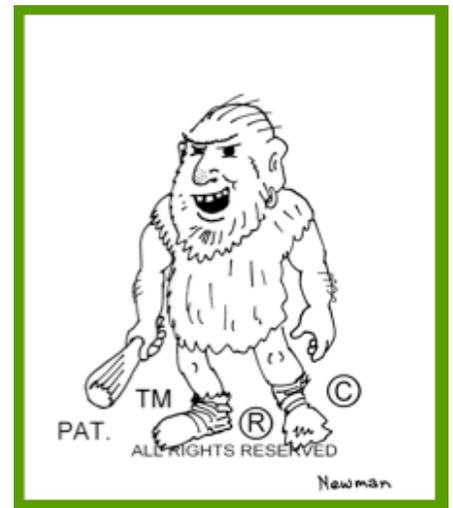


## BEWARE OF THE TROLLS

By Jeff Newman D'82, Esq.

When we were children, we were warned about the things that go bump in the night. The trolls we were told about are still very much with us, and a growing threat. In their modern incarnation, the trolls now stalk our business activities and intellectual property, and can be a very frustrating and expensive nuisance.

**What is an intellectual property troll?** It is an entity that acquires intellectual property rights or the color of rights from others, and uses them to search out businesses and individuals that are (often unwittingly) conducting business that, in some way, infringes the troll's assumed right. There are three general categories of intellectual property trolls: **Patent Trolls**, Trademark Trolls and Copyright Trolls. All three have the ability to ruin your day.



**Patent Trolls** are one of the most notorious breed and oldest breed of intellectual property troll as they typically hunt for entities that hold patents that they are not actually practicing—i.e. they're not making any products or providing any services covered by the patent. The troll typically seeks out and purchases a discarded patent and hunts for companies that may be infringing that patent. When the troll finds a likely victim, it threatens to start litigation. The costs of defending against a patent infringement can be high, so even a six-digit cash settlement or a royalty of a few percent is far less expensive than a costly/risky long-term court fight. The troll then eats up the settlement and prowls for more victims, using some of the funds to finance further trolling. One of the most famous trolls of legend and lore was Jerry Lemelson, who along with his patent

attorney partner, made hundreds of millions “inventing” concepts, and securing patents on them, which were little more than science fiction. He would use these tenuous patents to threaten or sue smaller companies in evolving areas of technology. In classic troll form, he almost never took on the bigger (and well-funded) companies, hoping that the small company would sooner settle for the nuisance value rather than engage in a company-crippling litigation. I am happy to say that when he eventually took on one of our larger clients, he lost. More recently, whole gangs of marauding patent attorneys and their investors have established firms like Acacia to carry out patent trolling as a highly organized business activity.

There is no perfect defense against a patent troll, but a **good troll repellent** is to conduct a “freedom-to-operate” analysis before embarking on a new product or technological initiative. This entails requesting your patent attorney to conduct a search of existing patents that are potentially close to your product/technology. Of course, some patents are hard to classify and some may not issue until you have begun operations, but this approach is often great insurance against a potentially costly misstep, and can greatly reduce the possibility of a hungry troll attack. Also, adopting a ‘scorched earth’ policy to reduce troll habitats can be effective. This can include buying or licensing potentially troubling patents yourself when they become available (before the troll does!), or seeking an opinion letter from your patent counsel stating that a troubling patent is not infringed by your activities. This is particularly important as it helps you avoid a charge of willful infringement and the punitive damages that could bring.

**Trademark Trolls** are critters who register marks on an intent-to-use basis to lock up a mark.

This tactic has several possible motives. The first is to grab a name that is potentially useful to

an invigorated company that is expanding its market and needs that trademark. The troll then sells the application for a fee, fills its pot of gold and looks for a new victim. This is not unlike a man who caught wind of a highway project and bought for pennies the land that would be needed for a cloverleaf intersection so that he could sell it for a steep profit. In the US trademark system, however, you cannot receive or keep a registration without showing use of the mark, and prior use of the mark, even if unregistered, is good grounds for challenging the troll's application. Another troll tactic is for a company to roll out a new product line and file many applications that are close to its major brand, to deny potential competitors from getting too close to the new product. They are not seeking money, only their own defenses. This troll will eventually throw away the excess marks but gains from the time when it had the neighborhood to itself. Defeating this kind of a troll takes time and patience. Their evil step-children, the [URL troll](#), is an article all unto itself.

The Patent and Trademark trolls have an unholy offspring, the [False Marking Troll](#). This little nuisance lurks out in consumer land, compulsively noting products that are labeled with Patent or Trademark symbols, then cross checks them with actual registrations. When they find an expired mark or a patent, they proclaim the product to be falsely marked and run to court. This kind of an action is called a *qui tam* proceeding, which is the beginning of a long Latin phrase meaning that this individual is standing in the shoes of the king to prosecute wrong-doers. The good news is that the suits for false marking of Patents have now been restricted under the new *America Invents Act* by requiring that the litigant show some real harm to its business based upon false patent marking. Nevertheless, the best advice is always to be accurate in your

packaging and claims of patents and trademarks. This includes conducting periodic updates to ensure that expired markings for patents and trademarks have been removed from the products.

The most recent and loathsome critter to appear is the **Copyright Troll**. These are found to be particularly active on the Internet. Two of the major troll clans are the **Movie Download Trolls** and the **Blog Trolls**. The first targets unlicensed downloading of legitimate movies and/or pornographic films. This has led to spectacular mass lawsuits having up to nine thousand “John Doe” defendants, known only by their ISP addresses. These trolls seek to discover the actual names by subpoenas to the actual Internet service providers so that they can shake down the individual downloaders. Some porn studios are probably earning more income from settling with downloaders than from sales of their little films. The best advice here is to not download movies without a license. As a word to the wise, consider parental controls your home’s Internet access if you have teenage boys or the odd uncle living or working with you. If the troll holds the rights to the movies because they made them, the case could best be handled by a quick settlement. If the troll was assigned the copyrights to the material, there may be grounds to fight by testing the validity of the assignment, but settlement is preferred by many, especially if they were midnight downloads of films with extra-nasty content and embarrassing names.

The **Blog Trolls** typically are media outlets that scan the web for infringements by blogs that post most or all of an article content from them without permission. Often, these articles are not even written by the troll, but have been acquired by an assignment. Again, a defense here is to be vigilant and not to post material without license on your blog. In some cases, visitors to the blog may plop an entire posting of infringing material. What if you were to wake up one morning to a

lawsuit with your name on it that seeks \$150,000 in damages because someone in Texas posted an entire article from a Nevada newspaper you never heard of? This has happened. While the right of that troll to sue is being challenged at great expense, many small blogs have had to settle. One preventative defense is to go to the US Copyright Office and register an Agent. This will create a firewall and allow for the accuser to notify you and give you an opportunity to receive a ‘Takedown Notice’ that permits you to remove the infringing material and avoid litigation (and expenses). This “safe harbor” provision is found in the Digital Millenium Copyright Act, 17 U.S.C. §§ 101 et seq. This has steered the trolls away from attacking the larger blogs and towards the smaller, more defenseless blogs who have no agents. We have heard some of the trolls admit that if they had to send a notice, there would be no reason for piling on their legal fees. If you are one of these small blogs, cyber-run, *do not walk*, to the US Copyright Office’s website, review the details for registered agents and ask yourself if the filing fee is worth avoiding a settlement in the thousands of dollars.

The best thing to do about trolls is not to feed them. If you are surprised by one, seek legal counsel, and don’t delay. The hesitant victim can easily become troll sushi.



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