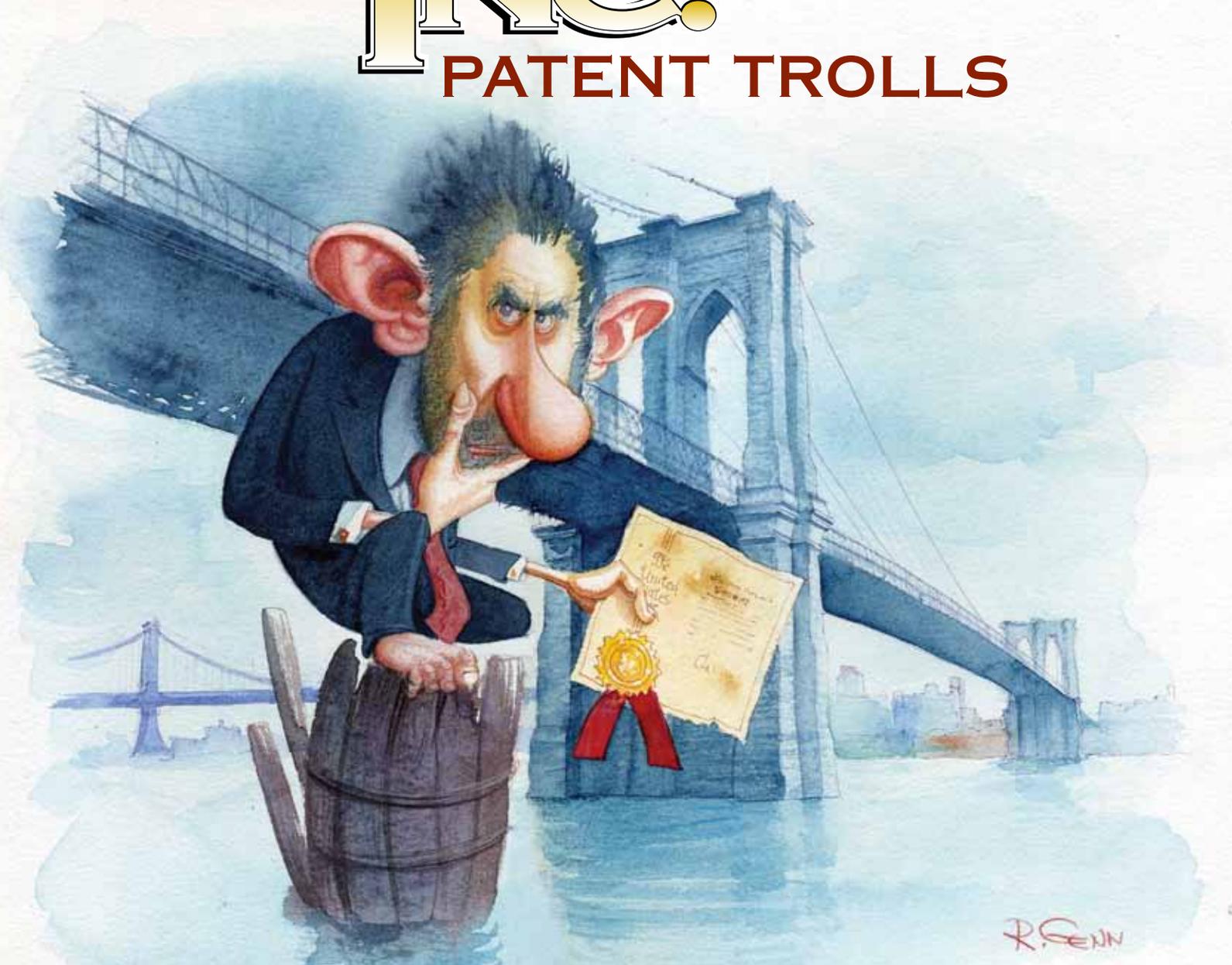


No. 11, July 2013

# TRIAL UPDATE LAWYERS INC.

## PATENT TROLLS



R. GINN

# PATENT TROLLS

## A Report on the Litigation Industry's Intellectual Property Line of Business

The framers of the United States Constitution considered the ability of inventors to protect and exploit their discoveries to be so essential to future prosperity that they included the ability to issue patents among the few enumerated legislative powers granted to the federal government.<sup>1</sup> Of late, however, litigation over software patents has become a drag, not a boon, to technological innovation: in 2011, Google and Apple spent more on patent litigation and acquisition than on research and development.<sup>2</sup> Unlike pharmaceutical patents—which defray massive government-required safety and efficacy trials and are limited to easy-to-define, specific chemical compounds—software patents are hard to define, enabling aggressive plaintiffs' lawyers exploiting the maze of U.S. legal rules to extract wealth from the nation's most innovative companies. And "patent trolls"—companies that produce no goods or services but own and seek to enforce patent rights against businesses that are producing goods or services using related technologies (see box, "What Is a 'Patent Troll?')—have begun to target Main Street companies, sending through their lawyers patent-infringement "demand letters" to everything from coffee shops offering wireless service to their customers to small businesses using scanner technologies on their purchased printers.<sup>3</sup>

---

*The Congress shall have Power to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

## WHAT IS A "PATENT TROLL"?

The intentionally pejorative term "patent troll" was popularized in 2001 by Peter Detkin, then vice president and associate general counsel at Intel.<sup>4</sup> It is commonly used to describe "non-practicing entities" (NPEs), patent holders who do not use their patent for invention, innovation, or production of a product but rather only license patents or sue for their enforcement.<sup>5</sup> Because NPEs can sometimes include individual investors, start-up ventures, and universities, critics

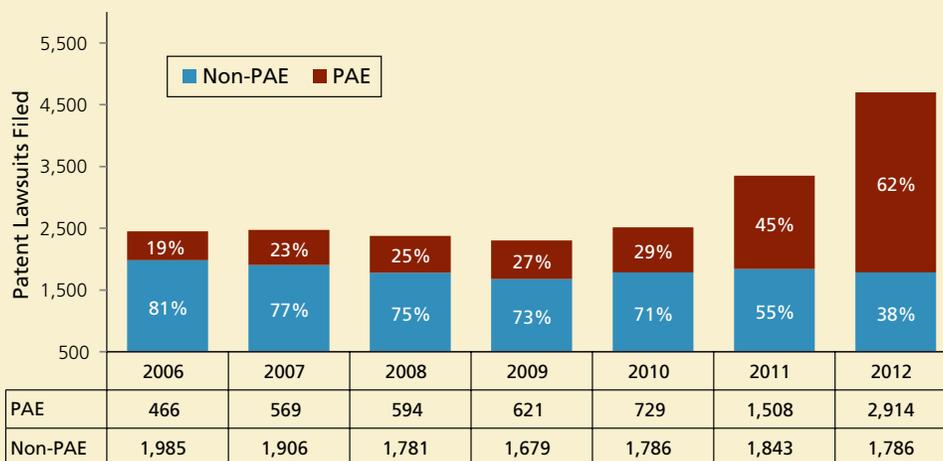
of patent trolling have gravitated toward the narrower term "patent assertion entities" (PAEs),<sup>6</sup> companies that exist in whole or significant part to generate revenues from patent enforcement—which now number in the hundreds,<sup>7</sup> including at least 16 public companies.<sup>8</sup> Ironically, Detkin himself is now the managing partner and significant owner of what is perhaps the largest PAE, Intellectual Ventures, which has amassed between 30,000 and 60,000 patents over the past five years.<sup>9</sup>

Thus, patent trolling has emerged as a big and growing business line for what the Manhattan Institute has dubbed Trial Lawyers, Inc.,<sup>10</sup> the subset of the plaintiffs' bar that behaves like the biggest of big businesses (with the exception that instead of selling products to willing consumers, the lawyers extract monies from unwilling defendants through their unique access to the courts). The cost to consumers is significant: according to a study by Boston University law professors Mike Meurer and Jim Bessen, the "patent tax" adds 20 percent to software and electronic research and development costs, with the direct costs of litigation by NPEs in 2011 totaling \$29 billion—up from only \$7 billion in 2005.<sup>11</sup> (Factoring in indirect costs, the authors estimated an annual cost of \$80 billion.)<sup>12</sup> The number of patent lawsuits filed by

PAEs grew from 466 in 2006 to 2,914 in 2012, an increase of 526 percent in just six years (see chart, "Number of Patent Lawsuits, by Plaintiff").<sup>13</sup> In 2011, 2,150 companies were forced to mount 5,842 defenses against NPE-initiated patent lawsuits—up from only 1,401 defenses in 2005.<sup>14</sup>

In response to patent-trolling abuse, judges, business leaders, and politicians have responded with a bevy of proposals. Seventh Circuit Judge Richard Posner, the most-cited jurist on the federal courts of appeals,<sup>15</sup> has proposed shortening software patent terms to five years.<sup>16</sup> Software entrepreneur Mark Cuban, billionaire founder of Broadcast.com, has suggested eliminating software patents altogether.<sup>17</sup> In a June policy announcement,<sup>18</sup> following up on a February speech

Number of Patent Lawsuits, By Plaintiff



Source: RPX Corporation, Professor Colleen Chien

decrying lawsuit abuse by patent trolls,<sup>19</sup> President Obama proposed seven legislative reforms and five executive actions designed to ameliorate the problem. The president's proposals follow on the heels of at least five bills in Congress addressing patent-trolling litigation<sup>20</sup> and a 2011 enacted reform, the Leahy-Smith America Invents Act,<sup>21</sup> which was touted as “the most significant reform of the U.S. patent system since 1836.”<sup>22</sup> The rest of this report will discuss these proposals, after describing the factors leading to the rise of patent-troll litigation abuse.

## PATENTING THE INTERNET

Enabled by the Patent Acts of 1790 and 1793,<sup>23</sup> the federal government issued more than 10,000 patents by the time what is now the U.S. Patent and Trademark Office (PTO) was created by the Patent Act of 1836; the office has issued nearly 9 million patents since.<sup>24</sup> Patents have long been a magnet for litigation, from “sewing machine wars” in the 1850s to “diaper wars” in the 1980s.<sup>25</sup> Indiana law professor Gerard Magliocca has documented how in the late nineteenth century, family farmers and railroads alike complained about “patent sharks.”<sup>26</sup>

Modern patent trolling is largely focused on the software industry: software patents constitute just 12 percent of all patents issued but 74 percent of the most litigated patents.<sup>27</sup> The problem, at root, is that “[p]atents on computer software [tend] to be the most vague, poorly written, and difficult patents to decipher.”<sup>28</sup> Though software patents have existed since the 1960s, very few were filed before the late 1990s—meaning that the PTO had very little experience with the field and very little “prior art,” i.e., “published evidence that key concepts in a patent application existed before the application was filed.”<sup>29</sup> Many, if not most, of the software patents issued by the PTO, especially in the early years, were so broad that they could conceivably cover almost anything to do with computers or the Internet,<sup>30</sup> and often several patents were being issued for roughly the same thing.<sup>31</sup>

Thus did the government issue patents such as the one granted in 1994 to the company Eolas, founded by Michael David Doyle. Eolas's patent covered the development of a web browser capable of supporting plug-ins, which the

company later claimed applied to the “interactive Web”—“essentially the whole Internet.”<sup>32</sup> In 2003, the company filed suit, seeking an injunction preventing Microsoft from distributing its popular Internet Explorer browser, alleging patent infringement.<sup>33</sup> Microsoft ultimately lost a \$565 million judgment—even though it introduced a significant body of evidence that others had developed the web-browsing technology prior to Eolas.<sup>34</sup> Microsoft and Eolas ultimately settled, in 2007, for an undisclosed amount.<sup>35</sup> In October 2009, Eolas filed suit again, alleging infringements of the same patent by 22 more companies—ranging from Internet and technology companies such as Adobe, Amazon, eBay, Google, and Yahoo! to more distant end users including Blockbuster, Frito-Lay, JPMorgan Chase, Office Depot, and Playboy Enterprises.<sup>36</sup> Fortunately for those companies, Eolas ultimately lost that case in 2012, when a jury in the Eastern District of Texas invalidated the relevant patents.<sup>37</sup>

## PATENT TROLLS EMERGE

Though Eolas is frequently dubbed a patent troll, the first real PAEs—companies formed exclusively to acquire and enforce patents—were developed by patent litigator Raymond Niro and inventor Daniel Henderson shortly after the dawn of the twenty-first century (see box, “The Original King of the Patent Trolls”). Specialized, stand-alone companies focused on enforcing patent rights have advantages in pursuing patent lawsuits.<sup>57</sup> As defenders of PAEs emphasize, selling patent rights to separate enforcement entities efficiently enables individual and small-company inventors to marshal financial resources and legal sophistication in mounting a defense of an allegedly infringed patent.<sup>58</sup> In addition, as patent-troll critics contend, PAEs can more aggressively pursue patent-infringement claims than can operating companies, which must weigh the economic gains of enforcing patent claims against the economic risks of defending against countersuits and third-party litigation alleging that their own technologies violate a patent.<sup>59</sup>

Without corporate reputations to protect, patent trolls are particularly well suited for “nuisance” lawsuits asserting dubious patent claims.<sup>60</sup> Unlike most of the developed world, U.S. courts generally lack “loser pays” fee-shifting mechanisms,<sup>61</sup> and, given the cost of discovery and trial in the American sys-

## THE ORIGINAL KING OF THE PATENT TROLLS

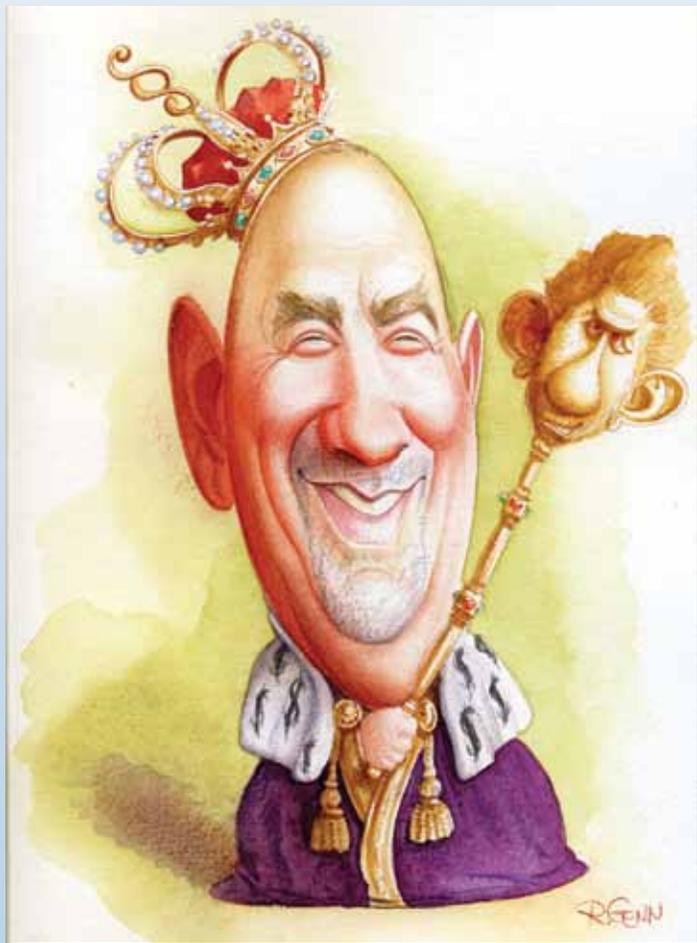
The founder and chieftain of Trial Lawyers, Inc.'s patent-troll division is Chicago-based litigator Raymond Niro, of Niro, Haller & Niro,<sup>38</sup> who claims over \$800 million in patent-suit recoveries.<sup>39</sup> Niro's firm pulls in an estimated \$100 million annually.<sup>40</sup> He has extensive property holdings in Chicago, Aspen, and Boca Raton; six Ferraris; and a Falcon 10 jet.<sup>41</sup>

In 1976, Niro and Gerald Hosier—a fellow intellectual property lawyer at the firm Hume, Clement, Hume & Lee—set out on their own.<sup>42</sup> Within the year, they scored their first contingent-fee client, inventor George Richards, and soon thereafter won 50 percent of a \$200,000 award.<sup>43</sup> By 1997, their patent-suit winnings had topped \$140 million.<sup>44</sup>

In the late 1990s, Niro sued more than 40 companies—including AT&T, IBM, and Sony—for allegedly infringing an early answering-machine-technology patent purchased from a Japanese inventor by inventor Daniel Henderson.<sup>45</sup> These suits brought in some \$65 million in licensing royalties.<sup>46</sup> In 2001, working with Niro, Henderson formed the first true PAE, Solaia Technology LLC, which was the sole bidder for a patent involving the use of spreadsheets in manufacturing equipment, put up to auction by Massachusetts-based Schneider Automation, Inc.<sup>47</sup> With Solaia the patent holder and Niro's law firm working for a share of licensing royalties, Niro mailed hundreds of letters to businesses seeking \$600,000 to \$1 million for "amicably and promptly resolv[ing] all issues" stemming from alleged patent infringement.<sup>48</sup> Niro ultimately sued 50 companies for patent infringement—including Boeing, BMW, and Clox—netting some \$10 million in fees from \$30 million in settlements.<sup>49</sup>

Among the more recent PAEs affiliated with the Niro firm is Innovatio IP Ventures, LLC, a Delaware company with Chicago offices five blocks from Niro's.<sup>50</sup> On February 28, 2011, Innovatio acquired

a portfolio of 31 patents from Broadcom Corporation, related to Wireless Fidelity (Wi-Fi) technology.<sup>51</sup> Innovatio then mailed more than 8,000 letters alleging patent infringement to retail businesses—including hotels, coffee shops, and restaurants—that offered customers Wi-Fi services.<sup>52</sup> From each establishment, Innovatio sought licensing fees of \$2,500–\$3,000.<sup>53</sup> Innovatio ultimately filed 26 lawsuits,<sup>54</sup> and wireless-technology manufacturers including Cisco and Motorola in turn filed suit against Innovatio in federal court in Illinois,<sup>55</sup> but the judge threw out the most significant of the manufacturers' claims, which had alleged violations of the federal Racketeering Influenced and Corrupt Organizations Act (RICO).<sup>56</sup>



tem, the median legal costs of defending a patent can range anywhere from \$650 thousand when the amount at risk is less than \$1 million, \$2.5 million when \$1 million to \$25 million is at risk, and \$5 million when over \$25 million is at risk.<sup>62</sup> Thus, the rational legal strategy employed by defendants facing low-value patent claims is to settle with the plaintiff—particularly for end-user, small-business defendants unlikely to face repeat patent claims.<sup>63</sup>

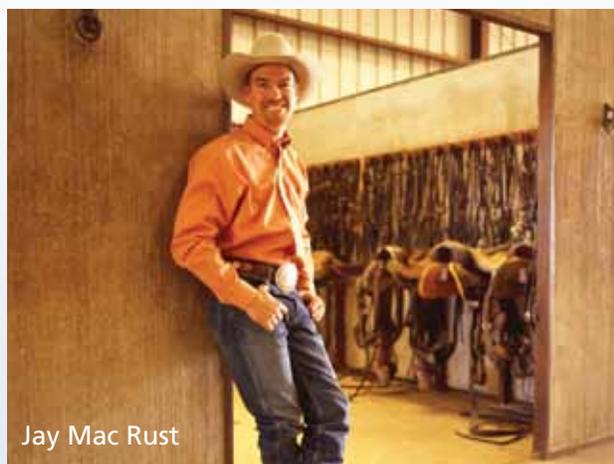
Perhaps unsurprisingly, then, by 2012, 62 percent of all patent litigation was brought in the name of patent trolls.<sup>64</sup> And though the cost of such litigation is high, most businesses targeted by patent-troll-sponsored lawsuits are small: 55 percent of defendants in patent-troll lawsuits filed in 2012

have under \$10 million in annual revenues.<sup>65</sup> Moreover, in 2012, for the first time, patent trolls targeted non-tech companies more frequently than tech companies, signaling a shift toward retailers and end users of technology-related patents (see box, “The Scanner Shakedown”).<sup>66</sup> Settlement and trial data conform to the hypothesis that patent-troll-backed litigation is likely to be low quality: 90 percent of software-patent defendants settle before trial,<sup>67</sup> but among those patent-troll cases that do go to trial nationwide, 90 percent are won by the defendants, as compared with a 50 percent win rate in non-patent-troll cases.<sup>68</sup>

Aside from the inherent advantages accruing to PAEs in patent lawsuits, such litigation is facilitated by the availability

## THE SCANNER SHAKEDOWN

© Larry Marcus



Jay Mac Rust

While traditionally focused within the software industry, patent-troll litigation has begun to be threatened and launched against a broad array of businesses that employ downstream end uses of patented technologies. A notorious recent example is the spate of demand letters issuing forth from MPHJ Technology Investments LLC, the “scanner troll.”<sup>69</sup>

In late 2012, MPHJ acquired patents granted to Israeli resident Laurence Klein, dating back to 1997, which cover scanner technologies employing a one-button scan and send-to-e-mail function.<sup>70</sup> (One-button scan-and-send technology is standard on most scanners and copiers today, though never incorporating the Klein patents, which have changed hands several times but never been employed in a manufacturing

setting; at least arguably, the technological innovation was developed prior to Klein by Ricoh.)<sup>71</sup> Rather than suing scanner and printer manufacturers, such as Hewlett-Packard and Xerox, attorneys working with MPHJ mailed demand letters from 40 affiliated shell companies with obscure six-letter names like AdzPro, GosNel, and JitNom to hundreds of small and medium-size U.S. businesses that were end users of printers and scanners—seeking roughly \$1,000 per worker in licensing royalties.<sup>72</sup>

Though the ownership of MPHJ is not public, the company is affiliated with a Waco, Texas, lawyer named Jay Mac Rust, according to a complaint filed against the company by the attorney general of Vermont,<sup>73</sup> and has been represented by outside counsel Bryan Farney of the Texas firm Farney Daniels.<sup>74</sup> Farney is a well-known patent lawyer, and Rust had previously represented bankrupt shell companies accused in legal complaints of running a “Ponzi scheme.”<sup>75</sup>

Rust and Farney have asserted a broad view of MPHJ’s patent rights; in a recorded conversation, Rust stated that “99 percent of people” were violating the MPHJ patents in sending scanned documents to their e-mail accounts.<sup>76</sup> The May 8 Vermont attorney general’s complaint, however, accuses the MPHJ scheme of violating the state’s consumer-protection laws,<sup>77</sup> and on May 23, Ricoh and Xerox filed an “inter partes” review request with the PTO seeking to invalidate the MPHJ patent.<sup>78</sup> Each of those actions is pending.

## HELD AT THE BORDER

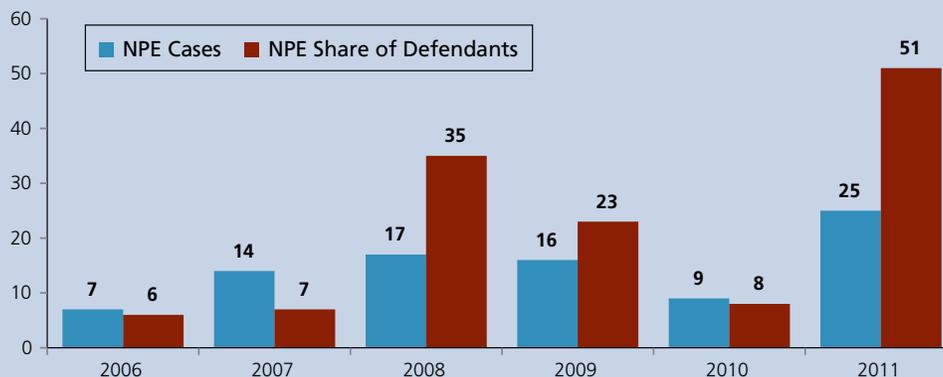
On June 4, 2013, the U.S. International Trade Commission (ITC) issued an exclusion order barring the importation and sale of several older-model Apple iPhones and iPads for infringing a Samsung patent<sup>81</sup> on an “apparatus and method for encoding/decoding transport format combination indicator in CDMA mobile communication system.”<sup>82</sup> According to Jefferies analyst Peter Misek, this injunction could deprive Apple of as much as \$2 billion in revenue.<sup>83</sup>

The “smartphone patent wars” have highlighted the latest forum-shopping tactic of Trial Lawyers, Inc.’s patent troll division: filing claims not in federal district court but at the ITC.<sup>84</sup> A 2006 Supreme Court ruling, *eBay v. MercExchange*,<sup>85</sup> made it more difficult to obtain injunctive relief—judicial orders to cease selling a product, as opposed to paying plaintiffs monetary damages—in federal court.<sup>86</sup> The *eBay* decision helped to ameliorate the “holdup” problem in patent litigation, in which plaintiffs could increase settlement values by threatening to stop the sales of products—including cars and electronic devices—that have software essentially embedded within products with values far greater than the patented program itself.<sup>87</sup> However, the *eBay* decision did not apply to the ITC, which oversees international trade and can thus issue injunctions that leave defendants’ imported products at the border.<sup>88</sup>

Since *eBay* was decided, “both PAEs and product producing companies have flocked to this once obscure trade agency.”<sup>89</sup> Between 2006 and 2011, the number of ITC patent investigations prompted by NPE-sponsored actions rose from two to 14—and the number of defendants named grew from four to 235.<sup>90</sup> Accordingly, the share of all ITC patent cases and defendants has come to be increasingly dominated by patent trolls (see chart, “Percentage of ITC Cases and Defendants in NPE-Sponsored Litigation”).

In recent years, the manufacturers of various common consumer items—including “computers, flat screens, GPS devices, and printers” and, strikingly, “every major smartphone”—have been embroiled in ITC patent inquiries.<sup>91</sup> *The Wall Street Journal* has decried such ITC patent litigation as “a weapon of protectionist mass destruction against competitors,” academic commentators have noted concerns,<sup>92</sup> and the Federal Trade Commission (FTC) has observed “that the ITC may attract suits by patentees that are less likely to obtain injunctions in district court, potentially leading to hold up and the resulting consumer harm.”<sup>93</sup> Among President Obama’s suggested patent reforms is bringing the ITC’s injunctive-relief standard in line with that articulated by the Supreme Court in *eBay*.<sup>94</sup>

Percentage of ITC Cases and Defendants in NPE-Sponsored Litigation, 2006–11



Source: Chien & Lemley, RPX Corporation

## DON'T MESS WITH TEXAS



© Mark Graham/The New York Times/Redux

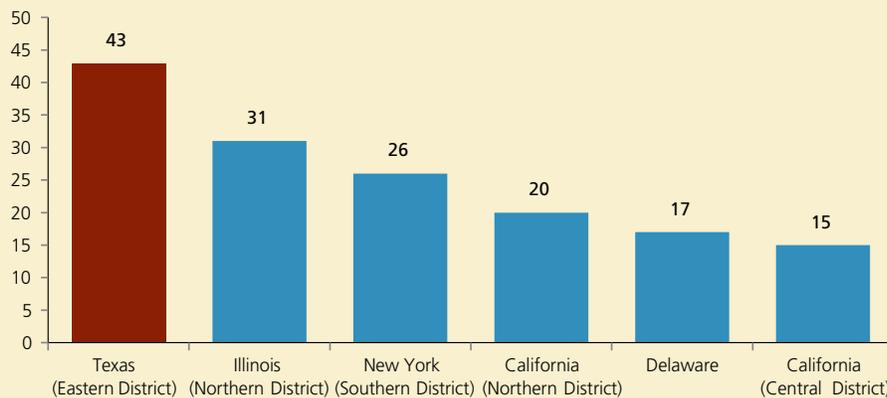
Judge T. John Ward

When Trial Lawyers, Inc. goes shopping for venues for patent-troll-sponsored lawsuits, they like to end up in the Eastern District of Texas, which houses Marshall, Tyler, and Texarkana along the Arkansas and Louisiana borders. The district's emergence as the nation's foremost

magnet court for patent lawsuits traces roughly to 1999, when Clinton appointee T. John Ward, a lawyer in private practice with previous experience largely in medical-malpractice and product-liability litigation, assumed the bench in Marshall.<sup>95</sup> Ward adopted a set of local procedures for handling patent litigation that he dubbed "The Rules"—which, along with his enforcement of those rules, turned the district into a "rocket docket" that sped up claims—and he tended to let patent cases go to trial rather than dismiss them.<sup>96</sup> Local juries in the sleepy town of 23,000, with a median income of \$30,000, began deciding cases in plaintiffs' favor, and at generous damage levels, compared with national norms.<sup>97</sup>

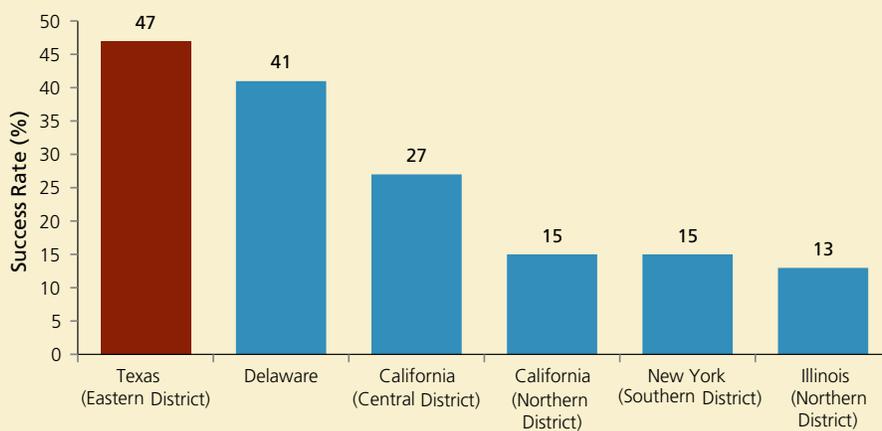
Apparently, defendants learned that Ward's court was a place where they should settle, and plaintiffs' firms and patent trolls learned that the district was where they should file their claims. The number of patent lawsuits filed in the Eastern District grew from 32 in 2002 to 234 in 2006 to a record 1,266 in 2012.<sup>98</sup> Last year, the district's patent docket accounted for over 22 percent of all patent cases filed nationwide, an all-time high<sup>99</sup>—reemerging as the litigation industry's forum of choice after briefly slipping behind Delaware (where most public U.S. companies are incorporated) in 2011,<sup>100</sup> when Ward retired from the bench. (Upon retirement, the senior jurist joined the local intellectual-prop-

### NPE Decisions by Federal District, 1995–2011



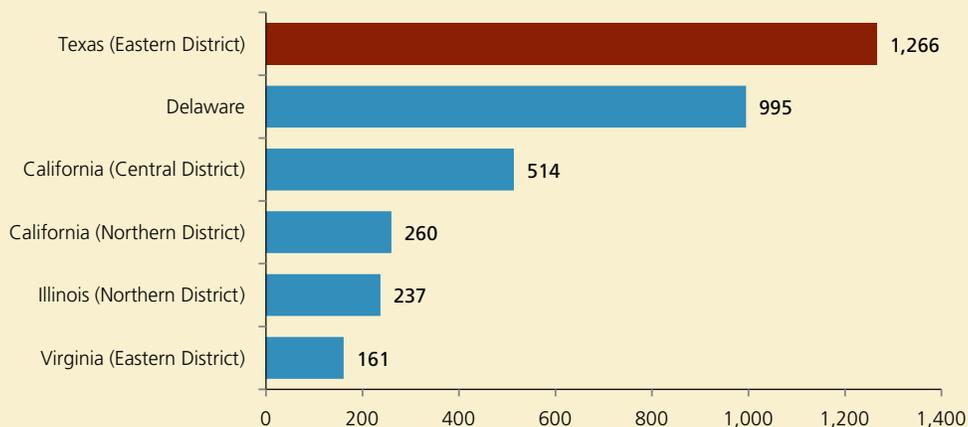
Source: PricewaterhouseCoopers

### Success Rate, NPE Decisions, 1995–2011



Source: PricewaterhouseCoopers

### Number of Patent Cases Filed, by Federal District, 2012



Source: James C. Pistorino, Perkins Coie; Pacer

erty law firm Ward & Smith<sup>101</sup>—headed by his son, Johnny Ward<sup>102</sup>—to serve as a patent-dispute mediator; by October 2012, under the district’s rules, the retired judge was able to practice in the Eastern District.<sup>103</sup>

While it is too soon to assess the tenure of recently appointed Judge James Rodney Gilstrap, most court observers do not expect a marked departure from the norms that Ward developed.<sup>104</sup> Though a Marshall native, Gilstrap, like Ward, as-

sumed the Eastern District bench with only limited patent-law experience.<sup>105</sup> President Obama nominated Gilstrap from a list of three prospective nominees forwarded to him by Texas’s Democratic congressional delegates; the other two on the list were Chad Everingham, formerly a magistrate judge who had helped manage the Eastern District’s patent docket; and Eric Albritton, a successful Longview, Texas, patent lawyer who had joined with Johnny Ward to file a defamation suit against a blogger who covered Texas patent litigation.<sup>106</sup>

of “forum shopping” under U.S. law. Though restricted to federal courts, patent lawsuits, like product-liability lawsuits,<sup>79</sup> can be asserted wherever a product is sold—as well as at the International Trade Commission (see box, “Held at the Border”).<sup>80</sup> Thus, plaintiffs’ lawyers can strategically “shop” their cases to venues most likely to expedite their claims, to permit them to go to trial, and to have juries favorably disposed to grant large verdicts for the plaintiff (see box, “Don’t Mess with Texas”).

## THE PUSH FOR REFORM

The rise of patent-troll litigation partially helped generate political support for the 2011 America Invents Act,<sup>107</sup> a comprehensive reform of U.S. patent law signed into law by President Obama on September 16, 2011.<sup>108</sup> For the purposes of deterring patent-trolling litigation, the legislation clarified joinder requirements to prevent plaintiffs in patent litigation from adding together unrelated defendants in a single lawsuit.<sup>109</sup> The new joinder rule was specifically designed to overturn a decision in the Eastern District of Texas that had stretched the Federal Rules of Civil Procedure to permit PAEs to sue multiple, disparate defendants in a single claim.<sup>110</sup>

By forcing patent trolls to file separate lawsuits against multiple defendants, the joinder reforms in the America Invents Act at least partly explain the dramatic increase in the number of patent claims and the share of patent claims filed by PAEs in 2011 and 2012.<sup>111</sup> By restricting “permissive joinder,” the reform does seem to have discouraged at least some suits against marginal defendants: the overall number of patent defendants fell from at least 14,201 in 2011 to 12,647 in 2012, a decrease of more than 10 percent.<sup>112</sup> Those “small companies that actually are sued, however, are arguably worse off because they have fewer joint defense options,” according to professor Colleen Chien, and many small retail businesses and technology end users who have not been sued continue to incur legal expenses in responding to patent-troll threat letters.<sup>113</sup>

Because the America Invents Act only affected patent-trolling litigation on the margin, it is unsurprising that calls for reform continue. Among the leading legislative efforts is the Saving High-Tech Innovators from Egregious Legal Disputes (“SHIELD”) Act, introduced in its most recent form,

H.R. 845,<sup>114</sup> on February 27, 2013, by Reps. Peter DeFazio (D-Ore.) and Jason Chaffetz (R-Utah). The legislation would force losing plaintiffs in patent lawsuits to reimburse defendants’ expenses if the plaintiffs fit the bill’s definition of PAE—i.e., any entity that was not the original inventor, exploiting the technology for profit, or affiliated with a university.<sup>115</sup> Moreover, the bill would limit civil discovery while the court determined if the plaintiff fit the statutory definition of PAE and would force PAEs to post a bond with the court to cover potential legal costs, in the event of loss, to proceed with litigation.<sup>116</sup>

On June 4, 2013, the White House released a report, *Patent Assertion and U.S. Innovation*,<sup>117</sup> prepared by the President’s Council of Economic Advisers, the National Economic Council, and the Office of Science & Technology Policy, accompanied by a press statement pushing for legislative actions to reduce patent trolling.<sup>118</sup> The president’s seven legislative proposals are designed to improve transparency (by requiring patent holders and applicants to disclose the “real party at interest” with the patent office and in communications alleging patent infringement), to permit broader challenges to issued patents before the Patent Trial and Appeals Board (PTAB), to protect end-user consumers and businesses from patent lawsuits, to enable more discretionary fee shifting by judges in patent lawsuits, and to extend to the ITC the Supreme Court’s *eBay* rules limiting injunctive relief sought by patent-infringement plaintiffs.<sup>119</sup>

## CONCLUSION: A POSITIVE STEP FORWARD

President Obama’s proposed reforms have been broadly hailed by Silicon Valley commentators and academic critics,<sup>120</sup> though not without exception.<sup>121</sup> It is hard to raise principled objections to certain of the president’s suggestions, such as improving transparency in identifying the parties at interest in patent litigation and limiting suits against end users of products such as cafés offering Wi-Fi services to customers or businesses using scanning technologies as intended.

In general, the president’s proposals, unlike the SHIELD Act, eschew a single-minded focus on patent trolls per se, in lieu of broader reforms designed to reduce the gains from

nuisance litigation filed by patent trolls—following the White House report’s argument that “the best approach to resolving today’s patent troll problem is not to ban firms specialized [*sic*] in patent assertion but rather to reduce the extent to which legal rules allow patent owners to capture a disproportionate share of returns to investment.”<sup>122</sup> The White House report’s analysis is essentially correct; indeed, the mechanisms that allow patent trolling to be profitable—including loose substantive liability standards, forum shopping to favorable venues, expensive civil discovery and other procedural rules, and the absence of loser-pays fee-shifting mechanisms and concomitant pressure to settle nuisance claims—are commonplace, if not universal, in civil litigation more broadly.

If the president’s proposals are open to criticism, it is probably in not going far enough. Though the president does tackle forum shopping in the context of injunctive remedies at the ITC, the proposals do not limit more broadly the lawsuit shopping that has permitted the Eastern District of Texas to emerge as patent trolls’ go-to district for litigation. More sweeping reforms might include requiring lawsuits to be filed in the district court corresponding to infringers’ place of incorporation or principal place of business, or granting original jurisdiction to patent-infringement suits to the Patent Trial and Appeal Board or another specialized fact finder. In addition, though the president’s reforms are broader than the more narrowly targeted SHIELD Act, the president’s proposals eschew the strict loser-pays

mechanism that the SHIELD Act promotes for PAE lawsuits, opting instead for discretionary fee shifting that has typically proved ineffective in curbing lawsuit abuse.<sup>123</sup> A better approach would be a well-developed loser-pays rule for all patent litigation, applied equally to plaintiffs and defendants.<sup>124</sup> Finally, the president’s proposals helpfully call for expanding the scope of challenge to loose “business method” patents that have facilitated much patent trolling, but at least arguably the reforms should have gone further. Indeed, some innovators and analysts have called for the elimination of software patents;<sup>125</sup> while such an idea may be too sweeping, it would be useful for Congress to clarify the definition of “processes” underlying such patents—especially given that the Supreme Court in 2008 broadened the definition previously adopted by the Federal Circuit,<sup>126</sup> thus limiting the ability to fight off PAE-backed challenges based on loose patent definitions.

Even if the president’s proposals could have been bolder, they are hardly inconsequential and would significantly ameliorate patent-troll-backed nuisance litigation. The White House deserves praise for its generally careful analysis and thoughtful proposed solutions to a complex but important problem. The protection of intellectual property is vital to American growth and innovation,<sup>127</sup> but patent-litigation abuse turns the goal of intellectual-property law on its head, *inhibiting* research and innovation by manipulating legal rules to extract income from those legitimately applying patented ideas to their products and services.

## Endnotes

- <sup>1</sup> See U.S. Const. art. I, sec. 8, cl. 8., “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”
- <sup>2</sup> See Sam Gustin, *Viewpoint: Obama’s ‘Patent Troll’ Reform: Why Everyone Should Care*, TIME (June 8, 2013), available at <http://business.time.com/2013/06/08/viewpoint-obamas-patent-troll-reform-why-everyone-should-care/>.
- <sup>3</sup> See Mike Masnick, *More Details Revealed On The Patent Lawyers Demanding \$1000 For Every Worker At Companies Using Scanners*, TECHDIRT BLOG (April 8, 2013, 3:53 PM), <http://www.techdirt.com/articles/20130408/02163322621/more-details-revealed-patent-lawyers-demanding-1000-every-worker-companies-using-scanners.shtml>; see also Tim Steller, *Local firm faces heat of patent enforcer*, ARIZ. DAILY STAR (February 17, 2013), available at [http://azstarnet.com/news/local/tim-steller-local-firm-faces-heat-of-patent-enforcer/article\\_456aaa3f-893e-5465-8e93-73c849415fad.html](http://azstarnet.com/news/local/tim-steller-local-firm-faces-heat-of-patent-enforcer/article_456aaa3f-893e-5465-8e93-73c849415fad.html).
- <sup>4</sup> See Brenda Sandburg, *You may not have a choice. Trolling for Dollars*, THE RECORDER (July 30, 2001), available at <http://www.phonetel.com/pdfs/LWTrolls.pdf>.
- <sup>5</sup> See PatentFreedom, *What Is an NPE?*, <https://www.patentfreedom.com/about-npes/background/> (last visited July 15, 2013).
- <sup>6</sup> See Colleen Chien, *Everything You Need to Know About Trolls (The Patent Kind)*, WIRED (June 26, 2013), available at <http://www.wired.com/opinion/2013/06/everything-you-need-to-know-about-trolls-the-patent-kind/>.
- <sup>7</sup> See Andy Greenberg, *Meet the Texas Lawyer Suing Hundreds of Companies For Using Basic Web Encryption*, FORBES (November 9, 2012), available at <http://www.forbes.com/sites/andygreenberg/2012/11/09/meet-the-texas-lawyer-suing-hundreds-of-companies-for-using-basic-web-encryption/>.
- <sup>8</sup> See Chien, *Patent Trolls by the Numbers*, PATENTLY-O BLOG (March 14, 2013), <http://www.patentlyo.com/patent/2013/03/chien-patent-trolls.html>.
- <sup>9</sup> See Tom Ewing & Robin Feldman, *The Giants Among Us*, 2012 STAN. TECH. L. REV. 1; see also Matt Rosoff, *Revealed: How Giant Patent Troll Intellectual Ventures Does Business*, BUSINESS INSIDER (Mar. 1, 2012), <http://www.businessinsider.com/revealed-how-giant-patent-troll-intellectual-ventures-does-business-2012-3>.
- <sup>10</sup> See Center for Legal Pol’y, Manhattan Inst., *Trial Lawyers, Inc.: A Report on the Lawsuit Industry in America 2003*, <http://www.triallawyersinc.com/>.
- <sup>11</sup> James Bessen & Michael J. Meurer, *The Direct Costs From NPE Disputes* (Bos. Univ. School of Law, Working Paper No. 12-34, revised June 28, 2012); but cf. Adam Mossoff, *The SHIELD Act: When Bad Economic Studies Make Bad Laws*, TRUTH ON THE MARKET BLOG (Mar. 15, 2013), <http://truthonthemarket.com/2013/03/15/the-shield-act-when-bad-studies-make-bad-laws/>.
- <sup>12</sup> Bessen et al., *The Private and Social Costs of Patent Trolls* (Bos. Univ. School of Law, Working Paper No. 11-45, 2011); see Catherine Tucker, *Patent Trolls and Technology Diffusion* (Mass. Inst. of Tech., Working Paper, 2011).
- <sup>13</sup> See Chien, *supra* note 8.
- <sup>14</sup> See Bessen & Meurer, *supra* note 11.
- <sup>15</sup> See Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. Legal Stud. 409 (2000).
- <sup>16</sup> See Charles Duhigg & Steve Lohr, *The Patent, Used as a Sword*, N.Y. TIMES (October 7, 2012), available at <http://www.nytimes.com/2012/10/08/technology/patent-wars-among-tech-giants-can-stifle-competition.html?pagewanted=all&r=0>.
- <sup>17</sup> See Gregory Ferenstein, *Mark Cuban’s Awesome Justification For Endowing a Chair To ‘Eliminate Stupid Patents,’* TECHCRUNCH BLOG (January 31, 2013), <http://techcrunch.com/2013/01/31/mark-cubans-awesome-justification-for-endowing-a-chair-for-eliminating-stupid-patents/>.
- <sup>18</sup> See Office of the Press Secretary, The White House, *Fact Sheet: White House Task Force on High-Tech Patent Issues* (June 4, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force-high-tech-patent-issues>.
- <sup>19</sup> See Masnick, *President Obama Admits That Patent Trolls Just Try To ‘Extort’ Money; Reform Needed*, TECHDIRT BLOG (February 14, 2013, 2:45 PM), <http://www.techdirt.com/articles/20130214/14351821988/president-obama-admits-that-patent-trolls-just-try-to-extort-money-reform-needed.shtml>.
- <sup>20</sup> See Chien, *supra* note 6.
- <sup>21</sup> Pub. L. No. 112-29, 125 Stat. 284 (2011).
- <sup>22</sup> See Adam Mossoff, *Patented Innovation and Patent Wars: Some Historical Perspective*, A SMARTER PLANET BLOG (Jan. 11, 2013, 8:00 AM), <http://asmarterplanet.com/blog/2013/01/patented-innovation-and-patent-wars-some-historical-perspective.html>.
- <sup>23</sup> Patent Act of 1790, Ch. 7, 1 Stat. 109-12 (1790); Patent Act of 1793, Ch. 11, 1 Stat. 318-23 (1793).
- <sup>24</sup> See U.S. Patent and Trademark Office, *Table of Annual U.S. Patent Activity Since 1790* (2013), [http://www.uspto.gov/web/offices/ac/ido/oeip/taf/h\\_counts.htm](http://www.uspto.gov/web/offices/ac/ido/oeip/taf/h_counts.htm).
- <sup>25</sup> See Mossoff, *supra* note 22.
- <sup>26</sup> See Gerard N. Magliocca, *Blackberries and Barnyards: Patent Trolls and the Perils of Innovation*, 82 NOTRE DAME L. REV. 1809 (2007).
- <sup>27</sup> See Kris Frieswick, *The Real Toll of Patent Trolls*, INC. MAGAZINE (Dec. 13, 2012), available at <http://www.inc.com/magazine/201202/kris-frieswick/patent-troll-toll-on-businesses.html>.
- <sup>28</sup> *Id.* at 1.
- <sup>29</sup> *Id.* at 2.
- <sup>30</sup> See Daniel Nazer, *EFF Politely Asks PTO to Stop Issuing So Many Crappy Software Patents*, EFF BLOG (Apr. 16, 2013), <https://www.eff.org/deeplinks/2013/04/eff-politely-asks-pt0-stop-issuing-so-many-crappy-software-patents>.
- <sup>31</sup> See Rob Goodier, *Patent Trolls: How Bad is the Problem?*, POPULAR MECHANICS BLOG (October 25, 2011, 4:00 PM), <http://www.popularmechanics.com/technology/gadgets/news/patent-trolls-how-bad-is-the-problem>; see also Masnick, *Patent Office Back to Approving Pretty Much Anything*, TECHDIRT BLOG (Aug. 20, 2010, 7:49 AM), <http://www.techdirt.com/articles/20100819/12015210689.shtml>; see also Eric Goldman, *The Problems With Software Patents* (Part 1 of 3), FORBES (Nov. 28, 2012), available at <http://www.forbes.com/sites/ericgoldman/2012/11/28/the-problems-with-software-patents/>.
- <sup>32</sup> See Frieswick, *supra* note 27; Don Reisinger, *Landmark lawsuits under way over who owns the Interactive Web*, CNET BLOG (Feb. 9, 2012, 7:29 AM), [http://news.cnet.com/8301-13506\\_3-57373801-17/landmark-](http://news.cnet.com/8301-13506_3-57373801-17/landmark-)

- lawsuits-under-way-over-who-owns-the-interactive-web/; see also Julie Samuels, *Why the Patent System Doesn't Play Well with Software: If Eolas Went the Other Way*, EFF BLOG (Feb. 15, 2012), <https://www.eff.org/deeplinks/2012/02/why-patent-system-doesnt-play>.
- <sup>33</sup> See Paul Festa, *Eolas files motion to enjoin IE*, CNET BLOG (Oct. 8, 2003, 11:29 AM), [http://news.cnet.com/2100-1028\\_3-5088349.html](http://news.cnet.com/2100-1028_3-5088349.html).
- <sup>34</sup> See Festa, *Microsoft appeals Eolas decision*, CNET BLOG (June 8, 2004, 12:34 PM), <http://news.cnet.com/2100-1032-5228882.html>.
- <sup>35</sup> See Frieswick, *supra* note 27.
- <sup>36</sup> See Nick Eaton, *After beating Microsoft, Eolas sues everyone else*, SEATTLEPI BLOG (Oct. 6, 2009, 12:26 PM), <http://blog.seattlepi.com/microsoft/2009/10/06/after-beating-microsoft-eolas-sues-everyone-else/>.
- <sup>37</sup> See *Eolas Technologies, Inc. v. Adobe Systems Inc.*, et al., 810 F. Supp. 2d 795 (E.D. Tex. 2012).
- <sup>38</sup> Niro, Haller & Niro, Ltd., Raymond P. Niro, <http://www.niroscavone.com/document.php?id=67> (last visited July 16, 2013). Note, the only assertion made by both the sidebar title "The Original King of the Patent Trolls" and the introduction of Raymond Niro as the "founder and chieftain of Trial Lawyers, Inc.'s patent-troll division," is that Raymond Niro is the leading figure within the scope of this current Trial Lawyers, Inc. edition focused on patent trolls. This characterization of Raymond Niro is specific to the format and purpose of the Trial Lawyers, Inc. series and is based on the research cited.
- <sup>39</sup> See *id.*
- <sup>40</sup> See Lisa Lerer, *Meet the Original Patent Troll*, IP LAW & BUSINESS (July 20, 2006), available at <http://www.trollbuster.com/OtherFiles/Library/FirstPatentTroll.pdf>.
- <sup>41</sup> *Id.* Erich Spangenberg was recently featured in the New York Times for his successes in "turn[ing] idle patents into cash cows" which have resulted in personal wealth accumulation comparable to, if not greater than, that of the original patent-troll mogul Raymond Niro. Spangenberg earns about \$25 million a year and until recently lived in a 14,000-square-foot home in Dallas which is now on the market for \$19.5 million. He often flies on a company jet, and at one point he owned 16 cars, six of them Lamborghinis. David Segal, *Has Patent, Will Sue: An Alert to Corporate America*, N.Y. TIMES (July 13, 2013), available at <http://www.nytimes.com/2013/07/14/business/has-patent-will-sue-an-alert-to-corporate-america.html?ref=business&r=0>.
- <sup>42</sup> See Lerer, *supra* note 40.
- <sup>43</sup> *Id.*
- <sup>44</sup> *Id.*
- <sup>45</sup> *Id.*
- <sup>46</sup> *Id.*
- <sup>47</sup> *Id.*
- <sup>48</sup> *Id.*
- <sup>49</sup> *Id.*
- <sup>50</sup> Gregory Thomas, *Innovatio's Infringement Suit Rampage Expands To Corporate Hotels*, PATENT EXAMINER BLOG (Sept. 30, 2011), <http://patentexaminer.org/2011/09/innovatios-infringement-suit-rampage-expands-to-corporate-hotels/>.
- <sup>51</sup> Matt Rizzolo, *Catching up on...Innovatio IP Ventures, LLC's Litigation Activities*, THE ESSENTIAL PATENT BLOG (January 3, 2013), <http://essentialpatentblog.com/2013/01/catching-up-on-innovation-ip-ventures-llcs-litigation-activities/>.
- <sup>52</sup> *Id.*
- <sup>53</sup> *Id.*
- <sup>54</sup> Joe Mullin, *Patent trolls and their foes square off at the FTC*, ARSTECHNICA BLOG (Dec. 11, 2012, 10:11 AM), <http://arstechnica.com/tech-policy/2012/12/patent-trolls-and-those-who-hate-them-square-off-at-the-ftc/>.
- <sup>55</sup> See *In re Innovatio IP Ventures, LLC Patent Litigation*, Case No. 1:11-cv-09308 (N.D. Ill. Feb. 4, 2013).
- <sup>56</sup> See Mullin, *Wi-Fi patent troll hit with racketeering suit emerges unscathed*, ARSTECHNICA BLOG (February 13, 2013, 10:05 AM), <http://arstechnica.com/tech-policy/2013/02/wi-fi-patent-troll-hit-with-novel-anti-racketeering-charges-emerges-unscathed/>; Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended at 18 U.S.C. §§ 1961-68 (2006)).
- <sup>57</sup> See Chien, *supra* note 6.
- <sup>58</sup> See Chien, *Colleen Chien on Patent Assertion Entities*, ANTITRUST & COMPETITION POLICY BLOG (April 8, 2013), [http://lawprofessors.typepad.com/antitrustprof\\_blog/2013/04/colleen-chien-on-patent-assertion-entities.html](http://lawprofessors.typepad.com/antitrustprof_blog/2013/04/colleen-chien-on-patent-assertion-entities.html).
- <sup>59</sup> See Chien, *supra* note 6.
- <sup>60</sup> See Marie Gryphon, *Greater Justice, Lower Cost: How a "Loser Pays" Rule Would Improve the American Legal System*, Civ. Justice Rep. No. 11, 5 (Manhattan Inst. for Pol'y Res., Dec. 11, 2008), available at [http://www.manhattan-institute.org/html/cjr\\_11.htm](http://www.manhattan-institute.org/html/cjr_11.htm) ("nuisance lawsuits characterized by modest stakes and little legal merit; they are filed for the sole purpose of inducing a defendant to settle them in order to avoid the expense of going to trial.").
- <sup>61</sup> See *id.* at 3.
- <sup>62</sup> See Jim Kerstetter, *How much is that patent lawsuit going to cost you?*, CNET BLOG (Apr. 5, 2012, 10:00 AM), [http://news.cnet.com/8301-32973\\_3-57409792-296/how-much-is-that-patent-lawsuit-going-to-cost-you/](http://news.cnet.com/8301-32973_3-57409792-296/how-much-is-that-patent-lawsuit-going-to-cost-you/) (citing Am. Intell. Prop. L. Ass'n, 2011 Report of the Economic Survey 29 (2011)).
- <sup>63</sup> See *id.*; Unlike small businesses, large non-end-user defendants, like Microsoft or eBay, have a strong incentive to litigate patent claims. Even if their litigation costs exceed available settlement values for any individual claim, as repeat players in the litigation game, these defendants have an incentive to take a strong line in settlement negotiations to deter future litigation, see Gryphon, *supra* note 60, at 3.
- <sup>64</sup> See Chien, *supra* note 8.
- <sup>65</sup> See *id.*
- <sup>66</sup> See *id.*
- <sup>67</sup> See John R. Allison, Mark A. Lemley, & Joshua Walker, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 Georgetown L.J. 677, 698 (2011) (86 percent of nonsoftware-patent-owners settle before trial).
- <sup>68</sup> See *id.* at 708. ("Something similar can be said about suits brought by NPEs. NPE suits, like software suits, constitute a large percentage of the most-litigated cases; they represent 730 of the 1134 cases in our combined data set, or 64.3%. If we consider just patent-owner wins and defendant wins on the merits, product owners win 40% of their cases across both the most-litigated and once-litigated data sets, while NPEs win only 8%. If we include default judgments, product-producing companies win 50% of their cases, whereas NPEs win only 9.2%.").
- <sup>69</sup> See Mullin, *Patent trolls want \$1,000—for using scanners*, ARSTECHNICA BLOG (Jan. 2, 2013, 9:30 AM), <http://arstechnica.com/tech-policy/2013/01/patent-trolls-want-1000-for-using-scanners/2/>.
- <sup>70</sup> Mullin, *Meet the nice-guy lawyers who want \$1,000 per worker for using scanners*, ARSTECHNICA BLOG (Apr. 7, 2013, 9:00 PM), <http://arstechnica.com/tech-policy/2013/04/meet-the-nice-guy-lawyers-who-want-1000-per-worker-for-using-scanners/>.

- com/tech-policy/2013/04/meet-the-nice-guy-lawyers-who-want-1000-per-worker-for-using-scanners/; see also Masnick, *supra* note 3.
- <sup>71</sup> See Mullin, *supra* note 70.
- <sup>72</sup> See Mullin, *At long last, Ricoh and Xerox hit back at scanner trolls*, ARSTECHNICA BLOG (May 24, 2013, 1:15 PM), <http://arstechnica.com/tech-policy/2013/05/at-long-last-ricoh-and-xerox-hits-back-at-scanner-trolls/>.
- <sup>73</sup> Complaint, State of Vermont v. MPHJ Technology Investments, Civil Action No. 2:13-cv-00170-wks (Vt. Super., 2013), <http://www.atg.state.vt.us/assets/files/Vermont%20v%20MPHJ%20Technologies%20Complaint.pdf>.
- <sup>74</sup> See Mullin, *supra* note 70.
- <sup>75</sup> *Id.* Note, there is no allegation that Rust himself was involved in any such scheme; he was the lawyer for the accused entities.
- <sup>76</sup> *Id.*
- <sup>77</sup> See Complaint, *supra* note 73.
- <sup>78</sup> Press Release, Ricoh Americas Corp. & Xerox Corp., Ricoh and Xerox File Action with U.S. Patent and Trademark Office To Combat Patent-Licensing Demands Against Their Customers (May 23, 2013), [http://www.ricoh-usa.com/about/docs/pdf/2013/05/Ricoh%20and%20Xerox%20Press%20Release\\_FINAL.pdf](http://www.ricoh-usa.com/about/docs/pdf/2013/05/Ricoh%20and%20Xerox%20Press%20Release_FINAL.pdf).
- <sup>79</sup> See Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q.J. 401, 403 (2010).
- <sup>80</sup> See Dennis Crouch, *Federal Circuit Upholds Strong Domestic Industry Requirement for USITC Patent Litigation*, PATENTLY-O BLOG (Oct. 5, 2011), <http://www.patentlyo.com/patent/itc/>.
- <sup>81</sup> William Diaz & Lincoln Mayer, *United States: U.S. International Trade Commission Grants Injunctive Relief on Standard Essential Patent*, MCDERMOTT WILL & EMERY (June 27, 2013), [http://www.mondaq.com/unitedstates/x/247424/Trade+Regulation+Practices/US+International+Trade+Commission+Grants+Injunctive+Relief+On+Standard+Essential+Patent; U.S. Patent No. 7,706,348 \(filed July 6, 2000\)](http://www.mondaq.com/unitedstates/x/247424/Trade+Regulation+Practices/US+International+Trade+Commission+Grants+Injunctive+Relief+On+Standard+Essential+Patent; U.S. Patent No. 7,706,348 (filed July 6, 2000)).
- <sup>82</sup> Florian Mueller, *ITC bans importation of older iPhones and iPads into the U.S. over 3G-essential Samsung patent*, FOSS PATENTS (June 4, 2013, 11:09 PM), <http://www.fosspatents.com/2013/06/itc-bans-importation-of-older-iphones.html>.
- <sup>83</sup> See Jon Gold, *Analyst says iPhone 4's U.S. sales injunction could cost Apple billions*, NETWORKWORLD BLOG (June 5, 2013), <http://www.networkworld.com/news/2013/060513-apple-iphone4s-injunction-270508.html>.
- <sup>84</sup> See 19 U.S.C. Sec. 1337 (b) (2010).
- <sup>85</sup> 547 U.S. 388 (2006).
- <sup>86</sup> See *id.* at 394 (“Because we conclude that neither court below correctly applied the traditional four-factor framework that governs the award of injunctive relief, we vacate the judgment of the Court of Appeals, so that the District Court may apply that framework in the first instance. In doing so, we take no position on whether permanent injunctive relief should or should not issue in this particular case, or indeed in any number of other disputes arising under the Patent Act. We hold only that the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards.”).
- <sup>87</sup> See Chien and Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 CORNELL L. REV. 1, 3 (2012), <http://blogs.law.stanford.edu/pis2012/files/2012/05/Chien-Lemley-Patent-Holdup-the-ITC-and-the-Public-Interest.pdf>.
- <sup>88</sup> See John C. Paul and Brian D. Kacedon, *Patent Owners Can More Easily Enjoin Infringers by Using the ITC Rather Than Federal District Courts*, LES INSIGHTS (Feb. 28, 2011), <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=559b40f8-ecd3-46cf-9c8c-7f5e3d7d61cc>.
- <sup>89</sup> See Chien & Lemley, *supra* note 87, at 3-4.
- <sup>90</sup> *Id.* at 20 (“In the years following eBay, the number of ITC investigations brought by NPEs has grown from 2 in 2006 to 16 in 2011 and the number of total respondents named in NPE cases has grown from 4 to 235.”)
- <sup>91</sup> See *id.* at 4, n.11 & n.12. (citing *In re Computer Products, Computer Components and Products Containing Same*, USITC Pub.4183, Inv. No. 337 TA 628 (September 2010), available at 2009 ITC LEXIS 2440 (computers); Certain Flat Panel Digital Televisions and Components Thereof; Notice of Investigation, 75 Fed. Reg. 51286 (Aug. 19, 2010) (flat screens); *In re Certain GPS Chips, Associated Software and Systems, and Products Containing Same*, USITC Pub. 4133, Inv. No. 337 TA 596 (March 2010), available at 2010 ITC LEXIS 582 (GPS devices); *In re Certain Inkjet Ink Supplies and Components Thereof*, Order No. 14, Inv. No. 337 TA 730 (Aug. 3, 2011), available at 2011 ITC LEXIS 1702 (printers)).
- <sup>92</sup> See, e.g. Chien, *Patently Protectionist? An Empirical Analysis of Patent Cases at the International Trade Commission*, 50 WM. & MARY L. REV. 63, 68 (2008); Robert W. Hahn & Hal J. Singer, *Assessing Bias in Patent Infringement Cases: A Review of International Trade Commission Decisions*, 21 HARV. J.L. & TECH. 457 (2008); Sapna Kumar, *The Other Patent Agency: Congressional Regulation of the ITC*, 61 FLA. L. REV. 529 (2009); Thomas A. Broughan, III, *Modernizing § 337's Domestic Industry Requirement for the Global Economy*, 19 FED. CIR. B.J. 75, 78 79 (2009); Taras M. Czebiniak, *When Congress Gives Two Hats, Which Do You Wear? Choosing Between Domestic Industry Protection and IP Enforcement in § 337 Investigations*, 26 BERKELEY TECH. L.J. 93 (2011).
- <sup>93</sup> FTC, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* 239 (2011), available at <http://www.ftc.gov/os/2011/03/110307patentreport.pdf>.
- <sup>94</sup> See Office of the Press Secretary, *supra* note 18, at Legislative Recommendation no.5.
- <sup>95</sup> See Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. TIMES (Sept. 24, 2006), [http://www.nytimes.com/2006/09/24/business/24ward.html?\\_r=2&oref=slogin&ref=technology&pagewanted=all](http://www.nytimes.com/2006/09/24/business/24ward.html?_r=2&oref=slogin&ref=technology&pagewanted=all).
- <sup>96</sup> See *id.*
- <sup>97</sup> See *id.*
- <sup>98</sup> See *id.*; James Pistorino, *Eastern District of Texas Most Popular for Plaintiffs (Again) But 11 Percent Fewer Defendants Named Nationwide*, PERKINS COIE (2013), [http://www.perkinscoie.com/files/upload/LIT\\_13\\_02Pistorino\\_2012Article.pdf](http://www.perkinscoie.com/files/upload/LIT_13_02Pistorino_2012Article.pdf).
- <sup>99</sup> See Pistorino, *supra* note 98, Table 2 at 3.
- <sup>100</sup> See *id.*, Table 3 at 4.
- <sup>101</sup> Robin Y. Richardson, *East Texas Federal Judge, magistrate leave posts*, NEWS-JOURNAL (Oct. 10, 2011), available at [http://www.news-journal.com/news/local/east-texas-federal-judge-magistrate-leave-posts/article\\_0bbbcdd1-2616-56cc-82bb-e5fba0475850.html](http://www.news-journal.com/news/local/east-texas-federal-judge-magistrate-leave-posts/article_0bbbcdd1-2616-56cc-82bb-e5fba0475850.html).
- <sup>102</sup> Ward & Smith Law Firm, <http://www.wsfirm.com/> (last visited July 15, 2013). The ethics rules of the Eastern District of Texas predate Judge Ward's tenure and were established independently. Therefore, those rules do not relate in any way to the rules of procedure dubbed “The Rules” adopted by Judge Ward and his practice of law in the Eastern

District of Texas post-retirement complied with those independent and pre-existing ethics rules.

<sup>103</sup> See Maria Chutchian, *Texas IP Firm Ward & Smith Launches New Tyler Office*, LAW360 BLOG (Jan. 11, 2012), <http://www.law360.com/articles/299380/texas-ip-firm-ward-smith-launches-new-tyler-office>.

<sup>104</sup> See Andrew Goldberg, *Straight Outta Marshall: Local Lawyer Gilstrap Tapped to Replace Ward*, THE PRIOR ART BLOG (June 3, 2011), [http://thepriorart.typepad.com/the\\_prior\\_art/2011/06/gilstrapnomination.html](http://thepriorart.typepad.com/the_prior_art/2011/06/gilstrapnomination.html).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*; Goldberg, *Johnny Ward and Eric Albritton on Troll Tracker blog: "Let's get this shut down,"* THE PRIOR ART BLOG (Sept. 18, 2009), [http://thepriorart.typepad.com/the\\_prior\\_art/2009/09/johnny-ward-and-eric-albritton-on-troll-tracker-blog-lets-get-this-shut-down.html](http://thepriorart.typepad.com/the_prior_art/2009/09/johnny-ward-and-eric-albritton-on-troll-tracker-blog-lets-get-this-shut-down.html).

<sup>107</sup> See Leahy-Smith America Invents Act of 2011, *supra* note 21.

<sup>108</sup> Among the significant changes brought about in this legislation was moving the granting of patents from a "first to invent" system to a "first inventor to file," a shift that proponents claimed would align U.S. patent law with foreign jurisdictions and simplify challenges to patent legitimacy and that opponents asserted would favor large incumbent firms over start-ups, since the former are more likely to have staff and attorneys best capable of navigating the patent application process. See George Rondeau, *"America Invents Act" patent law overhaul: the benefits and the drawbacks*, DAVIS WRIGHT TREMAINE LLP (Nov. 17, 2011), <http://www.lexology.com/library/detail.aspx?g=5f772592-7ac2-41bc-beeb-d3ff5c8ed192>. A full assessment of the America Invents Act and its pluses and minuses is beyond the scope of this paper.

<sup>109</sup> Quinn Emanuel Urquhart & Sullivan, LLP, *Multi-Defendant Joinder Under the America Invents Act: Much Ado About Nothing?*, JD SUPRA LAW NEWS (Dec. 20, 2012), <http://www.jdsupra.com/legalnews/multi-defendant-joinder-under-the-america-97136/>.

<sup>110</sup> See *MyMail, Ltd. v. AOL, Inc.*, 223 F.R.D. 455 (E.D. Tex. 2004); 157 Cong. Rec. S5429 (daily ed. Sept. 8, 2011) (statement of Sen. Kyl) (noting that Section 299 "effectively codifies current law as it has been applied everywhere outside of the Eastern District of Texas").

<sup>111</sup> See Chien, *supra* note 8, at sections 3 & 4.

<sup>112</sup> See Pistorino, *supra* note 98, at 4.

<sup>113</sup> See Chien, *supra* note 8, at section 4.

<sup>114</sup> H.R. 845, 113th Cong. (2013), available at <http://www.gpo.gov/fdsys/pkg/BILLS-113hr845ih/pdf/BILLS-113hr845ih.pdf>.

<sup>115</sup> See *id.*, at sec. 258A(d).

<sup>116</sup> See *id.* at secs. 258A(b) & (c).

<sup>117</sup> The White House, Executive Office of the President, *Patent Assertion and U.S. Innovation* (2013), available at [http://www.whitehouse.gov/sites/default/files/docs/patent\\_report.pdf](http://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf).

<sup>118</sup> See Office of the Press Secretary, *supra* note 18.

<sup>119</sup> See *id.*

<sup>120</sup> See Vivek Wadhwa, *Why Silicon Valley likes Obama's patent troll offensive*, WASH. POST (June 18, 2013), available at <http://www.washingtonpost.com/blogs/innovations/wp/2013/06/18/why-silicon-valley-likes-obamas-patent-troll-offensive/>.

<sup>121</sup> See Richard A. Epstein, *Trolling for "Patent Trolls,"* DEFINING IDEAS (June 11, 2013), <http://www.hoover.org/publications/defining-ideas/article/149096>.

<sup>122</sup> See The White House, *supra* note 117 (citing Lemley, *Are Universities Patent Trolls*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 611 (2008)).

<sup>123</sup> The Lawsuit Abuse Reduction Act of 2011: Hearing on H.R. 966 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 112th Congress 4-5 (2011) (statement of Victor E. Schwartz, Partner, Shook Hardy & Bacon, LLP).

<sup>124</sup> See Gryphon, *supra* note 60.

<sup>125</sup> See Ferenstein, *supra* note 17; see also Timothy B. Lee, *The Supreme Court Should Invalidate Software Patents*, FORBES (July 28, 2011), available at <http://www.forbes.com/sites/timothylee/2011/07/28/the-supreme-court-should-invalidate-software-patents/>; Steven Blum, *U.S. Judge Who Ruled Against Apple Wants to Eliminate Software Patents*, ANDROIDPIT BLOG (July 6, 2012), <http://www.androidpit.com/apple-patents-motorola>.

<sup>126</sup> See *Bilski v. Kappos*, 130 S. Ct. 3218 (2010).

<sup>127</sup> U.S. Dep't of Commerce, *Intellectual Property and the U.S. Economy: Industries in Focus vii* (2012), available at [http://www.uspto.gov/news/publications/IP\\_Report\\_March\\_2012.pdf](http://www.uspto.gov/news/publications/IP_Report_March_2012.pdf) (asserting that IP is linked to almost 28% of the entire U.S. workforce).



**Project Director**  
James R. Copland

**Editorial Director**  
Matthew Hennessey

**Project Manager**  
Isaac Gorodetski

**Research Interns**  
Vinny Sidhu  
Colin Hedrick

**Production Designer**  
Elaine Ren

**Original Artwork**  
Roman Genn  
[www.rgenn.com](http://www.rgenn.com)

[www.TrialLawyersInc.com](http://www.TrialLawyersInc.com)