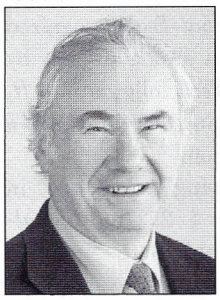
Stop the Grandstanding on Patent Trolls



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BERKELEY – President Obama came out swinging last month against "patent trolls," those much-vilified firms that make their money by threatening to sue companies for patent infringement and demanding hefty royalty payments.

The president and White House officials didn't shy away from the word "trolls," with its image of reptilian goblins who hold up innocent travelers at bridges. Yet a close review of the president's plans to crack down reveals that none would actually do much about trolling or the "smartphone patent wars" (few of which, by the way, involve trolls).

Let's stipulate that there is a problem. Patent litigation has grown by leaps and bounds in the past decades. So have "patent assertion entities" (aka trolls), which by some estimates filed more than half of all patent lawsuits in 2012.

Some of the so-called trolls invoke patents with stale ideas and flimsy claims, and then exploit the unpredictability and cost of litigation. Many companies pay substantial money to settle even when they're convinced they haven't infringed.

But I have two problems with Obama's campaign. For one, it has elements of a pitchfork crusade. As the administration seems to define the issue, "trolls" are companies that hold patents but "don't produce anything." The truth, however, is that both independent inventors and major companies routinely patent innovations that they don't intend to manufacture themselves. Thomas Edison licensed out scores of his inventions. So do many prestigious universities. Some big tech companies buy up pools of patents themselves, as Google did in buying up Motorola's portfolio of wireless patents.

No one calls these players "trolls"—nor should they. This is exactly the sort of specialization and division of labor that economists since Adam Smith have encouraged. The "non-practicing" firms, which purchase patents and assume the burden of licensing them, provide crucial incentives for high-risk research by rewarding inventors.

Perhaps we can agree on a definition of "good" trolls and "bad" ones. But so far, it all sounds like Justice Potter Stewart's definition of obscenity: you just know it when you see it.

This brings me to my second concern about President Obama's new attack. If you strip away the red-meat denunciations of "hijacking" and "extorting," you find cautious nips and tucks that wouldn't do much about troll-like behavior—and could hurt legitimate innovators.

At the very top of Obama's list is requiring patent-holders to disclose the "real party of interest." The White House claims that many trolls use shell companies to disguise their activities and confound their opponents.

Really? Is that the best they've got? If people sue you for patent infringement, it doesn't really matter who is behind them. What matters is whether they have a plausible infringement case and enough money to litigate.

The second item on the president's list: give courts more discretion to award attorney's fees to defendants in abusive patent lawsuits. This might help, because it would make people think twice about filing bogus cases. But one has to be concerned about the flip side: firms that use others' technology without paying for it, often by raising frivolous counter-claims or defenses. To protect their rights, many inventors have no choice but to rely on the legal system.

But discretion over attorney's fees is an issue at the margin. Randall Rader, chief judge of the U.S. Court of Appeals for the Federal Circuit, which specializes in patent cases, made a similar plea in the *New York Times* for penalizing frivolous patent litigants. As Judge Rader explained, however, judges already have this authority under current law—they just don't use it very much. It *would* be a major change to adopt a true "loser pays" system for attorneys' fees, but that could go far beyond punishing alleged trolls. In any case, President Obama hasn't proposed that.

Perhaps the president's biggest proposal is to call for some sort of shield for retailers and end users who simply buy or resell off-the-shelf products. This idea might slow down a few trolls, which have been known to sue retailers or end users in order to gain leverage. But it could also be harmful to legitimate innovators. Since the days of the Founding Fathers, the central protection of a patent has been the right, for a limited number of years, to block anyone who "makes, uses... or sells" a patented invention without permission.

The patent system provides basic protection for inventors, and it explicitly includes the right to take action against retailers and end users. Diluting it would be a major disincentive for risk-taking innovators, which is exactly the opposite of what President Obama says he wants to accomplish.

Meanwhile, the president pays only lip service to what is probably the real problem: our understaffed, overworked, and sometimes dysfunctional Patent and Trademark Office.

Trolls may be a symptom, but you can make a good argument that the underlying illness stems from overly broad or murky patents on inventions that are narrow and incremental.

Bad patents provide the primary opportunity for bad actors to exploit the cost and uncertainty of litigation. Yet aside from announcing "targeted training" for patent examiners, President Obama didn't offer much. What we need is a drastic improvement in the quality of the patent approval process, which could require dramatic improvements in the expertise of patent examiners, some very hard thinking about how to make claims more accurate, and perhaps even specialized patent courts at the district level.

Opponents of trolls seem to assume that patents only have value if they are held by companies that make products that use the invention. But the real problem is frivolous litigation, regardless of a company's business model. The administration's proposed tweaks won't fix that problem, but could cause real harm. IPT