

The UPC and Patent Trolls

simmons-simmons.com
elexica.com

The Harvard Business Review reported in 2014 that in the US, the “number of firms sued by Patent Trolls grew nine-fold in the last decade; now a majority of patent law suits are filed by trolls.”¹ In the United States in particular, Patent Trolls and what to do about them is a hot topic, both in the academic literature, as well as in Congress. A number of legislative proposals have been put forward to deal with the substantial (and apparently growing) number of Patent Troll cases, and whether new legislation is passed, and whether it is successful in addressing the issues associated with this trend remains to be seen.

With the ascendancy of Patent Trolls in the US, it is perhaps not surprising that some have been concerned whether the Unified Patent Court (UPC) will prove an attractive place for Patent Trolls to take up residence. The UPC will cover the majority of the European Union Member States’ jurisdictions, and therefore Patent Trolls will be able to seek damages and revocations on a much larger scale than is currently possible in the EU: this might make the UPC an attractive place for a Troll to file an action.

The UPC was not crafted in ignorance to this however. There are several provisions of the underlying rules and procedures which should deter Trolls finding this a fertile new jurisdiction.

What are the main tactics of a Patent Troll?

There are two main species of Patent Troll. The first is the most widely known, being a patentee which brings – or threatens to bring – an action for infringement in bad faith. The bad faith normally arises because the patentee is trying to achieve a financial settlement in its favour, notwithstanding the strength of the patent, and often without having investigated the alleged infringer’s actions or defences. In more extreme cases, an action may be brought simply to cause a nuisance. Historically, this type of Patent Troll has been more often than not a Non-Practising Entity (NPE), that is, an entity trying to make money from patent licences, rather than from practising the invention itself. Whilst most common, however, it should be remembered that there is no need for this type of Patent Troll to be an NPE.

¹ Bessen, J., “The Evidence Is In: Patent Trolls Do Hurt Innovation”, Harvard Business Review, November 2014.

The second type of Patent Troll can be called a 'reverse Patent Troll'. It is an entity that brings or threatens to bring revocation actions against patentees in bad faith. A good example of reverse Patent Trolls is a hedge fund manager challenging a pharmaceutical patent using the relatively low cost forum of "*inter partes* review" in the hope that the patentee's share price will fall. A hedge fund which has placed bets on the share price falling – short selling – will benefit from this fall in share price. Characteristically, this form of Patent Troll is not particularly concerned with the merits of the revocation action, and may not even have considered or researched the merits. Rather, this form of Patent Troll aims to make a profit from the patentee's wanting to avoid the litigation, on account of the associated costs: legal costs, costs in time and effort, and (in some cases) the effect the litigation has on a share price. For patentees with very high value patents, the threat of a revocation action, even if the claim appears to be spurious, may be sufficiently concerning to persuade a patentee to settle as the financial risk of allowing the revocation to get anywhere near trial is too great.

In both cases, Patent Trolls are relying on the respondent facing a pyrrhic victory, namely one where even if the respondent wins, the costs will have been so high it was not worth it. In the worst systems, the Patent Troll barely has to have any consideration of the strength of its own case, as defending any case (no matter how weak) is disproportionately expensive for the respondent.

In the United States in particular, Patent Trolls of both varieties have been a systemic problem. Relatively low filing fees, very costly full disclosure, and the American rule on costs (each side bearing their own, save in exceptional circumstances) mean that a Patent Troll has comparatively little to lose from starting abusive litigation. Other jurisdictions, such as the United Kingdom, have had substantially less trouble. The drafters of the UPC Rules of Procedure have adopted some of the United Kingdom's procedures which may prove to be effective deterrents.

Forum Shopping

The District Court for the Eastern District of Texas has become well-known for its patent docket, and in particular the perception that it is favourable to patentees (including Patent Trolls). There has been some concern that, with different divisions of the UPC spread across the participating Member States, one might emerge as the European Eastern District of Texas, and Patent Trolls might be able to forum shop to get to their preferred court.

This is an unfounded concern. First, claimants will be restricted by the UPC Rules as to where they are able to bring cases, which makes forum shopping difficult. Second, unlike in the Eastern District of Texas, all the divisions of the UPC will apply the same rules of procedure, which should prevent any local deviations from the beginning. Furthermore, most cases are expected to be decided by international panels, not always the same judges. This will mean that claimants will not be able to be certain which judges they will get, and thus forum shopping to a particular division may not get them the panel they wanted in the first place. As a further safeguard, the UPC Court of Appeal will have the power to review procedural decisions in order to ensure that consistency across the courts of first instance is maintained.

The potential for one division to deviate to a particularly pro-patentee position is therefore slight from the beginning, and the potential for it to remain that way with changing, international panels and Court of Appeal oversight is even smaller. That there will be limited scope for choosing where to sue only serves to make the likelihood of an Eastern District of Texas-style forum emerging yet more unlikely.

Costs

There are generally three main tranches to litigation costs: the pleadings; disclosure/discovery; and the trial. The more expensive it is for a Patent Troll at each stage, the more unlikely it is that it will be worth bringing abusive litigation. Further, the earlier a Patent Troll has to bear substantial costs, the more likely it is that it will not be worth holding out for the other party to give in. With these in mind, however, it is important that *bona fide* parties bringing a patent action should not be disproportionately dis-incentivised from bringing patent actions on account of very high, upfront costs.

The system developed for the UPC aims to balance the deterrence of abusive litigation at each of the main costs stages against the interests of *bona fide* parties trying to protect their own positions.

Application and Pleadings

In the UPC, the application fee for a claim for infringement will be set according to the value of the claim. This fee may be a very significant amount which must be paid at the outset. The traditional Patent Troll may be put off by the fee for an infringement claim. Value-based fees may dissuade some *bona fide* applicants from bringing very large claims; on the other hand, it will encourage applicants to assess both the strength and potential benefit of their claim. Patent Trolls are characteristically not too concerned with the legal strength of their claim, but rather rely on the action as a “stick” during negotiations. Whilst the application fee is unlikely to deter all Patent Trolls, forcing them to consider the strength and value of the claim will weed out many abusive actions.

In jurisdictions such as the United States, the application fee is comparatively small and not based on the value of the claim. There is little financial disincentive in a Patent Troll filing an action, if all that is going to be lost at that stage is in the order of hundreds of dollars. In the UK, the fees are pegged to the value of the claim, but are not as high as the UPC fees are expected to be, with a maximum of £10,000. The application fee in the UPC will be hundreds of thousands of euros for the highest value claims, with total fees of €336,000 applicable for cases valued in excess of €50 million.

The second large cost a claimant is required to bear comes from producing a full pleading. Unlike in many jurisdictions, in the UPC it will be necessary to have finalised the pleading when making the original application.

For a *bona fide* applicant, whether this is for infringement or revocation, the cost of a pleading will be expected: by the time the application is made, the expectation will be that the proceedings could go all the way to trial, and so it will not be a hardship to bear the cost of the pleadings. For a Patent Troll, however, there is the comfort in some jurisdictions (including the US) of not having to produce a full pleading for quite some time after filing: the Patent Troll can “sit back” somewhat whilst the defendant is forced to incur costs or settle.

In many UPC hearings, as well as legal judges, there will be a technical judge hearing the case. If a Patent Troll is to have a good bargaining position, it will have to make sure that not only is its case legally sound, it is also technically thought through. If it is to have a strong position, the Patent Troll will have to demonstrate that it will be able to satisfy the technical part of the case early on, and will not be able to avoid addressing the merits.

The UPC's system of requiring a very full technical and legal pleading, as well as evidence of infringement, all to be produced immediately, forces the applicant to invest heavily in the action: a *bona fide* applicant will accept this as part of the course, whilst a Patent Troll may be more unwilling to make such an investment.

Disclosure/Discovery

One substantial part of litigation costs relates to disclosure/discovery. Internationally, the requirements on litigants vary hugely. In some places disclosure includes all documents with any possible relevance to any issue which might arise. In other jurisdictions, disclosure is much more narrowly focused on tightly managed issues.

A Patent Troll will want to draw the respondent into a very expensive and time consuming disclosure exercise. A sophisticated Patent Troll is likely to be set up to provide such disclosure with relative ease and swiftness, and is unlikely to be as concerned about the distraction to management it will cause. In any event, the Patent Troll is often willing to sacrifice such expenditure in hope of still turning a profit. A Patent Troll, it must be remembered, is not usually aiming to get to trial, but rather to make the process of getting close so onerous on the respondent that it is persuaded (regardless of the legal merits) to settle, giving the Patent Troll a (likely undeserved) profit.

Thus, the way to prevent disclosure from becoming a powerful weapon in a Patent Troll's attempt to intimidate the other side into settlement is to prevent the cost of the exercise (both financially and time-wise) from getting out of hand. The respondent will be more willing to fight an action if it is relatively inexpensive, and thus a Patent Troll will be less likely to expect the respondent to cave in, if the costs are kept low.

The best way to ensure this is to provide that disclosure is narrowly focussed on the actual issues in dispute, and under the firm control of the Court. This way, the whole process is likely to be cheaper as there are many fewer relevant documents, and many fewer relevant people need be involved – whether this is experts, or senior employees as witnesses of fact.

The UPC has adopted measures which should promote cost- and time-efficiency in the disclosure process. For example, as in the system in England and Wales, the UPC will take an active role in delimiting the scope of disclosure and identifying the issues in dispute. The written stage of the proceedings, as well as any interim hearing seeking disclosure, will be presided over by a judge with supervisory control over the procedure. This will make the situation in the UPC quite unlike that of the United States or Ireland, for example, where the scope of disclosure is expected to be broad, and the court is not expected to take early decisions in order to narrow the purview of the dispute.

The Trial

The most expensive stage of litigation in many systems is the trial itself. The full team of lawyers is likely to be needed at hand, as will the expert witnesses, many of whom are expensive. Self-evidently, the longer the trial lasts, the more expensive it will be.

In the UPC, it is expected that the oral proceedings will last not more than a day in most cases. The length of expert testimony (and the cross-examination of it) will be closely controlled by the court, as will the length of the advocates' presentations. Most of the legal argument will be decided on the papers.

Compared with most other jurisdictions, including the United States, and to a lesser degree (though still substantially) the UK, this should reduce the costs of the oral proceedings.

Whilst, on the one hand, the comparative cost of the UPC oral proceedings will not discourage a Patent Troll from going all the way through trial, it should be remembered that most Patent Trolls do not intend ever to get there. A Patent Troll is not expecting to win because of a favourable judgment, but because the other side cannot face the financial cost and disruption of the litigation. Bearing the burden of the extra cost of trial, especially since it is not likely to win, will be at best neutral on the Patent Troll, if not dissuasive. As for the respondent, by the time the litigation approaches the oral stage, it will often likely be hardened in its resolve to have a hearing and judgment of the court

In this way, then, the economics of the UPC's procedure should dissuade Patent Trolls, favour those fighting them, and have a distinct benefit for *bona fide* litigants in that costs are kept low and proportionate to the actual issues in dispute.

There has been some concern at the potential for abuse which comes from bifurcated trials, which has led in Germany in some cases to an "injunction gap" between the determination of infringement and validity. It is expected that most of the UPC trials will not, in fact, be bifurcated (even though the option is there). Even for those trials that are bifurcated, the timing of the UPC proceedings is such that an injunction gap is very unlikely.

Patent Trolls are keen to get injunctions, and Patent Trolls do well in jurisdictions where an injunction is granted automatically once infringement has been found. In these jurisdictions, because the defendant is so keen to avoid an injunction, it is willing to settle. In the UPC, injunctions will not be mandatory following a finding of infringement, but will be discretionary. In a case which is clearly (or even perhaps suspected) abusive, the UPC may not order an injunction. This discretion is likely to serve as a deterrent for Patent Trolls: once again, active case management, even after the end of the trial, is thought to be a very good method of controlling the prevalence of abusive litigation.

Recovery of Costs

The procedure, then, has been set up in the UPC to apportion costs in time to discourage abusive litigation, as well as balancing the amount of costs in a way that deters abuse, but not at the expense of *bona fide* litigants or those responding to abusive litigation. The final mechanism which may deter Patent Trolls is that the costs of the proceedings will be recoverable from the losing side.

Article 69(1) of the UPC Agreement states,

"Reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity requires otherwise, up to a ceiling set in accordance with the Rules of Procedure."

This will apply for all litigation, and will benefit the respondents to an abusive action. Whilst a cost ceiling applies which is on a scale dependent on the value of the claim, for larger value claims (with which Patent Trolls are normally associated) this is substantial; the maximum award of recoverable costs is €2 million for a case valued at more than €50,000 million. For particularly complex cases the ceiling may be raised to a maximum of €5 million. Even then, the UPC retains its discretion under Article 69(3) to disapply the cost ceiling in exceptional circumstances:

“A party should bear any unnecessary costs it has caused the Court or another party.”

Thus notwithstanding the cost ceiling, the Court will be able to recompense the respondent to an abusive action beyond that ceiling, and even, it should be noted (though it is perhaps unlikely) if the respondent was not successful, either wholly or in part.

The UPC system of costs recovery has a great advantage over the United States system in particular, where the American rule on costs – each party bearing their own costs – still applies in most patent cases (save in “exceptional cases”). Ensuring that a party engaging in abusive and unnecessary litigation bears the costs of that litigation is an effective way to dissuade such litigation in the first place.

Conclusion

It is likely that there is no patent litigation system which would be free from Patent Trolls. Litigation is always expensive and disruptive, and threatening a party with the loss of money and time will sometimes allow a Patent Troll to coerce a commercial victory. The UPC has been organised, however, in such a way that the potential for Patent Trolls to abuse the system for profit has been substantially reduced.

Offices

Amsterdam

Simmons & Simmons LLP
PO Box 79023 1070 NB
Claude Debussylaan 247 1082 MC Amsterdam
The Netherlands
T +31 20 722 2500 F +31 20 722 2599

Beijing

Simmons & Simmons
33rd Floor China World Tower A
1 Jianguomenwai Avenue
Beijing 100004 People's Republic of China
T +86 10 8588 4500 F +86 10 8588 4588

Bristol

Simmons & Simmons LLP
One Linear Park Temple Quay
Bristol BS2 0PS United Kingdom
T +44 20 7628 2020 F +44 20 7628 2070

Brussels

Simmons & Simmons LLP
Avenue Louise/Louizalaan 143 1050 Brussels Belgium
T +32 2 542 09 60 F +32 2 542 09 61

Doha

Simmons & Simmons Middle East LLP
Level 5 Al Mirqab Tower Al Corniche Street
PO Box 23540 Doha State of Qatar
T +974 4409 6700 F +974 4409 6701

Dubai

Simmons & Simmons Middle East LLP
Level 7 The Gate Village Building 10
Dubai International Financial Centre
PO Box 506688 Dubai United Arab Emirates
T +971 4 709 6600 F +971 4 709 6601

Düsseldorf

Simmons & Simmons LLP
Kö-Bogen
Königsallee 2a
40212 Düsseldorf Germany
T +49 2 11-4 70 53-0 F +49 2 11-4 70 53-53

Frankfurt

Simmons & Simmons LLP
MesseTurm Friedrich-Ebert-Anlage 49
60308 Frankfurt am Main Germany
T +49 69-90 74 54-0 F +49 69-90 74 54-54

Hong Kong

Simmons & Simmons
13th Floor One Pacific Place
88 Queensway Hong Kong
T +852 2868 1131 F +852 2810 5040

Jeddah

Hammad & Al-Mehdar in alliance with Simmons & Simmons
Office #1209, King Road Tower, Malik Road,
PO Box 864 Jeddah 21421
Kingdom of Saudi Arabia
T +966 92 000 4626 F +966 2 606 9190

Lisbon

Sociedade Rebelo de Sousa in association with
Simmons & Simmons
Rua D. Francisco Manuel de Melo 21
1070-085 Lisbon Portugal
T +351 21 313 2000 F +351 21 313 2001

London

Simmons & Simmons LLP
CityPoint One Ropemaker Street
London EC2Y 9SS United Kingdom
T +44 20 7628 2020 F +44 20 7628 2070

Luxembourg

Simmons & Simmons Luxembourg LLP
Royal Monterey 26A Boulevard Royal
Luxembourg L-2429 Luxembourg
T +352 26 21 16 01 F +352 26 21 16 02

Madrid

Simmons & Simmons LLP
Calle Miguel Angel 11 5th floor 28010 Madrid Spain
T +34 91 426 2640 F +34 91 578 2157

Milan

Studio Legale Associato in affiliation with
Simmons & Simmons LLP
Via Tommaso Grossi 2 20121 Milan Italy
T +39 02 72505.1 F +39 02 72505.505

Munich

Simmons & Simmons LLP
Lehel Carré, Thierschplatz 6
80538 Munich Germany
T +49 89-20 80 77 63-00 F +49 89-20 80 77 63-01

Paris

Simmons & Simmons LLP
5 boulevard de la Madeleine 75001 Paris France
T +33 1 53 29 16 29 F +33 1 53 29 16 30

Riyadh

Hammad & Al-Mehdar in alliance with Simmons & Simmons
Level 18 Princess Al-Anood Tower 2
King Fahad Road Olaya
Riyadh Kingdom of Saudi Arabia
T +966 92 000 4626 F +966 12 606 9190

Shanghai

Simmons & Simmons
42nd Floor Wheelock Square
No. 1717 Nan Jing West Road
Shanghai 200040 China
T +86 21 6249 0700 F +86 21 6249 0706

Singapore

Simmons & Simmons Asia LLP
168 Robinson Road #11-01
Capital Tower
Singapore 068912
T +65 6831 5600 F +65 6831 5688

Tokyo

Simmons & Simmons Gaikokuho Jimu Bengoshi Jimusho
(Gaikokuho Joint Enterprise TMI Associates)
23rd floor Roppongi Hills Mori Tower
6-10-1 Roppongi Minato-ku Tokyo 106-6123 Japan
T +81 3 6438 5255 F +81 3 6438 5256

Simmons & Simmons is an international legal practice carried on by Simmons & Simmons LLP and its affiliated practices. Accordingly, references to Simmons & Simmons mean Simmons & Simmons LLP and the other partnerships and other entities or practices authorised to use the name "Simmons & Simmons" or one or more of those practices as the context requires. The word "partner" refers to a member of Simmons & Simmons LLP or an employee or consultant with equivalent standing and qualifications or to an individual with equivalent status in one of Simmons & Simmons LLP's affiliated practices. For further information on the international entities and practices, refer to simmons-simmons.com/legalresp

Simmons & Simmons LLP is a limited liability partnership registered in England & Wales with number OC352713 and with its registered office at CityPoint, One Ropemaker Street, London EC2Y 9SS. It is authorised and regulated by the Solicitors Regulation Authority.

A list of members and other partners together with their professional qualifications is available for inspection at the above address.