

Patent Trolls and Their Regulation in India

Divyansh Gautam & Tejaswi Sitaram Kandi

Symbiosis Law School, Pune
Maharashtra, India

ABSTRACT:

Introduction: *The Intellectual Property law in India has undergone an unfathomable change over the past decade. However, innovation, technological advances and the commercial gains which could be derived from such rights have led to the problem of increased litigations such as patent trolls. 'Patent troll' is a negative term used to describe an entity that enforces its patents against one or more alleged infringers in a manner that is considered unduly aggressive or opportunistic. Patent Trolls usually have no intention to manufacture or market the patented invention and their sole purpose is to make some quick money through cease and desist orders and Patents infringement litigations.*

Purpose: *This is a crucial area of research as patent trolls take advantage of the prevalent loopholes in the patent law system in various ways such as drawing huge settlement compensation from companies that cannot afford the cost and resources of litigation; they deter innovative companies from investing in research and development through the threat of litigation; and they do not practice the patents they hold, thus contributing no innovation in the advancement of technology and immunizing themselves from countersuit. In addition, trolls exhibit anticompetitive behaviour.*

Methodology: *The authors have used secondary sources to understand the prevalent patent law system and the best practices of various countries in order to draw a parallelism for the identification of solutions for the same.*

Value: *This Paper provides a survey of the modern patent landscape, addressing certain areas of the patent system that patent trolls are able to use to their advantage. This Paper then advocates that various concerned agencies play a more integral role in curbing anticompetitive troll behaviour and proposes several methods of patent reform.*

Key words: *development, intellectual property, litigation, patents, trolls*

I. INTRODUCTION

As per Section 2 (1) (m) of the Patents Act, a patent is a monopoly right conferred by Patent Office on an inventor to exploit his invention for a limited period.¹ In simple language it can be said that a patent is an exclusive economic/commercial right that is granted to the inventor for a limited period of time to use, manufacture or even sell it, so that he can harvest the profits of his honest work and efforts. As observed by Justice Sarkaria in *Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries*² :

*"The main aim of Patent Law is to promote scientific research, new technology and industrial progress. Providing exclusive privilege to own, use or sell the method or the product patented for a limited period, stimulates new invention of commercial utility."*³

Once this right is conferred upon a person, no other individual can interfere with this right unless he gets a license from the patent holder itself. This right provides a blanket protection to the invention so that no other individual can make use of it fraudulently for any personal gain.

¹S. 2(1) (m), Patents Act 1970.

²*Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries*, (1979) 2 SCC 511 at p. 517.

³ *Ibid.*

Although in usual course of business it is expected that an inventor would enforce the patent in the commercial market for monetary benefits or some other considerations. However, many of such inventors have been using this right in an unduly manner to earn some quick cash via filing infringement suits against companies and individuals who are using a product remotely or vaguely similar to their patented product. This is what is called patent trolling and such inventors are referred as patent trolls, which is nothing but a derogatory reference to such inventors indulged in practice of making money through litigations and licensing solely.

Patent Trolls

Patent Trolls may loosely be defined as entities that own and enforce patents without practicing or making the underlying patented inventions.⁴ It is a complex concept which is not easy to define, therefore, it becomes necessary to derive the nature of patent trolls from the activities that pertain to it. A patent troll does not intend to put the patent to use and practice. However, to categorise such a scenario as a troll merely on the basis of actual practice would not be wise as a small inventor may have a patent but may lack the resources to put it to use. The object of obtaining a patent must be merely to possess licencing rights and to derive revenue from the same for a patent to be treated as a patent troll or a Patent Assertion Entity (PAE). Such licenses are not obtained to put the patent to practice producing or selling products and technological inventions but solely to compel third parties to purchase licenses.

Persons or companies involved in patent trolls are opportunists, who buy or licence patents with the sole attention of filing infringement suits, often with no intention to manufacture or market the patented invention, but only to collect royalty or licensing fees.⁵ Statistics have shown that patent trolls alone have threatened over 100,000 companies and almost 62% of the ongoing patent infringement litigation has been filed to derive revenue in the year 2012 alone.⁶

This is however, not a recent phenomenon. The term was used in the 1990s to refer to entities that filed patent lawsuits aggressively. However, in the Indian context it became prevalent in the 2000s mainly in the IT and Communications industry. This too declined after the 2005 amendment to the Indian Patent Act, 1970.⁷ Patent Trolls are not expressly prohibited in the Indian patent law framework. But, the existence of provisions such as Sec. 146 of the Indian Patents Act, 1970 require that a granted patent must be used or worked in India. If not done so in the territory of India, it would invoke compulsory licensing.⁸

⁴Edward Lee, Patent Trolls: Moral Panics, Motions in Limine, and Patent Reform, 19 Stan. Tech. L. Rev. 113, 149 (2015).

⁵John M. Golden, Patent Trolls and Patent Remedies, 85 Tex. L. Rev. 2111, 2162 (2007).

⁶ Patent Assertion and US Innovation, Executive Office of the President, June 2013, the White House, Washington, http://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf

⁷Editor, V. (2016). Patent trolling: An Indian perspective | Vantage Asia. [online] Vantage Asia. Available at: <https://www.vantageasia.com/patent-trolling-an-indian-perspective/> [Accessed 07 Jan. 2019].

⁸ Supra.

Patent trolls are characterised with financially burdensome litigation with harm innovation as companies are compelled to reduce the cost on R&D, this further leads to an anti-competitive behaviour with the lack of encouragement of healthy competition.⁹

II. LITERATURE REVIEW

There is a continually extending assortment of writing regarding the patent trolling and its regulation in India. Scholars have contended for and against the overall efficiency of the Indian Patent Law in dealing with patent trolling activities. The concept of patent trolling is not a very old topic and is not limited to only developed nations like the America or Japan; it is a concept that has emerged in recent times and in various developing countries inspiring many researchers and scholars to probe into the causes and effects of such practices and the effect of such practices on innovation.¹⁰ In addition to this many studies have been conducted to study the different legislations governing this and the merits and demerits of the legislation for preventing and punishing this criminality. This has prompted the advancement of a limitless collection of work which has examined this issue from the point of view of every conceivable partner. The Researchers have endeavoured to cover the whole extent of writing accessible in considerable sum with a specific end goal to give an unbiased perspective. One of the most comprehensive works done on the regulation of patent trolls and its deteriorating effects on innovation is "Patent Laws: Advancing Innovation for the Public or Inflating Private Profits?"¹¹ a 2015 study done by Raymond Bai¹² and published in the *Western Journal of Legal Studies*.

This paper further analyses that how entities known as "patent trolls" abuse this protection to strike settlements with small as well as medium-sized companies, who are unable to afford the associated legal costs or are of the mind that there is a lot at stake to litigate.¹³ The effect of such practices is such that the corporations who sought to invest some capital in research and development are drained of financial resources, which ultimately has a deteriorating effect on technological innovations. Furthermore, researchers – Ragavan and Srividhya in their paper "India's Attempt to Reconcile Diversity and Intellectual Property Issues"¹⁴ present a rigorous and systematic review of the provisions of the Indian Patent Act especially those dealing with lack of inventive step and novelty. Another study which was conducted by Sitanshu Singh,¹⁵ regarding the regulation of patent

⁹ Harvard Business School-Lauren Cohen, Umit G. Gurun, Scott Duke Kominers – Patent trolls: Evidence from targeted firms. 2014.

¹⁰Blankrome.com. (2018). [online] Available

at:<https://www.blankrome.com/siteFiles/publications/A27C581CC4BC0AAF7057C45A1824525D.pdf> [Accessed 07 Jan. 2019].

¹¹ Raymond Bai, "Patent Laws: Advancing Innovation for the Public or Inflating Private Profits?", (2015) 6:1 online: UWO J Leg Stud 4.

¹² Raymond Bai, Western University, lbai27@uwo.ca.

¹³ Supra Note 1.

¹⁴Ragavan, Srividhya --- "India's Attempt to Reconcile Diversity and Intellectual Property Issues" [2012] INJIPLaw 2; (2012) 5 Indian Journal of International Property Law 1.

¹⁵Sitanshu Singh, Patent Associate, Khurana & Khurana, sitanshu@khuranandkhurana.com.

trolling activities in India in his work – *Practice of Patent Asserting Entities: Boon or Bane: Global Innovations*¹⁶ gives a meticulous analysis suggesting that the provisions of the Indian Patent Act has a positive and statistically significant effect on restraintment of patent trolling practices. As per the author in India, patent trolling does not pose any major threat to any entity seeking opportunity to enter the Indian market in view of the amendments to the laws which fairly controls the patent troll activity in India.¹⁷

A different and interesting view is presented by *V Rajkumar* in his paper – *The Effect Of Patent Trolls On Innovation – A Multi Jurisdictional Analysis*.¹⁸ The paper argues that patent trolls increase the transactional costs associated with developing technology and with claiming IP rights.¹⁹

III. RESEARCH METHODOLOGY

Since, the topic of this research exceptionally covers a very vast area and is of extreme significance therefore the Researcher will adopt both doctrinal and non-doctrinal method of research for this paper. The Researcher primarily will be relying on the articles, books, journals and other works by several authors, Indian and foreign, whose works have contributed significantly in development of jurisprudence on patent trolls and their regulation. Apart from these, the other primary sources will be the cases and arbitral awards which the Researcher will consider understanding the judicial view on patent trolling practices.

For secondary sources of information, the Researcher will be referring to certain information provided by other authors through sampling like questionnaire, surveys, etc. which would not provide any personal interpretation of the authors. This will help in gaining a wholesome understanding of views prevailing for and against the topic.

IV. OBJECTIVE

Patent trolling can be a controversial as well as a difficult topic to understand. Often due to its complex nature it becomes very difficult to impute a liability against anyone. In addition, the legislation governing this topic, the Patents Act, 1970, consists of no specific kind of liability. In this paper the Researchers through the evaluation of available literature like articles, reports and researches will try to show that how patent trolling activities can be regulated. The paper will then be analysing two recent judgements given by Intellectual Property Appellate Board regarding the regulation of patent trolling activities. Pursuant to this, the Researcher will then discuss the

¹⁶IIPRD Blog - Intellectual Property Discussions. (2014). Practice of Patent Asserting Entities: Boon or Bane: Global Innovations. [online] Available at: <https://iiprd.wordpress.com/2014/10/20/practice-of-patent-asserting-entities-boon-or-bane-global-innovations/> [Accessed 07 Jan. 2019].

¹⁷ Ibid.

¹⁸Rajkumar V, "The Effect of Patent Trolls on Innovation: A Multi-Jurisdictional Analysis" [2008] INJIPLaw 3; (2008) 1 Indian Journal of Intellectual Property Law 33.

¹⁹ Ibid.

scenario in India, need for regulation and numerous provisions of the Patents Act, 1970 dealing with the liability of such entities

V. SIGNIFICANCE

According to the Researchers this topic – Patent Trolling and their Regulation in India, will be a very relevant discussion regarding the broadening of the concept of Intellectual Property rights. Furthermore, it is the duty of the Indian Judiciary (and IPAB) and the Government to enact this legislation strictly to deter the NPEs and other entities from misusing their rights.

VI. SCOPE AND FURTHER RESEARCH

The topic of this research exceptionally covers a very vast area and is of extreme significance and the Researcher trusts that it will incite more Indian academicians to research on this matter as it can be also taken as different aspect of education and ethical business practices.

VII. PATENT TROLLS AND THEIR REGULATION IN INDIA (REGULATION OF PATENT TROLLING ACTIVITIES)

The overall process of avoiding the patent trolls is quite difficult and is getting more complex day by day because under many legal systems and especially Indian legal system potential trolls have a great advantage to remain hidden and have their patent rights infringed, instead of getting into negotiations with them. Furthermore, damages awarded through litigation have the potential to vastly overcompensate a patent holder whose patent has been infringed rather than a patent holder who grants a license.²⁰

The need for regulation

It has become very necessary to regulate such practices as they are slowing down the process of innovation in several ways. The legal costs associated with litigation initiated by patent trolls also reduce the funding available for innovation, and these legal costs can rise to quite significant amounts.²¹ Personnel who would otherwise be engaged in promoting innovation throughout the organization will have their attention diverted elsewhere by the litigation, which will consume the human resources of the technology developers in addition to the financial resources.²²

Patent trolling in India

²⁰ Nalsar.ac.in. (2018). [online] Available at: <https://www.nalsar.ac.in/IJPL/Files/Archives/Volume%201/5.pdf> [Accessed 8 Jan. 2019].

²¹ Rantanen, J, "Slaying the Troll: Litigation as an Effective Strategy against Patent Threats," (2006) 23 Santa Clara Computer Hardware & Technology Law Journal 43, 59.

²² Law.com. (2018). Law.com. [online] Available at: <https://www.law.com/?sreturn=20180816103445> [Accessed 8 Jan. 2019].

The practice of patent trolling was very much present in India in the Information Technology and Communications sector and was practiced till 2005 prior to the promulgation of the Patents (Amendment) Act, 2005 due to which there was an evident decline in the trolling practices.

It would be pertinent to note that the patent law in India does not prohibit the existence of patent trolls but merely threatens its existence. For example, as per Indian patent law it is compulsory for a granted patent to be used in India. However, on the other hand, if a patent that has been granted is not worked upon or is used in the Indian Territory for a period of three years, compulsory licensing might get invoked. Furthermore, the Indian Patents Act makes it mandatory to file statement of working of a patent at the end of each financial year.²³ And if the patent holders could not file such a statement, he may be liable to pay a fine and/or imprisonment. Therefore, patent trolling does not pose any major threat to the Indian Patent regime view of the amendments to the laws which fairly controls the patent troll activity in India. However, it still could have a deteriorating effect on an entity like start-ups and small-scale businesses seeking an opportunity to enter into the Indian market.

VIII. CASE STUDIES

While the practice of patent trolling poses a major threat to innovations in many nations, such practices are however not so profitable or viable in India. In the light of provisions incorporated in the Indian Patent Laws via certain amendments especially the Patents (Amendment) Act, 2005 along with the efficient functioning of the Intellectual Property Appellate Board, it can be well observed that while the other countries are plagued with patent troll activities, the Indian system strived fairly to control the problem of patent trolls. Therefore, it becomes necessary to analyse some of the cases decided by the IP Appellate Board regarding the practice of patent trolling in India.

In two recent judgements, the Intellectual Property Appellate Board (IPAB) revoked three patents, one belonging to Ram Kumar in the case of *Spice and Samsung v Ramkumar*²⁴ (Dual Sim Case) and two belonging to Bharat Bhogilal Patel in the case of *M/S Aditi Manufacturing Co. Vs. M/S Bharat Bhogilal Patel and Another*²⁵. Both patentees can be regarded as classic ‘patent trolls’, not only in the sense of ‘non-practicing entities’ but in the context of patentees who seek to exploit the weaknesses in the legal system to enforce equally weak patents.

²³ Mhrdiprchairst.org. (2018). [online] Available at: <http://mhrdiprchairst.org/Portals/18/IJPL%20Vol.%201%202008.pdf?ver=2016-04-25-175641-333> [Accessed 8 Jan. 2019].

²⁴ Spice Mobiles Ltd. and Another v. Somasundaram Ramkumar and Others, ORA/17 of 2009/PT/CH & ORA/31 of 2009/PT/CH

²⁵ M/S Aditi Manufacturing Co. Vs. M/S Bharat Bhogilal Patel and Another, M.P.Nos. 41 & 42 of 2012 in TRA/05 of 2008/PT/MUM & TRA/06 of 2008/PT/MUM & TRA/05 of 2008/PT/MUM & TRA/06 of 2008/PT/MUM

In these two cases both the patentees seek to enforce the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007. Both of the patentees did not file any kind of civil suit but had filed complaints with Customs Commissioners at various ports of entry requesting the Customs Department to seize 'import consignments' as it was alleged by them that the said consignments were infringing their patents. Ramkumar had been granted a patent for dual SIM mobile phones that permitted simultaneous communications on both SIM cards, Bharat Bhogilal Patel was granted two patents: the first patent was for a 'laser marking & engraving machine' and the second patent was for 'marking, etching & engraving by using laser beam on metals and non-metals'.²⁶

Case Study I - Spice & Samsung v. Ramkumar

Summary of Facts

In 2009 pursuant to some procedural mistakes, the Customs Departments started seizing several imported consignments of dual-SIM mobile phones in Chennai, Mumbai and Delhi claiming these consignments were violating the provisions of the Indian Patent Law, as alleged by Ramkumar in his complaint. The importers were some of the prominent mobile manufacturing companies such as Samsung, Spice, Micromax, etc. While some importers decided to pay Ramkumar the royalties he demanded, the rest of the companies kicked off a series of litigations across the length of the country, ranging from the District Court of Gurgaon to the High Courts of Punjab & Haryana, the High Court of Madras, the Customs Commissioners in Delhi, Mumbai & Chennai and the IPAB.²⁷

However, the Customs Commissioners in Chennai, Mumbai and Delhi decide to release the imported consignments, after hearing both parties, claiming most of these consignments were not infringing Ramkumar's patent in any way. By that time however Ramkumar had already claimed royalties from some of these companies. Eventually, there were money disputes within Ramkumar's circle of associates which resulted in the murder of one of Ramkumar's associates.

Analysis of the Judgement

In this case, due to the overall dispute of infringement of patents, Spice Mobiles which was represented by S. Majumdar and Samsung India which was represented by Pravin Anand & Archana Shankar of Anand and Anand sought to get the said patent revoked.

²⁶Open.mitchellhamline.edu. (2018). [online] Available at: <https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1065&context=cybaris> [Accessed 8 Jan. 2019].

²⁷ Spice Mobiles Ltd and Another Vs Somasundaram Ramkumar and Others - Citation 1117499 - Court Judgment | LegalCrystal. [online] Legalcrystal.com. Available at: <https://www.legalcrystal.com/case/1117499/spice-mobiles-ltd-vs-somasundaram-ramkumar> [Accessed 8 Jan. 2019].

- **Amendments of the claims:** The first argument that was dealt by the IPAB was the several amendments that were made to the patent specification during the prosecution of the patent application. The extensive number of amendments made during the prosecution resulted in the number of claims increasing from the initial 4 to 20 at the time of grant. All the claims that were made appear to be dependent on Claim 1, which was as follows –

“A cellular or mobile technology gas to come with a facility for a multiplicity of current sim cards and/ or enhanced sim cards, a multiplicity of current sim sockets and / or enhanced sim sockets for accepting a multiplicity of current sim cards and / or enhanced sim cards, a multiplicity of headphone/ earphone jacks for accepting a multiplicity of headphone/ earphone plugs and / or a multiplicity of Bluetooth devices in order to operate side by side the said cellular or mobile technology in said different communication networks is presented, and a multiplicity of incoming and/or outgoing calls can be communicated side by side with the said respective sim cards.”²⁸

The applicants to the suit contested that as per Sections 57 & 59 of the Patents Act, 1970 a patent application or a patent specification can be amended only through an explanation or disclaimer or any other means which does not result in broadening of the original claims.²⁹ Furthermore, it was argued by the parties before the IPAB that the said amendments were secured through misrepresentation and fraud, and also that the amendments were invalid since the ambit or scope of the claims is much broader than the original claims filed by Ramkumar. In his defence Ramkumar contended that the said amendments were a result of the clarifications that were sought by the patent office.

The IPAB accepted the arguments that the amendments were too broad and that “amended claims 1-20 do not fall wholly within the scope of the claims 1-4 as originally filed”³⁰. As a result, the IPAB set aside the amendments to Ramkumar’s patent. The IPAB also directed the Patent Office to apply its “discretion more cautiously and judiciously under section 57(6), especially when there are large scale amendments as in the present case.”

- **Lack of Novelty under Section 64(1)(e):** The second ground on which the claim was challenged was the ‘lack of novelty’ (also known as anticipation) in Ramkumar’s invention. Based on this ground, a proof is required that such an invention was already known either through its publication or through actual working. Regarding this, both Spice Mobiles and Samsung India were able to supply the Appellate Board with a list of prior art which they thought adequately anticipated Ramkumar’s patent.

²⁸ Ibid.

²⁹ Reddy, P. (2012). IPAB revokes patents belonging to debutant Indian ‘patent trolls’. [online] SpicyIP. Available at: <https://spicyip.com/2012/07/ipab-revokes-patents-belonging-to.html> [Accessed 8 Jan. 2019].

³⁰ Supra note 9.

The analysis made by the Appellate Board was to some extent muddled as in various instances the Board appears to confuse ‘anticipation’ with ‘inventive step’ despite both grounds being quite different from each other. However, relying on the overwhelming evidence pointing towards anticipation, the IPAB sided with Spice Mobiles and Samsung India and held that most of the elements of the said patent were anticipated by prior art.

- **Lack of inventive step Section 64(1)(f):** The third ground of challenge was the ‘lack of inventive step’ in patent. The ‘inventive step’ argument challenges the validity of a patent on the grounds that the claimed invention “does not involve a technical advance as compared to the existing knowledge” thus making it obvious to a person skilled in the art.³¹

Both Spice and Samsung were able to prove through various paper works of prior art, establishing the obviousness of most claims in Ramkumar’s patent, especially the prior art relating to ‘dual-SIM’ cellular phones. Hence, again the Intellectual Property Appellate Board sided with the Spice mobiles and Samsung India regarding the lack of Inventive Step in Ramkumar’s patent. The decision ended with imposing costs on Ramkumar for filing a frivolous suit. Furthermore, the Board directed the Controller General of Patents to remove the patent from the Register of Patents and advised them to be more cautious especially in the light of patent trolling practices.

Case Study II - Aditi Manufacturing Co. v. Bharat Bhogilal Patel

Summary of Facts

In the present case, the petitioners who were represented by Rushvi Shah & Zahid Shaikh firstly filed the revocation petition before the Gujarat High Court which then on further analysis of the issues involved in the case transferred it to the Intellectual Property Appellate Board. The two petitions in question sought to revoke two patents – Patent No.189027 granted for a process of manufacturing engraved design articles on metals or non-metals and Patent No. 188787 granted for an improved laser marking and engraving machine.³²

Analysis of the Judgement

Even though Bombay High Court occasionally prods the Customs Commissioners to follow the IPR Import Rules, Bharat Bhogilal Patel in this case was not so fortunate in enforcing his patents. However, he was able to create quite a nuisance for big shot companies for instance – the head of the Raymond’s was criminally prosecuted by the Bombay High Court on Bharat Bhogilal Patel’s petition for patent infringement. In fact,

³¹prezi.com. (2018). Spice and Samsung v. Ramkumar. [online] Available at: https://prezi.com/ibhd19vvj_pe/spice-and-samsung-v-ramkumar/?webgl=0 [Accessed 8 Jan. 2019].

³²Nopr.niscair.res.in. (2018). [online] Available at: <http://nopr.niscair.res.in/bitstream/123456789/31954/1/JIPR%2020%284%29%20210-222.pdf> [Accessed 8 Jan. 2019].

several other big shot companies like L.G., were also issued notices by the Customs on the grounds that they were violating Patel's patents. However, the fact is still under dispute that whether Patel was successful in collecting royalties from such companies for the intervening period.

As per the claims of the patent holder the invention in both the patents was in the following aspects –

- “Marking, etching engraving, scrubbing and cutting were done in one stroke. He submitted that all the prior arts are US Patents and they were used in a different voltage from the Indian one.”³³
- “That the industrial application of the invention is much wider. There is a beam in the invention which is not found in the prior art. The range in the invention is wider to cover all materials from plastic to diamonds and it is therefore, cost efficient and effective.”³⁴
- “That in the invention different sources of light may be used and the multi-step process for marking has been made into a single step process.”³⁵
- “That the invention works in Indian temperature when compared to the prior art and even Small-Scale Industries can use it and therefore, it has economic significance.”³⁶
- “That the invention is not a software by itself.”³⁷

The applicants seeking to revoke the said patents, were able to file and submit extensive evidence establishing that the said patents lacked novelty and to establish prior art. The key thrust of all the evidence adduced was to establish that the invention claimed by the patentee was widely known in prior art and that the patents though granted failed to establish the improvements over prior art.³⁸

In this case, unlike the Ramkumar case, the Intellectual Property Appellate Board carefully documented all the evidence provided by the applicants, including statements of expert witnesses and invoices, while deciding the case and pronouncing the judgement in favour of the applicant. Furthermore, it would be pertinent to note that IPAB also held that –

“In the present case, prior arts have the features of the invention and there is nothing new in the features that have been claimed as new. The three experts have testified to this. We have evidence before us that the very

³³). M S Aditi Manufacturing Co Vs M S Bharat Bhogilal Patel and Another - Citation 1117493 - Court Judgment LegalCrystal. [online] Legalcrystal.com. Available at: <https://www.legalcrystal.com/case/1117493/m-s-aditi-manufacturing-co-vs-bharat-bhogilal> [Accessed 8 Jan. 2019].

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸vLex. (2018). Writ Petition Nos. 18565, 18566 of 2012 and M.P. No. 3 of 2012 in W.P. No. 18566 of 2012. Case: 1. Bharat Bhogilal Patel, 2. Aditi Manufacturing Co. Vs 1. Union of India, 2. Bharat Bhogilal Patel. Chennai (Madras) High Court. [online] Available at: <https://vlex.in/vid/1-bharat-bhogilal-patel-577388942> [8 Jan. 2019].

*same machine has been purchased by others prior to the date of invention.*³⁹

Hence both petitions filed before the Intellectual Property Appellate Board for revocation of the patents were allowed with the observation that – “The invention was already known and there is neither any novelty nor any inventive step and therefore, both the TRAs are allowed.”⁴⁰

In conclusion, with both these patents being revoked, not only has the IPAB reduced its caseload by two cases but also put an end to almost a dozen litigations across the country before several forums including the Madras High Court, the Delhi High Court, the Bombay High Court dealing with such cases. These cases are classic examples of why India needs to have a much more efficient IP adjudication mechanism and why coping mechanisms should be incorporated in the Indian Patent Law to deal with patent trolling practices.

IX. RECOMMENDATIONS

After thorough analysis of the works done regarding the patent trolling and their regulation, the Authors would like to put forth following recommendations –

- **Implementing Patent Concentration Strategy** – India should promote the establishment of Patent Defence Funds like China, while developing relationships with foreign universities and other prominent research institutions, becoming party to intellectual property contracts, agreeing to buy patent technology to protect its international market strategic security.
- **Perfecting the Patent Trading Market** – Due to the existing low degree of patent commercialization in India, there are numerous patents in universities and scientific research institutes, which provides patent troll with the opportunity to gather information regarding such patents and initiate patent litigation. Therefore, the Indian government should reach the full realization of commercialization of patents and reduce the risk of patent trolling.
- **Enhancing the Level of Patent Examination** – The most basic starting point to solve the present patent troll chaos is to control the overall process and quality of patent examination, to avoid bulk authorization of patents. The IP Office/Board shall give out detailed and clear standards and norms for patent examination to avoid the ambiguity and misinterpretation of patent claims. This will eventually lead to improvement of the professional standards of patents.

X. CONCLUSION

One of the purposes of this paper was to provide an overall picture of patent trolls, about their activities,

³⁹ Ibid.

⁴⁰ Lexology.com. (2018). Patent trolls: a global perspective | Lexology. [online] Available at: <https://www.lexology.com/library/detail.aspx?g=e6a23668-b328-42b3-bfff-06d54b2d33ee> [Accessed 8 Jan. 2019].

strategies, in order to get an initial understanding and to be able to differentiate between them and other entities with similar business behaviour.⁴¹ A ‘Patent Troll’ is an extortive entity conducting, deceptive, abusive, and possibly unlawful behavior in connection with patent litigation. Many definitions have been proposed in an attempt to identify these ‘patent extortionists,’ but being a patent owner and enforcing, asserting, or monetizing a patent cannot in itself be extortive behaviour. Therefore, none of them can be used to accurately capture a patent extortionist scenario.⁴² Furthermore, despite the fact that most of the individuals or companies are very much aware of patent they are still very reluctant to assess or even acknowledge this problem. The reason for this could be that patent holders have an exclusive right to protect their patent even when they are not making use of them. This practice is often viewed as a business model since it is very common for big corporations who predominantly reign over the commercial market. However, small companies and individuals have to be protected from patent trolling as they are the ones who are affected the most mainly due to the heavy investments that they already made in research and development of a product. Such small companies and individuals devoid of deep pockets are primarily targeted by these Non Performing Entities because they quite easily yield before their demands looking at the vulnerable position that they are in and this is the reason that such small companies and individuals who are at a vulnerable position require protection.

However, the Indian Patent Law to some extent has been able to curb with the problem of patent trolling. The Patents Act, 1970 deals with the patent trolling in two important ways –Firstly, in order to license or enforce, a patent troll has to acquire patent/patents in a very specific field of technology.⁴³ Since patents are usually in possession of different individuals, it would take some time for the patent trolls to acquire those rights.⁴⁴ Thereafter acquisition he will have to wait for the technology to mature before enforcing it or taking any other steps. even then this process could not be feasible for the patent troll as the Patents Act makes it mandatory for a patent holder to work out the patent or use it in India and in case he fails to do so, the Controller can grant compulsory license to a person who applies for it.⁴⁵ In order to check the working of patents the Act requires the patent holder to file an annual statement regarding the working of patents.

Therefore, it becomes necessary for the patent troll to work the patent for at least three years so as to prevent it from compulsory licensing which is a prerequisite for grant of compulsory license. Secondly, the patent troll would find it very difficult to enforce their rights before the courts. it is a well known fact that Indian Courts are

⁴¹Lup.lub.lu.se.(2018).[online]Available at:

<http://lup.lub.lu.se/luur/download?func=downloadFile&recordOid=8169230&fileOid=8727944> [8 Jan. 2019].

⁴²Pure.au.dk. (2018). [online] Available at: http://pure.au.dk/portal/files/75088235/Patent_Troll_Thesis_Kristoffersen_N.H..pdf [Accessed 8 Jan. 2019].

⁴³ Hoffmann-La Roche Ltd. v. Cipla Ltd., 2016 (65) PTC 1 (Del) (DB), p.16.

⁴⁴ Dhanpat Seth v. Nil Kamal Plastic Crates Ltd., 2008 (36) PTC 123 (HP) (DB) at p. 127.

⁴⁵ Graham v. John Deere Co., 383 U.S. 1 (1996).

generally not patent friendly and do not grant injunctions easily.⁴⁶ Furthermore, after succeeding in a case, which might be a long process, the damages granted are not very sufficient to support the business model of patent trolling.⁴⁷ It has been observed in number of cases that often the damages awarded by the Courts are nominal unlike the damages given by the Courts in USA or UK.⁴⁸

In the view of the abovementioned barriers posed by the Indian Patent Law, it becomes very difficult for the patent troll to sustain in the Indian market. However, there is still some need to bring on new reforms mainly to provide protection to new entrants and small companies in the market.

⁴⁶ Novartis AG v. Union of India, 2013 (54) PTC 1 (SC) at p.80.

⁴⁷ CTR Manufacturing Industries Limited v. Sergi Transformer Explosion Prevention Technologies Pvt. Ltd ,(65) PTC 262 (Bom), p. 288.

⁴⁸ Edward Lee, Patent Trolls: Moral Panics, Motions in Limine, and Patent Reform, 19 Stan. Tech. L. Rev. 113, 149 (2015).