Introduction to the 2015 Chapman Law Review Symposium:

Trolls or Toll-Takers: Do Intellectual Property Non-Practicing Entities Add Value to Society?

by Samuel F. Ernst[1]

There are few areas of patent law more contentious than the dispute over the social utility of "non-practicing entities," or (if you will excuse the expression) "patent trolls."[2] Generally speaking, patent trolls are companies that acquire patents, not for the purpose of developing new technologies and creating jobs, but for the sole purpose of demanding royalties (through litigation if necessary) from those companies that do release products on the market. Whether non-practicing entities add value to society is a topic of much debate, and the focus of this conference.

On the one hand, there has been no shortage of condemnation of patent trolls from the legal community. One study reported that patent trolls imposed direct litigation costs on defendants of $29 billion in 2011 alone.[3] This stunning figure does not even include the indirect costs of litigation (for example, the cost of manpower directed away from useful activities when engineers must assist in collecting discovery, giving depositions, investigating non-infringement and invalidity defenses, and so forth; and the jobs that

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[2] And some scholars will not excuse that expression. James F. McDonough argues that the term "patent dealers" is a "[a] more suitable, market-contextual term for nonpracticing patent owners who license or enforce their patents." James F. McDonough, The Myth of the Patent Troll: An Alternative View of the Function of Patent Dealers in an Idea Economy, 56 EMORY L.J. 189, 201 (2006). Robin Feldman and her colleagues prefer the term "patent monetization entities." Robin Feldman, Tom Ewing, and Sara Jeruss, The AIA Expanded: the Effects of Patent Monetization Entities, 17 UCLA J. L. & TECH. 1, 16 (2013).

[3] James Bessen and Michael J. Meurer, The Direct Costs from NPE Disputes, 99 CORNELL L.R. 387, 408 (2014).

could be preserved or created with the money spent on defending litigation). Nor does this figure include the substantial amount of royalties paid to patent trolls in licensing negotiations to avoid the prospect of costly litigation.[4] Robin Feldman and her colleagues estimate that patent trolls filed 58.7% of the patent infringement lawsuits in 2012, and observe that trolls frequently target start-up companies in the internet and technology sectors;[5] companies that are just embarking on the path to innovation and cannot afford to defend themselves even if the asserted patents are plainly invalid or not infringed.

In this vein, commentators condemn patent trolls as "bottom feeders" who acquire and assert low value patents, calculating that the high cost of litigation will result in an early settlement.[6] Patent trolls are able to drive up the cost of litigation with impunity. They can demand expensive discovery but are immune to counterattacks because they produce no products that can be the target of patent infringement counterclaims and have little information to discover, given that they are small companies or even shell corporations with little or no employees.

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[4] *See id.* at 409.

[5] Feldman et al., *supra* n. 2 at 13 (citing John R. Allison et al., *Patent Litigation and the Internet*, 2012 STAN. TECH. L. REV. 3, 4 (2012); Colleen V. Chien, *Startups and Patent Trolls*, 1 (Santa Clara U. Sch. of Law, Research Paper No. 09-12, 2012), available at http://digitalcommons.law.scu.edu/facpubs/553.

[6] *See* Mark A. Lemley and Douglas Melamed, Missing the Forest for the Trolls, 113 COLUM. L. REV. 2117, 2126 (2013). Professor Lemley and Mr. Melamed identify two other varieties of patent trolls: "lottery ticket" trolls own a patent they believe reads on a wide swath of technology and hope to "hit it big" with a large jury award; "patent aggregators" collect many thousands of patents and are able to force companies to take licenses without litigation because it is infeasible and prohibitively expensive to defend against such a sheer number of patents, regardless of whether they are valid or infringed. *Id.* at 2126-27.

Indeed, whereas most areas of patent law are arcane and abstract, patent trolls have failed to escape the attention even of the President of the United States, who has complained that patent trolls "don't actually practice anything themselves. They're just trying to essentially leverage and hijack somebody else's idea and see if they can extort some money out of them."[7] And condemnation of patent trolls appears to be one area on which the two parties can agree. *Vox* reports that "[t]he incoming Republican chairmen of both the House and Senate Judiciary committees have signaled their support for patent legislation. And they largely see eye to eye with President Obama, who has also called for reform."[8] In support of such reforms, Senator Orrin Hatch recently said, "[p]atent trolls – which are often shell companies that do not make or sell anything – are crippling innovation and growth across all sectors of our economy."[9]

On the other hand, some scholars have argued that the criticism of patent trolls is misguided. James F. McDonough forcefully argues that patent trolls (or patent dealers, as Professor McDonough calls them) benefit society by providing liquidity, market clearing, and increased efficiency to the market for patents.[10] The evolution of an efficient market for innovation gives inventors an incentive to invent and gives the public "easier and broader access to inventions."[11] Hence patent trolls help to effectuate the

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[7] Mike Masnick, *President Obama Admits that Patent Trolls Just Try to 'Extort' Money; Reform Needed*, Techdirt (Feb. 14, 2013) (available at https://www.techdirt.com/articles/20130214/14351821988/president-obama-admits-that-patent-trolls-just-try-to-extort-money-reform-needed.shtml).

[8] Timothy B. Lee, "Senate Republicans are getting ready to declare war on patent trolls," Vox (Nov. 25, 2014) (available at http://www.vox.com/2014/11/20/7251877/republican-patent-troll-fight).

[9] Id.

[10] McDonough, *supra* n. 2 at 216-218.

[11] *Id.* at 223.

goal of the Patent and Copyright Clause of the U.S. Constitution, to "promote the Progress of . . . useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their respective . . . Discoveries."[12]

In a wholly different vein, Mark Lemley and A. Douglas Melamed argue that those who focus their energy on attacking patent trolls are "missing the forest for the trolls." While patent trolls are a large and growing problem, they are merely "a symptom of systemic issues the patent system faces in the IT industry – too many patents interpreted too broadly, a remedy system that routinely awards excessive damages and enables patent holders to bargain for excessively costly settlement, and an enormous royalty stacking problem."[13] Professor Lemley and Mr. Melamed further argue that "[p]racticing entities, as well as trolls, can and do take advantage of these issues."[14]

The 2015 Chapman Law Review Symposium will seek to advance the discussion of non-practicing entities in three ways: (1) by expanding on the scholarly debate surrounding patent trolls summarized above; (2) by expanding on the perspectives informing this debate beyond academia by inviting the views of practitioners from both sides of the patent troll divide; and (3) by expanding on the scope of this topic by considering the nature and possibility of copyright and trademark trolls.

First, a panel of distinguished patent law scholars will expand upon and further develop the debate summarized above with new data and theories on the issue of patent trolls:

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[12] U.C. Const. art. I., § 8, cl. 8.
[13] Lemley and Melamed, *supra* n. 6 at 2180.
[14] Id.

- Professor Robin Feldman will explore the nature of patent trolls and assess their impact on the business and legal landscape of the country. Professor Feldman will then consider how the legal system has responded to the patent troll phenomenon through legislation, court decisions, and regulatory activity and consider what reforms may lay ahead.
- Professor Amy L. Landers will explore how patent trolls are creating a "bubble" in the value of patents, the bursting of which could have destabilizing, negative consequences for investment in research and development.
- Professor Ryan T. Holte will analyze in detail the Supreme Court case of *eBay v. MercExchange*, in which the Supreme Court struck a blow to patent trolls by holding that a finding of patent infringement does not necessarily entitle a plaintiff to a permanent injunction. Professor Holte argues that the opinion is misunderstood as precluding non-practicing entities from obtaining injunctions, due, *inter alia*, to eBay's superior publicity resources and because the parties settled before the Federal Circuit had a chance to rule on the case after remand to the district court.
- Professor Brian Frye will argue that the use of the patent troll metaphor and other intellectual property metaphors obscures our understanding of the societal justification for intellectual property and causes us to grant intellectual property rights that are incompatible with that justification. If we set the patent troll metaphor aside, we find that non-practicing entities theoretically provide market liquidity to ensure that inventors obtain the

full market value of their patents. To the extent non-practicing entities cause mischief by asserting weak patents or increasing litigation costs, this is true of practicing entities as well and is the fault of the Patent and Trademark Office issuing low quality patents.

Second, a distinguished panel of patent law practitioners and policy makers will debate the effect of non-practicing entities on industry. This panel will include:

- Congressman Dana Rohrabacher of California's 48th Congressional District;
- Robert D. Fish, a partner at Fish & Tsang LLP who litigates patent cases;
- Lee Cheng, the Chief Legal Officer of the technology company Newegg Inc.;
- Ian D. McClure, the Director of Intellectual Property Exchange International, Inc., a company that describes itself as "the World's First Financial Exchange for Licensing and Trading Intellectual Property Rights";[15] and
- Nathan Shafroth, a partner at Covington & Burling LLP who litigates patent cases.
- John B. Sganga, Jr., a partner at Knobbe, Martens, Olson & Bear, LLP who litigates patent cases and teaches at the Fowler School of Law will moderate this panel.

Third, a distinguished panel of copyright and trademark scholars and practitioners will expand this discussion to consider the nature and existence of "soft i.p." trolls.:

[15] https://www.ipxi.com.

- Professor Tom W. Bell will examine the emergence of "copyright pornography trolls," who sue thousands of John Doe defendants with the hopes of netting millions in settlement payments from the guilty and innocent alike. Professor Bell will also examine the use of taxi medallions to pursue networked transportation companies such as Uber and Lyft. Professor Bell argues that these types of vexatious conflicts result from the mistreatment of statutory and regulatory privileges as property rights.
- Professor Michael S. Mireles will explore how trademark law has effectively mitigated the problem of non-practicing entities through farseeing laws and regulations in areas such as Internet domain registration and Patent and Trademark Office inter partes proceedings.

Chris Arledge, the co-founder and managing partner of One LLP, Brad Greenberg of the Columbia Law School, and Lindy Herman of Fish and Tsang LLP will also contribute to this panel. The panel will be moderated by Professor Mary Lee Ryan of the Fowler School of Law.

Finally, we are honored to have Andrew Byrnes, Chief of Staff of the United States Trademark Office as our keynote speaker. Mr. Byrnes will discuss ongoing developments relevant to patent applicants and owners, including non-practicing entities, and the role of the U.S. Patent and Trademark Office and the Obama Administration in helping to ensure that the IP system is balanced, effective, and promotes innovation.