



PATENT LAW IN THE SERVICE OF INNOVATION: THE DANGER OF “PATENT TROLLS”

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The “Patent Troll” Phenomenon

What are “patent trolls?” The definitions vary, but generally patent trolls are persons or entities that

- do not manufacture any products,
- do not invent any inventions,
- obtain patents from others, and
- use predatory practices to extract money from companies that manufacture products that might infringe the patents.

Sometimes these entities are also referred to as “non-practicing entities” (meaning entities that do not manufacture any products that embody the patents – they do not “practice” the patented inventions) or “patent assertion entities” (meaning entities that specialize in patent enforcement – they “assert” patent rights).

Critics blame patent trolls for the steep rise in the numbers of patent infringement cases filed in the United States starting in 2011. Patent troll activities are considered harmful to innovation.

Patent Cases Filed in U.S. Federal District Courts in 2000 - 2012



What part of the increase in the numbers of patent lawsuits can be attributed to patent trolls?

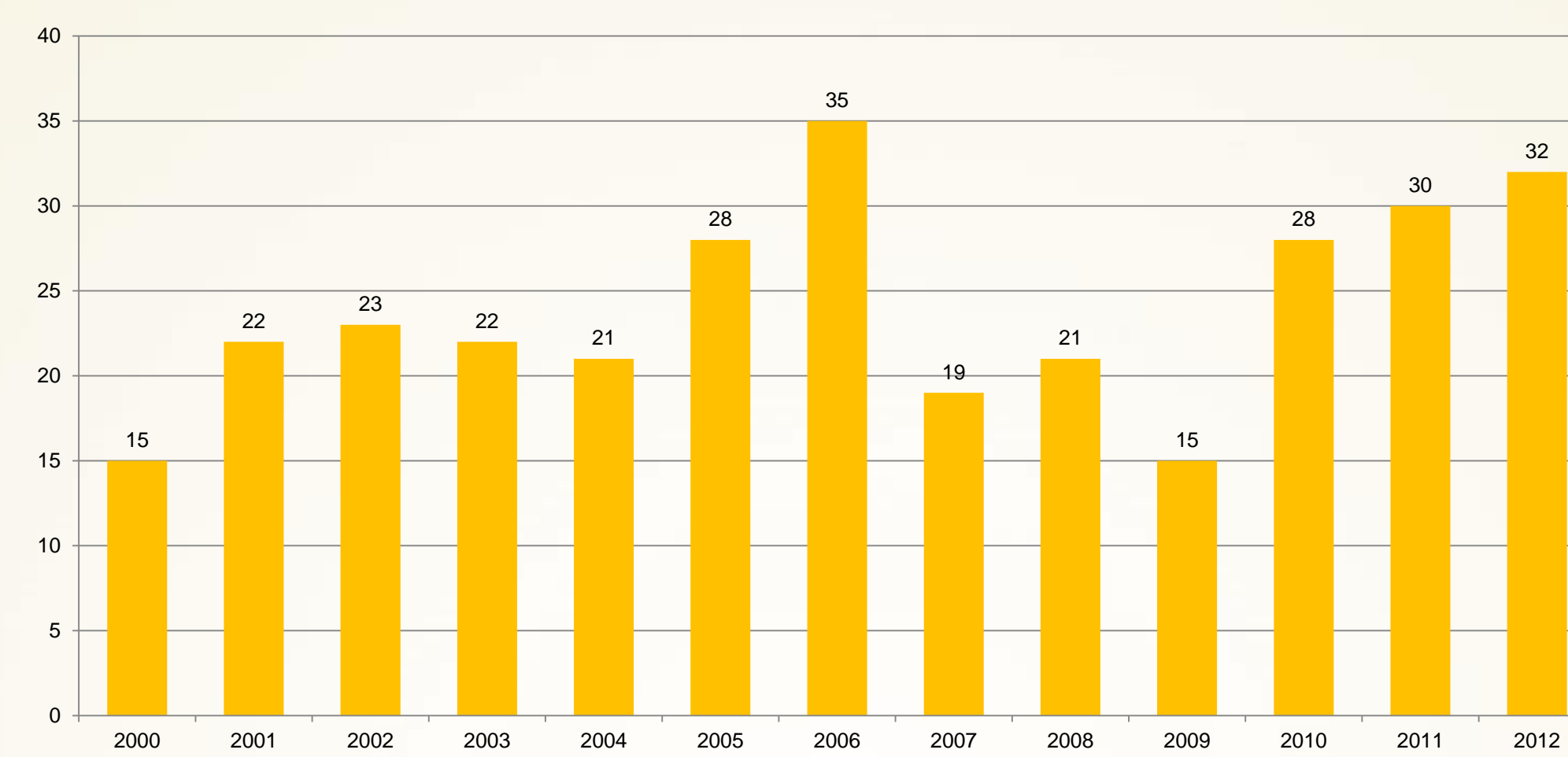
- For 2012, the estimates of the share of patent troll-filed patent lawsuits with respect to the total number of patent lawsuits filed in U.S. federal district courts range from 50% (Cotropia, Kesan & Schwartz, 2013) to 67% (RPX, 2013).
- In 2012 in two of the major U.S. patent litigation venues, namely the U.S. District Court for the District of Delaware and the U.S. District Court for the Eastern District of Texas, 50% and 69% of patent lawsuits, respectively, were filed by entities that fit some definition of patent troll.

Patent trolls typically file multiple lawsuits (which is especially the case after the 2011 amendment of the U.S. Patent Act), with the result that a small group of entities is responsible for the rise in the number of lawsuits filed. For example, in 2012 in Delaware 27 plaintiffs filed ten or more patent lawsuits in the federal district court, with one of them filing 58 lawsuits; in that year in the Eastern District of Texas 34 plaintiffs filed ten or more patent lawsuits in the district court, with one of them filing 98 lawsuits.

Patent Troll Activity in Nevada

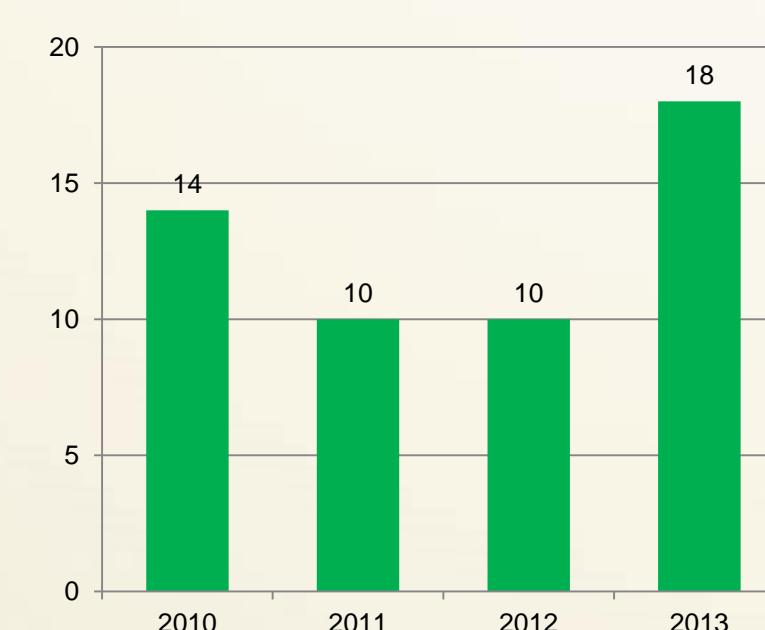
Patent trolls have been active in Nevada although their activities, at least when measured by the number of patent lawsuits filed in the U.S. District Court for the District of Nevada, have not increased as quickly as in some other district courts.

Patent Cases Filed in the U.S. District Court for the District of Nevada in 2000-2012



In 2010-2013 repeat plaintiffs, who are typically the plaintiffs who are suspected of being patent trolls, accounted for between 10 and 18 cases in Nevada each year, which was 50%, 33%, 31%, and 42%, respectively, of patent cases filed in Nevada in those years.

Patent Cases Filed in the U.S. District Court for the District of Nevada in 2010-2013 by Plaintiffs who were Plaintiffs in Ten or More Patent Cases Filed in the U.S. Federal District Courts in 2000-2013



However, one cannot conclude that all repeat plaintiffs are patent trolls. Repeat plaintiffs are not always patent trolls, and patent trolls are not always repeat plaintiffs.

Depending on the definition used to identify patent trolls, patent trolls filed between 20 and 27 lawsuits in Nevada in 2010-2013, which is 15-20% of all patent suits filed in Nevada during that period. These percentages are substantially lower than the nationwide percentages for the same activity suggested by various empirical studies.

Present Research

Professor Trimble’s research presented here covers nine selected U.S. federal district courts outside Nevada and the U.S. Federal District Court for the District of Nevada. The nine-district research covers all 6,420 patent cases filed in those courts in 2004, 2009, and 2012; the Nevada research covers all 133 patent cases that were filed in the U.S. District Court for the District of Nevada in 2010-2013.

Proposals for Reforms to Suppress Patent Troll Activity

The true effects of patent troll activity on the U.S. economy are debated, with the prevailing opinion being that patent troll activity is harming innovation and negatively affecting the U.S. economy.

The phenomenon of patent trolls is not new; patent trolls and their business model have existed for decades. What is new about the phenomenon is the fact that its magnitude has now made it the defining feature of the patent litigation landscape in the United States. It is emblematic of the rise in the awareness of the phenomenon that the issue graduated from professional law journals to academic law reviews, and eventually to the front pages of daily newspapers.

By mid-2013 numerous stakeholders, Congress, and the White House had contributed their voices and actions to the fight against the undesirable phenomenon. Among the reform proposals are the following:

- *Legislative Proposals in Congress:* Innovation Act (H.R. 3309), Patent Abuse Reduction Act (S. 1013), Patent Transparency and Improvements Act of 2013 (S. 1720), Patent Quality Improvement Act (S. 866)
- *White House and USPTO Initiatives:* e.g., a proposal for new rules on reporting patent ownership information, a USPTO webpage with resources relating to abusive patent litigation, including links to databases with demand letters
- *Legislative Proposals at the State Level:* e.g., Wisconsin Senate Bill 498
- *ITC Proceedings:* changes in the interpretation of the rules for standing to file for an ITC proceeding
- *Judiciary:* limitations on the availability of injunctive relief, more frequent utilization of existing civil procedure tools to punish abuses of litigation

Recently some experts from the judiciary and academia have cautioned against taking hurried legislative action against patent trolls. These experts claim that existing tools can be sufficient weapons against the patent troll phenomenon while still allowing court discretion in the safeguarding of the legitimate interests of patent holders.

INNOVATION