Patent Enforcement – The Sport of Kings

By Barry Ungar, Chief Litigation Counsel, Rembrandt IP Management, LLC

Over the last few years there has been a storm of outrage directed at the unfairness and damage done by patent owners which extort money from companies based on invalid and valueless patents, enabled by the extraordinary cost and burden of defending a patent infringement lawsuit. This storm has highlighted, almost exclusively, bad patents and bad patent owners. The result has been the topic of many articles and blogs, which include dubious statistics, and very broad proposed new Congressional legislation. Even President Obama felt the need to include it in his State of the Union Address, and he has stated his intention to attack this abusive litigation. The problem, aside from the faulty statistics on which the effort is based, is that very little attention is being paid to how these efforts may affect the inventors of good, valid patents. If one assumes that all, or virtually all, patents should never have been issued by the United States Patent and Trademark Office, it is clear that we should make it extremely difficult to enforce patents. But not even the most aggressive proponents of these efforts are willing to make such a claim. Therefore, before more damage is done to the patent system which has brought extraordinary benefits to our nation since the importance of patents was first enshrined in Article 1, Section 8 of our Constitution over 220 years ago, it is incumbent upon us to consider how these proposed reforms will affect the vast number of inventors and patent owners who are not "patent trolls."

To be clear, there is a problem. But it involves a relatively small number of patent owners abusing the patent system. Their abusive behavior should be stopped. We support efforts targeted at stopping patent owners from suing large numbers of alleged infringers solely to settle for less than the cost of defense, and those sending letters to end-user consumers to get some money out of them, with no contribution to our economy or innovation.

There is one fact, missing from the discussion, essential to understanding the America in which inventors of good patents are living in today. It is not only the small number of abusive patent owners who use the cost of patent litigation to their benefit. It is also the companies which infringe. If an inventor of a patent comes to a patent attorney with a patent being infringed by a well-capitalized company, and asks the attorney to get the company to take a license to the patent, the attorney will almost certainly advise that the company will not voluntarily pay a reasonable royalty for a license. So the inventor asks the attorney to sue the company. The attorney tells the inventor that such litigation will cost millions of dollars – perhaps over $10 million. The inventor, not likely to have that kind of money, asks the attorney whether she would be willing to take the case on a contingent basis. Even if the attorney is willing to do that, she will tell the inventor that he will have to pay the costs – perhaps $1.0 - $3.5 million. The inventor says that he also cannot afford that, and asks whether he has any alternative. He is told that the only alternative is to partner with a company like our company, Rembrandt, which has the capital and expertise to level the playing field with the infringer.

The large companies which do not want to pay for the inventions they use without permission understand this dynamic very well. They know that, given the cost of patent enforcement litigation, their only real potential risk is from companies which have the capital and expertise to challenge them. But they cannot openly admit that they want to put companies out of business which provide capital and expertise to patent owners to enforce good patents. Fortune, however, has looked favorably on them – it has provided the infamous moniker "patent troll", which has been used unfairly as an umbrella term to capture any enforcer, good or bad. So, in the guise of wanting to put a stop to abusive patent litigation (of course, not their own abusive litigation conduct, such as frivolously asserting that a huge

number of prior inventions invalidate the patent on which they are being sued, solely to run up the cost of prosecuting the infringement case), they have spent about a hundred million dollars on a public relations and lobbying effort to create new statutory and regulatory obstacles to enforcement of patents – all patents.

There is not space here to review each section of the proposed new legislation, but very little of it will, in reality, affect the real patent abusers, and there will be a lot of unintended consequences (at least unintended by the legislators and regulators). But one consequence is certain – it will become more difficult and expensive for anyone to enforce patents.

For example, the proposal to reject the American rule on payment of fees, under which each party bears its own fees, and instead to provide for fee-shifting, will have little effect on abusers, since they almost always settle before trial. But it will make it less likely patent owners will be willing to bring an enforcement action, and make it more difficult for inventors to find companies willing to take the risk of enforcing their good patents. The provisions which make changes to the pleading requirements and other procedural changes also will increase the cost of litigation, to the same effect. If adopted, patent enforcement will be the "sport of kings." Only the most well capitalized companies like Rembrandt will be able to help inventors and other patent owners level the playing field with the well-capitalized infringers.

In sum, it is important to know that there are not only "patent trolls" out there who should be stopped – there also are patent infringers; and unless patent owners have allies willing and able to help them enforce their patent rights, innovation will take a body blow which could have extremely bad effects for the nation.