Stop Looking Under the Bridge for Imaginary Creatures: A Comment Examining Who Really Deserves The Title *Patent Troll*

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Introduction

Commonly, patent trolls are viewed as non-producing patent holders that enforce their patents.[1] This perception of a patent troll must be changed because it unfairly gives a number of legitimate intellectual property businesses a bad name. Many legitimate businesses play a positive role by encouraging innovation, increasing liquidity,[2] and providing market clearing. The positives produced by these businesses far outweigh any negatives they create and courts should not make it more difficult for these businesses to gain injunctive relief.

Instead of hindering legitimate intellectual property businesses, the courts and legislature should focus on the main problem with patent litigation—patent quality. The declining quality of patents, the many patent applications before the United States Patent and Trademark Office (USPTO), and the consequent litigation currently overwhelm the patent system.

If the courts and legislature want to regulate the activities of patent trolls, then they should only act against the real trolls. Real patent trolls are any bad faith actors that own patents.[3] Just as both good and bad actors flock to

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[1] *See infra* Part I.A.

[2] JOHN DOWNES & JORDAN E. GOODMAN, DICTIONARY OF FINANCE AND INVESTMENT TERMS 386 (6th ed. 2003) ("Ability to buy or sell an asset quickly and in large volume without substantially affecting the asset's price.").

[3] *See infra* Part II.

the glamour and glitz of Hollywood, patent trolls and legitimate businesses alike are attracted to the economic opportunities created by the patent system. However, any regulations must distinguish between the two because the legitimate intellectual property businesses provide many societal benefits.

Unfortunately, both the real and imaginary patent trolls have been dragged from under the bridge and placed at the center of a high-stakes legal debate.[4] It is difficult to understand why there is so much controversy. In reality only two percent of all patent litigation is linked to so-called *trolling*.[5] Because the debate is concerned about a future increase in litigation by non-producing patent holders, one has to think more long-term to properly understand the controversy.[6] Whatever the concerns, a poor resolution of this controversy could affect the future innovation and the productivity of many entities.

Part I of this Comment discusses the origin of the term *patent troll* and the common definition of the term. It also discusses the negative effects that critics argue these non-producing entities have on the market and the recent actions of the Supreme Court that seemingly reduce the litigation power of so-called *trolls*. Part II defends the legitimate activities of many non-producing intellectual businesses that fall under the common definition *patent troll*. Part II also discusses the true identity of a troll, which is immensely different from the common definition of the term. Finally, Part II discusses how the courts can determine the real patent trolls. The conclusion suggests that the Supreme Court reevaluate the path it has traveled since overruling the Court of Appeals for the Federal Circuit in *eBay v. MercExhange, L.L.C.*.[7]

I. An Overview of Patent Trolls and Their Surrounding Mess

A. The Origin and Common Perception of a Patent Troll

Coined by Intel's then Assistant General Counsel, Peter Detkin, the term *patent troll* first surfaced in 2001 as an alternative to the even more derogatory term "patent extortionist."[8] Intel's Counsel applied the *patent troll* label to Tech-

[4] *See infra* Part I.C.

[5] Nathan Myhrvold , Perspectives on Patents: Post-Grant Review Procedures and Other Litigation Reforms, http://www.intven.com/docs/NMyhrvoldTestimony052306.pdf, at 10; *see also* Nathan Myhrvold, *Inventors Have Rights, Too!*, THE WALL STREET JOURNAL, Mar. 30, 2006, at A14.

[6] *See* Brief of Amicus Curiae Yahoo! Inc. in Support of Petitioner at 4, eBay v. MercExchange, L.L.C., 126 S. Ct. 1837 (2006) (No. 05-130).

[7] 126 S. Ct. 1837 (2006).

[8] Raymond P. Niro, *The Patent Troll Myth*, Aug. 4, 2005, http://www.piausa.org/index.php/patent_reform/archive_109th_congress/articles/raymond_p_niro_08_04_2005. Peter Detkin now works at a company named Intellectual Ventures that many would be considered a patent troll. *Id.*

Search, a company that had acquired patent number 5,574,927 ('927 patent) for a microprocessor chip, from another company in January 1998.[9]

TechSearch notified Intel that some of its products infringed the '927 patent.[10] After Intel refused a license offer, TechSearch filed a lawsuit claiming that Intel's Pentium Pro and Pentium II lines of products infringed the '927 patent.[11] Since *Intel,* patent trolls have commonly been perceived as parties that acquire and enforce patent ownership without intending to use the patent for production.[12]

The term *patent troll* has become the center of much discussion and strikes a particular resonance with the technology industry.[13] Other industries, like the pharmaceutical or biotech sectors, are less concerned with patent trolls because patent enforcement is crucial to their business model.[14]

Business models in the technology industry have evolved differently because of the industry's unique realities.[15] The rate of development in the technology industry is rapid and innovation is usually incremental and cumulative.[16] Technology companies view patents as an obstacle that hinders them from building on already existing technology.[17] When seeking to get products into the market, these companies often face a "patent thicket" consisting of hundreds or even thousands of patented processes.[18]

As a result, large technology companies build sizable patent portfolios, not to enforce them, but so that they can play defense if a rival company asserts a patent by threatening the asserter's products.[19] This practice bears a remarkable resemblance to the doctrine of mutually assured destruction with nuclear arms; but, unfortunately, it is useless against non-producing patent

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[9] *Id. See also* TechSearch L.L.C. v. Intel Corp., 286 F.3d 1360, 1363 (2002) (identifying the patent at issue as the '927 patent). The litigation history of this case is interesting. Intel applied some questionable tactics in this case. Intel tried to use a shell company which was incorporated in the Cayman Islands to obtain rights for the patent they were claiming was invalid. Niro, *supra* note 8. The patent at issue was a RISC architecture computer configured for emulation of the instruction set of a target computer. U.S. Patent No. 5,574,927 (filed Mar. 25, 1994) (issued Nov. 12, 1996).

[10] Niro, *supra* note 8.

[11] Niro, *supra* note 8; *see also TechSearch*, 286 F.3d at 1363 (identifying the '927 patent).

[12] *See* Niro, *supra* note 8.

[13] *See generally* Myhrvold, *supra* note 5.

[14] *See* Myhrvold, *supra* note 5.

[15] Myhrvold, *supra* note 5.

[16] Brief of Amicus Curiae Yahoo! Inc. in Support of Petitioner, *supra* note 6, at 7.

[17] *See* Myhrvold, *supra* note 5.

[18] Brief of Amicus Curiae Yahoo! Inc. in Support of Petitioner, *supra* note 6, at 7–8.

[19] Myhrvold, *supra* note 5.

enforcers.[20] The practice is useless against many so-called *patent trolls* because they limit their business model to enforcing patent rights and, thus, do not produce products that could be threatened with patent infringement.[21]

Born out of the Intel suit, the term *patent troll* reflects an issue of general concern throughout the technology industry and has become the center of much debate. While the term is relatively new, patent trolls, as commonly defined, have been around since the dawn of the U.S. patent system. In fact, Thomas Edison, the admired inventor, would be one of the first patent trolls under the current definition.[22] Between 1868 and 1931, Edison was a prolific inventor who knowingly sold patents to non-practicing purchasers who intended to profit by enforcing their newly acquired patent rights.[23] As someone who made a fortune from his unproduced patents, Edison would probably fit the current perception of a patent troll.[24] However, as a great inventor and holder of over a thousand patents, Edison does not deserve such a negative label.[25] Edison was not a bad-acting patent troll; instead he was a legitimate businessman and inventor who simply enforced the patents he owned.

B. Arguments of Those who Oppose Patent Trolls

Critics argue that *patent trolls* are non-producing intellectual businesses (Non-Producers) which cause market failures by preventing products from reaching consumers, hampering innovation, and taking advantage of inventors and small entities.[26] Critics also claim, and I agree, that Non-Producers should not be rewarded for their bad faith strategies, such as delaying patent

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[20] Myhrvold, *supra* note 5.

[21] *See* Myhrvold, *supra* note 5.

[22] *See* John LaPlante, *The Case for Abandoning the Term "Patent Troll,"* 17 INTELL. PROP. LITIG. 1, *available at* http://www.rkmc.com/The_Case_for_Abandoning_the_Term_Patent_Troll.htm ("For example, during the late 19th and early 20th century, Thomas Edison earned patents for well over a thousand inventions, many of which completely transformed our world.").

[23] *Id.*

[24] *Id.*

[25] *See generally* FRANK LEWIS DYER & THOMAS COMMERFORD MARTIN, EDISON, HIS LIFE AND INVENTIONS (The World Wide School 1997) (1910), *available at* http://www.worldwideschool.org/library/books/hst/biography/Edison/toc.html (listing the patents granted to Edison in the "List of United States Patents" section).

[26] Brief of Amicus Curiae Yahoo! Inc. in Support of Petitioner, *supra* note 6, at 9 n. 6. Market failure is a term used to describe a situation in which markets do not efficiently allocate goods and services. *See* B. CURTIS EATON ET AL., MICROECONOMICS at 672 (5th 2002) ("Market Failure: a name given to models that fail to achieve the maximum gains from trade.").

issuance or enforcement of patents, which anticipate an increase in the value of the infringing use to the infringer.[27]

The patent enforcement activities of Non-Producers may prevent some products from reaching consumers because vendors face large costs just to research patent infringement claims. These costs can reach half a million dollars or more.[28] In addition, many vendors avoid researching patent infringement claims because the penalty for willful infringement can be treble damages.[29]

The large costs of researching patent infringement are just the beginning because "it costs $1.5 million to defend a typical case and $4 million to defend a damage claim of over $25 million."[30] Non-producing plaintiffs also have the advantage over producers as they can forum shop for a federal court with personal jurisdiction friendly to their claim.[31]

In addition to the expenses and the advantages plaintiffs have with forum shopping, critics argue that under the current legal system, Non-Producers can demand settlements from companies that exceed the true economic value of their patents. Non-Producers have nothing to lose by halting the manufacture of products that they do not intend to produce.[32]

Instead of bearing the burden of such costs, vendors often choose not to produce certain goods that otherwise would have conferred value to society.[33] As a result, consumers do not receive the products they need or want.[34] Because these activities do not add social value, many critics argue that Non-Producers should not be allowed to create such market failures.[35]

In addition to hindering the production of certain goods, critics argue that Non-Producers may hurt innovation and take advantage of inventors and

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[27] Brief of Amicus Curiae Yahoo! Inc. in Support of Petitioner, *supra* note 6, at 2–3.

[28] Dave Bursky, *Patent Trolls a Costly Thorn in Industry's Side*, ELECTRONIC ENGINEERING TIMES, July 24, 2006, at 6.

[29] Brief of Amicus Curiae Yahoo! Inc. in Support of Petitioner, *supra* note 6, at 10; *see generally* Note, *The Disclosure Function of the Patent System (or Lack Thereof)*, 118 HARV. L. REV. 2007 at 2017–23 (2005) (explaining that as a result of the frequent willful infringement verdicts in patent lawsuits, businesses are subject to great risk when they choose to search through the patent records).

[30] Brief of Amicus Curiae Yahoo! Inc. in Support of Petitioner, *supra* note 6, at 12.

[31] *See* 28 U.S.C. § 1400(b) (2000); Brief of Amicus Curiae Yahoo! Inc. in Support of Petitioner, *supra* note 6, at 13.

[32] Brief of Amicus Curiae Yahoo! Inc. in Support of Petitioner, *supra* note 6, at 1.

[33] Brief of Amicus Curiae Yahoo! Inc. in Support of Petitioner, *supra* note 6, at 13–14.

[34] *See* FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY 26 (2003), *available at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf.

[35] Brief of Amicus Curiae Yahoo! Inc. in Support of Petitioner, *supra* note 6, at 13.

small entities.[36] Coupled with declining quality in the patents issued by the USPTO, the enforcement activities of Non-Producers may hurt innovation by preventing innovators from building on to existing technology.[37] Also, some critics argue that these companies actually take advantage of inventors and small entities by buying patents far below their actual worth.[38] Some Non-Producers buy up huge portfolios of patents, sometimes for pennies on the dollar.[39]

C. The Supreme Court and Patent Trolls

In May 2006, the Supreme Court, in *eBay, Inc. v. MercExchange, L.L.C.*,[40] dealt a heavy blow to so-called *patent trolls* by unanimously eliminating the Federal Circuit's general rule that favors permanent injunctive relief for patent infringement.[41]

In *eBay*, the Court found that eBay infringed MercExchange's patent on a shopping cart auction feature.[42] At the time, MercExchange was not manufacturing the invention.[43] Instead, it offered non-exclusive licenses to others under its patent.[44] In the case, eBay argued that permanent injunction should be precluded even though it might be liable for damages to MercExchange.[45]

The trial court awarded MercExchange past damages and said the remedy of future damages would be available for any continued infringement

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[36] *See generally* Russ Nelson, Letter to the Editor, *U.S. Law has No Teeth in Punishments for Patent Thieves*, ELECTRONIC ENGINEERING TIMES, Apr. 10, 2006, at 34 (describing how patent trolls hurt him as a small inventor).

[37] Brief of Amicus Curiae Yahoo! Inc. in Support of Petitioner, *supra* note 6, at 13–14; *see generally* Mathew Sag & Kurt Rohde, *Patent Reform and Differential Impact*, 8–10 (Nw. Law & Econ. Research, Working Paper No. 925722, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925722 (explaining the differences between bad patents and patent trolls). Mathew Sag & Kurt Rohde suggest that the problems created by patent quality and patent trolls, while often considered in tandem, are in fact severable. *See id.* at 8-9.

[38] See David V. Radack, Patent trolls: Pay Up or Fight?, 8 LAWYERS J. 3. (2006).

[39] *Id. See* Comment, *Towards a Solution to the Problem of Illegitimate Patent Enforcement Practices in the United States: An Equitable Affirmative Defense of "Fair Use" in Patent*, 20 EMORY INT'L L. REV. 791, 826 n.219 (2006).

[40] eBay v. MercExchange, L.L.C., 126 S. Ct. 1837 (2006).

[41] *Id.* at 1838–39.

[42] *Id.* at 1839 (noting a jury found eBay infringed on MercExchange's patent in MercExchange, L.L.C. v. Ebay, Inc., 275 F. Supp. 2d 695, 698 (E.D. Va. 2003)).

[43] *See id.* at 1839.

[44] *Id.* at 1840 (quoting MercExchange, L.L.C. v. eBay, Inc., 275 F. Supp. 2d 695, 711 (E.D. Va. 2003)).

[45] *See* Brief of Petitioner at 32–33, eBay v. MercExchange, L.L.C., 126 S. Ct. 1837 (2006) (No. 05-130).

by eBay.[46] However, the trial court denied MercExchange's request for an injunction against eBay.[47] On appeal, the United States Court of Appeals for the Federal Circuit (Federal Circuit) reversed the trial court ruling and applied a general rule favoring permanent injunctions.[48] The Federal Circuit's general rule was that a permanent injunction should issue once infringement and validity have been adjudged.[49] The Federal Circuit allowed exceptions in rare instances where injunctive relief should be denied in order to protect the public interest.[50]

However, the Supreme Court reversed the Federal Circuit and removed its general rule favoring the injunctions.[51] The Supreme Court ordered the lower courts to use the traditional "four-factor test" to weigh the equities of the case instead.[52] Under the four-factor test

> [a] plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.[53]

The Court's opinion, however, provides little guidance on how courts should apply the four-factor test.[54] Chief Justice Roberts suggested that the test should continue to produce injunctions in most of the cases where there is infringement of a valid claim.[55] However, Justice Kennedy was harshly critical of patent trolls.[56] Justice Kennedy attributed high rates of injunctions to patent owners, who do not produce corresponding products.[57]

Looking at the opinion, it seems that there exists an intent to shift the common perception of patent troll to a new perception that would exclude

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[46] *See* MercExchange, L.L.C. v. eBay, 275 F. Supp. 2d 695, 710–15 (E.D. Va. 2003) (explaining why damages are better suited than an injunction), *rev'd*, 401 F.3d 1323 (Fed. Cir. 2005), *vacated*, 126 S. Ct. 1387 (2006).

[47] *Id.* at 715.

[48] MercExchange, L.L.C. v. eBay, 401 F.3d 1323, 1339 (Fed. Cir. 2005), *vacated*, 126 S. Ct. 1387 (2006).

[49] *Id.* at 1338.

[50] *Id.*

[51] eBay v. MercExchange, L.L.C., 126 S. Ct. 1837, 1841 (2006).

[52] *Id.*

[53] *Id.* at 1839.

[54] James R. Farrand, *Shifting Patent Power: The Supreme Court Takes Up "Patent Reform" Where Congress Fails to Act*, COMPUTER & INTERNET LAW., Dec. 2006, at 1, 3.

[55] eBay v. MercExchange, L.L.C., 126 S. Ct. 1837, 1841 (2006) (Roberts, C.J., concurring).

[56] *Id.* at 1842 (Kennedy, J., concurring).

[57] *Id.*

non-producing inventors and institutions like universities.[58] Justice Thomas states that "some patent holders, such as university researchers or self-made inventors, might reasonably prefer to license their patents . . . . Such patent holders may be able to satisfy the traditional four-factor test . . . ."[59] Inventors and universities will likely be more successful than other Non-Producers in obtaining injunctions against infringing companies.[60]

The non-producing groups most affected by the decision "will have a very hard time showing sufficient irreparable harm, the requisite balance of hardships, or the correct public interest to obtain injunctions."[61] The Supreme Court's decision in *eBay* suggests that patent law and enforcement is heading towards a more pro-producer standard.[62]

II. Separating Reality from Fiction

A. Defending Legitimate Intellectual Property Businesses

The Supreme Court decision in *eBay* leads patent law in an entirely new direction, potentially resulting in very inefficient applications of patent law. On one hand, *eBay* suggests that injunctions will rarely be denied to patent holders if they produce or sell the products covered by their patents.[63] On the other hand, Justice Kennedy's concurrence suggests that patent holders who do not make or sell the products covered by their patents will find it more difficult to obtain permanent injunctions.[64]

As a result, producers will have less to worry about. Non-Producers should experience fewer licensing successes and may have to settle for smaller royalties when they are able to strike licensing deals.[65] Although this may be good news for producers, the change may herald doom for some intellectual property businesses.

We should not achieve the goal of encouraging production by sacrificing innovation. In drafting the Constitution, the Founders gave Congress the authority in Article I, Section 8 "[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."[66] Patent law has since played an important role in society by facilitating the creation of ideas

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[58] *See Farrand, supra* note 54, *at 4.*

[59] eBay, Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837, 1840 (2006).

[60] *See* Farrand, *supra* note 54, at 4.

[61] *See* Farrand, *supra* note 54, at 4.

[62] *See* Farrand, *supra* note 54, at 4.

[63] *See* Farrand, *supra* note 54, at 4.

[64] *See* Farrand, *supra* note 54, at 4.

[65] *See* Farrand, *supra* note 54, at 4.

[66] U.S. CONST. Art I, § 8, cl. 8.

and innovations that have become very important resources.[67] Presently, "[a]s much as [75%] of the value of publicly traded companies in America comes from [such] intangible assets, up from around 40% in the early 1980s."[68]

Patent law successfully encourages ideas and innovation by centering patentee rights around the concept of exclusion.[69] The power to exclude adds value to inventions by preventing others from freely replicating them.[70] Because the policies underlying patent law focus on fostering invention, not on promises to commercialize, courts should not consider the patentee's use when deciding whether to grant an injunction.[71]

Simply stated, patents are intended to reward invention, not commercialization.[72] Patent law should not use promises to commercialize as criteria to discriminate against classes of patent owners.[73] It is important to innovation that patent owners remain free to produce the patented invention, to license the patented invention to others parties, or the right of refusal.[74]

Patent trolls may exist, but we must differentiate them from legitimate Non-Producers. Often critics, who point fingers at some so-called *patent trolls*, fail to take into consideration the ways in which their activities make the market more efficient. Intellectual property businesses actually help the market to be more efficient by encouraging innovation, increasing liquidity and providing market clearing.[75] Intellectual property businesses encourage innovation by ensuring that independent inventors are compensated for their inventions.[76] In taking over the enforcement and licensing process, they allow inventors to focus on what they do best—invent.[77]

The modern world recognizes the benefits of specialization. It is no different with patents.[78] Inventors maximize efficiency by focusing on inventing and allowing other parties to deal with enforcement or licensing of patents.[79]

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[67] *See* LaPlante, *supra* note 22; Alexander Poltorak, *On 'Patent Trolls' and Injunctive Relief*, May 12, 2006, http://www.ipfrontline.com/depts/article.asp?id=10854&deptid=4.

[68] John LaPlante, *supra* note 22; James F. McDonough III, Comment, *The Myth of The Patent Troll: An Alternative View of the Function of Patent Dealers in an Idea Economy*, 56 EMORY L.J. 189, 191 (2006).

[69] *See* LaPlante, *supra* note 22.

[70] *See* LaPlante, *supra* note 22.

[71] *See* LaPlante, *supra* note 22.

[72] *See* McDonough, *supra* note 68, at 221.

[73] *See* McDonough, *supra* note 68, at 221–23.

[74] *See* McDonough, *supra* note 68, at 221–22.

[75] *See* McDonough, *supra* note 68, at 211.

[76] *See* Poltorak, *supra* note 67.

[77] *See* Poltorak, *supra* note 67.

[78] Poltorak, *supra* note 67.

[79] *See* Poltorak, *supra* note 67.

Indeed, many inventors find enforcement or licensing of patents to be distracting, time consuming, and costly.[80]

Intellectual property businesses also increase liquidity and provide for market clearing.[81] They act as market intermediaries for the inventors and prevent large companies from bullying inventors through acts of patent squatting.[82] Patent squatters benefit from the use of intellectual property without compensating the owners because inventors and small entities often cannot afford to enforce their patents through litigation.[83] Some intellectual property businesses who are accused of being trolls simply have deeper pockets. They can afford to enforce patents against patent squatters who refuse to compensate inventors and small entities.

Some critics cry foul about the costs involved in investigating the validity of a patent.[84] Inventors and small entities also face cost challenges in enforcing their valid patents against the squatters because of the enormous costs of patent lawsuits.[85] Inventors and small entities must overcome average litigation costs of $2 million.[86] Also, inventors and small entities lose the opportunity to pursue other activities because they become tied up in litigation that lasts an average of 1.12 years.[87]

In fact, inventors and small entities face patent squatting and cost barriers which create market failures.[88] This necessitates the need for a third party with the capital power to both compensate patent owners and enforce the patents against squatters.[89] The activities of some intellectual property businesses

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[80] Poltorak, *supra* note 67.

[81] *See* McDonough, *supra* note 68, at 211.

[82] *See* McDonough, *supra* note 68, at 190; LaPlante, *supra* note 22. Per McDonough, patent trolls are patent dealers that signal the emergence of a securities and commodities exchange. McDonough, *supra* note 68, at 190. However, patent trolls are not manifestations of early patent dealers. Instead they are the market mechanism that will encourage producers to look to such markets to avoid the more expensive alternative of dealing with patent trolls. Without patent trolls, large businesses can instead choose to continue to squat on the work and labor of independent inventors and small entities without fear of major costs. *See* LaPlante, *supra* note 22.

[83] *See* LaPlante, *supra* note 22. Patent squatters are companies that knowingly infringe on valid patents without providing compensation. *See id.*

[84] Jeff A. Ronspies, Comment, Does David Needs a New Sling? Small Entities Face a Costly Barrier to Patent Protection, 4 J. MARSHALL REV. INTELL. PROP. L. 184, 197 (2004).

[85] *Id.*

[86] *Id.*

[87] *Id.* at 201.

[88] McDonough, supra note 68, at 212; see also Stephen Wren, Letter, 'Patent Trolls' and Market Dominance, Wash. Times, Oct. 4, 2006, at A18.

[89] *Id.*

provide incentives for large businesses to compensate independent inventors and small entities or face more expensive alternatives.[90]

The Supreme Court should not weaken the ability of legitimate intellectual property businesses to obtain an injunction.[91] The threat of an injunction is an important tool to motivate would-be patent squatters to negotiate a license or settle patent infringement litigation.[92] Otherwise, the squatter is no worse at the end of litigation than in the beginning. Additionally, removing exclusionary rights from a patentee amounts to a compulsory license, something which most economists agree is a poor incentive for innovation.[93]

The Supreme Court should also consider that making it more difficult for non-producing patent owners to gain injunctive relief would increase the costs needed by inventors and small businesses to compete with more powerful companies. Inventors and small businesses with limited resources, who may prefer to focus solely on innovation, would be forced to build, finance and manage production processes just to have the right to stop infringement.[94] Any legal act that complicates the test for injunction based on production would therefore add more costs to a process that is already burdensome to patent holders.[95] Remember, an inventor or small business involved in innovation already has to deal with the enormous costs involved with discovery, motion practice, appeal, and reexamination.[96]

Why restrict a class of intellectual property business when the real concern for laws targeting patent trolls is a few bad actors? An actual standard already exists that differentiates between a practicing and a non-practicing patentee.[97] Once a court finds infringement, a patentee who does not practice the patented invention is entitled only to a reasonable royalty, while a patentee who manufactures a product may claim lost profits.[98] Additionally, two rules deter and punish parties that make frivolous claims—Rule 11 of the Federal Rules of Civil Procedure allows for sanctions and 35 U.S.C. § 285 allows for the recovery of attorneys fees.[99] In fact, concerns about many intellectual

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[90] *See* McDonough, *supra* note 68, at 211.

[91] *See* eBay v. MercExchange, L.L.C., 126 S. Ct. 1837 (2006).

[92] LaPlante, *supra* note 22.

[93] *See* LaPlante, *supra* note 22.

[94] Brief of the United Inventors Ass'n & Technology Licensing Corp. as Amici Curiae in Support of MercExchange, L.L.C., on the Merits, at *2, eBay v. MercExchange, L.L.C., 126 S. Ct. 1837 (2006) (No. 05-130), 2006 WL 622121.

[95] *Id.* at *8.

[96] *Id.*

[97] LaPlante, *supra* note 22.

[98] *See* Mark A. Lemley & Ragesh K. Tangri, *Ending Patent Law's Willfulness Game*, 18 BERKELEY TECH. L.J. 1085, 1112–13 (2003).

[99] LaPlante, *supra* note 22.

property businesses do not arise because of the nature of such businesses in their pure form.[100] The concerns about intellectual property businesses arise because of the realities of an imperfect market in which a lot of low quality patents have been issued.[101] The market may eventually become more efficient through improvements in patent quality through legislative acts,[102] and/or with the emergence of a securities market.[103] However, as with all other human conceptions, the market will never be perfect. As a result, the regulation of Non-Producers can theoretically reduce the frequency of frivolous and wasteful patent cases.[104]

However, this solution seems highly wasteful when juxtaposed against the broader problem of patent quality reform. Attempts to prevent the small, but rapidly rising, area of litigation primarily concerning the technology industry would also limit the rights of many non-producing patent holders with *good patents*.[105]

Because the benefits of the activities of legitimate Non-Producers far outweigh the negatives associated with their activities, the goals of patent reform should focus on the quality of the patents and policies that reduce both buying and selling costs in the market.[106] Regardless, any regulation intended for patent trolls should be narrowly focused and applied only to bad actors in the patent market.

B. The Real Patent Trolls are Bad Actors

The common perception of *patent troll* becomes baffling when one tries to reconcile why some groups are included and others excluded. The common perception is so broad that it includes universities and independent inventors, but so exclusive that it excludes companies that produce goods but still amass patents for bad faith purposes.[107]

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[100] *See* McDonough, *supra* note 68, at 202.

[101] McDonough, *supra* note 68, at 202.

[102] *See generally* Sag & Rohde, *supra* note 37 (suggesting methods for getting patent reform accomplished in the legislature).

[103] *See* McDonough, *supra* note 68, at 219 (suggesting patent trolls signal the emergence of a securities market).

[104] *See generally* ROBERT G. BONE, THE ECONOMICS OF CIVIL PROCEDURE (2003) (discussing the frivolous lawsuit problem in Chapter One).

[105] *See* Brief of Amicus Curiae Yahoo! Inc. in Support of Petitioner, *supra* note 6, at 4.

[106] *See generally* McDonough, *supra* note 68 (supporting a securities exchange to efficiently deal with the patent troll problem); Sag & Rohde, *supra* note 37 (explaining ways to reform patent laws to handle bad patents).

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

Universities should not be considered patent trolls when their patents raise money to increase the standard of education in America.[108] In 2000, universities collected $1.1 billion in royalties from their 13,000 U.S. patents.[109] Reinvested for the benefit of students and scientists, the income allowed for future research and discovery.[110]

Similarly, independent inventors should not be considered patent trolls. Though they do not produce their innovations, independent inventors are crucial to America's technological growth and account for 18% or more of the patent filers in the USPTO.[111] Radical innovation is more common among independent inventors than firm-based inventors who tend towards more incremental innovation.[112] As a result, independent inventors are more likely to create inventions of greater technical importance than firm-based inventors.[113]

Therefore, as suggested by *eBay* and the Yahoo! brief, universities and inventors should not be considered to be patent trolls.[114] However, a wider class of non-producing inventors should also be able to satisfy any test that the Supreme Court chooses to adopt for receiving injunctions.

Intellectual property businesses that facilitate innovation, market clearing and liquidity should also not be considered patent trolls because their activities confer important benefits.[115] The activities of these organizations aid innovators and should not be penalized for commercialization.[116] Otherwise, the reach of patent law would be overly broad in its regulation of behavior that is important to innovation.

While being overly broad in some instances, patent law that turns on commercialization would inexplicably ignore producing companies that enforce patents in non-production areas.[117] For example, Kodak collected $92 million from Sun Microsystems after suing Sun for infringing Java patents that they

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[108] *See* LaPlante, *supra* note 22.

[109] LaPlante, *supra* note 22.

[110] LaPlante, *supra* note 22.

[111] Brief of the United Inventors Ass'n & Technology Licensing Corp. as Amici Curiae in Support of MercExchange, L.L.C., on the Merits, *supra* note 94, at *5.

[112] Brief of the United Inventors Ass'n & Technology Licensing Corp. as Amici Curiae in Support of MercExchange, L.L.C., on the Merits, *supra* note 94, at *5.

[113] Brief of the United Inventors Ass'n & Technology Licensing Corp. as Amici Curiae in Support of MercExchange, L.L.C., on the Merits, *supra* note 94, at *5.

[114] eBay v. MercExchange, L.L.C., 126 S. Ct. 1837, 1840 (2006); Brief of Amicus Curiae Yahoo! Inc. in Support of Petitioner, *supra* note 6.

[115] *See* McDonough, *supra* note 68, at 211.

[116] Poltorak, *supra* note 67.

[117] *See* Lueck et al., *supra* note 107.

did not produce.[118] The courts should not distinguish between (1) producers and (2) non-producers who enforce patents in areas in which they do not manufacture. This would only create a status quo that allows large businesses who can easily afford to produce goods to consistently receive injunctions. This would make it almost impossible for smaller businesses, who cannot afford to produce, to achieve the same injunctions.[119]

Also, under such a definition, the label of *patent troll* would not apply to producing companies that buy patents, with no intention of using them for anything but for the offensive purpose of putting their competitors out of business. The patent enforcement activities of such companies have forced many competitors to acquire patents only for defensive purposes.[120] Such a cycle is a significant market failure that patent law turning on commercialization would probably fail to address.

Looking at the broad issue, the innovation that many intellectual property businesses encourage should not be compromised to satisfy a few producers that primarily belong to the technology industry.[121] Instead, a solution to the producers' broad concerns should focus on the greater problem affecting them—the issuance of low quality patents. Problems that speak to the quality of patents should not be associated with the problems that speak to the actions of patent trolls. We should not slander legitimate intellectual property businesses or reduce their ability to receive a permanent injunction.

The ability to receive an injunction should be reduced only for the narrow set of bad actors who own patents. Rather than being based on commercialization, the perception of patent troll should be based on bad faith. Under a bad faith definition patent trolls could fall into three categories: (1) parties who try to hide owning a patent until a company unsuspectingly infringes it, waiting until the company has expended significant resources so that they can extract a settlement; (2) parties that acquire large patent portfolios solely for the offensive purpose of putting competitors out of business; and (3) parties who intentionally acquire low quality patents in order to enforce them against companies, hoping to receive a settlement because the companies want to avoid the high discovery costs. To the limited extent that such parties are a problem, the law should focus on patent trolls as defined by bad faith practices.

To determine if a business fits the mold of the first category of patent trolls that hide owning a patent, the courts can evaluate on a case-by-case basis whether the business delayed patent issuance for the purpose of set-

[118] *See* Lueck et al., *supra* note 107.

[119] Poltorak, *supra* note 67.

[120] *See* Myhrvold, *supra* note 5.

[121] *See* Myhrvold, *supra* note 5.

ting a "trap."[122] The courts can determine if a trap was set by evaluating if the business "(a) [took] an abnormally long time to publicize the claim, (b) [made] a series of continuations and amendments that reflect post-application developments by [producers] . . . and (c) [by looking at] other actions by the patent holder . . . ."[123] The exact facts will vary, but the courts should assess all the circumstances in order to seek a fair result.[124]

The other two categories of patent trolls may have difficulties in court because it is hard to show intent. However, where it is clear that a patent troll falls into either category, law firms who accept cases on a contingent-fee basis would avoid taking these questionable cases because they would be destined for failure.[125] Furthermore, any legislative improvements that target patent quality would reduce the availability of low quality patents and thus reduce the role played by patent trolls falling under category three—those who deliberately acquire low quality patents. In spite of the difficulties of enforcing two of the categories, it is not worth regulating the activities of legitimate intellectual property businesses in order to tackle the problems created by such patent trolls. The positive effects of the legitimate intellectual property businesses affected far outweigh the negatives created by the bad faith actors whose actions account only for a small percentage of patent litigation.

Conclusion

In *eBay*, the Supreme Court signaled an intent to take a position that would be more hostile position to legitimate Non-Producers, many unfairly labeled as *trolls*, by making it more difficult for them to achieve permanent injunctions. Patent law and enforcement seem to be heading towards a more pro-producer standard, but at what price?

Patent law should not compromise the rights of intellectual property businesses that encourage innovation based on commercialization. The success of the United States patent system is due to policies that focus on fostering innovation. The system should not change that approach for the benefit of a few disgruntled producers who are a part of the technology industry.

Because they encourage innovation, liquidity and market clearing, we must distinguish between legitimate intellectual property businesses from patent trolls. Without their presence, many inventors would not be able to focus on innovation. They would have a hard time tackling the large businesses that are involved in patent squatting, as well as the numerous expenses that can be incurred in the U.S. patent system.

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[122] *See* Brief of Amicus Curiae Yahoo! Inc. in Support of Petitioner, *supra* note 6, at 22.

[123] *See* Brief of Amicus Curiae Yahoo! Inc. in Support of Petitioner, *supra* note 6, at 22.

[124] *See* Brief of Amicus Curiae Yahoo! Inc. in Support of Petitioner, *supra* note 6, at 23.

[125] *See* Niro, *supra* note 8.

The law should not chase imaginary patent trolls. Instead, the legal system should narrowly focus on the real patent trolls who are simply the bad faith actors that unfairly use the patents that they own. The courts can weed out these bad actors on a case-by-case basis in many circumstances. To the extent that there are challenges, the courts should avoid creating broad categories that will affect the positives many legitimate intellectual property businesses confer.

Creating law based on commercialization to regulate patent trolls would be pursuing an action that would lead to an inefficient solution. Patent quality is the primary problem and must be addressed in the realm of patent litigation. It should not be conflagrated with the relatively minor problems caused by bad faith actors in the patent industry. The Supreme Court therefore should reevaluate the path it has undertaken in the *eBay* decision.