

Analysis of Patent Troll Schemes and Their Arrangements in Indonesia

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Abstract. *The purpose of this paper is to discuss patent trolls, analyse Indonesia's regulation of patent trolls, and raise awareness of patent trolls. This research uses normative legal research methods. Normative research is conducted by examining literature data. The data is analysed using qualitative methods and presented descriptively. The conclusions drawn from this research are (1) the main problem in enforcing the law against patent trolls is the difficulty in identifying the perpetrators, who cannot be recognised solely through their identity; (2) the changes to the definition of patent enforcement in Law 6/2023 complicate this identification more than the previous rules.*

Keywords: Abuse; Patent; Trolls.

1. INTRODUCTION

Patent trolls are a practice in which a company or individual who owns a patent but does not use the patent to produce his invention, but rather to gain a profit in the form of money by using patent infringement claims to win a court decision.

Ted Sichelman explained that *patent trolls*

"Specialize in identifying users of certain technologies (potential patent infringers) and seek to extract royalty payments from them".¹

This means that *patent trolls* look for companies that may infringe on their patents with the goal of getting royalty payments. *Patent trolls* get their patents from various sources². They then wait for the right time to find the target company they will then claim that the company has infringed their patent.³

Patent trolls send a letter (summons) to the target company⁴. The letter contains a request for royalty payment to the target company which generally provides three options, namely

¹ Ted Sichelman, 'Commercializing Patents', *Stan. L. Rev.*, 62 (2009), p. 341.

² Stefania Fusco, 'Markets and Patent Enforcement: A Comparative Investigation of Non-Practicing Entities in the United States and Europe', *Mich. Telecomm. & Tech. L. Rev.*, 20 (2013), p. 439.

³ Tun-Jen Chiang, 'A Cost-Benefit Approach to Patent Obviousness', *John's L. Rev.*, 82 (2008), p. 39.

⁴ Stefania Fusco, 'Markets and Patent Enforcement: A Comparative Investigation of Non-Practicing Entities in the United States and Europe', *Mich. Telecomm. & Tech. L. Rev.*, 20 (2013), p. 439.

- (1) stop using the technology from the patent and use the patent alternative;
- (2) pay royalties to them; or
- (3) undergo litigation proceedings.⁵

Chien explained that *patent trolls* target both companies with large cash reserves, as well as startup companies⁶. From 2009 to 2013, Apple Inc. was the most sued by *patent trolls* with 171 cases, followed by Hewlett-Packard with 137, Samsung with 133, AT&T with 127, and Dell with 122⁷. In 2011, Apple and Google spent more on payment for alleged patent infringement than for *Research and Development*. [Click or tap here to enter text.](#)

In 2014, the founders of the Life360 app, Alex Haro and Chris Hulls, fell victim to the practice of *patent trolls*. The incident began when they received a letter from Malcolm Beyer stating that they had three days to pay the license fee for allegedly infringing on a patent belonging to AGIS, a company owned by Beyer. When Haro and Hulls tried to contact Beyer, they discovered that AGIS did not have clear contact information. Haro and Hulls refused to pay the license fee requested by Beyer and decided to take the case to court. In the end, the judge rejected AGIS's lawsuit, so Haro and Hulls did not have to pay Beyer a license fee. However, they are still disadvantaged because they have to incur huge legal costs, which is USD 1.5 million or equivalent to Rp 19.8 billion.⁸

From the case of Haro and Hulls, it can be concluded that even though *the patent troll* to be carried out fails, the party affected by the *patent troll* is still disadvantaged. Therefore, the practice of *patent trolls* is very detrimental and has a great chance of occurring in Indonesia in this digital era.

Departing from the description of the problem above, the author will discuss patent *trolls* to increase awareness of this and analyze Indonesia's regulations on *patent trolls*.

2. RESEARCH METHODS

The method used in this study is the normative method. This normative approach is carried out by analyzing regulations related to patent law. The secondary data used in this study was obtained from literature and online sources that have a relationship with patent trolls. The existing data was analyzed using qualitative methods and presented in a descriptive manner.

3. RESULTS AND DISCUSSION

3.1 Patent troll

Patent trolls are a form of patent abuse. This term is widely used to define the activities of companies that have patents but do not use patents, but to gain profits both in the

⁵ David Segal, 'How a Typical Patent Battle Took an Unexpected Turn', *New York Times*, 2013 <http://www.nytimes.com/2013/07/14/business/how-a-typical-patent-battle-took-an-unexpectedturn.html?pagewanted=all&_r=0, accessed> [accessed 18 June 2024].

⁶ Colleen V Chien, 'Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents', *NCL Rev.*, 87 (2008), p. 1571.

⁷ John Paczkowski, 'Patent Trolls Love Apple', *Allthingsd*, 2013 <<https://allthingsd.com/20130829/patent-trolls-love-apple/index.html>> [accessed 18 June 2024].

⁸ Anne Flaherty, 'This Year's Fight for the Tech Industry: Patent Trolls', *The Jakarta Post*, 2015 <<https://www.thejakartapost.com/news/2015/04/15/this-years-fight-tech-industry-patent-trolls.html>> [accessed 18 June 2024].

form of money, prevent competitors, and prevent the use of other parties or companies that want to use (*practice*) the patent.⁹

In the case of *patent trolls*, patents that are supposed to protect innovations are misused by *patent trolls*, thus endangering innovations that should be protected¹⁰. Stefania Fusco in her writing stated that:¹¹

Patent trolls appear to have violated the fundamental quid pro quo on which patent law is based. Trolls have been accused of using patents to extract value from companies operating in certain industries while giving nothing to society in return. Moreover, trolls have been accused of harming innovation.

Patents are now experiencing a shift in meaning, which should be protected and instead used as a weapon of war by *patent trolls* [Click or tap here to enter text.](#). John R. Allison explained that *patent trolls* can harm innovation because they often sue small companies. Many small companies, instead of engaging in litigation, prefer to pay licensing fees. Even when *patent trolls* sue large corporations, they also tend to choose to pay licensing fees rather than face higher patent litigation costs.

Perp *Patent Troll* called *Patent Assertion Entities* ("PAEs"). PAEs are companies that obtain patents from third parties to benefit from patent infringement litigation filed against other business entities¹². In general, PAEs tend to target small companies because most of them are not sure to fight off the perpetrators *Patent Troll* in court and did not have much money to defend themselves.

Although most *patent trolls* target small companies, it should be noted that large companies can also be targeted. For example, Apple suffered losses in 2020 due to losing to a *patent troll* known as VirnetX and had to pay more than USD 500 million¹³. Google paid out USD 1 billion in 2014 after losing a lawsuit against a troll named Vringo.

Furthermore, most of the perpetrators *Patent Troll* be *Non-Practicing Entities* ("NPEs"), i.e. individuals or companies that have valid patents but do not use those patents for production¹⁴. According to PricewaterhouseCoopers, in 2014, 67% of patent claims filed by NPEs were patent-related.¹⁵ However, it does not mean that all NPEs who file patent cases are perpetrators *Patent Troll*. An entity such as a university, or a company *Startup* who failed to market their patents, are examples of NPEs¹⁶. Thus, to identify "*patent*

⁹ Paul R Gugliuzza, 'Patent Trolls and Patent Litigation Reform', 2016, doi:10.1093/oxfordhb/9780199935352.013.15.

¹⁰ (Bajpai, 2016)(Bajpai, 2016)

¹¹ Fusco, 'Markets and Patent Enforcement: A Comparative Investigation of Non-Practicing Entities in the United States and Europe'.

¹² Michael Risch, 'Framing the Patent Troll Debate', *Expert Opinion on Therapeutic Patents*, 24.2 (2014), pp. 127–30.

¹³ Eric Blattberg, 'Google Ordered to Pay as Much as \$1 Billion to Patent Troll Vringo', *Venturebeat*, 2014 <<https://venturebeat.com/business/google-ordered-to-pay-as-much-as-1-billion-to-patent-troll-vringo/>> [accessed 18 June 2024].

¹⁴ Stefan Lederer, 'The Growing Problem Of U.S. Patent Trolls, And What Should Happen Next', *Forbes*, 2021 <<https://www.forbes.com/sites/forbesbusinesscouncil/2021/07/22/the-growing-problem-of-us-patent-trolls-and-what-should-happen-next/>> [accessed 18 June 2024].

¹⁵ Robert W. Payne, "Fighting Patent Trolls: New Weapons Emerge," *Business Law Today* (June 2015), hal. 1.

¹⁶ John R Allison, Mark A Lemley, and David L Schwartz, 'How Often Do Non-Practicing Entities Win Patent Suits?', *Berkeley Technology Law Journal*, 32.1 (2017), pp. 237–310.

troll"Not only based on the form of the company, but also based on the way the patent is used by the individual or company.

3.2 Regulation of Patent Trolls in Indonesian Patent Law

Legal protection for patent rights in Indonesia is mainly contained in Law Number 13 of 2016 concerning Patents ("Patent Law"). According to the Patent Law, a patent is an exclusive right granted by the state to an inventor for his invention in the field of technology for a certain period of time, In the provision, the inventor can use this exclusive right to exploit the creation or give permission to others to use it.

To obtain patent protection, innovation must meet several criteria, including:¹⁷

1. The invention is in the form of a technological solution to a problem;
2. The invention has novelty value, which means it has never been shown or published before;
3. Inventions contain unpredictable inventive steps and distinguish them from pre-existing inventions;
4. Inventions can be applied industrially, which means they can be utilized in large quantities while maintaining the same quality.

Patent protection in Indonesia follows the principle of '*first to file*'. The party who first registers a patent for an invention has the right to the invention (inventor).¹⁸ Therefore, with such a system before an inventor can exercise his rights, his invention must be registered and proven to meet all four criteria mentioned above.

The Patent Law stipulates that inventors are obliged to carry out patents. The regulation is listed in Article 20 of the Patent Law which states;

- 1) *Patent holders are required to make products or use processes in Indonesia.*
- 2) *Making products or using processes as referred to in paragraph (1) must support technology transfer, investment absorption and/or employment provision.*

The rule was then strengthened by Article 132 of the Patent Law which regulates the deletion of patents. Article 132 paragraph (1) letter e states that the deletion of a patent based on a court decision is carried out if the patent holder violates the provisions as intended in Article 20 of the Patent Law.

Thus, the Patent Law stipulates that the patent holder has an obligation to exercise his patent. With this rule, the existence of NPEs is minimized. So that the potential for perpetrators and cases of *patent trolls* in Indonesia becomes smaller. This is because, as mentioned above, most patent trolls are NPEs.

Potential problems arise when Article 20 of the Patent Law is amended by Law Number 6 of 2023 concerning the Stipulation of Government Regulations in Lieu of Law Number 2 of 2022 concerning Job Creation into Law ("Law 6/2023"),

¹⁷ Directorate General of Intellectual Property, "Patent Director, DTLST, RD: Requirements for Having Novelty Value, Inventive Steps, and Applicable in Industry," <https://dgip.go.id/artikel/detail-artikel/direktur-paten-dtlst-rd-syarat-paten-memiliki-nilai-kebaruan-langkah-inventif-dan-dapat-diterapkan-dalam-industri?kategori=Berita%20Resmi%20Desain%20Industri&csrt=9459106074965993814>, accessed on April 24, 2024

¹⁸ Article 20 of Law No. 13 of 2016

Article 107 point 3 of Law 6/2023 reads;

The provisions of Article 20 are amended to read as follows:

Article 20

(1) Patents must be implemented in Indonesia.

(2) The implementation of the Patent as intended in paragraph (1) consists of:

- a. the implementation of Patents-products which includes making, importing, or licensing patented products;*
- b. the implementation of Patents-processes that include making, licensing, or importing products resulting from the patented process; or*
- c. Execution of Patents - methods, systems, and uses that include making, importing, or licensing products resulting from patented methods, systems, and uses.*

The word "or" in the sound of the article indicates an exclusive choice. This means that if one condition is met, then the other is unnecessary or irrelevant. With this rule, patent holders only need to perform one of the actions listed in Article 107 of the Job Creation Law to fulfill their obligations, making it difficult to categorize Patent *Troll* actors because of the definition of patent implementation.

The rules mentioned above are rules regarding the definition of patent enforcement by patent holders to associate them with the identification of "*patent trolls*" in patent law in Indonesia. Apart from these rules, there are no rules in Indonesian patent law that specifically discuss patent *trolls* in Indonesia.

4. CONCLUSION

Patent trolls are the practice of using patents as a source of income by trapping and spying on other parties. Although not specifically against the law, the activity of patent trolls is very detrimental. Therefore, it is important to be aware of the existence of patent trolls in order to anticipate the practice.

The main problem in enforcing laws related to patent trolls is the difficulty of identifying the perpetrators, who cannot be identified by their identity alone. In addition, the definition of patent enforcement in Law 6/2023 makes it more difficult to identify patent trolls than before. Thus, the best strategy to detect patent trolls is to study the behavior of patent holders and make regulations related to patent abuse in the form of patent trolls. This is so that legal protection of patent rights does not become a double-edged sword that is detrimental to innovation. In addition, patent claims must also be carefully reviewed to avoid filing litigation in bad faith. The Indonesian government should create regulations to prevent the occurrence of patent trolls in Indonesia which can be in the form of rules regarding stricter measures to curb the activities of patent trolls, such as mandatory reporting of patent usage and penalties for non-compliance. In addition, Indonesian academics can intensify their focus on the NPE phenomenon and its implications, recognising the important role of intellectual property rights in protecting innovation, given the lack of such studies in Indonesia.

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