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A Case for Patent Reform

Six problems with the USPTO system and six ways to fight trolls, improve patent quality and bolster innovation.

About the Author

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The United States is one of the world's most innovative countries.

Each year the US Patent and Trademark Office (USPTO) receives over half a million patent applications, and issues nearly three hundred thousand patents.

Patents and patent applications are important for protecting both pioneering innovations and incremental – but inventive – developments that provide competitive advantages. They also help companies raise capital to continue to invent and make things we want.

The need to foster innovation through a limited, exclusive patent right has been recognized for centuries. But now patent trolls are taking unfair advantage and it's time to change things.

The US Constitution gives Congress the power to "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."

It's now up to Congress to use that power again to rein in the trolls.

Problems and Solutions

Everyone – except the trolls, that is – recognizes the need to fix the patent granting and enforcement systems, but the key is to fix them without reducing the value of, and protection for, genuine innovation. So what is wrong and what can be done about it?

Litigation procedures and the cost of patent litigation currently favor trolls.

• **PROBLEM:** Current procedural rules allow a patent troll to say relatively little in the complaint about how a defendant allegedly infringes a patent. Provided a complaint identifies a product or service of the defendant, that is often enough to allow the lawsuit to proceed to the next phase. This makes it easy for a patent troll to file a lawsuit and difficult for a defendant to get a meritless suit dismissed at an early stage.

• **SOLUTION:** Require a plaintiff to put much more detail in a complaint, such as identifying the patent

claims asserted, explaining with detailed specificity how the accused products and features allegedly infringe, and describing the actions of anyone alleged to have contributed to or induced the infringement.

• **PROBLEM:** Trolls can "forum shop" to litigate in more plaintiff-friendly venues such as the Eastern District of Texas. Trolls will often hide their funding and corporate structure, and often set up a new shell company where they want to sue, so that it can be hard for a defendant to transfer a case to the defendant's home state.

• **SOLUTION:** Require a plaintiff to disclose the full ownership of the patents and the sources of funding for the litigation, and make it easier for defendants to join others into a lawsuit.

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• **PROBLEM:** Expensive "discovery" – where each side has to provide relevant documents and things to the other side – usually happens early in a case, before the defendant has an opportunity to challenge the merits of the case in a summary procedure (without a trial).

The burden of discovery is not shared equally between defendants and patent trolls because most trolls have few relevant documents as they do not make any products or compete in the market, and they may not even have the original inventor's files and notes.

So cost-wise, the expensive and often time-consuming discovery process is tilted heavily against the defendant and in favor of the troll. This is particularly true these days when electronic discovery ("e-discovery") of emails and other electronic files can be extremely burdensome and expensive.

The cost of discovery plays right into the troll's hands, because a settlement (particularly an early settlement) is often likely to cost a defendant less than just the discovery phase alone.

• **SOLUTION:** Limit discovery until after certain key stages of a patent lawsuit. This would take away one of the troll's favorite weapons and often the biggest incentive for defendants to settle meritless cases early on.

It's too hard to recover fees and costs when you win.

• **PROBLEM:** If you beat a troll, it is often difficult to recover your own attorney's fees and costs. Under current rules, it is necessary to show that a troll did not have a good faith basis to bring the case or that it was "objectively baseless," or show some other "litigation misconduct." Courts are typically reluctant

to penalize a troll unless the facts are particularly egregious.

• **SOLUTION:** Make it easier to recover legal fees and costs if a defendant prevails and give more power to the courts to assess litigation misconduct.

Trolls sue many customers and end-users, in addition to the original manufacturer.

• **PROBLEM:** Trolls often rope in a multitude of customers and end-users in their lawsuits when the real dispute should be with the manufacturer. This is done to put pressure on the manufacturer to settle, as well as giving the troll a hugely expanded list of companies from whom to extract a settlement fee.

• **SOLUTION:** Limit lawsuits against customers and end-users until the primary dispute with the manufacturer has been finally resolved.

> ***"Trolls often rope in a multitude of customers and end-users in their lawsuits when the real dispute should be with the manufacturer."***

Trolls favor certain types of patents and patent claims.

• **PROBLEM:** Trolls like patent claims that have broad functional language. They often try to stretch the meaning of the patent claims far beyond what the inventor originally invented. Most troll lawsuits are in the internet, e-commerce and software fields, where the USPTO may have issued quite broad claims, and where defining an invention in words is perhaps harder than in mechanical or chemical patents.

• **SOLUTION:** Improve the patent granting process at the USPTO and expand the range of patents subject to accelerated review at the USPTO.

Congressional Action

Six bills were introduced into the most recent Congress to address these problems and set out solutions.

Below is a brief summary of what has been proposed there.

Ultimately, it is hoped a comprehensive bill will emerge and become law, so watch this space!

Problem	**Solution**	**Congressional Bill(s)**
Filing a complaint in court for patent infringement requires relatively little information	Require much more detail in the complaint	H.R. 2639 S. 1013

Trolls use shell companies and hide their sources of funding	Require full disclosure of ownership and funding and make it easier to join the real parties.	H.R. 2369 H.R. 1013 H.R. 2024
Expensive discovery happens before a court addresses the merits of a case	Limit discovery until after certain key decision points in a case	H.R. 2639 S. 1013
Trolls sue customers and end-users to put pressure on the manufacturer to settle and extract more money	Limit suits against customers and end-users until the primary suit against the manufacturer has been resolved	H.R. 2639
Trolls rarely have to pay if they lose	Make it easier to recover legal fees and costs if successful and get sanctions for abusive litigation	H.R. 845 H.R. 2639 S. 1013
Only certain business method patents are subject to accelerated review by the USPTO	Expand the "Covered Business Method Patent" review program	S. 866 H.R. 2766
Broad functional claims, particularly in software and business method patents	Improve the quality of the patents issuing from the USPTO	