



Crossing the bridge: from trolls to tolls

Innovations have an alternate route to the marketplace, one with promise and a price

Let's begin with the story of a troll. No, not that kind of troll; not yet, anyway. The original fairytale troll, an evil, toothy critter lurking beneath bridges, comes to us from Scandinavian folklore. In particular, there's one variation on the fable, "Three Billy Goats Gruff", in which a hungry troll confronts a series of progressively larger goats, waiting for the biggest, fattest meal possible. In the end, however, greed defeats the troll in the form of a goat so big he knocks the troll into the river.

I generally endeavour to keep my allusions a bit more erudite than children's fairytales, but this is a particularly apt metaphor. On some level we all bundle-up our products and with trepid footsteps attempt to cross the bridge from innovation to market without falling prey to the (patent) troll along the way. Some might say patent trolls are even grimmer than any villain out of Grimm's fairytales; so will greed lead the patent troll to a similar fate? Is another big Billy goat ready to deliver us? We shall see.

From Trolls to tolls

We can't simply re-write the tale of the patent troll; but they live in an adaptive eco-system so a new chapter is in the works.

In the past, large corporations were often the source of both patent litigation and the asserted patents. So, to avoid patent warfare, they could generally just cross-license, giving each other peaceful passage. The advent of the patent troll changed everything. Impervious to counter-assertion, a troll could reach across corporate and geographic boundaries to access a wealth of assertable patents. To combat trolls, operating companies needed to expand their own reach and armour.

Enter a new form of patent aggregator, a defensive patent entity (DPE). A DPE has similar patent reach and imperviousness to assertion as its evil twin, the troll; but it uses patents defensively, not offensively.

By way of an over-simplification, a DPE acquires rights in patents of interest and extends its subscribers a licence – freeing them from assertion under those patents. In a manner of speaking, the DPE works to take patents out of the assertion market, so it can take you out of the assertion market. A number of firms already operate in some fashion like a DPE (eg, AST, OIN and RPX), each with varying business models, fee structures and constituencies.

In effect, DPEs are building an over-pass to the market out of the reach of patent trolls lurking below. Of course, like any public works project this over-pass needs to be paid for, as do the patent rights upon which it is built. As it generally involves non-exclusive licensing to multiple parties, this kind of high-traffic model allows associated fees to be quite low ... like the tolls paying for a bridge. Constructing an alternate route to the market has taken us from trolls to tolls.

The commuter lane

So, if you're a commuter on this new over-pass from innovation to the marketplace, should you stop and pay the toll? It really depends upon how you frame the problem statement. Will DPEs usher in the demise of the patent troll and patent litigation? No.

However, my own experience and other sources suggest that assertable patent assets are indeed leaving the market. The tough question, though, is whether a company's litigation exposure drops, proportionally or in any meaningful way, through DPE activities. For every assertable patent a DPE removes from the market, there might well be another 100 to take its place. As they say, results may vary.

Even so, DPEs provide a potentially valuable risk coverage option which was previously non-existent. Faced with divining exposure to patent litigation, a false positive is far less expensive; it's an insurance premium. A false negative can have disastrous consequences; it's a big insurance claim. And, we all carry some kind of insurance, don't we? However, the availability of insurance should not be taken as a substitute for understanding risk.

Taking proper advantage of the DPE opportunity requires its consumers to understand that litigation exposure and the cost-benefit of DPE coverage.

Happily ever after?

How does this fairytale end? It's really just begun. Clearly the DPE market needs to evolve and hopefully do so in service of the efficient flow of innovation into the marketplace. DPEs have the potential to remove barriers to commercialisation, and even help return more value to a broader set of innovators than otherwise possible. Incentivising innovation and a heightened understanding of the market dynamics of IP inures to everyone's benefit.

And the cautionary part of this tale? Encourage DPEs to facilitate, but not inflate markets for patents – align cost with contribution. And we should be wary if DPE size or scope threatens to make subscribing an offer corporations simply cannot refuse. That kind of overwhelming market power puts DPEs in a position analogous to NPEs: one by virtue of patent quality, one by patent quantity.

In short, we've got a new over-pass to the market, an alternate route which is still under construction. Not surprisingly, keeping it truly a public works project requires vigilance for inefficiency and cost over-runs. The market has a way of correcting itself and an educated consumer is our best ally in that effort, and likely also to be the DPE's best customer. But remember, our old friend the patent troll is still with us, should anyone decide to risk driving on the shoulder to avoid paying the toll.

Damon C Matteo is vice-president and chief intellectual property officer at the Palo Alto Research Center, Silicon Valley
cipo@cipoforum.com