



SMALL BUSINESS
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Not Under My Bridge

SBLC has written about patent “trolls” before.

Smaller businesses sometimes find themselves in patent disputes when they discover that they may have infringed on a patent that is extraordinarily broad in scope. These patents are sometimes referred to as “submarine” patents. When they were originally filed, they were general in nature and the full extent of potential uses was not known. When technology catches up later with the invention, the patent owner has a right that stretches across many industries. For many years, a patent applicant could delay the consideration of an application intentionally, to allow the world to catch up with the invention, thereby extending the length of the protection. Patent law was changed some time ago to prevent blatant delay manipulations.

The patent “trolls” are individuals or companies that have acquired patents (many times those patents are those patents overly broad in reach but managed to get through the patent process) but have no real intent to commercialize or utilize the patent. Some refer to these as “patent speculators.”

Some inventors who might be called “trolls” by others, are small businesses that do not have expertise or resources to develop the uses for their patent. They are true “innovators.” There has been a spirited debate on how one distinguishes between a speculator and a true innovator. Most victims of speculators would say you would know a speculator when you see one. And for some big companies, speculators at the door are a daily occurrence.

On balance, a “regular” small business is more likely to be the victim of a troll rather than a patent holder.

President Obama has joined the bipartisan chorus of concern with an administrative effort to slow down the troll activity. While it might help, legislation is probably what is needed to bring some common sense back to the patent infringement regime and Senator John Cornyn (R-TX) has been a leader of such an effort. The President also called for legislation.

Of the executive actions, the two that should help a little bit:

*Patent trolls are increasingly targeting Main Street retailers, consumers and other end-users of products containing patented

technology — for instance, for using point-of-sale software or a particular business method. End-users should not be subject to lawsuits for simply using a product as intended, and need an easier way to know their rights before entering into costly litigation or settlement. Today, the Patent and Trademark Office (PTO) is announcing new education and outreach materials, including an accessible, plain-English web site offering answers to common questions by those facing demands from a possible troll.

*[Businesses] remain concerned about patents with overly broad claims — particularly in the context of software. The PTO will provide new targeted training to its examiners on scrutiny of functional claims and will, over the next six months develop strategies to improve claim clarity, such as by use of glossaries in patent specifications to assist examiners in the software field.

Of the legislative suggestions, the two that probably would help the most:

*Expand the PTO’s transitional program for covered business method patents to include a broader category of computer-enabled patents and permit a wider range of challengers to petition for review of issued patents before the Patent Trial and Appeals Board (PTAB).

*Protect off-the-shelf use by consumers and businesses by providing them with better legal protection against liability for a product being used off-the-shelf and solely for its intended use. Also, stay judicial proceedings against such consumers when an infringement suit has also been brought against a vendor, retailer, or manufacturer.

Senator Cornyn said: "I've heard from entrepreneurs and businesses across Texas that the reforms in my bill are desperately needed to foster innovation and growth.

"I am pleased that President Obama is joining this important conversation, and I look forward to working on solutions that allow Texans to overcome the burdens they face from patent litigation abuse."

Senator Cornyn's bill, the Patent Abuse Reduction Act, S. 1013, would require plaintiffs to disclose the substance of their claims and reveal their identities when they file their lawsuit; allow defendants to force interested parties into court; bring fairness to the discovery process; and shift responsibility for the cost of litigation to the losing party.

What's It Made Of?

In the last report, we wrote that we expected the Environmental Protection Agency (EPA) to finally release a rule regulating formaldehyde in composite wood products under the Formaldehyde Standards for Composite Wood Products Act. It required the EPA to issue regulations to implement the law. A final rule was supposed to be in place by January 1, 2013 according to the law. The Office of Management and Budget has

been "reviewing" the EPA's proposal for almost a year and finally told the EPA it can go ahead.

Well, the EPA has issued the rule (www.epa.gov/oppt/chemtest/formaldehyde/index.html#proposed) but it is a proposed rule so the story is not yet complete. For folks who manufacture, distribute, or sell composite wood products, the key issue is the final "sell through" date for products that do not meet the standards. Until the rules is finalized, we will not know that date.