

PATENT AND TRADEMARK LAW

Patent Trolls Come Under Increasing Fire in Federal Courts

By Rob Maier

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A subject of extensive debate within the U.S. patent system has been the classification of “patent trolls”—most widely defined as individuals or companies that acquire patents solely for the purpose of assertion, often in cases without any merit, but which leverage the high cost of patent litigation defense to force small settlements. Sometimes, these entities are more charitably described as non-practicing entities (“NPEs”)—i.e., entities that do not use or practice the technologies claimed in the patents they own.

However, differences in approach and behavior generally separate the most notorious “patent trolls” from other types of NPEs (such as, for example, universities and research institutions that develop, but do not commercialize, new technologies). Ultimately, trolls are often characterized by the widespread assertion of

baseless claims calculated to draw nuisance-value settlements.

A number of measures have been enacted in the U.S. patent system to combat the troll problem.

Following the lobbying of big tech and others, the 2011 enactment of the America Invents Act provided a significant overhaul of the U.S. patent laws, and with it a number of tools for defending assertions of bad patents. The most popular among these is the introduction of inter partes review proceedings at the U.S. Patent and Trademark Office, which allow parties to challenge the validity of patents, giving the patent office a “second look” in a trial-like proceeding that has become the tool of choice for invalidating bad patents. But despite these new options, the troll problem has persisted.

More recently, in situations of particularly egregious behavior, federal courts have



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Courtesy photo

increasingly begun to impose various disciplinary measures on patent trolls—and even their attorneys—including sanctions pursuant to Federal Rule of Civil Procedure Rule 11 and 35 U.S.C. Section 285. These types of sanctions decisions are becoming more common, and possibly even signal a new trend in federal judges increasingly taking patent trolls to task.

When patent trolls or their attorneys commit particularly egregious conduct, courts can order sanctions using a number of mechanisms. One of the most common is Rule 11.

FRCP Rule 11

Federal Rule of Civil Procedure 11(b) requires attorneys to certify that court filings are not presented for an improper purpose, all legal contentions are warranted by existing law, and that there is evidentiary support for factual contentions or denials. Further, Rule 11(c) allows courts to impose sanctions on any attorney, law firm, or party that violates Rule 11(b).

In *Cedar Lane Technologies v. Blackmagic Design*, No. 20-cv-01302 (NDCA 2020), Rule 11 was raised against plaintiff Cedar Lane, an NPE patent holder. Cedar Lane’s attorney—one of the most prolific filers of recent patent litigation suits nationwide (see “Top 300 Law Firms by Case Filings,” available at https://law.lexmachina.com/counsel/top?case_type=27)—filed three amended complaints, two of which were found to have been filed in violation of Federal Rule of Civil Procedure 15, which limits plaintiffs to a single amended complaint as of right.

Additionally, in each filing, Cedar Lane’s attorney was listed as “pro hac vice admission to

be filed”—but no such pro hac vice admission was ever sought, until the issue was raised by the court. When questioned by the court, the attorney revealed that he previously had filed 49 suits in the Northern District of California despite not being admitted to the California bar. In 29 of these, he served as lead counsel but did not seek pro hac vice admission or pay an admission fee.

The court ordered sanctions under Rule 11, finding that Cedar Lane’s attorney made frivolous arguments in defense of the Rule 15 violations. Further, the court referred the attorney to the Northern District’s Standing Committee on Professional Conduct for his “deliberate

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scheme” to avoid paying pro hac vice fees.

The same attorney represented the plaintiff, another patent assertion entity, in *Magnacross v. OKI Data Americas*, No. 3:20-cv-01959-M (NDTX 2022). Here, Magnacross’ brief filed in opposition to the defendant’s motion to dismiss was found to have included sections that were copied directly from another case

asserting the same patent. Problematically, the brief addressed patent claims that were not asserted in the *Magnacross* case. When questioned by the court, Magnacross' counsel stated that he had not reviewed the filing, or the defendant's reply in which the defendant pointed out the issue.

The court issued *sua sponte* sanctions under Rule 11. In doing so, the court found that counsel for Magnacross' failure to conduct a reasonable inquiry regarding the contents of its brief was a clear Rule 11 violation, and held Magnacross and its attorney jointly and severally liable for sanctions in the amount of \$5,000.

35 U.S.C. Section 285

Although Rule 11 applies to district court proceedings generally, 35 U.S.C. §285 is another tool that has been used against filers of meritless patent claims. Section 285, which is unique to patent litigation, allows the court to award attorney fees to the prevailing party in "exceptional cases." Whether a case is "exceptional" is determined on a case-by-case basis, considering the totality of the circumstances. *Octane Fitness v. ICON Health & Fitness*, 572 U.S. 545, 554 (2014). Generally speaking, an "exceptional case" is one that "stands out from others" based on the "strength of the party's litigation on position" or "the unreasonable manner in which the case was litigated."

One example of a case that was recently found to be exceptional is *VDPP v. Volkswagen Group of America*, No. 4:23-cv-02961 (SDTX 2024). VDPP's case as filed and prosecuted was found to be flawed in several

respects, including (1) it raised claims for future infringement of an expired patent, (2) it was found to have included false representations that there were no settlement agreements related to the asserted patent, and (3) it included initial disclosures that addressed patents not at issue in the case. Volkswagen moved for a finding that the case was exceptional, and sought attorney fees.

The court found that "VDPP and its counsel have made this case exceptional." Memorandum and Order, 6, *VDPP v. Volkswagen Group of America*, 4:23-cv-02961 (SDTX 2024). In particular, the court stated that VDPP's posi-

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tions were frivolous and unreasonable, and its legal theories were flawed. The court also took note of VDPP's pattern of frequent litigation. VDPP's lawyer—another prolific patent litigation filer (see "Top 300 Law Firms by Case Filings," available at https://law.lexmachina.com/counsel/top?case_type=27)—represented VDPP in 21 other cases asserting the same patent.

In each of these cases, settlement demands fell far below the cost of defense—suggesting that these were, in fact, the type of patent troll "shakedowns" that have plagued the patent system for years. Noting a "strong need for deterrence, not only of VDPP, but of its

counsel,” the court imposed sanctions under Section 285, holding VDPP and its counsel jointly and severally liable for attorney fees in the amount of \$207,543.60.

Other Efforts to Rein in NPEs

In addition to this willingness of federal judges to directly sanction both plaintiffs and lawyers for these types of assertions, at least one federal judge—Chief Judge Connolly of the District of Delaware—has pressed NPEs by pursuing the litigation funders who stand behind and fund NPE activities.

In particular, Judge Connolly entered a “Standing Order Regarding Third-Party Funding Arrangements,” which requires parties, within 30 days of filing a complaint, to disclose the involvement of any third party litigation funder (as well as the details of that funder’s involvement). This disclosure requirement has led to a number of investigations into funders behind NPE cases filed in Delaware.

As one example, Judge Connolly launched an investigation into the funder behind *Nimitz Technologies v. BuzzFeed*, No. 1-21-cv-01362 (D. Del. Nov. 27, 2023) after parties in several cases, each associated with the funder, failed to comply with the standing order.

The investigation revealed that, in an effort to hide its involvement in the cases, the Texas-based funder assigned the asserted patents to LLCs belonging to unrelated individuals—including a food truck operator—to whom the funder promised passive income from settlement proceeds. The funder struc-

tured these are “Consulting Services” agreements with the individuals, which provided that the funder would monetize the patents, but was not a law firm and would not provide legal services. However, attorneys employed by the funder litigated these matters on behalf of the LLCs, even filing and settling cases without having any communication at all with the LLC owners.

In light of these facts, Judge Connolly rebuked the attorneys involved and forwarded the evidence to various offices of disciplinary counsel, the USPTO, and the Department of Justice for further investigation. Judge Connolly also referred the attorneys, who are Texas residents, to the Texas Supreme Court’s Unauthorized Practice of Law Committee, noting that in Texas an individual can be criminally prosecuted for unauthorized practice of law. Similar issues have arisen in other cases in Delaware as well.

In the end, this increasing scrutiny of patent trolls and their lawyers—both by defendants and the judiciary—may continue to apply pressure on true patent troll assertions, and may help to disincentivize that behavior. It remains to be seen whether these issues will begin to be more commonly raised in other judicial districts, and whether other judges will be receptive to similar arguments. Such a trend could meaningfully shift the power and leverage dynamic currently enjoyed by NPEs, towards a system that is more favorable for defendants in NPE patent cases.