PATENT TROLLING: COMPARATIVE ANALYSIS OF INDIAN & EUROPEAN FRAMEWORKS

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INTRODUCTION

A patent is an exclusive right accorded by the government of a country to a person responsible for an invention for a specific period of time. The invention, and not discovery, is the subject matter of the patent. Tangible property can only be in one place at one particular time. Still, ideas can travel very fast and be in multiple places simultaneously.[1] However, this novel idea is not protected under patent law. Rather, it is the product or execution of this idea that Patent law aims to protect. The main aim of Patent law is to promote/incentivize scientific research and technological advancements and further support industry growth. A patent provides an exclusive right to use or sell the inventive method or product patented, thus promoting inventions of commercial utility.[2] The strength or weakness of the IP (e.g., patent) system has a strong effect on the interest of foreign investors and industries, and a low level of IP protection will demotivate certain types of investments in various industries from being made. Thus, an economy needs to have an efficient patent system.

However, many people tend to unduly use this right accorded by Patent law to earn a fortune via filing infringement suits against companies and individuals who have a product remotely or vaguely similar to the former's patented product. This is known as patent trolling, and such patentees are referred to as patent trolls, a derogatory reference to those who make money through litigations and licensing solely.

Patent trolls have attracted the attention of governments worldwide. Curbing this menace is a tricky question w.r.t to lawmaking and enforcement as these trolls gain strength from the very patent law jurisdictions they reside in. They make it difficult for innovative companies to enjoy their rights. India and Europe have their own unique legislations protecting patent rights in their respective jurisdictions and have direct or indirect provisions to tackle the problem of

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[1] James F. McDonough III. Myth of the Patent Troll: An Alternative View of The Function of Patent Dealers is in an Idea, Emory Law Journal 56, (January 1, 2006) at 206.

[2] Radhey Shyam v. Hindustan Metal Industries, AIR 1982 SC 1444.

patent trolling. Before exploring these provisions, a better understanding of patent trolls is needed.

PATENT TROLLS DEFINED

Broadly speaking, Patent Trolls are entities that own & enforce patents but do not indulge in making anything out of those patented inventions.[3] Former Assistant Counsel of Intel, Peter Detkin, is the person credited for coining the term- "companies that buy rather than create patents and then extract disproportionately high license fees by threatening expensive litigation as the alternative"[4] However, Courts prefer the term "Non-Practising Entities" or a "Patent Assertion Entity".[5] Patent trolls acquire patents mainly for the purposes of licensing and not for production or further innovations.[6] They acquire patents and sue producing or innovative companies for infringement with respect to the acquired patent.[7] They rarely sell any product or service for the patents they hold and file infringement suits for. These entities are usually seen as firms having patent professionals and lawyers with experience in litigation and patent law.[8] Their usual targets are big companies with huge revenue but some of them tend to diversify and target companies involved in mere manufacturing, distribution, and even retail in a particular industry.[9] In some cases, these entities wait till a target company develops similar technology so that they can sue the latter for infringement.[10] These abusive practices tend to create commercial uncertainty, stifle innovation, increase litigation costs for the victim entities, and further scare off investors. Patent trolls are known for their financially draining legal actions that hinder innovation by forcing businesses to cut back on R&D expenditures. This further encourages anti-competitive behavior by discouraging healthy competition.[11]

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[3] Edward Lee, Patent Trolls: Moral Panics, Motions in Limine, and Patent Reform, 19 Stan. Tech. L. Rev. 113, 149 (2015).
[4] Jennifer Gregory, The Troll Next Door, 6 J. Marshall Rev. Intell Prop.L.(2007). Pages 292-309.
[5] Divyansh Gautam & Tejaswi Sitaram Kandi, 'Patent Trolls and Their Regulation in India' (2018) 1 Int'l JL Mgmt & Human 125.
[6] Haus, Axel & Juranek, Steffen. (2014). Patent Trolls, Litigation, and the Market for Innovation. SSRN Electronic Journal. 10.2139/ssrn.2424407.
[7] Sarker, A., Reddy, N.R., & Sethi, N. (2019). The Menace of Patent Trolls: What the World Can Learn from India.
[8] Supra Note 6.
[9] Supra Note 7, Page 21.
[10] David G. Barker, Troll or No Troll? Policing Patent Usage With an Open Post-Grant Review, 4 *Duke Law & Technology Review* 1-17 (2005)
[11] Harvard Business School-Lauren Cohen, Umit G. Gurun, Scott Duke Kominers - Patent trolls: Evidence from targeted firms. 2014

Interestingly, defensive arguments have been made on the grounds that these entities actually promote innovation and increase liquidity along with reducing the risks investors may face and getting more royalties for small inventors.[12] However, experts in the field and relevant agencies of governments are of the opinion that these entities often do much more harm than good.[13] Bottomline, the presence of such entities in any patent jurisdiction makes investors reluctant to enter due to apprehension of increased litigation costs *inter alia.* According to a white house report published in 2013, patent trolls threatened nearly 1,00,000 companies in the year 2012 alone and more than 60% of such litigations were aimed at deriving revenue.[14]

The overall process of avoiding patent trolls is challenging and becoming more complicated by the day because, under many legal systems, potential trolls have a significant advantage in avoiding detection and allowing infringement of their patent rights rather than engaging in negotiations. Furthermore, compared to a patent holder who issues a license, damages granted through litigation have the potential to dramatically overcompensate a patent holder whose patent has been violated.[15] Thus, it has become necessary to regulate the practices of these entities to prevent further stifling of innovation and losses incurred.

PATENT TROLLS IN EUROPEAN UNION

In recent years, numerous companies in the EU have been the victims of patent trolls. More than 70% of suits filed by PAEs outside the USA are in Europe.[16] However, the surge in such cases came much later. Stringent laws in Europe made it very difficult for PAEs to operate successfully. Article 93[17] and Article 123[18] of the European Patent Convention (also known as the Munich Convention) are instances of such stringent provisions. The laws made it

[12] Myhrvold, N. (2017, September 7). *The big idea: Funding eureka!* Harvard Business Review. Retrieved April 17, 2023, from https://hbr.org/2010/03/the-big-idea-funding-eureka
[13] Federal Trade Commission, The Evolving IP marketplace: Aligning Patent Notice and Remedies with Competition, (2011), page 67. https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf
[14] Patent Assertion and US Innovation, Executive Office of the President, June 2013, the White House, Washington, http://www.whitehouse.gov/sites/default/files/docs/patent report.pdf
[15] Yadava, Raag ,"Excluding the Troll: An Attempt To Reform Patent Law" [2010] INJlIPLaw 5; (2010) 3 Indian Journal of Intellectual Property Law 78.
[16] Evans, H. (2012, July 9). *Tech companies facing mounting IP Challenges: Computer Weekly*. ComputerWeekly.com. Retrieved April 17, 2023, from https://www.computerweekly.com/news/2240159175/Tech-companies-facing-mounting-IP-challenges
[17] Article 93, European Patent Convention, 1973.
[18] Article 123, European Patent Convention, 1973.

impossible to file infringement suits if there is even a slight difference in the subject matter of the patents involved.

Furthermore, the European Patent System has a centralized office for granting patents that are held valid across all EPC member nations. However, even though the patent granting system is centralized, the adjudication of matters is still nationalized[19] (patents being territorial in nature). For instance, if a patent is infringed in an EU nation and the infringement is upheld by the Courts of that nation, this does not mean that the same patent will be automatically held infringed in other European nations. This acts as a major disincentive for patent trolls that intend to profit from a patent that has been working community-wide.[20]

Another setback for patent trolls in Europe is the cheaper cost of litigation.[21] Cheaper litigation costs encourage the companies being sued to fight the case in court instead of losing huge amounts of money in settlements with these trolls. Additionally, even the damages awarded in such cases in less when compared to countries like the USA.[22] Thus, even if a PAE tries to sue for infringement in the EU, it won't be awarded any gainful amount in case of a favorable decision.

Another provision that helps curbs this menace is the prohibition of contingency fee in Europe.[23] The term "contingency fee" refers to a particular kind of fee arrangement in which a lawyer or law firm accepts that payment of fees will only be made if the case is successful.[24] Prohibition of such fees reduces frivolous litigation and eliminates the chances of conflict between clients and their lawyers in this regard.

Although NPE patent litigation cases are still few in number in Europe, they have clearly increased in both absolute and relative terms, and they now make up a sizable, mostly unrecognized portion of patent litigation.[25] This rise can be explained by the fact that these entities now go for forum shopping[26]. Depending on their approach (such as asking for an

[19] Jason Rantanen, Slaying the Troll: Litigation as an Effective Strategy against Patent Threats, 23 Santa Clara High Tech. L.J. 159 (2006). Available at: http://digitalcommons.law.scu.edu/chtlj/vol23/iss1/5
[20] Supra Note 7, page 24.
[21] *Ibid.*
[22] Supra Note 7, page 25.
[23] Section 123, European Patent Convention, 1973.
[24] *Contingency fee*. Cambridge Dictionary. (n.d.). Retrieved April 17, 2023, from https://dictionary.cambridge.org/dictionary/english/contingency-fee
[25] STERZI Valerio, RAMESHKOUMAR Jean-Paul, VAN DER POL Johannes (2020), Non-practicing entities and transparency in patent ownership in Europe, Bordeaux Economics Working Papers, BxWP2020-10. https://ideas.repec.org/p/grt/bdxewp/2020-10.html
[26] BLACK's Law Dictionary 655 (6th ed. 1990).

injunction), they can choose the jurisdiction where they think they will get the best verdict and where they can settle their case the fastest.[27] As a result of this strategy, Germany has become a lucrative jurisdiction for these entities.[28] This is due to multiple factors. Firstly, procedural times are shorter in German Courts in such instances.[29] Secondly, German Courts have an image of being favorable to NPEs, with a high record of outcomes favoring them.[30] Furthermore, It is more difficult for the defendant to invalidate the asserted patent(s) before an injunction has been imposed because of their bifurcated system.[31] Compared to other European courts, there seems to be a greater risk of an injunction being granted in Germany.[32] Relevant industries (mainly ICT) being active in Germany is another contributing factor.[33]

Policymakers must review and rethink rules in light of the recent rise in patent trolls in the European Union. To monitor patent troll activity, guarantee that patent awarding processes are of the highest calibre, and reduce legal uncertainty, measures need to be done to improve the transparency of litigation-related data. The European Union's patent system needs to be more adaptable and reliable if it is to keep up with the speed of digital innovation. Recognizing the abuses being committed by patent trolls in the EU and preparing themselves to address this issue properly could be the first step in resolving this issue.

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SAFEGUARDS IN INDIA

Before the passage of the Patents (Amendment) Act, of 2005, which clearly led to a drop in trolling practices, the practice of patent trolling was quite prevalent in India's information technology and communications industries. By excluding software in itself from patent protection, a common subject matter vulnerable to trolling activities in the technology sector, the Patent Act's implementation effectively eliminates a significant area for trolling.[34]

[27]Gabison, G.A.,. Lessons that Europe can learn from the US patent assertion entity phenomenon. Information & Communications Technology Law, 24(3), 2015 pp.278-302.
[28] Supra Note 19.
[29] Supra Note 25
[30]Love, Brian & Helmers, Christian & Gaessler, Fabian & Ernicke, Max. (2017). Patent Assertion Entities in Europe. 10.1017/9781316415887.007.
[31] Supra Note 19, page 14.
[32] Thumm N and Gabison G. Patent Assertion Entities in Europe: Their impact on innovation and knowledge transfer in ICT markets. EUR 28145 EN. Luxembourg (Luxembourg): Publications Office of the European Union; 2016. JRC103321.
[33] Stefania Fusco, Markets and Patent Enforcement: A Comparative Investigation of Non-Practicing Entities in the United States and Europe, 20 Michigan Telecommunications & Technology Law Review 439 (2012).
[34] Supra Note 7, page 25.

The option for post-grant objection, which deters patent trolling activities, is one way India has managed to prevent patent trolling.[35] Any interested party may submit a post-grant opposition within 12 months after the date of publication of the grant of a patent on any of the reasons listed therein by providing a notice of opposition to the Controller, as per Section 25(2) of the Patents Act. The Controller notifies the patentee of the opposition after receiving the notice, and a board of opposition is established to investigate the opposition and provide recommendations to the Controller. This clause guarantees that the patent may still be challenged on the grounds outlined in section 25(2) of the Act even after it has been awarded. This makes it possible to dispute a patent on a variety of grounds after it has been awarded and possibly sold to a patent troll. In other words, just because a patent has previously been granted does not preclude later challenges to its applicability or functionality.

Further, India had the advantage of having a specialized Intellectual Property Appellate Board(IPAB) available since it promotes swift resolution of disputes and lowers litigation expenses. This made it possible for smaller businesses targeted by patent trolls to protect their patents without worrying about incurring huge litigation fees. However, this board was later abolished[36] and various High Courts may establish separate divisions for IP disputes.[37]

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Compulsory Licensing is another method by which patent trolling can be curbed.[38] The fundamental idea behind the clause is that the patent holder has a legal duty to commercialize his innovation as quickly and fully as is reasonably practical.[39] Patents are not just given to provide patent holders a monopoly on importing the patented product.[40]A compulsory license may be granted if the patentee fails to make his innovation accessible to the public by manufacturing it himself or by issuing licenses. A patent holder in India has three years from the date of patent issuance to work on his idea before anyone with an interest may apply to the Controller for the granting of a compulsory license.[41] Additionally, under Section 146, the Controller has the authority to issue a written notice to the patent holder or licensee requesting

[35] Section 25(2), Indian Patent Act, 1970.
[36] John, F. A. & R. (2021, April 19). *An obituary for the IP Appellate Board*. The Hindu. Retrieved April 17, 2023, from https://www.thehindu.com/opinion/op-ed/an-obituary-for-the-ip-appellate-board/article34352587.ece
[37] Media, N. (2021, October 5). *India Jurisdiction Report: A new era of IP litigation in India*. World IP Review. Retrieved April 17, 2023, from https://www.worldipreview.com/contributed-article/india-jurisdiction-report-a-new-era-of-ip-litigation-in-india
[38] Section 84, Indian Patents Act, 1970.
[39] Section 83(a), Indian Patents Act, 1970.
[40] Section 83(b), Indian Patents Act, 1970.
[41] *Ibid.*

that they provide the Controller with the relevant data on the extent to which the claimed invention has been used commercially in India.[42] After receiving such notification, the patentee or his licensee must respond within the specified time frame with information regarding how the claimed invention functions. Trolls who do not use their patents are thus discouraged by the system of compulsory licensing and the requirement of working patents.

Thus, Indian patent rules do not support patent trolls' fundamental goal of merely acquiring patents without using them on Indian soil. To elaborate, India believes that legitimate public demands should be taken into account and is regarded to be dissatisfied[43] if the patented invention is not being used in India or is not being used to the fullest extent possible under the circumstances.[44]

Additionally, It is important to note that the grant and sealing of the patent, or the Controller's judgment in the case of an objection, do not ensure the validity of the patent, which may be contested in revocation or infringement proceedings before the High Court on a variety of grounds.[45] Further, The validity of a patent is not guaranteed by the issuance of a patent, according to section 13(4) of the Patent Act of 1970. Thus, The burden of establishing the validity of a patent in a lawsuit for patent infringement falls on the patentee because there is no presumption as to its validity. This is probably going to deter trolls from filing infringement claims against purported infringers.

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Thus, India's legislative actions, as compared to the European Union, are hostile to the establishment and maintenance of patent trolls. They do not, however, totally eliminate the threat. This is due to a number of factors, not the least of which is the fact that while technology patents may be one of the main targets for patent trolls, they are not the only industry that is impacted. In India, a compulsory licensing application cannot be made until three years have passed after the date the patent was granted. This gives the patent trolls three years to buy a patent and sue other targeted businesses.

While appreciating India's precautions, it's equally crucial to think about additional potential measures. India should encourage the creation of Patent Defence Funds(Similar to China[46])

[42] Section 146, Indian Patents Act, 1970
[43] Section 84(1)(a), Indian Patents Act, 1970.
[44] Section 84(7)(d), Indian Patents Act, 1970.
[45] Bishwanath Prasad Radhey Shyam vs Hindustan Metal Industries, AIR 1982 SC 1444.
[46] Fang, W., & Yu, Y. (2019). Research on the allocation of China's National Defense Patent System. *Advances in Economics, Business and Management Research*, *100*. https://doi.org/10.2991/aebmr.k.191217.003

while fostering relationships with international universities and other esteemed research institutions, taking part in intellectual property agreements, and agreeing to purchase patent technology to safeguard its strategic market position abroad. There are many patents in universities and scientific research institutes as a result of India's low level of patent commercialization, giving patent trolls the chance to learn more about these patents and start legal proceedings. Therefore, India should aim at commercializing patents at the most reasonably large scale possible in order to reduce the risks of such trolls.

Further, controlling the whole procedure and caliber of patent examination is the most fundamental first step in order to address the current patent troll mess and prevent the mass authorization of patents. To prevent ambiguity and incorrect interpretation of patent claims, the IP Office/Board shall issue precise and unambiguous guidelines and norms for patent examination. The professional standards for patents will gradually improve as a result of this.

An Open Post-grant review is an additional possible step that can help safeguard the interests of businesses that use and create patented technologies for societal benefit. This can be put into practice either when a patent is renewed or whenever a patent is sold. To make sure that the non-functioning invention does not prevent society from benefiting from it, the patentee must demonstrate the working of the patent to the invention Office at both of these times. Such a clause would guarantee that patents are not purchased only for the purpose of enforcing them and that there is also an intention to actually use them at the time of sale.[47]

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The open post-grant review would deter patent trolls since it would interfere with their core business model. At the same time, both the patentee and the buyer would benefit from the increased value of legitimate patents. This would encourage innovation since the technology that belongs in the public domain cannot be kept for use by patent trolls.[48]

CONCLUSION

In conclusion, patent trolling is a complicated problem that calls for a diversified solution. While both jurisdictions have taken steps to combat patent trolling, the comparison of the Indian and European regimes demonstrates that there are some significant disparities in how they address the problem and the current challenges they face.

[47] Supra Note 7, page 25.
[48] Supra Note 7, page 25.

The lack of a precise definition of patent trolling in India and the restricted availability of injunctive remedies continue to be major obstacles. Whereas, Patent trolls may find it simpler to take advantage of the system in Europe due to the lack of a clear definition of patent trolling and the potential for forum shopping.

In the end, a number of variables, including the clarity of the legal framework, the availability of injunctive relief, the cost of litigation, and the strength of the patent office determine how effective a system is for combating patent trolling. As a result, ongoing initiatives to combat patent trolling must adopt a thorough strategy that takes into account each of these aspects.

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