Patent trolls

Abuse of the patent system benefits neither inventors nor the economy at large

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IN FOLKLORE trolls terrorise goats and children. Online, they post abusive messages about people they have never met. In the world of intellectual property, the term "patent troll" denotes a firm that owns a patent, but does not manufacture products or supply services based upon it. Although there is nothing wrong in principle with an inventor licensing his ideas or selling the rights to them outright, many trolls are not genuine inventors. Moreover, lengthy and expensive lawsuits over patent infringement, new research suggests, act as a drag not only on the economy as a whole, but also on innovation itself.
Patent trolls are not new. In 1895 George Baldwin Selden (pictured), an American lawyer, was awarded a patent for an “improved road-engine”. The idea was not really his: he plagiarised it from an exhibit at the 1872 Centennial Convention. But that did not stop him from suing car manufacturers for infringing on his "hard-earned" patent, forcing them to pay him royalties.

Although some patent portfolio managers, such as Intellectual Ventures, generate many of their own inventions, many others simply acquire patents and make money by suing firms that infringe them. These non-practicing entities (or NPEs) argue that this allows them to protect the rights of inventors who may not have the financial firepower to take on big firms. But the number of patent-related lawsuits has risen more than ten-fold since 2000. The most litigious NPEs file more than one lawsuit a week: one, Acacia Research, filed as many as 239 in 2013, according to RPX, a patent consultancy. Even big tech firms with long histories of innovation are mercilessly targeted. NPEs sued Apple 59 times in 2013, for instance.

A recent paper, by Lauren Cohen, Umit Gurun and Scott Kominers, suggests that the rise in patent-related litigation has not really helped protect the rights of inventors. The authors collected a comprehensive dataset on NPEs, relevant patents and lawsuits between NPEs for the period 2001 and 2011. The paper's authors found that rather than acting as benevolent patent enforcers, NPEs simply target the firms with the most cash—however good or bad their argument that a patent has been infringed is. For example, the probability of being sued by NPEs doubles after a firm experiences a sudden increase in its cash balance. Patent trolls are also more likely to go after firms that employ fewer lawyers. And the largest NPEs are the worst offenders.

Economists say that patent trolls can play a useful role by helping to transfer the profit generated by patents from manufacturers to inventors. But the new research finds that inventors only receive 5% of their patent’s value after successful infringement cases. The rest goes to lawyers and NPEs that do not engage in innovation.

In effect, this damages productivity by punishing innovators for their success. The authors find in their data that firms that lost lawsuits against patent trolls or settled out of court spent on average $211m less on research and development than firms that won. This meant that they were also less likely to conduct research that produced new patents in the future. Because economic growth is fuelled by innovative firms boosting their productivity, these disincentives could be holding back the wider economy.

Sadly, a solution to this problem still seems far off. In the past four years, ten bills that attempt to tackle patent trolling have appeared before Congress, but none has got anywhere. The proposals focused on increasing penalties against NPEs that lose patent infringement lawsuits. But due to the strength of NPE lobbyists, no serious reforms are likely to be passed soon, says Mr Kominers. Time, perhaps, for a more innovative approach.