EXCLUDING THE TROLL: AN ATTEMPT TO REFORM PATENT LAW

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I. IDENTIFYING THE ISSUE

The right to exclude, without the right to use, is somewhat peculiar to patent law.[1] The grant of a patent, in *status quo*, does not create in the patentee the right to make, use, and vend the thing patented.[2] Nor does it imply any such rights. A patent, as Chisum states, merely "*grants to the patentee the negative right to exclude others … it does not grant the affirmative right to make, use or sell.*"[3] This paper seeks to question this negative right of exclusion that is often asserted as a "bedrock principle" with no further analysis or validation.[4]

In this context, it becomes interesting to take note of a recent phenomenon that has crept up in the Patent Office, the phenomenon being, one of patent trolls.[5] The scope of this term, subject to an independent debate in itself, is fiercely contested. However, for the purposes of this discussion, it refers broadly to "a person or company that enforces its patents against infringers with no intention to manufacture or market the patented invention itself."[6] As succinctly put forth by Peter Detkin, patent trolls "*make a lot of money off a patent that they are not practicing and have no intention of practicing and in most cases never practiced.*"[7]

With this background, this article operates on a very limited scope in relation to the manner in which patents are defined in *status quo*, which allows for the existence of patent trolls. The normative analysis conducted through the course of the paper will primarily seek to weed out the concept of patent trolls by means of redefining patent rights and obligations. To this end, two questions will be answered. First, why, on principle, should patent trolls be done away with? And secondly, what changes are required to be made to the current framework to effectuate their exclusion?

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1. A. Mossoff, *Exclusion and Exclusive Use in Patent Law* 321, 22 HARV. JL & TECH. (2009), at 5; *See* Sections 24 and 48, Indian Patent Act, 1970.
2. *Ibid.*, at 336.
3. D. S. CHISUM, CHISUM ON PATENTS (Lexis Publishing, 2000), at § 16.02.
4. *Supra* note 1, at 325.
5. In 2001, when he was assistant general counsel at Intel Corp., Peter Detkin famously coined the term "patent troll" to describe firms that acquire patents only to extract settlements from companies on dubious infringement claims.
6. L. A. Fennell, *Adjusting Alienability*, 1403, 122 HARV. L. REV. (2009), at 1407.
7. Intellectual Property Today, *The Original Patent Troll Returns*, <http://www.iptoday.com/news-article.asp?id=372&type=ip> (last accessed on August 12, 2009).

As a caveat, this paper does not question the foundations of the patent system, i.e. it does not intend to enter the public versus private interest debate and assumes the incentive theory of patents to be true.[8] It only offers a modest alteration to the current system to remedy the issue of patent trolls.

II. Patent Law Deviating Off Course: A Historical Context

The history of patents began with royal grants by Queen Elizabeth (1558-1603) for monopoly privileges that advanced her economic and industrial policies.[9] Hence, one of the primary differences between these sixteenth-century royal manufacturing monopolies and the current patent system is that the former imposed on their recipients an affirmative duty to practice the trade.[10] By the late eighteenth century, Courts had altered the *quid pro quo* of the patent from an affirmative duty to a disclosure of the invention.[11] This paradigmatic change, in the opinion of the author, requires a second thought.

Patents originated as a mechanism for ensuring the progress of industry, production of commodities and public access to goods by means of allowing only one individual to produce an item, and excluding all others.[12] The current system, by defining patents solely in terms of the right to exclude, violates this fundamental rationale for the existence of patents – ensuring public access to products. *Status quo* permits patent trolls to *just* exclude others and not practice the invention itself thereby leading to an expropriatory situation where the troll has no accountability to society.

In essence, a patent is a social contract between the patentee and the state. The former is placed under an obligation to utilize the license *and* disclose its working in exchange for a monopoly right as opposed to *only* disclosing the innovation – a fundamental distinction which the law currently bears no nexus to. Logically, as patent trolls violate this social contract - disclosing the working of the patent but failing to utilize it - protection granted by the current system should not be extended to them. Further, patent law has always rested on the inarticulate major premise of a delicate balance of personal interest versus private interest. Patent trolls, through usage of patents as mere exploitative commodities, accrue *no* public interest.[13] For this reason, their activity must lie

8. *See generally* G. Ghadini, Intellectual Property and Competition Law: the Innovation Nexus (Edward Elgar Publishing Ltd., 2006).
9. A. Mossoff, *Rethinking the Development of Patents: An Intellectual History*, 1550-1800 1255, 52 Hastings L. J. (2001), at 1255.
10. *Ibid.*, at 1256.
11. *Supra* note 9, at 1256.
12. W. R. Cornish, Intellectual Property: Patents, Copyright, Trade Marks and allied Rights (Sweet & Maxwell, 1996), at 108.
13. Whilst public disclosure of the invention *does* provide a public interest, the same exists only in the long term after expiration of the patent term.

outside the scope of protection of the law.[14]

Attempts to ensure the compulsory working of patents have been spread across jurisdictions to varying extents, most notably by Section 83 of the Indian patent legislation.[15] Consequently, such protection of unilateral contracts and unproductive behaviour within the domain of patent law in India and all over the world, has not been a conscious policy decision of the drafters. On the contrary, it has the inadvertent result of a fundamental flaw in the current definitional framework, which such entities have utilized to the maximum extent. This flaw, as discussed above, lies in defining patents solely on the basis of the right to exclude. *Status quo* does not impose any obligation upon the patentee with respect to other use-rights. When the historical development explained previously is combined with Hohfeld's classification of use-rights as "privileges" and exclusion as a "claim/right", one can see the reason for the existence of the current system.[16] I seek to elucidate how these so-called use-*rights* must rather be use-*obligations*. Logically contradictory as that may be, the bundle of rights encompassed under the heading of a "property right", *inter alia* the right to alienate, the right to exploit etc., ordinarily *protected* by the legal system are subject to restrictions as regards patents in light of the public purpose which trumps the protection of individual *rights*.

This system creates a distinction between tangible and intangible property resources and assigns the exclusion concept solely to the latter due to certain doctrinal differences, adverted to subsequently.[17]

III. Remedying *Status Quo*

In this regard, this article proposes a compulsory utilization and/or licensing model, as is explained below, which aims to exclude patent trolls from the existing legal framework without affecting the interests of other patentees.

Currently, patentees are under no obligation outside of disclosure, other than those relating to misuse, fraudulence etc.[18] However, the proposed model advocates fixation of an additional *duty to compulsorily utilize the patent* in return for the right to monopoly and exclusion of others. Such an modification of the system should be viewed from two grounds; first it would not affect those who are currently utilizing their patents and hence, would preserve *status*

14. *Supra* note 8, at 13.
15. David G. Barker, *Comment, Troll or No Troll? Policing Patent Usage with an Open Post-Grant Review* Duke L. & Tech. Rev (2005).
16. *Supra* note 1, at 343; *see generally* W. N. Hohfeld, *Some Fundamentals Legal Conceptions as Applied in Judicial Reasoning* 16, 23 Yale Law Journal (1913).
17. *Supra* note 1, at 325.
18. *Supra* note 12, at 216.

quo, and, secondly, it specifically singles out patent trolls and forces them to utilize or sell their patents which can subsequently be exercised in the public domain for the benefit of society.

In this regard, the author is aware that the definition of patent trolls used in this paper would incorporate universities, students and independent inventors within its ambit as well. In order to remedy such an issue, patent trolls who claim that they are incapable of production must necessarily license the patent to an entity capable of production. Thus, on one hand, due to the presence of licensing fees, such inventors still retain incentive to innovate, while on the other, utilization of patents would be simultaneously ensured.

However, a common obstacle one runs into with such an approach lies in defining what constitutes 'use'. The question which forms the crux of the debate is whether patentees can produce a minimal number of units per year and thereby avoid sanction in the proposed model or does such behaviour violate principles of competition law? If such is not the case, should patent law impose a minimum production limit or is such behaviour adequate to constitute 'use'? In this regard, it is proposed that the scale of manufacturing or production so as to fulfil such an obligation may be determined in accordance with the demand for, necessity of and public interest in the product produced through utilization of that patent. Insignificant production by a patentee which falls grossly below the market demand should not be considered adequate 'use' of the patent under any circumstance. Admittedly, the legal framework may only go so far as outline the framework. The intricacies of determining the exact limits of production lie in sphere of economics and public policy, which lie outside the present concern. Such a proposal stands notwithstanding safeguards and sanctions under competition law. It is only where market power is unlawfully obtained or exploited, as is not the case in relation to patent trolls, that a true antitrust problem arises.[19] Thus, the independent decisions of the patentee regarding the means by which a particular invention is to be marketed or produced or as the case may be, combined with other productive inputs, ought to be regarded as having no inherent anticompetitive import.[20] Furthermore, patent holders are granted the right to exclude as opposed to a monopoly or any form of exclusive market power. Antitrust and competition law, therefore, is rendered inapplicable to a large extent.

IV. Demystifying Doctrinal Differences

Whilst imposition of such a duty to necessarily utilize the patent would

19. JD Briggs, *Intellectual Property and Antitrust: Two Scorpions in a Bottle*, 10 Sedona Conference Journal 65(2009), at 69.
20. *id*.

weed out patent trolls, one must also consider the doctrinal differences and justifications provided for defining patents as they are presently in *status quo*.[21] The most important doctrinal scenario evidenced for the necessity of defining patents in terms of only a negative right to exclude is that of 'blocking patents'.[22]

This concept of a blocking patent is best illustrated by an example. A, having patented drug X and process Y to produce the drug, can exercise her right to exclude B from commercially exploiting his own patented process W to produce X. In this situation, A has a 'blocking patent' because she can block B's use of his own patented process. In sum, if a patentee has a use-right for a particular patent, then a blocking patent, which is another valid patent that can exclude such use, would necessarily entail an infringement of this use-right.[23]

In the context of the example, A has monopoly over production of drug X. Consequently, B is precluded from utilizing that process as the final product X may only be produced by the A. In sum, B's *right* to the process W is being infringed by A's *right* to produce X. Both rights are legitimate. Thus, it seems logically inescapable that the conceptual content of a patent necessarily comprises a negative right to exclude.[24]

Such a conflict can be easily resolved through application of one of the simplest and most commonsensical maxims, '*your right stops where my nose begins*'. The presence of a positive use-right, if granted, need not necessarily lead to violation of others' use-rights. This can be achieved as long as subsequent use-rights are subject to earlier patents. In the above example, B will be accorded positive use-rights subject to non-violation of an earlier exclusion right of A.

The system proposed, wherein positive use-rights are in fact transformed into duties, will ensure eradication of patent trolls without interfering with the concept of blocking patents. Continuing from the above example, A will still be guaranteed her right to exclude others as B's use-right remains 'blocked' since it is subject to the former. Simultaneously, A would be under duty to utilize her patent to ensure its availability in the public domain. If, however, A is a patent troll, her right to exclude others would be inoperative and thus B, who would have otherwise been 'blocked' under *status quo*, can exercise the use of his patented process without fear of infringement. Therefore, in either scenario, the patent is utilized and the product is released into the public domain.

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21. *Supra* note 1, at 325.
22. *Supra* note 1, at 327.
23. *Supra* note 1, at 326.
24. *Supra* note 1, at 326.

While *solely* a right to exclusion, without the duty to exercise positive use rights,[25] can be granted for tangible property, the same cannot be applicable to intangible property, especially patents.[26] A patent protects a *unique* innovation and hence, it envelops the entire universe of that particular patented resource. Further, by virtue of the resource being unique, no other individual can lay claim on it or any similar resource. Conversely, with respect to tangible property, resources are rarely unique. Therefore, individuals can lay claim on other resources of a similar nature. Thus, exclusion, has a much more comprehensive effect in relation to patents.[27]

To elucidate the situation being: I own a sheep farm. The law stops you from trespassing on or utilizing my sheep farm. However, you are free to purchase your own sheep farm, which number in the thousands. But if I patent a process for the extraction of wool from those sheep, you are wholly excluded from using that process and extracting wool from your sheep wherever you may be (assuming that my process is substantially cost-effective). Simplistic as this example may be, in the field of pharmaceuticals and information technology, the ramifications are, at the least, severe.[28]

V. Tangible v. Intangible Property: Drawing Distinctions

Thus, in the case of tangible resources, a right to exclude others from one's property does not preclude the opportunity of excluding others from obtaining their own properties of a similar nature. A patent, however, universally and completely excludes. Therefore, defining patents solely on the basis of the right to exclude carries with it certain ethical concerns considering the all encompassing, concrete obstacle it places in front of other members of society from acquiring that knowledge, especially if the patent holder is under no obligation to exercise his patent.

VI. Concluding Remarks

In conclusion, this article draws five observations. First, patent trolls should not be accorded protection by the law due to a) violation of the social contract; and b) skewing the public-private interest balance unjustly. Second, the current conception of patents solely in terms of the right to exclude marks a manifest deviation from the principles on which the concept of patents was

25. *See generally* W. N. Hohfeld, *Some Fundamentals Legal Conceptions as Applied in Judicial Reasoning* 16, 23 Yale L. J. (1913).
26. G. W. Paton, A Textbook of Jurisprudence (OUP, 1972), at 516.
27. Jason Kirby, "*Patent Troll or Producer? The Evolution of Intellectual Property*", NAT'L POST (Ont., Can.), (Jan. 14, 2006)
28. Connell O'Neill, *The Battle Over Blackberry: Patent Trolls and Information Technology*, 17 The Journal of Law, Information, and Science (2008), at 99-112

founded. Third, such deviation must be remedied in order to regain the balance between public and private interests. Fourth, the defence of 'blocking patents' in favour of *status quo* can be easily resolved through the proposed model which ensures removal of patent trolls for the benefit of society, while protecting the interests of other patent holders in possession of 'blocking patents'. Lastly, patents are a form of intangible property *vis-à-vis* tangible property and the concerns regarding the right to exclusion must be addressed in both scenarios individually, keeping in mind fundamental differences.