

Beyond Trolling the Trolls: White House Acts to Curb Abuse by Patent Assertion Entities

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Earlier this year, President Obama addressed frivolous patent suits in a Google+ hangout session, commenting that Patent Assertion Entities (PAEs) "don't actually produce anything themselves" and assert patents "to essentially leverage and hijack somebody else's idea and see if they can extort some money out of them." In response, PAEs have argued that they are doing nothing wrong by asserting legally granted patents, and that they promote a fair marketplace by protecting smaller inventors that would otherwise be exploited by large corporations.

Undeterred by this defense of what a growing faction consider to be an abusive cottage industry, on June 4 the White House issued five executive actions and seven proposed legislative changes "designed to protect innovators from frivolous litigation and ensure the highest-quality patents in our system." Aimed at PAEs, or "patent trolls," many of these reforms come straight from the tech industry's wish list.

In direct response to industry and in an effort to deter questionable infringement suits, the President is directing the United States Patent and Trademark Office (PTO) to implement a rulemaking process requiring patent applicants and owners to regularly update ownership information when they are involved in proceedings before the PTO, specifically designating the "ultimate parent entity" in control of the patent or application.

Mirroring this executive action, the Administration recommended legislation requiring any party sending demand letters, filing an infringement suit, or seeking PTO review of a patent, to file updated ownership information, and enabling the PTO or district courts to impose sanctions for non-compliance. Additional recommended legislation would incentivize the public filing of demand letters.

To further deter abusive litigation, the Administration recommended legislation that would grant district courts more discretion to award attorney's fees to prevailing parties and as a sanction for abusive court filings. Recommended legislation would also protect consumers and businesses against liability for using an off-the-shelf product solely for its intended use, and stay judicial proceedings against such consumers when an infringement suit has also been brought against a vendor, retailer, or manufacturer.

Another PTO specific executive action requires the PTO to provide new education and outreach materials, including a web site offering answers to common questions by those facing demands from a possible troll. The President is also directing the PTO to provide new training to its examiners on how to scrutinize functional claims and to develop strategies to improve claim

clarity. Recommended legislation would 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.

The President is also looking to rein in the growing use of the ITC by trolls. Legislation has been recommended that would change the ITC standard for obtaining an injunction to better align it with the traditional four-factor test of *eBay Inc. v. MercExchange*, thus heightening the current burden. Further recommended legislation is geared towards ensuring the ITC is able to hire the necessary qualified Administrative Law Judges. With respect to ITC exclusion orders, the President has directed the U.S. Intellectual Property Enforcement Coordinator to launch an interagency review of existing procedures that Customs and Border Protection and the ITC use to evaluate the scope of exclusion orders, and to work to ensure that the process and standards utilized during exclusion order enforcement activities are transparent, effective, and efficient.

In addition to this action by the White House, in recent weeks lawmakers in both chambers have introduced five bills that aim to address legal issues relating to PAEs. Still, some members of Congress are skeptical of these types of proposals, viewing them as an effort to limit access to the courts. But a report from the President's Council of Economic Advisers, the National Economic Council, and the Office of Science & Technology is likely to foster additional support for bold legislative action to stifle patent trolls.¹ This report estimates that companies targeted by PAEs paid them \$29 billion in 2011, a 400% increase from 2005.

President Obama has also directed an expansion of ongoing outreach efforts to bring attention to patent litigation abuse. The outcry against patent trolls is likely to get even louder as the public becomes more aware of the problem.

In light of the President's position on PAEs and the mounting, bi-partisan support to curb patent litigation abuse, the White House's actions and proposals can be seen as significant steps directed to advance incentives for innovation in high technology and eliminate what many see as a drain on the American economy.

It is no secret that PAEs exercise little restraint in asserting their patents, targeting companies of all sizes and across virtually every industry. This has resulted in the large, unified, and powerful front that is now mobilized against the PAE business model—and the U.S. government is paying full attention. It will be compelling to see how PAEs react to this action by the White House, and if any meaningful change is brought to the patent litigation landscape in the near future.

¹ http://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf