should not be borne solely by parties that have acquired patents of questionable validity.

The rebuttable presumption of patent validity is still the law of the land and, in the absence of bad faith on the part of the owners of presumptively valid patents, NPEs should be afforded the same rights as other patent holders.

By way of example, for years there was debate as to whether the Bellevue, Washington-based Intellectual Ventures LLC (IV) qualified as a patent troll. Founded in 2000 by Nathan Myhrvold and Edward Jung, former Microsoft officers, over the years IV accumulated more than 30,000 patents, patent applications, and licence assets. Its investors included well-known names such as Microsoft, Intel, Google, eBay, Nvidia, and Cisco. By virtue of these investments, these and other investors are believed to have sought a shield from litigation.

IV has realised licensing revenues in the billions of dollars. For years, it refrained from suing alleged infringers, choosing instead to go to great lengths to negotiate licence arrangements. However, as time went by and a number of alleged infringers of IV's patents refused to accept licences, IV was forced to enforce its patent rights in the courts if it didn't want those rights to become abandoned.

This sleeping giant with a multibillion dollar war chest and tens of thousands of patents finally awoke in December 2010 and, after years of not filing a single lawsuit, filed its first. Is IV, with its many hundreds of employees of which one fifth are engineers and scientists, a patent troll? Does the fact that its employee ranks include hundreds of attorneys alter things? Clearly, IV's significant resources enable it to enforce its rights through litigation.

The licence income realised by patent trolls has attracted the attention of many different types of investors. A number of start-up companies have found the public to be an interesting source of capital through the public offering of shares. As an example, a German national, Harry Gaus, teamed up with Toronto-based Patent Enforcement and Royalties Ltd (PEARL) to enforce a US Gaus patent against Conair Corporation. PEARL sold shares to the public and used these funds for a patent infringement action in return for a percentage of monies recovered, if any.

Gaus agreed to pay PEARL 25 percent of any monies recovered from Conair in an action naming

Gaus as the plaintiff. However, after years of battling in the US District Court for the Southern District of New York, including a trial before a magistrate judge, Gaus's litigation backfired. The Federal Circuit dismissed the case in its entirety, wiping out an approximately $50,000 jury verdict for Gaus. The defendant's money, time and energies required to defend this complex lawsuit could not be recovered, because the circumstances of the litigation did not fall under the umbrella of an 'exceptional' case, which otherwise would have qualified it for an award of attorneys' fees.

There are very practical and understandable reasons why patent trolls have taken hold in the US. One reason is the legal system that permits attorneys to represent clients in matters on a contingency fee basis. We don't see contingency fee arrangements of this type in most jurisdictions elsewhere in the world. The fact that parties without considerable resources might be able to hire lawyers to represent them in matters having great merit provides a level playing field when they go up against parties with enormous resources. They will have no exposure to fees or, in some cases, costs, which will be paid from recoveries, if any, from court victories or settlement.

Trial by jury

Another reason why patent trolls are able to convince their targets to accept licence arrangements instead of contesting matters in court resides in another US legal system feature: trial by jury. Owners of patents have the legal right to have the facts of their dispute decided by a jury, not a judge. It is a petite jury of six, plus alternates usually numbering two or more, who typically hear testimony and view evidence in patent infringement litigation. The jury decides whether one or more claims of a patent are infringed. In the absence of a litigation being bifurcated, that same jury will decide whether the presumptively valid patent is in fact valid.

The presumption of patent validity is a rebuttable presumption. Juries are truly unpredictable. Anyone suggesting otherwise has not had much experience trying patent cases before juries. It is my experience that most juries genuinely try to do the right thing, and try to be fair to the parties. With few exceptions, they take their sitting as part of a jury very seriously, and most jurors are attentive and interested in the case before them. However, I have tried patent cases before juries where one or more jurors has repeatedly fallen asleep during live testimony, and where the judge has had difficulty keeping the jurors awake. This uncertainty feeds the apprehension of accused patent infringers.

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The patent owner carries the burden of proving infringement based upon a predominance of the evidence, and must obtain a unanimous verdict of infringement in order to prevail on that issue. If there is less than unanimity, the judge will declare a mistrial, and the entire court proceeding will need to be repeated. Or the jury may unanimously determine that there is no infringement, thereby granting a victory to the alleged infringer.

An alleged infringer must similarly obtain a unanimous jury verdict of invalidity in order to prevail on that issue. However, the burden of proving patent invalidity is greater than that associated with proving infringement. This burden requires clear and convincing evidence. It is easy to recognise that an accused infringer faces a formidable task in proving by clear and convincing evidence to every single person sitting on the jury that the presumptively valid patent in suit is invalid.

Jurors also decide the amount of damages to be awarded to a patent owner, if any. And such jury awards can be astronomical. While judges have the power to reduce or set aside a large jury damages award, they are generally hesitant to do so. The $930 million awarded to Apple by the California district court during the initial phase of its litigation with Samsung is an example of the enormous exposure facing accused infringers.

Yet another reason that accused infringers will often seek to take a licence from patent trolls, rather than fight in court, has to do with the enormous legal costs associated with defending such a lawsuit. It is reported that the median legal fees required to defend a relatively non-complex patent infringement litigation can approach $5 million, exclusive of expert witness fees and many other costs. A defendant will have to pay those fees without knowing whether victory is guaranteed or assured. And if the defendant wins the case, absent special circumstances, it will not recover these monies.

It is hoped that the foregoing observations will assist those who find themselves the target of a patent troll. ■

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