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An Insight into the Apparel Industry's Patent Troll Problem

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An Insight into the Apparel Industry’s Patent Troll Problem

by ASHLI WEISS*

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Introduction

The folks that you're talking about [patent trolls] are a classic example [of the problems facing the U.S. patent system]; they don't actually produce anything themselves. They're just trying to essentially leverage and hijack somebody else's idea and see if they can extort some money out of them... [O]ur efforts at patent reform only went about halfway to where we need to go and what we need to do is pull together additional stakeholders and see if we can build some additional consensus on smarter patent laws.

—Barack Obama, President of the United States¹

Patent trolls, also known as non-practicing entities or patent assertion entities, have had a terribly destructive effect on the American economy. Alleged infringers paid patent trolls \$29 billion in 2011, and troll activity between 2007 and 2011 is estimated to have resulted in \$300 billion of lost wealth.² In an attempt to mitigate the damaging effects of patent trolls, the U.S. House of Representatives passed the Innovation Act on December 5, 2013. The bill was designed to counteract troll activity by increasing patent ownership transparency, heightening pleading requirements, and introducing defendant-friendly fee-shifting and joinder provisions.³ The bill followed the introduction of seven other pieces of legislation, demands by the Obama administration, and a national anti-troll advertising campaign highlighting the problems associated with patent trolls.⁴

Of the many examples of patent troll litigation, troll suits targeting apparel companies provide a useful illustration of how

1. Patent Assertion and U.S. Innovation, Executive Office of the President (June 2013), available at http://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf (hereinafter *Patent Assertion and U.S. Innovation Executive Memo*) (President Obama held a Google Hangout where he took questions from the public for an hour. Toward the end, an entrepreneur spoke and noted that patent trolls frequently sue her peers. This quote was taken from President Obama's response.).

2. *Id.* at 9-10.

3. H.R. 3309, 113th Cong. (2013).

4. See Electronic Frontier Foundation, *Current Legislative Proposals for Patent Reform* <https://www EFF.org/issues/current-legislative-proposals-patent-reform> (Briefing all legislative, executive and state actions addressing the patent troll problem) (last updated Dec. 9, 2013); Patent Assertion and U.S. Innovation Executive Memo, *supra* note 1; Laura Sydel, *Taking the Battles Against Patent Trolls to the Public*, All Tech Considered (Aug. 30, 2013, 5:21 PM), <http://www.npr.org/blogs/alltechconsidered/2013/08/30/217272814/taking-the-battle-against-patent-trolls-to-the-public> (discussing the Nation Retail Federation's campaign against patent trolls).

patent trolling affects end users. Because the apparel industry has long clung to a legacy business model, only in recent years adopting new and innovative modern technologies, it might not seem like natural target of patent trolls.⁵

Furthermore, rather than developing technologies such as online shopping carts or the attachment of PDF receipts to emails in-house, apparel companies tend to utilize such technologies as end users by purchasing them from other vendors.⁶ A casual observer might conclude that apparel companies' reliance on outside companies' technology would not make them particularly appealing targets for patent litigation. After all, apparel is primarily a creative industry that focuses on the aesthetics of fashion and not on technological innovation.

However, patent trolls have increasingly targeted the end users of patent-encumbered technology, and in turn have frequently targeted companies in the apparel industry.⁷ The unfortunate reality is that the apparel industry provides an appealing and vulnerable target for troll litigation. Apparel is a multibillion dollar industry, and the fact that companies in the apparel industry primarily utilize other companies' cutting-edge technology contributes to the decision to settle litigation rather than challenge asserted patents in court—generally, it is much cheaper to settle and pay a license than to go to court.⁸ Given apparel companies' deep pockets and tendency toward settlement, then, it is unsurprising that patent trolls find them tempting targets. As this article will illustrate in detail, patent trolls have filed many suits against apparel companies. The problems patent troll suits pose to apparel companies provide a useful example of the predicament faced by a variety of similarly situated, nontechnology-oriented companies targeted by troll litigation.

The threat of continued troll litigation has led retail industries like apparel to turn to Congress in search of a solution to the patent

5. See generally Mathew Carroll, *Three Future Waves of Innovation in E-Commerce for Fashion & Apparel*, FORBES (Nov. 1, 2011), <http://www.forbes.com/sites/matthew-carroll/2011/11/01/3-future-waves-of-innovation-in-e-commerce-for-fashion-apparel-quora/>.

6. See Laura Sydell, *Taking the Battle Against Patent Trolls to the Public*, NATIONAL RETAIL FEDERATION (Aug. 30, 2013), <http://www.npr.org/blogs/alltechconsidered/2013/08/30/217272814/taking-the-battle-against-patent-trolls-to-the-public>.

7. See Press Release, The White House, Office of the Press Secretary, FACT SHEET: White House Task Force on High-Tech Patent Issues (Jun. 4, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force-high-tech-patent-issues>.

8. See Sydell, *supra* note 6.

troll problem.⁹ A bill that addresses the patent troll issue facing apparel requires insightful solutions, which this article aims to provide by detailing key elements to be included in proposed legislation. It begins by discussing the history of technology and apparel, and where this relationship stands today. The article then explains the reasoning behind patent trolls' targeting of apparel, and provides several recent cases as examples. Lastly, the final section analyzes the Innovation Act H.R. 3309, which appears to be the bill that Congress is most likely to choose as its answer to the patent troll problem. This final section recommends amendments to the Innovation Act that address the specific problems troll suits create for the apparel industry.

Part I: The Perfect Target

A choice target for patent trolls is a company with a combination of certain desirable economic and structural characteristics. These characteristics include the widespread adoption of new technologies and the use of these technologies as an end user.¹⁰ As apparel companies have grown and changed over the past century they have developed many of these characteristics.

A. The Rise of Technology in Apparel

The integration of technology into the apparel business model has been gradual, a process greatly influenced by the history of the industry itself.¹¹ America's apparel industry first emerged in the 19th Century.¹² At the time, tailors had personal relationships with their customers and would craft garments to fit each of them individually.¹³ Over time, tailors recognized that the shaping, fitting and assembly of garments involved steps that did not vary from one customer to the next, and developed a mathematical sizing system to accommodate most people with very few patterns.¹⁴ Beginning in the 20th Century, tailors began to develop these patterns into comprehensive paper "information systems" which enabled the exact reproductions needed

9. See Stephen Schatz, *Retailers Urge Action To Combat Patent Troll Demand Letters*, NATIONAL RETAIL FEDERATION (Nov. 7, 2013), http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=1690.

10. See *infra* Section I.D.

11. See Carroll, *supra* note 5.

12. See *Short History of Ready-Made Clothing*, National Institute of Standards & Technology (Oct. 8, 2004), <http://museum.nist.gov/exhibits/apparel/history.htm>.

13. *Id.*

14. *Short History of Ready-Made Clothing*, National Institute of Standards & Technology (Oct. 8, 2004), <http://museum.nist.gov/exhibits/apparel/history.htm>.

for the cutting and stitching of clothing in mass production systems.¹⁵ It was thus with the rise of the mass production of clothing that the apparel industry began to integrate more advanced technological tools into their traditional, old-fashioned business model.¹⁶

The apparel industry experienced a technological boom in the mid-1990s as companies began to modernize their operations.¹⁷ The business side of apparel eagerly integrated new technologies into its brick-and-mortar locations, enabling the printing of receipts at cash registers, the sale of gift cards, and the use of networked devices like computers and printers.¹⁸ However, the apparel industry was slow to develop a significant Internet presence, and it was not until 2005 that companies began to experience large scale growth online.¹⁹ Nonetheless, today nearly every apparel company has an Internet presence. Modern technology, especially the internet, has upended the apparel industry's business model and led to extensive structural changes.²⁰

B. The Apparel Industry and Technology Today

In the apparel industry today, companies that wish to survive and compete have found it necessary to aggressively adopt modern technologies.²¹ Customers familiar with the benefits of modern technology expect a higher level of service and convenience. As market leaders have adapted and changed, free market pressures have pushed other apparel companies to follow suit.

It was only a few years ago that apparel companies advertised exclusively through traditional mediums like print and television.²²

15. *Short History of Ready-Made Clothing*, National Institute of Standards & Technology (Oct. 8, 2004), <http://museum.nist.gov/exhibits/apparel/history.htm>.

16. *Id.*

17. See generally JAMES E. DION, THE EFFECTS OF POS IMPLEMENTATION AND RETAIL TECHNOLOGY ON SALES AND PROFITABILITY FOR SMALL TO MED SIZED RETAILERS, TRICITY RETAIL 1-2 (2003), available at http://www.tricityretail.com/brochures/wp_posimplementation.pdf.

18. *Id.*

19. See James B. Stewart, *Internet Big Four: Worth a Look as Growth Stocks*, WALL ST J. (May 4, 2005), <http://online.wsj.com/news/articles/SB111516197645623835>.

20. See generally UCHE OKONKWO, LUXURY ONLINE: STYLE, SYSTEMS, STRATEGIES (2010).

21. See Plunkett Research, Ltd., *Introduction to the Retail Industry*, <http://www.plunkettresearch.com/retailing-stores-market-research/industry-and-business-data> (last visited Apr. 10, 2014).

22. John S. Major & Valerie Steele, *Fashion Industry: Media and Marketing*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/1706624/fashion-industry/296479/Media-and-marketing> (last visited Apr. 10, 2014).

Today, the world of apparel advertising has grown beyond traditional media and expanded into the online realm, a natural transition given the highly visual worlds of both fashion and the internet.²³ A competitive apparel company today must engage with consumers online, over social networks, and through customers' mobile phones. These technological outlets are more targeted and efficient, and allow companies to gather and utilize various types of information about their customers in order to guide the design of their product lines.

As a result, technology has transformed the role of the designer in shaping trends. Rather than relying upon a designer's intuition of people's desires, retailers can now collect customer data and analyze it to anticipate the styles and items that people will want to buy. Indeed, this kind of data processing has become such a powerful tool that retailers can correctly predict a customer's purchasing needs before they even know that they want a particular item. In a recent example of the predictive power of retail data processing, Target sent customized advertisements to a customer for pregnancy-related products before she even knew she was pregnant, a prescience enabled by superior data processing.²⁴ The apparel industry has begun processing customer data in similar ways.²⁵ Data processing has proven itself to be a useful tool, changing the way brands interact with customers, the way retailers identify and capitalize on emerging trends, and even the way retailers manage their supply chains.²⁶

Although some of this data is obtained through brick-and-mortar stores, apparel companies collect much of it through e-commerce, which has become a vital sales platform for the industry. E-commerce offers companies the advantages of lower operational costs, twenty-four-hour and seven-days-a-week sales windows, and greater customer reach made possible by virtual storefronts accessible

23. Major, et al., *supra* note 22.

24. See Kashmir Hill, *How Target Figured Out a Teen Girl Was Pregnant Before her Father Did*, FORBES (Feb. 16, 2012), <http://www.forbes.com/sites/kashmirhill/2012/02/16/how-target-figured-out-a-teen-girl-was-pregnant-before-her-father-did/> (explaining how every time a consumer goes shopping, intimate details about their consumption patterns are being recorded and used by the retailer).

25. See Jeffrey Edward Axline & Brian Joseph Lebl, *Leveraging Downstream Data in the Footwear/Apparel Industry* at 11 (May 11, 2007) (unpublished M. Eng. thesis, Massachusetts Institute of Technology).

26. See Jessica Binns, *Top Apparel Companies Transform Their Processes With Business Intelligence*, APPAREL, Oct. 2013, available at <http://apparel.edgl.com/case-studies/Top-Apparel-Companies-Transform-Their-Processes-with-Business-Intelligence> 88796.

from anywhere.²⁷ In 2012, e-commerce apparel sales grew almost four times faster than brick-and-mortar retail sales.²⁸ This growth is predicted to continue. In a recent article, eight CEOs from top retail companies listed “investing big in online shopping” as one of their top three goals.²⁹ Experts forecast that U.S. online retail sales will grow from \$231 billion in 2012 to \$370 billion in 2017, representing 10% of total U.S. retail sales in 2017.³⁰ In addition, apparel companies increasingly have begun to emphasize mobile commerce, or transactions made on smartphones and tablets.³¹ Although sales on mobile devices are a relatively newer development, experts predict that mobile sales are set to increase dramatically in the coming years.³² In 2012 mobile commerce accounted for 11% of U.S. e-commerce retail sales, but by 2016 is expected to account for a full quarter of U.S. e-commerce retail sales.³³ Technology has already fundamentally reshaped the way apparel companies do business, and the evidence thus far suggests that the deep integration of modern technology and modes of business into the apparel industry is far more than a passing trend.

C. The Patent Troll Business Model

The patent troll business model focuses solely on the acquisition and assertion of patents. Trolls scour the legal landscape for vaguely worded, broadly defined patents, often buying them from bankrupt companies or small inventors.³⁴ They commonly act through shell

27. LOIS F. HERZECA & HOWARD S. HOGAN, *FASHION LAW AND BUSINESS: BRANDS AND RETAILERS* 505 (2013).

28. *Id.* (citing Carmela Aquino, *2013 U.S. Digital Future in Focus Series*, COMSCORE, INC. (Aug. 22, 2013), http://www.comscore.com/insights/blog/2013_digital_future_in_focus_series).

29. Barbara Thau, *Eight Retail CEOs (Including Wal-Mart's) Reveal Top Goals for 2013*, FORBES (Jan. 17, 2013, 8:30 AM), <http://www.forbes.com/sites/barbarathau/2013/01/17/eight-retail-ceos-including-wal-marts-reveal-top-goals-for-2013/>.

30. See Herzeca & Hogan, *supra* note 25 (citing *U.S. Online Retail Forecast, 2012 to 2017*, INTERNET RETAILER (Apr. 2013), <http://www.internetretailer.com/trends/sales/>).

31. See Thau, *supra* note 29.

32. See Herzeca & Hogan, *supra* note 25 (citing Claire Can Miller, *Do People Actually Shop on Phones? The Answer is Decidedly Yes*, N.Y. TIMES BITS BLOG (Jan. 9, 2013), <http://www.bits.blogs.nytimes.com/2013/01/09/do-people-actually-shop-on-phones-the-answer-is-decidedly-yes/>).

33. See Herzeca & Hogan, *supra* note 27.

34. Dan D'Ambrosio, *Patent Trolls Demand Infringement Fees*, USA TODAY (Nov. 12, 2013), <http://www.usatoday.com/story/money/business/2013/11/12/patent-trolls-demand-infringement-fees/3511307/>.

companies whose only asset is a single patent.³⁵ All litigation is filed through these shell entities, so when they assert their rights in the patent in question, they leave no assets vulnerable to countersuit.³⁶ Furthermore, the consequences of patent trolling are significant: a recent study estimated that the direct accrued cost of patent troll lawsuits on targeted firms was \$29 billion in 2011.³⁷ The profitability of the patent troll business model derives in large part from two key factors: (1) the ease of asserting patents against a large number of potential infringers, at very little cost to the troll; and (2) the large potential liability to the accused infringers, who are inclined to pay a relatively small licensing fee rather than to take on the expense of a patent trial and the risk of a large judgment if they are ultimately found to have infringed the asserted patents.

Data shows that the patent troll business model works, and is very profitable. In 2007, patent trolls filed 22% of all patent infringement lawsuits.³⁸ Four years later, in 2011, the suits filed by patent trolls increased to 40% of such lawsuits.³⁹ Observers have argued that the jump in filing was due in large part to recent changes in the law brought about by the America Invents Act (“AIA”), as litigants rushed to file patent infringement claims before certain provisions of the new law went into effect.⁴⁰ In 2012, however, filings by trolls increased yet again—according to a study by Colleen Chien, trolls initiated 62% of all patent litigation in that year.⁴¹

35. D’Ambrosio, *supra* note 34.

36. *Id.*

37. James E. Bessen & Michael J. Meurer, *The Direct Costs From NPE Disputes*, 99 CORNELL L. REV. 387, 389 (2014).

38. See Sara Jeruss, Robin Feldman & Joshua H. Walker, *The America Invents Act 500: Effects of Patent Monetization Entities on US Litigation*, 11 DUKE LAW & TECH. REV. 357 (2012) (an article providing statistical information that supports the proposition that patent monetization entities play a role in a substantial portion of the lawsuits filed today).

39. *Id.*

40. See, e.g., General Patent Corporation, *America Invents Act Turns Out to Be a Law of Unintended Consequences*, <http://www.generalpatent.com/america-invents-act-turns-out-be-law-unintended-consequences> (Dec. 2012).

41. Colleen Chien, *Patent Trolls by the Number*, PatentlyO (Mar. 14, 2013) (referring to a statistic provided by RPX Corporation, a company that provides solutions to troll threats for its member companies and has great data principally maintained by Seth Besse), available at <http://www.patentlyo.com/patent/2013/03/chien-patent-trolls.html>.

Patent troll suits often end in settlement.⁴² Defendants simply prefer to pay licensing fees rather than face the huge cost of litigating a patent and the danger of being found to have infringed a patent and having to pay a large judgment.⁴³ The average patent troll litigation costs a defendant \$2 million and takes an average of eighteen months to reach a final judgment.⁴⁴ Even though studies have shown that trolls actually lose more than 90% of the time when their patents are actually challenged in court, most defendants, when confronted by the sobering possibility of such costs, choose to settle for an amount that is far lower than the cost of litigation.⁴⁵ These high costs also discourage the countersuits against trolls, which mean that it is unlikely that a given troll's patent will be invalidated. Without countersuits, trolls remain free to continue filing suits on the basis of weak or invalid patents, further perpetuating the cycle and subjecting more accused infringers to the same tactics.

Furthermore, trolls primarily assert software and software-related business patents, which together account for 89% of troll litigation.⁴⁶ Software patents are nearly five times as likely, and business method patents are nearly fourteen times as likely, to be wielded in a lawsuit as compared to chemical patents.⁴⁷ A report released by the nonpartisan Government Accountability Office explains that this disparity is caused at least in part by the "prevalence of low-quality patents," which can be asserted against a broad range of defendants because such patents frequently contain overly broad claims and do not clearly and properly delineate the property right being granted.⁴⁸ Although there is some uncertainty inherent to all patent claims, this problem is particularly pronounced for software patents.

Trolls use the overbreadth of software patents to their advantage. Trolls will often assert bad patents against defendants

42. See The Internet Association, *Patent Trolls Harm American Industry and Innovation* at 1 (2013), http://internetassociation.org/wp-content/uploads/2013/12/IA_PatentTrolls_v8.pdf.

43. See John R. Allison, Joshua H. Walker & Mark A. Lemley, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 *Georgetown L.J.* 677, 709 (2011).

44. Drew Curtis, Founder, Fark.com, TED Talk: How I beat a patent troll (Feb. 2012), available at http://www.ted.com/talks/drew_curtis_how_i_beat_a_patent_troll.html.

45. See Chien, *supra* note 41.

46. See United States Government Accountability Office, *Assessing Factors That Affect Patent Infringement Litigation Could Help Improve Patent Quality*, 14 (Aug. 2013) (hereinafter *GAO Report*), available at <http://www.gao.gov/assets/660/657103.pdf>.

47. *Id.*

48. *Id.* at 28.

whose activities only fall within the purview of the patents in question due to the patents' overly broad claim language.⁴⁹ In fact, trolls assert more litigation against non-tech companies than tech companies.⁵⁰ Trolls also target non-tech companies more frequently because, as the end users of allegedly patent-encumbered technologies created by other companies, they provide a pool of large numbers of unrelated defendants.⁵¹ Thus, there are many more entities from which to demand royalties and threaten litigation, allowing a troll to shake down many companies over numerous uses of a single product.⁵²

D. Apparel is the Perfect Target for a Patent Troll

It has taken time for apparel to become a multi-billion dollar industry.⁵³ During this journey the apparel industry has adopted various technologies, and in the process has caught the attention of patent trolls—themselves a part of another billion-dollar industry.

The apparel industry relies on cutting-edge technology to stay connected to its customers. To maintain their competitive edge, apparel companies incorporate the newest and most innovative technologies within their organizations.⁵⁴ As apparel companies adopt new technologies, they offer new targets to patent trolls so that even after a prior dispute is resolved, trolls invariably have another technology and another patent on which they can bring suit.

As explained above, apparel companies are generally end users of patented technology.⁵⁵ As end users, apparel companies use third-party technology to solve a problem or fulfill a need. In other words, they do not develop or sell any patented technology themselves, but instead merely use the products of other companies—products that

49. *GAO Report*, *supra* note 46, at 28.

50. *See* Chien, *supra* note 41.

51. *See* Heesun Wee, *Patent Trolls Target US Businesses, Consumers Ultimately Foot The Bill*, CNBC (Mar. 31, 2014), <http://www.cnbc.com/id/101514899>.

52. *See* National Retail Federation and Shop.org, Statement submitted to the United States House of Representatives Committee on Small Business for its hearing on “Patent Reform Implementation and New Challenges for Small Business” held on May 15, 2013 (hereinafter *NRF and Shop.org Letter*), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.nrf.com%2Fmodules.php%3Fname%3DDocuments%26op%3Dshowlivedoc%26sp_id%3D7600&ei=JvCtUpD_JcTuoAS324CYAQ&usg=AFQjCNE9536kOQDwK0NqaAnVxpl14Zd8kQ&sig2=IewLqzoX4-M2vviX4ZMPUQ&bvm=bv.57967247,d.cGU.

53. *See* Lauren Effron, *Why do Female Models Make More than Male Models?*, ABC NEWS (Oct. 10, 2013), available at <http://abcnews.go.com/Business/female-models-make-male-models/story?id=20534067>.

54. *See supra* Section I.B.

55. *Id.*

are potentially patent-encumbered. Being an end user makes for a larger pool of potential infringers for patent trolls to target as compared to the developer or seller of the patented technology, since for every creating entity there may be numerous customers that have deployed a patent-encumbered product.

The continued use of such technologies seems to be an inevitable part of the future of apparel companies. This is partly because the pace with which modern technologies are being integrated into the apparel business model has never been greater and is projected to increase significantly in years to come.⁵⁶ The benefits of technology have allowed apparel companies to operate more efficiently and extend their reach into the online world, and the products and services that have allowed this are now thoroughly integrated into their business model. From advertisements, sales, communications and distribution, technology is ingrained every step of the way. Further, consumers now expect a certain level of convenience and service provided by modern technology. Should an apparel company forego technology in one area that its competitor has not, the former may lose its customer base to the latter.

Once apparel companies are exposed to patent litigation, they are especially likely to settle. The majority of apparel companies operate on thin profit margins and lack the legal resources, such as in-house counsel, to fight complex patent infringement claims.⁵⁷ Furthermore, the structure and focus of the typical apparel company is such that it cannot dedicate a great deal of operational bandwidth to proactive defensive practices when it comes to anticipating patent litigation. Designers are focused on creation of garments and the business side is focused on sales, and if a company has in-house counsel it is likely they only have the resources to focus on issues closer to the company's main operations like trademark and copyright. Consequently, an apparel company is often blindsided and ill-prepared for litigation when served with a lawsuit by a patent troll. Rather than pay an amount that could bankrupt the company by going to trial, the apparel company will usually settle with the patent troll by paying a licensing fee.

There are also a few coincidences that potentially explain why apparel companies have become such a frequent target for patent trolls. First is apparel's timing in increasing its integration of technology into its business model. The apparel industry began

56. See *supra* Section I.B.

57. See NRF and Shop.org Letter, *supra* at note 52.

heavily investing and using technology around 2005.⁵⁸ This is around the same year that patent trolls began to develop and expand their particular brand of abusive litigation practices.⁵⁹ Since 2005, both apparel's use of technology and patent trolls' filing of lawsuits have increased considerably.⁶⁰ Second is the type of patented technologies that apparel companies typically use. Apparel companies use products that potentially implicate many software-related business method patents.⁶¹ Such patents are exactly the type that trolls most often leverage in abusive litigation.⁶² The timely increase in technology used by apparel companies and their heavy use of software-related business method patents combine to make apparel companies an even more attractive target for patent trolls.

Part II: Troll Litigation Aimed at Apparel

A. Limited Data Hurdle

There is no published breakdown on the effect of patent troll litigation and apparel companies. There are several reasons for this.

First, the lack of a commonly agreed-upon definition for the term "patent troll" inhibits the starting point for many inquiries into the effects of patent trolls as well as reform efforts.⁶³ There is currently no commonly agreed-upon definition of who is and is not a patent troll, and the terms nonpracticing entity, patent assertion entity, and patent troll are often used interchangeably.⁶⁴ Defining these terms for use in legislation, or settling on a widely acceptable definition in a manner that clearly identifies an entity that engages in abusive litigation, has proven to be challenging.⁶⁵ Consequently, outcomes can vary between different studies in part because their criteria depend upon the study's individual definition for a patent troll.⁶⁶

58. NRF and Shop.org Letter, *supra* at note 52.

59. George H. Pike, *Blackberry: Lawsuit and Patent Reform*, INFORMATION TODAY, INC. (last visited Mar. 25, 2014), available at <http://www.infoday.com/it/may06/Pike.shtml>.

60. See Sections 1.B, 1.C.

61. See NRF and Shop.org Letter, *supra* note 52.

62. See *supra* Section 1.B.

63. Jeruss et al., *supra* note 38 at 366.

64. *Id.*

65. See *id.* at 367.

66. *Id.* at 367-69.

The study and identification of activity by patent trolls is also hindered by the entities' structure and arrangements.⁶⁷ Patent troll activities are shrouded in complex layers of subsidiaries or revenue-sharing agreements, and their structures have thousands of shell companies.⁶⁸ This makes it near impossible to know who is pulling the strings.

Furthermore, as previously mentioned, much of the litigation initiated by patent trolls ends in settlement. This is partly due to the high cost of litigation, resulting in 90 percent of such matters ending with the defendant paying a licensing fee or entering into a settlement.⁶⁹ The information provided in settlement agreements are notorious for being accessible only by the parties involved.⁷⁰ Thus, data regarding the activity of patent trolls is incomplete, and when there is data regarding settlements, it is often misleading.

B. Analysis of Apparel as a Troll Target

In recent years, over 200 retailers have contacted the National Retail Federation ("NRF") to report that they were the target of patent trolls' abusive litigation practices.⁷¹ The NRF is the world's largest retail trade association and is the voice of retail worldwide, representing retailers of all types and sizes from the United States and more than 45 countries abroad.⁷² The association has actively pursued the interests of retail in the battle against patent trolls.

The NRF defines a retail company as one focused primarily on selling consumer goods directly to the end consumer.⁷³ This definition, and the NRF's statistics, includes chain restaurants.⁷⁴ According to the NRF, retailers have seen an increasing number of

67. See Sara Jeruss, Robin Feldman & Tom Ewing, *Patent Monetization Entities Filed 58% of Lawsuits in 2012*, IP WATCHDOG (Apr. 14, 2013), <http://www.ipwatchdog.com/2013/04/15/patent-monetization-entities-filed-58-of-lawsuits-in-2012/id=39079/>.

68. *Id.*

69. See Allison et al., *supra* note 43.

70. James Bessen, *Patent Trolling Was Up 11 Percent Last Year*, THE WASHINGTON POST: THE SWITCH (Jan. 31, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/01/31/patent-trolling-was-up-11-percent-last-year/>.

71. See NRF and Shop.org Letter, *supra* at note 52.

72. National Retail Federation, *Mission Statement and About the National Retail Federation*, http://www.nrf.com/modules.php?name=Pages&sp_id=146&pmenu_id=1&mn_type=1 (last visited Dec. 15, 2013).

73. *Id.*

74. *Id.*

patent lawsuits in recent years, and about 40 percent come from patent trolls.⁷⁵

In taking a closer look at patent troll litigation filed against only apparel companies, I found no statistical analysis exists specific to this category. To fill the void, and to better understand litigation filed by patent trolls against apparel companies, I analyzed complaints filed against top apparel companies. I was able to identify which trolls most frequently file suit against apparel companies and the patents that were used by these trolls in filing mass amounts of complaints against individual apparel companies.

The focus group I used to initiate the study was comprised of apparel companies derived from four reputable brand-ranking resources. Those resources included Brand Finance, Interbrand, Millward Brown and the World Luxury Association. I compared each resource's listed brands and the most frequently cited brands. The final list included Louis Vuitton, Chanel, Gucci, Prada, Tiffany & Co., Hermès, J.Crew, Gap, Coach, Guess?, H&M, Nike, Victoria's Secret and Zara.

Matters involving patent infringement are federal cases, so I was able to limit my research of complaints through the administrative database of the United States federal courts, PACER.⁷⁶ I began my research by searching for each brand in the PACER database, limiting the results to suits filed between 2010 and 2013. The results revealed four entities strategically targeting apparel: GeoTag, Webvention, Parallel Networks and ArrivalStar. These four entities filed more than half of the 98 complaints filed against the focus group.

Having found the names of these repeat offenders, I went back to PACER to perform individualized searches. I broadened my initial focus group of fourteen apparel companies to include all apparel companies. Then, I examined each complaint filed by the respective troll against an apparel company. By analyzing the complaints I was able to pinpoint which patent each respective troll was asserting against hundreds of retailers.

C. The Most Notorious Trolls and Their Actions Against Apparel Companies

A company called GeoTag has asserted U.S. Patent Number 5,930,474 ('474) against hundreds of apparel companies. Titled

75. National Retail Federation, *NRF Welcomes White House Announcement on Patent Litigation Abuse* (June 4, 2013), available at http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=1589.

76. See generally PACER, <http://www.pacer.gov/> (last visited Dec. 15, 2013).

“Internet Organizer for Accessing Geographically and Topically Based Information,” the ‘474 patent claims “system[s and methods] which associate . . . on-line information with geographical areas.”⁷⁷ In other words, and as GeoTag has interpreted it, the ‘474 patent claims a website that has a map showing locations on it.

GeoTag has been so litigious with the ‘474 patent that it picked up the nick-name “Google Maps Patent Troll.”⁷⁸ Its persistence in asserting this patent is readily apparent upon review of its complaints. In one, GeoTag filed suit against over 50 companies, nearly all of which were apparel companies.⁷⁹ Over the past several years GeoTag has brought a number of such suits asserting the ‘474 patent against different apparel companies.⁸⁰

Next, Webvention is a company that claims to own rollover online pictures with embedded hyperlinks. Webvention owns U.S. Patent Number 5,251,294, entitled “Accessing, assembling, and using bodies of information.”⁸¹ Webvention has asserted this patent against Giorgio Armani, Adidas, Abercrombie and Fitch, Armani Exchange, Neiman Marcus and several other apparel companies.⁸²

A typical cease and desist letter sent by Webvention regarding the ‘294 patent reveals the manner in which such trolls attempt to set the terms for their extortive activities: “For the next 45 days, Webvention is willing to license the ‘294 patent for a one-time, fully paid-up licensing fee of \$80,000.00 for a non-exclusive, company wide right to use Webvention technology.”⁸³ Pundits joked sarcastically

77. U.S. Patent No. 5,930,474 (filed Jan. 31, 1996) (issued July 27, 1999).

78. See Lance Cleveland, *Beware: GeoTag Patent Trolls Lurking*, CHARLESTON SOFTWARE ASSOCIATES (July 17, 2013), <http://www.charlestonsw.com/beware-geotag-patent-trolls-lurking/>.

79. Plaintiff’s First Amended Complaint, *GeoTag, Inc. v. Circle K Stores, Inc.*, 11-CV-405 (E.D. Tex. Sept. 13, 2011).

80. See generally Complaint for Patent Infringement, *GeoTag, Inc. v. Gucci America Inc. et al.*, 10-CV-00571 (E.D. Tex. Dec. 17, 2010); Complaint, *GeoTag Inc. v. Eye Care Centers of America, Inc.*, 11-CV-404 (E.D. Tex. Nov. 03, 2011).

81. U.S. Patent No. 5,251,294 (filed Feb. 7, 1990) (issued Oct. 5, 1993).

82. See Complaint, *Webvention LLC v. Adidas America Inc.*, 11-cv-03623 (E.D. Tex. Oct. 5, 2010); Complaint, *Webvention LLC v. A/X Armani Exchange LLC*, 12-cv-00017 (Dist. Md. Jan. 10, 2012); Complaint, *Webvention LLC v. Giorgio Armani Corporation*, 11-CV-00486 (E.D. Tex. Nov. 17, 2011); Complaint, *Tommy Hilfiger Group B.V. v. Webvention Holdings LLC et al.*, 11-CV-00266 (Dist. Del. Mar. 30, 2011); Complaint for Declaratory Judgment, *American Apparel Inc. v. Webvention Holdings LLC*, 10-CV-00936 (Dist. Del. Nov. 1, 2010); Complaint, *Webvention LLC v. Abercrombie & Fitch Co.*, 10-CV-00253 (E.D. Tex. July 20, 2010).

83. See Matthew Lasar, *Rollover Image on Your Website? That Will be \$80,000 (Please)*, ARS TECHNICA (Oct. 14, 2010), <http://arstechnica.com/tech-policy/2010/10/patent-troll-takes-over-the-web-can-it-be-stopped/>.

about the gracious tone of Webvention's letter in only requiring a mere \$80,000 when the requested fee could bankrupt a company.⁸⁴

Another troll that has targeted apparel companies is Parallel Networks, which sued about 120 different companies in a single patent infringement lawsuit alleging infringement of its U.S. Patent Number 6,446,111.⁸⁵ The patent covers the use of individualized applets on handheld devices to speed up data transfer rates and has been asserted against almost everyone involved in e-commerce.⁸⁶ The victims of this patent suit included Tiffany & Co., Victoria's Secret, The Gap, and many other apparel companies.⁸⁷

ArrivalStar is one of the most active patent trolls I came across, having filed hundreds of lawsuits in recent years for several of its patents that cover technology that tells a customer when its packages will arrive. Tracking the shipping of a purchase from the vendor's warehouse to a customer's front porch is a common and useful feature offered by many online retailers. Among those hundreds of apparel companies whose use of this kind of tracking was targeted by ArrivalStar were Chanel, Spanx, Toms Shoes and Lacoste.⁸⁸

It is notable that the ArrivalStar patent troll has never taken its patents anywhere near a trial, and hardly any of its lawsuits even have gone beyond early stages of litigation.⁸⁹ A major implication of this tactic is that the patent's validity is never seriously threatened. One attorney for a defendant, whose case ended up settling, expressed concern about having no opportunity to challenge ArrivalStar's patents. The attorney explained that he can't force ArrivalStar into court if the company agrees not to sue, because "there's no longer a case or controversy to satisfy standing requirements . . . I'd love to do

84. See Matthew Lasar, *Rollover Image on Your Website? That Will be \$80,000 (Please)*, ARS TECHNICA (Oct. 14, 2010), <http://arstechnica.com/tech-policy/2010/10/patent-troll-takes-over-the-web-can-it-be-stopped/>.

85. Dennis Crouch, *And the Internet Won: Parallel Networks Versus Website Operators*, PATENTLYO (Jan. 21, 2013), <http://www.patentlyo.com/patent/2013/01/parallel-networks-v-abercrombie-fitch-et-al-fed-cir-2013-back-in-2010-parallel-networks-sued-about-120-different-compa.html>.

86. U.S. Patent No. 6,446,111 (filed June 18, 1999) (issued Sept. 3, 2002).

87. See generally Original Complaint for Patent Infringement, Parallel Networks, LLC v. Abercrombie & Fitch Co., 10-CV-00111 (E.D. Tex. Mar. 29, 2010).

88. See generally Complaint, ArrivalStar S.A. v. Chanel, Inc., 13-CV-22528 (S.D. Fl. July 15, 2013); Complaint, ArrivalStar S.A. v. Spanx, 13-CV-22489 (S.D. Fl. July 12, 2013); Complaint, ArrivalStar S.A. v. Toms Shoes, Inc., 13-CV-22490 (S.D. Fl. July 12, 2013); Complaint, ArrivalStar S.A. v. Lacoste USA, Inc., 13-CV-20647 (S.D. Fl. Feb. 22, 2013).

89. Joe Mullin, *Patent Troll Backs Down, Agrees to Stop Suing Public Transit Agencies*, ARS TECHNICA (Aug. 21, 2013), <http://arstechnica.com/tech-policy/2013/08/patent-troll-backs-down-agrees-to-stop-suing-public-transit-agencies/>.

work that others can free-ride upon, but I can't pursue a case in court without a client that's being injured.”⁹⁰

D. Synopsis of Findings

Trolls are well known for asserting one patent against hundreds of defendants patentable a time. In their suits against apparel companies, Geotag, Webvention, Parallel Networks and ArrivalStar were all involved in “campaigning” of this kind.⁹¹ These are just examples of a larger trend, and many other trolls have sued apparel companies on patents claiming such features as the rendering of JPEGs, the concept of embedding a URL in a text message, scanning a paper document into a computer and then attaching it to an e-mail, online shopping cart technology, and smartphone apps that include a link to privacy policies posted on the companies' web sites.⁹²

Prior to the enactment of the AIA, this kind of campaigning—suing large numbers of defendants in a single litigation—was a characteristic for which trolls were notorious. The complaints filed by Geotag in 2010 are a prime example of this abusive type of litigation. This type of litigation was, however, thwarted with the implementation of the AIA. In typical pre-AIA litigation filed by patent trolls, a troll would file a patent infringement suit against numerous defendants that had nothing in common, other than the fact that each had been accused of infringing the same patent. The AIA restricts the ability of plaintiffs to file one lawsuit against numerous defendants in situations such as these. Now, joinder of defendants is permitted only where the claims against the defendants arise out of “the same transaction, occurrence, or series of

90. Joe Mullin, *Patent Troll Backs Down, Agrees to Stop Suing Public Transit Agencies*, ARS TECHNICA (Aug. 21, 2013), <http://arstechnica.com/tech-policy/2013/08/patent-troll-backs-down-agrees-to-stop-suing-public-transit-agencies/>.

91. See *supra* Section II.B.1.

92. See Richard Mescher, *Update on Patent Trolls*, TECHNOLOGY LAW SOURCE (May 15, 2013) (providing an overview on several patent trolls and the patents they troll with), <http://www.technologylawsource.com/2013/05/articles/intellectual-property-1/patents/update-on-patent-trolls/>; National Retail Federation, *NRF Welcomes White House Announcement on Patent Litigation Abuse* (Jun. 4, 2013) (providing several examples of patents that patent trolls have asserted against retail), http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=1589; Erica Wilson, *Setback for Patent Troll Under “Patent Exhaustion” Doctrine Liberates Mobile Technology*, PAYMENT LAW ADVISOR (Aug. 22, 2013) (discussing the patent that covered links embedded in text messages), <http://www.paymentlawadvisor.com/2013/08/22/setback-for-patent-troll-under-patent-exhaustion-doctrine-liberates-mobile-technology/>; Patent Assertion and U.S. Innovation Executive Memo, *supra* note 1 (providing examples of patents that patent trolls have asserted against companies in general).

transactions, or occurrences relating to the making, using, importing into the United States, offering for sale, or selling the same accused product or process” and requires that questions of fact common to all defendants or counterclaim defendants arise in the same action.⁹³

My research indicates that patent trolls appear to have responded to this change by drafting very vague complaints, which can be reused against many different defendants. With one complaint that is vague enough, a patent troll is able to use it against every defendant against whom the troll asserts its patent. This was readily observable in the complaints filed by Geotag, Webvention, Parallel Networks and ArrivalStar.⁹⁴ Each of these patent trolls used the same words, and only substituted the name of the defendant in their complaints.⁹⁵

Using the same complaint against several hundred different companies shifts the burden to the defendant.⁹⁶ The complaints are vaguely worded and do not pinpoint the exact nature of the alleged infringement.⁹⁷ Often, the complaints are so vague that defendants do not even know what is being asserted against them.⁹⁸ With low pleading standards the complaint passes muster, and defendants are forced to either draft response pleadings asking for a more definite statement as to the cause of action or perform their own discovery on what is exactly the issue.⁹⁹

A final observation concerns the type of patents that trolls are asserting against apparel. Geotag, Webvention and ArrivalStar all asserted software-related business method patents in their complaints against the apparel companies. These patents typically claim methods

93. Wes Klimczak, *IP: How the AIA has affected patent litigation*, INSIDE COUNSEL (June 18, 2013), <http://www.insidecounsel.com/2013/06/18/ip-how-the-aia-has-affected-patent-litigation>.

94. *See generally supra* Section II.B.1.

95. *Id.*

96. *See generally* Mike Masnick, *Patent Troll Lawyers Smacked Down, Made To Pay Sanctions, For Mass Lawsuits Followed By Quick Settlement Offers*, TECHDIRT (Aug. 8, 2011), <http://www.techdirt.com/articles/20110805/17230815417/patent-troll-lawyers-smacked-down-made-to-pay-sanctions-mass-lawsuits-followed-quick-settlement-offers.shtml>.

97. D'Ambrosio, *supra* note 34.

98. *See* Andrea Huspeni, *The Rising Threat of Patent Trolls and What You Can Do To Protect Your Startup*, ENTREPRENEUR (Apr. 15, 2013), <http://www.entrepreneur.com/article/226367>.

99. *See* Jeff Becker, *The Latest in Patent Reform: The Innovation Act (H.R. 3309)*, BAKER BOTTS INTELLECTUAL PROPERTY REPORT (Dec. 2013), http://www.bakerbotts.com/file_upload/IPReport201312-TheLatestInPatentReformTheInnovationActHR3309.htm.

that purport to cover the printing of receipts at cash registers, the sale of gift cards, and the connection of any product such as a computer or printer to an Ethernet network.¹⁰⁰

Part III: Congressional Solution

The activity of patent trolls is coming under increasing scrutiny from Congress, and their response comes at a critical time. Our country is at a crossroads and legislative measures are needed to address the patent troll problem. The Innovation Act, which at this point appears the likeliest reform to pass in Congress, makes several changes that could help protect apparel companies from abusive patent troll litigation, but the bill contains several weaknesses that should be addressed before it becomes law.

A. The Innovation Act

Introduced by House Judiciary Committee Chairman Bob Goodlatte, the Innovation Act, passed in the House on December 5, 2013.¹⁰¹ The bill makes many changes to various provisions of the Patent Act, three of which may help solve the kinds of issues facing apparel companies.

First, The Innovation Act attempts to deter vaguely worded complaints. The Act heightens the pleading standard in patent cases, requiring a claimant to identify the patents and claims that are allegedly infringed, and to specify how they are being infringed.¹⁰² This provision would help clarify for defendants what exactly a plaintiff alleges they have done to infringe the plaintiff's patent.

This heightened pleading standard would likely increase the cost of campaigning for patent trolls. Trolls use vague pleadings so they can simply substitute different defendants' names when filing new suits, keeping down the costs of filing multiple infringement actions.¹⁰³ Raising pleadings standards will require patent trolls to expend more time and money in asserting their patents, which will make campaigning more expensive and may could potentially lead to less patent troll litigation.

Second, the Innovation Act requires courts to make decisions about whether a patent is valid or invalid early in the litigation process and requires the Judicial Conference to make rules to reduce

100. See NRF and Shop.org Letter, *supra* note 52.

101. H.R. 3309, 113th Cong. (2013).

102. H.R. 3309 § 281A.

103. See *supra* Section II.C.

the costs of discovery in patent litigation.¹⁰⁴ These provisions seek to prevent patent trolls from dragging patent cases on for years based on invalid claims and to lower the costs of discovery. With these provisions, apparel companies will, hopefully, be encouraged to assert their rights against patent trolls rather than settle.

Third, the Innovation Act incorporates a provision that would protect end users from patent trolls. The bill creates a voluntary process allowing small businesses to postpone expensive patent lawsuits while larger sellers complete related patent lawsuits against the same plaintiffs.¹⁰⁵ In other words, it is meant to protect customers who bought the product off-the-shelf. If the voluntary process works, it would deter the harmful effects of the common patent troll tactic of going after the end user. For example, a patent troll that goes after an apparel company that provides free Internet for its clientele via a wireless router can postpone the litigation until the suit between the patent troll and the maker of that router is finalized.

B. Weaknesses of the Innovation Act

The Innovation Act will solve many immediate problems that have damaged the nation's patent system and economy. Its provisions go to the heart of current abusive patent litigation practices. There are weaknesses, however, that must be addressed to adequately protect the apparel industry from vexatious troll litigation.

1. Customer-Suit Provision

First, there are issues with the Innovation Act's customer-suit provision. With the current bill, the customer-suit provision creates a voluntary process for a customer to postpone the lawsuit while a larger seller completes a similar patent lawsuit against the same plaintiff.¹⁰⁶ This provision is problematic because it assumes that the patent troll will always go after the larger seller of the patent and it relies upon a final judgment resulting from the suit between the patent troll and larger seller. Greater protection for end users must be provided. If the Innovation Act is passed with the customer-suit provision as it stands now, apparel companies will continue to be targeted by patent trolls.

To protect apparel companies, the Innovation Act should strengthen its customer-suit provision by completely immunizing end

104. H.R. 3309 § 299A.

105. H.R. 3309 § 296.

106. H.R. 3309 § 296.

users from patent troll litigation. By preventing suits against end users, the patent troll would be forced to bring the suit against the proper defendant—the manufacturer, distributor or retailer who is selling the allegedly infringing technology. This proposed alteration would also change the civil procedure process. Suits brought against the end user would result in the implementation of a mandatory stay upon intervention on the part of the manufacturer. Upon the commencement of the stay, the patent troll would be forced to pursue the more appropriate target.

The modified customer-suit provision would have a good political support base. There are many businesses and consumers who have been subjected to licensing demands or outright lawsuits based on their use of ordinary staples of commerce as end users. This provision would effectively eliminate an abusive patent troll practice while still allowing effective enforcement of legitimate patent holder's rights.¹⁰⁷

2. Heightened Pleading Standard Provision

Second, there is a possibility that the heightened pleading standard proposed in the Innovation Act might not deter patent trolls from filing suit. The current provision requires a claimant to identify the patents and claims that are allegedly infringed, and to specify how they are being infringed.¹⁰⁸ Virtually every court in the U.S. already mandates similar disclosures. These disclosures are called “infringement contentions” and are required at some point during the course of a patent litigation. While the Goodlatte bill would accelerate these contentions and convert them into a prerequisite before filing a complaint, patent trolls generally prepare detailed drafts of these charts prior to launching suit.¹⁰⁹

There are also arguments as to whether a heightened pleading standard is even appropriate. The Innovation Act's heightened pleading could reduce the frequency of frivolous lawsuits while narrowing the scope and lowering the costs of discovery.¹¹⁰ On the

107. See Levenfeld Pearlstein, LLC, *The Obama Administration Hops on the Anti-Troll Bandwagon* (June 6, 2013), <http://www.lplegal.com/content/obama-administration-hops-anti-troll-bandwagon>.

108. H.R. 3309 § 281A.

109. See Michael Rossen, *A Closer Look at Patent Troll Legislation (pt 1): Pleading Requirements*, TECHPOLICYDAILY (Nov. 18, 2013), available at <http://www.techpolicydaily.com/technology/patent-troll-legislation-closer-look/>.

110. See Law & Economics Center, *Measuring the Effects of Heightened Pleading Standards Under Twombly and Iqbal* (last visited Dec. 15, 2013), available at <http://www.masonlec.org/programs/46>.

other hand, the heightened pleading standard might reduce or eliminate access to the legal system for both low quality and meritorious cases alike.¹¹¹

The NRF has also voiced concerns over the heightened pleading standards provision, and hopes to see more clarification in how plaintiffs must clearly state their initial demands regarding a patent.¹¹²

3. *Failure to Address Software-Related Business Method Patents*

Third, the current version of the Innovation Act fails to address software-related business method patents. These types of patents are arguably the root cause of the patent mess.¹¹³

In an earlier version of the Innovation Act, the bill contained a continuation and expansion of the “Transitional Program for Covered Business Method Patents.”¹¹⁴ This provision provides a fast-track process at the U.S. Patent and Trademark Office for knocking out low-quality patents by letting companies challenge suspicious “business method” patents, many of which cover basic software practices. The provision was, however, eliminated by the force of powerful lobbies (notably for Microsoft and IBM).¹¹⁵

As the Innovation Act stands today, there is no efficient way to challenge the huge number of bad software-related business method patents. Without a rule providing a mechanism to challenge these patents at the Patent Office, companies’ only other option often lies in persuading a jury that the patent is obvious or that the invention it describes is not new.

The NRF has also voiced concerns over the absence of a provision addressing software-related business method patents. It hopes to see clarification over how patent lawsuits can cover these types of patents; for example, business methods that pertain to how businesses conduct transactions over the Internet or post content to web sites regarding their products and services.¹¹⁶

111. Law & Economics Center, *Measuring the Effects of Heightened Pleading Standards Under Twombly and Iqbal* (last visited Dec. 15, 2013), available at <http://www.masonlec.org/programs/46>.

112. See Paul Demery, *‘Patent Troll’ Legislation Moves Ahead in Congress*, INTERNET RETAILER (Dec. 11, 2013), available at <https://www.internetretailer.com/2013/12/11/patent-troll-legislation-moves-ahead-congress>.

113. See Jeff John Roberts, *House Passes Innovation Act by Vote 325-91: A Small Solution to a Big Patent Problem*, GIGAOM (Dec. 5, 2013), <http://gigaom.com/2013/12/05/house-passes-innovation-act-325-91-a-small-solution-to-a-big-patent-problem/>.

114. *Id.*

115. *Id.*

116. See Demery, *supra* note 112.

Conclusion

Apparel companies are ideal targets for patent trolls. They have technology inextricably intertwined into their business model and purchase it as end users. Furthermore, they have an ever-increasing rate of technological consumption and are ill-equipped to litigate patent disputes. These attractive characteristics have not gone unnoticed by trolls.

Over a few short years, there have been thousands of complaints filed against apparel companies by patent trolls. These complaints seek to enforce patent rights that are vague and obscure. Although Congress is working to combat the abusive litigation strategies used by patent trolls, its current proposed legislation is not strong enough. An adequate bill would take into account the unique history and characteristics of the apparel industry, and use this information as its guide in implementing effective legislation.