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WHO IS A TROLL? NOT A SIMPLE ANSWER

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I. INTRODUCTION

"On the road of innovation, sits an ugly patent troll.
From the largest corporations, he extorts a patent toll.
Casting wide a patent net, all infringers he will get.
Faced with permanent injunction, ask for Rule 11 sanction.
Armed with mighty patent claims, claiming willfulness and tort,
Treble damages and pains, he drags infringer into court.
Raise your laches and estoppel, 102 and 103…
Your defenses troll will trample, you will end as licensee.
Faster than a Rocket docket, sticks his hand into your pocket.
Troll, disguised as an inventor, will deprive you of your splendor…
Corporations be united! He who slays the patent troll,
by the Queen he will be knighted, and exalted by us all."[1]

The troll in this pointed ballad is not the ugly monster, from the classic children's nursery rhyme, *Three Billy Goats Gruff*, who lived under a bridge and demanded tolls from all who needed to cross. Instead, the ballad is a one-sided depiction of a new breed of intellectual property toll taker called a "patent troll." 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," said Peter Detkin, then the assistant counsel at Intel Corp., who was fighting off TechSearch Inc.'s patent infringement suit against Intel in 1999.[2] Ironically, since Mr. Detkin's very first use of the term patent troll, he has left Intel in 2002 to join Intellectual Ventures, a patent enforcement company that uses patent infringement claims as a method of generating revenue.

The topic of patent trolls has stirred up some heated discussion in the recent year. It has been said that "[p]atent trolls invent nothing and produce nothing," rather they "exploit flaws in the patent system by purchasing excessively broad and questionable patents on ubiquitous software and e-commerce technologies."[3] Trolls seem to behave in a predictive pattern. They tend to target internet retailers, service, information and news providers who usually are not competitors of the patent holders, and are the end users of the patented technology.[4] In a non-trolling environment, a company threatened with a patent infringement suit might use its own patent to counter-attack the aggressor or it may acquire a patent that broadly covers the technology at issue as a defensive maneuver.[5] However, in the trolling environment, there are no simple defensive strategies. Trolls do not practice the patented invention nor do they make any product; thus, they cannot be infringing, regardless of what the other side has.[6] Facing the dilemma of spending as much as $4 million and two years in a typical complex litigation,[7] many companies, by default, find that taking a patent license from the trolls is the easiest way out.

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1 Quote by Alexander Poltorak, President and CEO of General Patent Corp. International--an IP enforcement firm, in a speech at the Intellectual Property Owners Conference on Patent Trolls in Washington, D.C. in March 2005. The Patent Troll Ballad is adapted from the article "*On Patent Trolls and Other Patent Myth*" based on the talk Dr. Poltorak gave at the conference. http://www.patentclaim.com/Patent_Claim/Media_Coverage/160/.

2 Brenda Sandburg, *You May Not Have A Choice. Trolling For Dollars*, THE RECORDER, Jul. 30, 2001, at 1, *available at* http://www.law.com/regionals/ca/stories/edt0730a.shtml.

3 Rita Heimes, Director of Center for Law and Innovation, University of Maine School of Law, *Patent Trolls Prey On SMEs*, THE RECORDER , Jul. 30, 2001, at 5, *available at* http://mainelaw.maine.edu/cli/documents/Patent_Trolls.PDF#search='patent%20trolls%20prey%20on%20SMEs'

4 *Id.*

5 *Id.*

6 *Id.*

7 Thomas Adcock, *The Wars Against Trolls-An Aggressive Pair of Orrick Lawyers Has A Battle Plan to Combat Infringement Claims*, IP MAGAZINE, Summer 2005, at 23.

So how did trolling become so lucrative? Based on the data from the National Academy of Sciences, there are only 3000 patent examiners handling 350,000 filings per year.[8] As a result, each patent application only gets an average of 17 to 25 hours of inspection against the prior art.[9] In 2004, 169,296 utility patents were issued.[10] Many of the patents which have been litigated in recent years can be read as very broad. For example, Acacia Media Technology ("Acacia"), a subsidiary of Acacia Research Corporation, claims that it holds patents covering any system that compresses and distributes video and multimedia content over the internet, cable TV lines, satellite and wireless services.[11] It is very difficult to imagine that every time an internet user watches a video or listens to an audio clip or even looks up a credit card statement online, he or she ought to pay a license fee to Acacia because its patents cover all of the activities described above.[12]

The patent trolls' aggressive corporate strategies are frequently criticized by the legal and technology communities. Some say that patent trolls are the "bottom feeders of the industry" and have "placed a hidden tax on technology that impedes innovation".[13] Other people in the industry conclude that by abusing the patent system, "patent trolls clog up the legal system with baseless litigation" and "bankrupt the manufactures of technology" by demanding high licensing fees.[14] Even more commentators feel that although patent trolling is not illegal in the eyes of courts, it is "immoral."[15]

The other side of the debate offers a drastically different view. Some proponents of patent enforcement firms claim that the so-called patent troll is only a myth. They argue that the practice of patent enforcement provides capital to inventors, levels the licensing playing field for small inventors, and most important of all, redefines the nature of patents as true property[16] rather than an abstract piece of paper.

In any battle, the winners get to write the history and label the heroes and villains as they see fit. In the industry's battle with the patent trolls, the news gives daily reports of companies taking a license from a patent enforcement firm for a patent which many engineers think is obvious. Naturally, it seems the trolls are winning the war. However, the patent enforcment firms, instead of being regarded as patent pioneer firms, have been referred to as "trolls." If it is truly as the trolls argue that there is nothing wrong with licensing patents without developing the technology, then why is there an indignant feeling resonating around the trolling environment? What is the current reality in the field of patent law? Who are the heroes and villains? What are the issues and how should they be resolved? While the answers to these questions are elusive, this article aspires to stimulate debate and discussion of this controversial topic.

II. HISTORY / DEVELOPMENT

A. Types of Companies: Are They Trolls?

When Mr. Detkin coined the term patent troll, his definition made it very easy for anyone to spot one. That is, when a company does nothing but invest in patents and generate revenue by enforcing them, it is a troll. However, when a company actually produces products and at the same time is heavily involved in licensing schemes, does it blur the line between troll and non-troll? A closer look of the following types of companies from the bottom of the ladder to the top in the technology industry may bring this line into focus.[17]

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8 *Id.*
9 *Id.*
10 Elizabeth D. Ferrill, *Patent Investment Trusts: Let's Build A PIT To Catch The Patent Trolls*, 6 N.C.J.L. & TECH. 367 at 368, Spring 2005. (citing USPTO Press Release FY 2004 Performance and Accountability Report). *See also* http://www.uspto.gov/web/offices/com/speeches/05-06.htm.
11 *See Heimes, supra* note 3, at 3.
12 *Id.*
13 *See* forum discussion posted by readers in response to article *Ex-Microsoft CTO Claims Patent Problem is Myth*, http://news.com.com/Ex-Microsoft+CTO+claims+patent+problem+is+myth/2100-1030_3-5842261.html. www.news.com, , Aug 23, 2005.
14 *Id.*
15 *Id.*
16 Ferrill, *supra* note 10, at 378.
17 The discussion in section II-A of this paper adopts the format of section II-B, Modern Patent Enforcement in Elizabeth D. Ferrill's law review article "*Patent Investment Trusts: Let's Build a PIT to Catch the Patent Trolls*," 6 N.C.J.L. & TECH. 367, Spring 2005.

1. The new breed at the bottom

A new breed of companies has emerged in the market as the range of patentable subject matter expanded exponentially. These companies can fit into Mr. Detkin's classic definition of the patent trolls.

a. TechSearch LLC

In 1998, TechSearch LLC sued Intel Corporation for patent infringement and was the first entity to be referred to as a "patent troll." Before 2001, TechSearch had made millions of dollars asserting an acquired patent on a method of transmitting data between computers.[18] Close to 100 companies, including UAL Corporation., Sears, Roebuck and Co. and Hyatt Corporation. have chosen to pay TechSearch licensing fees rather than litigate.[19] Anthony Brown, a former partner from a Chicago law firm and founder of TechSearch, knew the key ingredient to build a successful patent enforcing firm was a broad patent.[20] He looked through the list of the USPTO issued patents and finally struck gold on a patent that could potentially cover anyone with a webserver.[21] TechSearch promptly sued Intel for infringement and sought an injunction against Intel to stop production of its Pentium processors.[22] Although TechSearch lost that particular lawsuit to Intel, it has won many other cases over the years. In January 2004, TechSearch formed InternetAd System to handle licensing agreements from various websites that use popular online ad formats including pop-up ads.[23] It has filed complaints against ESPN, the New York Times.com and Travelocity.[24] It also seeks licensing agreements for the same patent with many other websites.[25] TechSearch, it would appear, makes its money by simply suing others for licensing fees.

b. Acacia Research Corporation

Arguably, the most notorious of all of these companies in this category er is Acacia Research Corporation. Despite what its name implies, Acacia is not in the business of technical research. Rather it primarily acquires and licenses patented technologies. It currently holds 32 patent portfolios totaling 120 US patents.[26] Acacia has been criticized for engaging in bullying tactics while conducting its licensing negotiations. For example, during 2003 and 2004, Acacia sent letters to educational institutions, demanding them to pay license fees for using the streaming technology which enables "distance learning."[27] Acacia represented that whenever a student retrieves digitized audio or video of lectures or seminars from the institution, this distance learning process infringes upon Acacia's patents.[28] In 2003, Acacia demanded 2 percent of the institutions' distance education gross revenue as a license fee with a minimum initial payment of $1000 and maximum initial payment of 25 percent of the anticipated annual royalty.[29] However, as described above, Acacia contends its patents cover a much broader scope than the distance education. Therefore, during 2004, Acacia sent another batch of new letters with a modified "E-learning" license agreement that demanded royalties based upon file transfers with a minimum annual royalty of $5000 from each institution.[30]

Acacia not only employs very aggressive tactics, it also has a very strategic game plan. It is speculated that Acacia deliberately sued adult entertainment industry websites before more mainstream companies. Unlike the poorer educational institutions, these websites are more likely to fight back in a patent infringement suit, but they generally don't have the resources of the larger technology companies such as Microsoft.[31] If Acacia wins the litigation over the adult entertainment

18 Sandburg, *supra* note 2, at 2.
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.* at 3.
23 Stefanie Olsen, *Patent Owner States Claim in Net ad Suit,* CNET News.com, Jan. 7, 2004. http://news.com.com/2100-1024_3-5136909.html.
24 *Id.*
25 *Id.*
26 *See* www.acacia.com.
27 Wesley D. Blakeslee, *The Acacia Patent Claims and Options for Educational Intuitions.* (prepared on behalf of the National Association of College and University Attorneys, 2004.) http://www.nacua.org/documents/Blakeslee-Acacia3.pdf#search='The%20Acacia%20Patent%20Claims%20and%20Options%20for%20Educational%20institutions'.
28 Wesley, *supra* note 27.
29 *Id.*
30 *Id.*
31 John Borland, *Patent Scare Hits Streaming Industry*, CNETnews.com, Feb. 6, 2004, http://news.com.com/2100-1023-983552.html.

industry, it will have a precedent that will facilitate pursuing larger, deep pocket companies.[32] In July, 2004, U.S. District Court Judge James Ware announced the first rulings of the Markman hearings in *Acacia Media Tech. v. New Destiny Internet Group*, *et al.*, revealing some weaknesses in the patents.[33]

Also in 2004, Acacia boldly moved onto the next field in streaming media by filing patent infringement law suits against Direct TV, Charter Communications, Comcast Corporation, Echostar Communications Corporation, Boulder Ridge Cable TV, Central Valley Cable TV, Seren Innovations, Cox Communications and Hospitality Network Inc.[34] Most recently, on August 15, 2005, Acacia announced it has entered into a licensing agreement for certain uses of its digital media transmission (DMT) technology with Gannett Co, Inc., Internet Broadcasting System, Inc., Journal Communications, Inc., Landmark Communications, Inc., the EW Scripps Company and Tribune Company.[35] All of these licensees are major online news, information and publication companies. To date, Acacia has entered into 302 license agreements for its DMT technology with companies that provide online entertainment, e-learning, cable television, hotel on demand TV services and corporate advertising and promotion.[36]

2. Patent pioneer enforcement firms

Moving up the ladder of enforcement firms, the next type are entities representing inventors who want to license their patents. With the advent of the patent licensing business, Dallas-based George Mahr and David Leonard started one such pioneering firm.[37] Since the late 1980s, Mahr-Leonard Management Co. ("MLM") has represented many notable inventors. It has negotiated more than $700 million worth of licenses.[38] During most of its existence, MLM has handled other people's patents. Once upon a time, it must have been very refreshing to have companies like MLM represent the little guys and get them adequate compensation for their inventions. But does being a pure patent enforcement firm make them trolls? Perhaps, at least by Mr. Detkin's original definition. When MLM started, Mahr said "…only a few played the patent enforcement game and the negotiations were friendly. But a whole host of patent enforcers are now pursuing licenses," thus people are more willing to fight back and are no longer willing to pay the toll.[39] In the current hostile environment, MLM is buying up patents to keep control of the litigation process, thus modifying its business model. However, MLM still retains the title of a "patent pioneer" while Acacia is branded as a patent troll.

3. Technology investment and management companies for educational institutions

The next type of entities are technology investment and management companies that provide support and services for all development activities of their clients. Infringement protection and licensing negotiations are among their services; however, these companies usually focus on technology investments from universities and research institutions. The revenue generated from the licenses in return are poured back into academic research projects conducted by the institutions. While these companies may initiate litigation against patent infringers under their own names, such litigation is mainly a vehicle to turn the prolific academic research discoveries into active commercial use and thus provide further financial resources to advance the academia.

4. Companies that do their own research and license the technology developed

Climbing further up the ladder of the licensing firms, there are companies who invest in research and development ("R&D") but may not practice the patented technologies. They generate most of their revenues from licensing their patents while reinvesting the revenue in R&D. Such companies could be developing some of the fastest growing technologies and hold very

32 *Id.*
33 Geoff Daily, *District Court Delivers Blow to Acacia*, Legal Issues, Jul. 14, 2004. http://www.streamingmedia.com/article.asp?id=8724.
34 *Acacia Unit Sues DirecTV, Others*, LOS ANGELES BUSINESS, June 16, 2004, *available at* www.bizjournals.com/losangeles/stories/2004/06/14/daily22.html.
35 *Id.*
36 *Id.*
37 Brenda Sandburg, *Pair of Patent Pioneers Change Their Business as Corporations Fight Back*, THE RECORDER , Jul. 30, 2001, *available at* http://www.law.com/jsp/printerfriendly.jsp?c=LawArticle&t=PrinterFriendlyArticle&cid=1015973982380.
38 *Id.*
39 *Id.*

impressive patent portfolios. They make most of their revenue from royalties of their licenses and yet they will not be regarded as a patent troll. An interesting scenario to consider would be if some of the key patents from such entities were enforced by a patent enforcement company. Would the patent community still be concerned? In this case, should the differences of where the licensing revenue goes differentiate a conventional business from a patent troll?

5. Companies that manufacture patented inventions but are also major licensors of patent rights

At the very top of the ladder, we have companies that utilize their developed technologies to manufacture products. Companies such as Intel, IBM, and Microsoft are certainly not what Mr. Detkin had in mind when he characterized the patent trolls.

In the 1990's, IBM implemented fundamental changes in its intellectual property ("IP") management philosophy. Consequently, it increased its licensing revenue from $30 million a year in the early 1990's to $1 billion a year by the end of 2000, and is now approaching $2 billion in annual income from patent royalties.[40]

In 2004, Bill Gates announced Microsoft's plan to file 3000 patent applications annually.[41] Brad Smith, Microsoft's senior vice president and general counsel, stated that Microsoft can no longer rely on copyright protection for its inventions.[42] He reasoned that Microsoft spends $6 billion on R&D and therefore needs to file 3000 patent applications to protect its investment.[43] At that level, Microsoft would over take IBM as the leading patent seeker in the U.S.[44] Microsoft indicated that while its own R&D department is capable of pumping out large numbers of patents, the company will also consider buying smaller firms to acquire additional intellectual property.[45] Microsoft's announcement set off warning bells in the industry. Some of Microsoft's patents are already under criticism for being too broad or too basic.[46]

Are Microsoft and IBM merely expanding their patent portfolio for self protection, or are they partaking in the gold rush along with the identified trolls to generate vast licensing revenues? The answers have yet to be seen.

B. Shades of Gray

After surveying the companies above, the line between troll and non-troll remains unclear. Perhaps the patent licensing game is an inevitable evolution in the unstable world of the technology industry. The case of *MercExchange v. eBay* exemplifies the instability faced by companies conducting business operations online.[47]

1. *MercExchange v. eBay*

In another story in the patent troll book, eBay suffered a bitter defeat in the form of a surprise patent from MercExchange, a formerly unheard of company. MercExchange owns a patent that was issued on December 1, 1998, more than three years after eBay started its online operation.[48] At that time, eBay had already achieved $47 million in annual sales revenue.[49] In 1998, the U.S. Court of Appeals for the Federal Circuit finally held for the first time, in *State Street Trust Co. v. Signature Fin.Group, Inc.*,[50] that "business method" is a patentable subject matter. Therefore, it is

40 Sam Mamudi, *Patent Trolling Merits Debated*, Managing Intellectual Property, Mar. 2005, *available at* http://www.legalmediagroup.com/news/print.asp?SID=15195&CH=.
41 Keith Regan, *Gates Says Microsoft Will Increase Patent Push*, E-COMMERCE TIMES, Jul. 30, 2004, www.ecommercetimes.com/story/35465.html.
42 Randall Stross, *Why Bill Gates Wants 3,000 New Patents*, THE NEW YORK TIMES, Jul. 30, 2005, *available at* http://www.nytimes.com/2005/07/31/business/yourmoney/31digi.html?ex=1280462400&en=d1d9b6aeb510698b&ei=5088&partner=rssnyt&emc=rss.
43 *Id.*
44 Keith Regan, *Gates Says Microsoft Will Increase Patent Push*, E-COMMERCE TIMES, Jul. 30, 2004, www.ecommercetimes.com/story/35465.html.
45 *Id.*
46 *Id.*
47 *See eBay and Subsidiary Found to Have Willfully Infringed Two Business Method Patents*, Baker Botts LLP, INTELLECTUAL PROPERTY REPORTS, vol. 3 issue 26, Jun.3 2003, *available at* http://www.imakenews.com/bakerbotts/e_article000156005.cfm?x=b11,0,w.
48 *Id.*
49 *Id.*
50 *State Street Trust Co. v. Signature Fin.Group, Inc.*, 149 F.3d 1368, 1373-1375 (Fed. Cir. 1998).

logical that eBay had not secured an online operation business method patent when it was first launched.[51] Furthermore, since the USPTO's practice of periodically publishing patent applications did not start until 2001, eBay had no means of tailoring its operations around MercExchange's pending claims.[52] Yet in MercExchange's home state of Virginia, a federal jury found eBay willfully infringed upon MercExchange's patent. The judge ordered eBay to pay $29.5 million in damages but rejected MercExchange's request to issue a permanent injunction against eBay.[53] Both parties appealed. In March, 2005, the Federal Circuit reversed the district court's denial for a permanent injunction against eBay because they "see no reason to depart from the general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances."[54] On August 26, 2005, eBay took its fight with MercExchange to the Supreme Court.[55]

2. *Kodak v. Sun*

Another topic of debate in the gray zone is the battle between Kodak and Sun Microsystems, Inc. In 2004, Kodak, using a patent purchased from Wang Laboratory, sued Sun for patent infringement over Sun's Java programming language. Kodak was prepared to ask for $1 billion in damages, which equaled 50 percent of Sun's operating profit from sales of computer services and storage equipment from 1998 to 2001.[56] In Kodak's home state of New York, a federal jury found Sun infringed Kodak's patents. The parties subsequently settled for $92 million in exchange for a license for Java technology under all of Kodak's patents.[57] Settling with Kodak appears to be the "best" option Sun had, since the appeals process would create more uncertainty.[58] Sun committed itself to protect its customers from patent suits through indemnification agreements. It stood behind its products rather than leaving its customers to face the heat.[59]

Aside from praising Sun's meaningful indemnification clause, the pertinent question raised here is what role was Kodak playing? Was Kodak legitimately enforcing its (intellectual) property rights or was it trolling? Kodak's gain in this litigation was solely monetary as it is not directly competing with Sun. Since the lawsuit between them, "mega troll" has surfaced in the community as a new term to describe the blurred line between trolls and non-trolls when the larger companies also started to engage in the licensing game.[60]

3. JGR Acquisition Inc.

Regardless of whether or not it was a mega troll, Kodak at least was visible and direct in its attack. A company is more vulnerable when its enemy remains hidden. In 2004, JGR Acquisition Inc. ("JGR"), representing a mystery owner, incorporated six days before the auction of Commerce One, purchased Commerce One's patent portfolio for $15.5 million.[61] Some of the technology described by these patents broadly covers the frame work for electronic communication and connectivity between parties using web services.[62] A few major companies using web services greatly fear this mystery owner could be aggressive and use the patents to come after them.[63] It appears that JGR was incorporated for the sole purpose of acquiring Commerce One's patent portfolio. JGR's owner was determined to beat out seven other bidders; including two that are connected to Intellectual Ventures[64] and two other anonymous bidders.[65] Is JGR's owner a new troll under the bridge or simply a known troll in disguise?

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51 *eBay and Subsidiary Found to Have Willfully Infringed Two Business Method Patents*, Baker Botts LLP, INTELLECTUAL PROPERTY REPORTS, vol. 3 issue 26, Jun.3 2003, *available at* http://www.imakenews.com/bakerbotts/e_article000156005.cfm?x=b11,0,w.
52 *Id.*
53 *Id.*
54 *See* Ina Steiner, *New Developments In eBay-MercExchange Patent Suit*, AuctionBytes.com, Sep. 28, 2005, *available at* http://auctionbytes.com/cab/abn/y05/m09/i28/s01. *MercExchange, LLC. v. eBay, Inc.*, 401 F.3d 1323 (Fed. Cir. 2005).
55 *Id.*
56 Ben Dobbin, *Kodak, Sun Microsystems Settle High-States Lawsuit*, ASSOCIATED PRESS, Oct.7, 2004, *available at* www.usatoday.com.
57 *Id.*
58 Eugene Quinn, *Clash of the IP Titans, Kodak v. Sun: The $1Billion Claim*, PATENT WORLD #167, Nov. 2004, *available at* http://www.ipwatchdog.com/050-PW-Nov-04-Closing.pdf#search='Clash%20of%20the%20IP%20Titans%2C%20Kodak%20v.%20Sun'.
59 *Id.*
60 Heimes, *supra* note 3, at 6.
61 Renee Boucher Ferguson, *Commerce One Patents Auctioned Off*, EWEEK.COM-WEB SERVICES, Dec 8, 2004, *available at* http://www.eweek.com/article2/0,1759,1737418,00.asp?kc=EWNKT0209KTX1K0100440.
62 *Id.*
63 *Id.*
64 *Id.*
65 John Oates, *Mystery Bidder Snaps Up Commerce One Patents*, THE REGISTER, Dec 7, 2004. *available at* www.theregister.co.uk.

There is little information indicating who the owner is, or what JGR plans to do with the acquired patents. As speculation grows, IBM, Google, Oracle and Sun have reportedly been discussing a joint defense should JGR try to enforce the patents.[66]

C. Troll's Defenses: The Myth of The "Patent Troll"

Nathan Myhrvold, ex-Microsoft chief technical officer (CTO), now the chief executive of Intellectual Ventures, claims that the patent troll problem is a myth.[67] He argues that patent litigation represents only 3 percent of federal lawsuits and that the number of lawsuits filed per patent has been steadily declining.[68] Myhrvold testified at a U.S. House of Representatives hearing during April 2005 that his company provides financing to inventors and helps them get a share of the profits from their inventions.[69] Mr. Detkin, on behalf of Intellectual Ventures, further testified that only 2 percent of patent cases filed in the past five years were filed by entities that don't sell any products, and half of those were by Acacia.[70] Many people do not share this optimistic view. However, if the wicked witch of the west can tell a heartwarming, compelling love story before she is condemned by Dorothy's bucket of water, it is certainly worthwhile to hear the patent trolls' version of their story. After all, if they are the ones winning all the gold in the pot, they will be labeling the heroes and villains. The patent enforcers claim that "patent system is a crucial part of what made America great,"[71] and the companies complaining about the system are the real crooks "who took great liberties with others' inventions."[72] Here are some of the major points that patent enforcement companies have raised.

First, patent enforcers argue a patent is not needed to practice the invention and that it does not give the patentee the positive right to practice the invention. A patent confers only the negative right to exclude others from using, making, selling, offering for sale or importing the patented invention.[73] Thus, the patent right has nothing to do with whether or not the owner of the patent practices the invention. The negative exclusionary right a patent confers is nothing more than a right to sue for infringement.[74] Therefore, they are merely asserting the only available right they had as the owner of such patents.

Second, the value of a patent is different from the value of the product derived from it. The patent itself only protects the monopoly to produce the product. The value of a patent depends on the willingness and ability of the patentee to enforce it. If one is not willing or capable of enforcing it, (i.e., by getting a license from an infringer) the patent is rendered worthless. In the eyes of the law, there is no difference between a patentee who practices the patented invention and patentee who does not. Therefore, the concept of the patent troll is only a myth.[75]

D. A Second Look: Time to Redefine the "Patent Troll"

After the discussion above, it is clear that Mr. Detkin's original definition of the patent troll is inadequate. A patent troll cannot merely be such a one dimensional term that describes a company making a lot of money off a patent that they are not practicing. It has been demonstrated that many of the technology companies reflect some aspect of the original definition of a patent troll. Therefore, patent troll should be a term that defines a company with a particular corporate practice or philosophy. As a result, a company could be a troll in one instance and not other instances.

At the congressional hearing, Mr. Detkin, departing from his original definition, represented the view that companies that have only enforced patents but have not developed a

66 *Id.*
67 Declan McCullagh, *Ex-Microsoft CTO Claims Patent Problem Is Myth*, news.com forum discussion, *available at* http://news.com.com/Ex-Microsoft+CTO+claims+patent+problem+is+myth/2100-1030_3-5842261.html.
68 *Id.*
69 Brenda Sandburg, *A Modest Proposal*, THE RECORDER , May 09, 2005, *available at* http://www.law.com/jsp/article.jsp?id=1115370308794.
70 *Id.*
71 Ronald J Riley, President of Professional Inventors Alliance, commenting on *Ex-Microsoft CTO Claims Patent Problem Is Myth*, news.com forum discussion. *See also*, Declan McCullagh, *Patent Bill Would Make Sweeping Changes*, CNET News.com, Sep. 13, 2005, *available at* http://news.com.com/Legislating+creativity--feds+plan+patent+reform/2009-1008_3-5860582.html.
72 *Id.*
73 Alexander Poltorak, *see supra* note 1.
74 *Id.*
75 For more discussion *see supra* note 1.

product are not necessarily patent trolls.[76] Mr. Detkin, along with other panelist from the Patent Property Rights Conference on March 14, 2005 argued that whenever an invention is put to commercial use, suing for rights is an acceptable practice, and is a fair use of patent rights. Several years after his creation of patent troll terminology, Mr. Detkin redefined it as a company that owns "…no more than a few patents of questionable merit and is not in any business related to the patents."[77]

According to Joe Beyer, the vice president of licensing from Hewlett-Packard Development Company, L.P. ("HP"), a patent troll is defined as "a company whose primary business model is to acquire patents and assert them against another company, and a company that is only interested in money and not, for instance, cross-licensing."[78] In this definition, large companies such as IBM or Kodak would never be patent trolls since their primary business model is not to acquire patents and obtain licenses.

In light of the ever blurring line between trolls and non-trolls in today's patent environment, it is necessary to craft a two tiered definition for patent trolls. An anonymous commentator summarized a definition which is particularly useful. First, a patent troll would be a company that receives no benefit from excluding others because it does not have a competitive product nor does it plan to develop one. This could include entities that are formed only as patent enforcement companies, as well as entities that hold patents on inventions that are not incorporated into their products. Second, a patent troll's tactic would be to use threat of litigation and its associated costs to force others into licensing agreements without closely scrutinizing the validity and strength of the patent-the kind of patent where one's lawyer would say "'you can fight it and probably win,' that will cost [you] $X, they are asking for $X/10."[79] Only when a company satisfies both parts of the definition, will it meet the criteria of a patent troll.

III. PROPOSED SOLUTIONS

A. 2005 Patent Reform

Many commentators, a group of technology companies (such as eBay) and lawmakers are concerned that patent trolls could be stifling innovation. They formed a coalition to argue for reform of the U.S. patent system.[80] The Patent Reform Act of 2005, formally filed as HR2795, represents an ongoing attempt.

Congressman Lamar Smith introduced the Patent Reform Act of 2005 in June 8, 2005 in an attempt to "eliminate legal gamesmanship from the current system that rewards lawsuit abuse over creativity."[81] One of the most drastic proposals in this bill would change the U.S. patent system from "first to invent" to the international standard of "first to file."[82] Another significant change under the bill includes a post grant opposition where third parties could challenge the validity of issued patents at the USPTO. The post grant opposition would be much broader than a reexamination procedure. Within nine months of the patent's grant and six months of receiving a notice of infringement, any interested party could bring an opposition proceeding in the USPTO. Thus, a defendant in a troll initiated patent infringement suit, instead of carrying out a full litigation in a district court, has the option to evoke a post grant review as an faster, cheaper alternative resolution.[83]

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76 Mamudi, *supra* note 40.
77 Brenda Sandburg, *A Modest Proposal*, THE RECORDER , May 09, 2005, *available at* http://www.law.com/jsp/article.jsp?id=1115370308794.
78 Mamudi, *supra* note 40.
79 *Defining Patent Trolls*, Patent Chronicles Blog Archive, anonymous comment entered on March 28, 2005, *available at* http://www.patentchronicles.com/archives/20050328/patent-trolls.
80 Erica Werner, *Lawmakers Want to Crack Down on Patent Trolls*, ASSOCIATED PRESS, Jun. 2005, *available at* http://www.usatoday.com/tech/news/techpolicy/2005-06-09-patent-troll_x.htm?csp=34.
81 Congressman Larmar Smith Website, *available at* http://lamarsmith.house.gov/News.asp?FormMode=Detail&ID=669.
82 *Id.*
83 One of the advantages of a post grant system is that the proceeding would provide companies with an unbiased venue to challenge a competitor's patent. In addition, a panel of three administrative patent judges with experiences in patentability issues would make the decision as compared to members of a lay jury. (There are significant debates on the issue whether jury system should be used at all for any patent cases. Although fascinating, the topic is beyond the scope of this paper and the discussion will be saved to another day). Furthermore, filing an opposition at the PTO would limit the discovery scope and thus prevent challengers from being forced to turn over thousands of confidential documents to their competitors. The overall cost of the procedure would be a fraction of ordinary patent litigation in a district court. For a more comprehensive discussion, *See* Donna Meuth, *Patent Reform Would Change Business Pace*, BOSTON BUSINESS JOURNAL, Sep 26, 2005, *available at* www.boston bizjournals.com.

The most controversial section of HR2795 proposes changes to the injunction provisions in the Patent Act that directly dealt with the perceived issues of patent trolls. In the first version of this proposed legislation, its language would allow an injunction to be issued only if a patent holder would suffer irreparable harm without one.[84] Therefore, it would be more difficult for a patent troll to get an injunction against an alleged infringer if the patent troll does not have a competitive product. This modified injunctive relief provisions would also abolish the presumption of irreparable harm. Thus, the section would require the courts to consider patent trolls' actual use of the technology claimed by the patents as part of the overall balancing of the equities.[85] If that were the case, eBay would not be facing a possible permanent injunction for infringing MercExchange's patent, since MercExchange does not practice online auctions.[86]

Many large high-tech companies greatly support this section, however, other industries heavily contest the very same provision. The opponents of this section voiced the concern that the language of HR2795 puts too much emphasis on the commercialization of the products and would deter individual inventors from enforcing legitimate patents.[87] As a result, even the members in the software industry are not united on this subject.[88] Many smaller software developers do not support taking away the automatic injunctions.[89] Take MercExchange as an example, inventor Woolston, founder of MercExchange, represented the view that MercExchange is "fighting for the rights of entrepreneurs trying to do business in a world that favors corporate giants."[90] MercExchange claims it intends to develop online sales someday. And if the bill takes away a patent owner's right to stop others from using the patented invention, how can a small company such as MercExchange ever raise enough capital to commercialize its invention.[91]

With pressure from the opponents building up, Congressman Smith, has circulated a draft amendment for HR2795. The draft amendment removes the entire section of injunctive relief provision that originally dealt with the issue of trolls.[92] Some commentators fear that this elimination will further widen the gap between the proponents and the opponents of this section and cast more doubts on HR 2795's ability to successfully implement any patent reforms.[93] However, in exchange for eliminating the injunction provision, Smith added a new venue provision to the amendment of HR 2795,[94] which could be very beneficial to the defendants in a patent litigation.[95] HR 2795 as it was first introduced on June 8, 2005 is still the official bill, and all of the patent community anxiously awaits an official substituted bill.

B. Fighting Back

In the midst of the battle with the trolls, another approach both the legal and the technology communities took was to fight back. In a few cases, small businesses have set up websites

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84 Larmar Smith, *Remarks Before the Conference on Patent Reform*, Jun 9, 2005, http://www.lamarsmith.house.gov/News.asp?FormMode=Detail&ID=650.
The traditional injunctive relief is a very powerful tool to enforce one's patent monopoly rights. In current court settings, once infringement and validity are established, the court presumes irreparable harm and will permit an injunction absent a sound reason for denying it. This is exactly the Federal Circuit Court's holding in *MercExchange, LLC. v. eBay, Inc.*, 401 F.3d 1323 (Fed. Cir. 2005). The threat of injunctive relief is often sufficient to deter litigation and force accused infringers to settle with the patentee even though the patentee does not have a commercial product based on the patented invention.

85 *See* Congressman Larmar's remarks before the conference on patent reform, http://www.lamarsmith.house.gov/News.asp?FormMode=Detail&ID=650

86 Although, MercExchange does claim it will start an online company utilizing the patented method. (see discussion below).

87 Comments by the Association of American University, the American Counsel On Education, the Association of American Medical Colleges and the Counsel on Governmental Relations on HR2795, the Patent Act of 2005.
High tech companies and the pharmaceutical industry do not share the same concern with patent trolls since drug formulas are much more difficult to develop. The pharmaceutical industry is concerned that this change would greatly impact the creation of new and innovative drugs. Pharmaceutical companies file relatively fewer patent applications than the high tech industry, and they heavily rely on the automatic injunction to prevent infringers from using, making or selling the patented drugs. It will be very difficult for these two industries to reach an agreement on the issue of injunctive relief.

88 Declan McCullagh, *Patent Bill Would Make Sweeping Changes*, CNET News.com, Sep. 13, 2005, *available at* http://news.com.com/Legislating+creativity--feds+plan+patent+reform/2009-1008_3-5860582.html.

89 *Id.*

90 Ellen McCarthy, *Waiting Out A Patent Fight With e-Bay*, WASHINGTON POST, Jan. 6, 2005, *available at* http://www.washingtonpost.com/wp-dyn/articles/A51969-2005Jan5.html.

91 Erica Werner, *Lawmakers Want to Crack Down on Patent Trolls*, ASSOCIATED PRESS, Jun. 2005, *available at* http://www.usatoday.com/tech/news/techpolicy/2005-06-09-patent-troll_x.htm?csp=34.

92 *See* http://www.promotetheprogress.com/ptpfiles/patentreform/patentact2005/Patentact2005_draftamendsubst.pdf.

93 J.M. Buchanan, *Patent Act of 2005-Draft Amendment Circulated*, Promote the Progress, Aug 23, 2005, *available at* www.promotetheprogress.com/archives/2005/08/patent_act_of_2_2.html.

94 J.M. Buchanan, *House Subcommittee Hearing On Patent Reform-Compromise And Controversy*, Promote the Progress, Sep 15, 2005, *available at* www.promotetheprogress.com/archives. *Also see* http://www.promotetheprogress.com/ptpfiles/patentreform/patentact2005/Patentact2005_draftamendsubst.pdf.

95 http://www.promotetheprogress.com/ptpfiles/patentreform/patentact2005/Patentact2005_draftamendsubst.pdf.

to publicize the patent owners' actions and to create a prior art pool.[96] In this way they form a supportive community to defend against similar infringement claims. For example, PanIP defendants' group website, "youmaybenext.com," gathered critical information and communicated it to businesses that might be facing PanIP's patent infringement threat.[97] In addition, after Acacia's E-learning license threat, a number of educational institutions have also grouped together in a common defense network with their individual counsels.[98] However, these alliances are among the minority. Defendants in the same industry may have an easier time cooperating with each other. In unrelated fields, however, companies and enterprises do not have the opportunity to find each other.[99]

IV. FINAL DISCUSSION

The patent community could spend hours or even years arguing about the definition of a patent troll and deciding what companies are trolls, but this exercise could be futile. As Poltorak, president and CEO of an IP enforcement firm said, "anyone in the patent wonderland can be his own lexicographer." Therefore, the pertinent question is whether trolling is really a problem and if so how big? If the patent system only grants a patentee the right to exclude, why shouldn't a company such as Kodak enforce its patent rights whether or not it is in the software business. Kodak is legally and legitimately the owner of the intellectual property, which are no different than any other properties. Yet utilizing the value of its patent made Kodak the focus of a great deal of public criticism and speculation. Courts have determined that enforcing a patent is an absolutely right, thus the next question is whether or not there is a potential moral problem with trolling.

Legality and morality are separate issues. There was a time no genetic cloning was patentable because of moral objections. Subsequently, the US Supreme Court has repeatedly affirmed the decision in *Diamond v. Chakrabarty*,[100] holding that anything under the sun made by man is patentable. Thus, the concept of trolling cannot merely be scrutinized by the visibility we have today. The whole course of development of the patent world from Jefferson and Madison to the present day has to be considered. The evolution of the notion of patent troll will develop over time. It is a by-product of the patent system. As long as patents exist, people will sue for infringement. Then, is the technology industry prepared to jettison the patent system entirely because of the most recently perceived problem? Of course not! The technology industry believes in the concept of patents and is convinced that the patent system nourishes innovation. The bottom line is how can the system be improved to prevent patent extortion? The heart of the problem is not trolling itself, it is, as it has always been, the purpose for which the patents are asserted.

Smaller companies started collecting tolls from others in the 1990s, and as more patents are being filed each year, more and more larger companies are demonstrating a tendency for trolling. Therefore, perhaps trolling is an inevitable part of competition in today's economy where intellectual property has become the key ingredient to success for any technology company.

On the other hand, perhaps corporate morality and responsibility should receive more emphasis. While the primary duty of a corporation is to make profit for its shareholders, is there something inherently unfair about using a broad, virtually generic patent to obtain licenses? As discussed above, there are no definite heroes or villains in the troll story book. Companies change roles in each litigation. When the same players are on both sides of the game, it is difficult to address the issue.

There are no easy answers to questions about patent trolls, but there is another perspective. If the inventions in the patents involved in a litigation are truly innovative, novel and non-obvious, and they are the type of innovation that deserve up to 20 years of monopoly, would the legal and technology communities still have the same debates about trolling behavior?

96 *Supra* note 3 at 5.
97 *Id.*
98 Blakeslee, *supra* note 27.
99 *Supra* note 3 at 5.
100 *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).