

The Patent Trolls Are Coming...To Medtech

For years medical device makers have largely avoided one of the technology world's biggest headaches: patent "troll" litigation, but that's about to change. What medtech needs to do to fight the trolls.

BY JAY NUTTALL

- Information technology firms have long been the main targets of patent trolls, but the medtech industry should brace for a sharp increase in lawsuits.
- This increase will be driven by a flood of new patent filings and a wave of patent sales and acquisitions.
- While there is no way to stop patent trolls, there are a number of aggressive steps that medtech firms can and should take to mitigate the potentially significant risk and business disruption these cases can inflict.

Patent litigation has been on the rise for decades, with the number of cases filed increasing six times since the 1980s. Most of the growth in the last decade can be attributed to a class of litigants who file lawsuits for a living. These plaintiffs call themselves patent aggregators or non-practicing entities (NPEs), but are commonly referred to as patent "trolls." They acquire patents with no intention of using the underlying technology. They never manufacture or sell anything. Instead, many monetize their patents by aggressively filing infringement lawsuits against businesses that the trolls argue are using the technology. This has proven to be such a lucrative practice that several NPEs are now publicly traded companies.

Given that litigation is their reason for being, it's no surprise that trolls are fearless in filing their infringement claims. Because they don't manufacture anything, they have no need to worry about infringing on any competitor's patents, and thus no fear of countersuits. And when it comes to filing actions, it's the more the merrier: as they pile on cases, they create economies of scale that enable them to bring legal actions at relatively low cost.

The patent troll's signature move is to acquire a vague patent to some widely used technology or process (such as adding a flash drive to an implantable medical device), and then wait silently until there has been deep, irreversible investment in that technology – and widespread use of the alleged patented technology. Only then, once companies have sunk massive investments into these technologies, will the patent troll send out a batch of infringement notices – letters demanding settlements that the trolls disguise as licensing fees. Those fees are often less costly than the prospects of battling it out in the courts, even if a company expects to prevail. (See sidebar, "The Secret Weapons Of NPEs".) So it's easy to see why accused infringers pay up, and why the patent troll business has seen explosive growth. It's a shakedown that works. According to **RPX Corp.**, which provides patent risk management services, patent trolls filed 62% of all new patent infringement cases in 2014 – more than double their share of cases in 2009.

Currently, the bulk of this litigation has been aimed at e-commerce companies, software developers, and computer hardware

manufacturers. Medical devices, meanwhile, represent only 2% of NPE litigation, whereas they make up around 10% of overall patent litigation. (See Exhibit 1.) In a 2013 survey, Santa Clara Law School professor Colleen Chien found that while 90% of venture capitalists in the technology sector had fielded a demand from a patent troll, only 13% of pharmaceutical and medical device investors had been hit with similar notices.

But that tide is turning. In 2009, plaintiffs filed nine medical device patent infringement cases. In 2014, they filed 93. This year we'll see even more, and in the coming years the number of filings may increase by around 15% to 20% every year. (See Exhibit 2.)

There will be a significant increase in medical device troll litigation for several reasons. First, the number of infringement cases

closely corresponds to the number of new patents: RPX's research found a 96% correlation. There's been a 15% to 25% increase in medical device patents issued the past few years. It's safe to expect a corollary rise in infringement suits based on this factor alone.

The year 2014 also saw a big increase in medical device patent sales and acquisitions. Trolls who had previously specialized in buying patents in other industries are now entering and expanding their patent portfolios in the medical device area.

HIGH STAKES, LONG ODDS

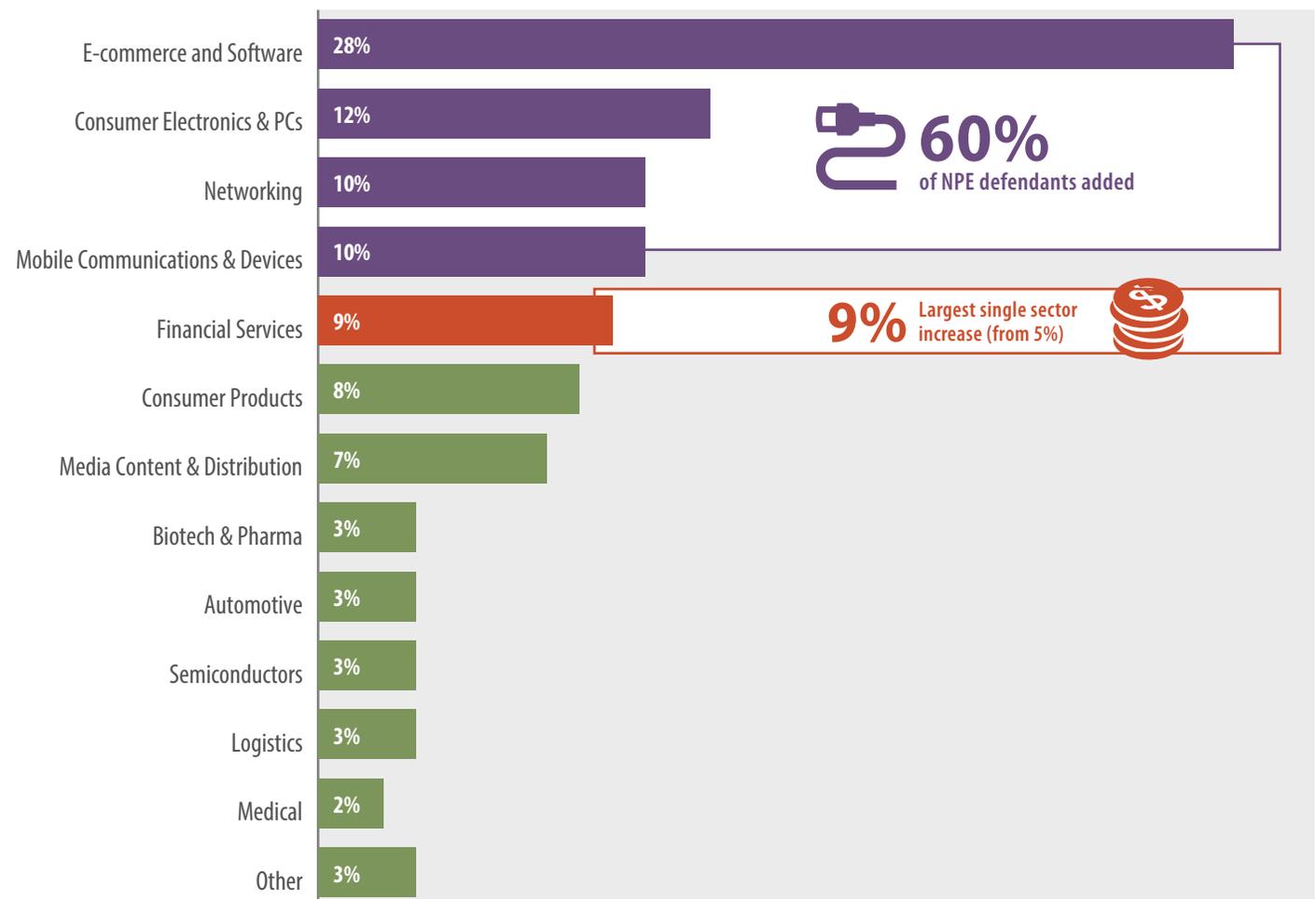
Whatever you may think of their utility or fairness, patent-infringement cases are not to be taken lightly. Damages awarded in medical device infringement suits are among the highest in any industry: the me-

dian, according to PricewaterhouseCoopers, is around \$15 million to \$16 million – about \$10 million higher than the overall median infringement verdict. The medical device industry's robust revenue and relatively high profit margins create fat targets for NPEs.

Most cases brought by patent trolls never make it to trial, let alone judgment – although NPEs file 67% of infringement cases, only 20% of judgments involve NPEs, according to PWC – since it's far more sensible for defendants to settle quickly than to risk years of costly discovery and court battles. To capitalize on this apprehension and insulate themselves from their own set of protracted litigation costs, patent trolls set settlement requests below potential court costs, enticing companies to pay up and move on quickly. More bad news: when the cases do go to trial, plaintiffs

Exhibit 1

Total NPE Defendants Added By Sector



SOURCE: ©RPX Corp., "2013 NPE Litigation Report"

in medical device cases win more often than in other tech sectors. Across all industries, PWC found plaintiffs won just 33% of cases, but won nearly 40% of medical device cases. Worse news: at trial, when NPEs win infringement suits, their median damages are nearly triple those won by practicing entities. You can be sure that trolls know these figures by heart; it's another reason medical device companies now have a target painted on their backs.

MEET THE PLAYERS

The Plaintiffs

The top plaintiffs in patent troll infringement cases are typically large, well-funded NPEs, several of which are publicly held. They include **Acacia Research Corp.**, **WiLan Inc.**, **Intellectual Ventures Inc.**, **IPNav**, **My Health Inc.**, and **DE Partners Golden Rule LLC**.

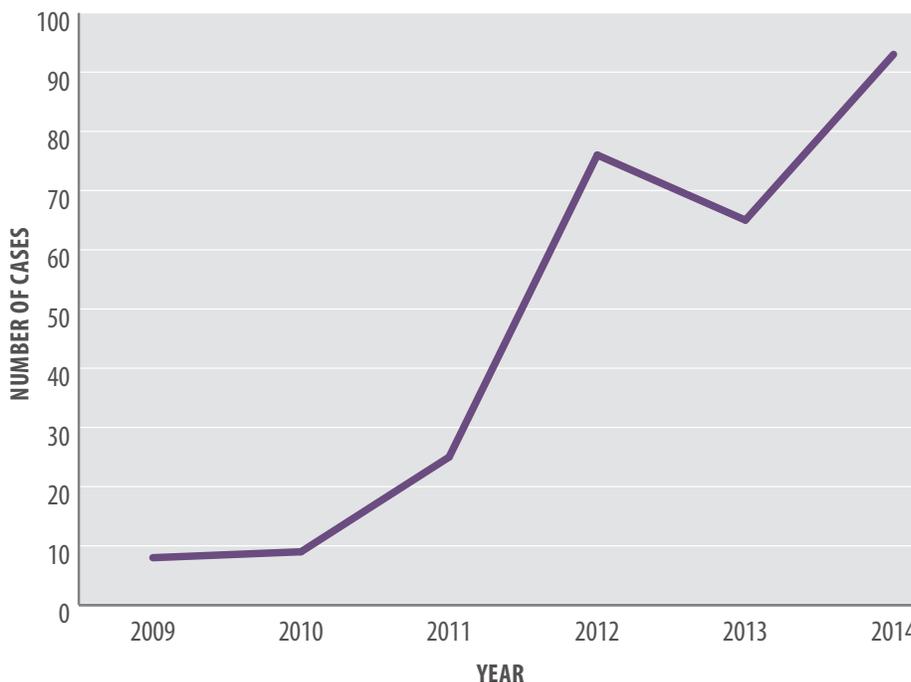
These formidable players have lately been using their well-stocked war chests to build patent portfolios in the medical technology realm. For instance:

- Intellectual Ventures has a medical device patent portfolio with an estimated 1,000 individual patents in at least 100 categories.
- More than 60 universities have sold some of their patent rights to Intellectual Ventures, according to Paul Basken's reporting in the Chronicle of Higher Education. Among those, the California Institute of Technology, which has sold exclusive rights to more than half of its patents to Intellectual Ventures.
- **Hanover Portfolio Acquisitions Inc.**, another top-20 patent litigator, recently executed a letter of intent to acquire 70% of pain management firm Pulsed Energy Technologies LLC, along with all of its intellectual property.
- In 2012, Acacia Research bought seven patent portfolios with more than 1,900 patents and applications relating to medical technology.
- Last year, IPNav acquired approximately 500 patents from Medtronic PLC – a deal that led medical technologies giant Stryker Corp. to launch an anti-trust case against both parties.

So armed, these patent aggregators are now pursuing infringement suits and settle-

Exhibit 2

NPE Medical Device And Services Patent Cases



SOURCE: ©RPX Corp., www.rpxcorp.com

ments. Intellectual Ventures has filed at least three infringement suits over microchips in medical imaging equipment. In 2013, an Acacia company with about 150 patents relating to orthopedic surgery sued **Biomet Inc.**, which settled. Acacia also settled with **ConMed Linvatec** in April for patents in the same portfolio. These large NPEs will use their massive – and growing – patent portfolios to ramp up activity in the medical device sector. (See box, "How To Spot A Troll.")

The Defendants

Patent trolls follow the money. In a large study of NPEs, **Harvard University** finance professor Lauren Cohen, PhD, found patent trolls most commonly file complaints against defendants they perceive to be cash-rich and high-margin. This puts companies like Medtronic, **Royal Philips Electronics NV**, **Boston Scientific Corp.**, and **Johnson & Johnson** squarely in the crosshairs.

The Judges

Not surprisingly, NPEs have developed a preferred list of forums for their claims, and thus often file in a relatively small number of districts. PWC's research showed that 41% of NPE-led cases were filed in just five districts:

Eastern Virginia, Delaware, Eastern Texas, Western Wisconsin, and Central Florida. NPEs appear to seek jurisdictions with relatively experienced judges and faster time to trial.

HOW TO PROTECT YOURSELF AGAINST PATENT TROLLS

When you receive an infringement notice from a patent troll, settlement may appear to be an enticing option. Litigation seems risky, disruptive, and expensive, particularly when compared with the often strategically low settlement requests that patent aggregators make. A quick cost-benefit analysis pushes many toward the cheapest, quickest resolution. One issue with acceding quickly to these initial demands is that it opens the door for more requests. Successful negotiations embolden NPEs to repeat their strategy. Patent trolls have wide and deep portfolios of patents with an enormous number of potential targets. By demonstrating that your firm is an easy hit, you incentivize them to keep coming back to the well.

So what options do you have? Instead of settling quickly or dragging your feet in the vain hope that the patent troll will somehow lose interest, roll up your sleeves and get

to work. Review the claims and respond aggressively with defenses and arguments you intend to raise. Doing the work at the outset will set the right tone and convey the message that you take these claims seriously and that you are not a pushover. Here's how:

1. Know the landscape and the land mines.

Take a look at the intellectual property out in the marketplace – the patents held by your competitors, companies in potential growth areas, and by patent trolls. Before entering into a new space, do your research about who owns what. Foster collaboration between your research and legal teams to ensure that you avoid using technology that could be used to substantiate a troll's claim. If patents expose you to risk, consider acquiring or cross-licensing them. And if that's not possible, then design around them ahead of time.

2. Be an aggressive defendant.

Once approached or sued by a patent troll, put the plaintiff on notice early of your claims and defenses. Answer quickly and let them know you will mount a strong defense.

3. Press your advantage.

A sensible early option is to seek review of the patent's validity through inter partes review (IPR) before the Patent Trial and Appeal Board. (See *"The Business Case For Post-Grant Patent Review"* — IN VIVO, December 2014.) Before yielding to an extensive and invasive discovery process, have the patent office take another look at the patentability of the claims. This can lead to outcomes, such as narrowing or ending the case, that are vastly less expensive and speedier than litigation. Claim construction is also a time in which you may bring in experts to educate the court about the technology in question. Filing IPRs and early summary judgment motions can put the patent trolls only assets, their patents, at risk.

Findthebest.com, a research and reviews web site, is a great example of an aggressive defendant that had success attacking the validity of the patent itself. When Lumen View Technology LLC sought \$50,000 for alleged infringement on a patent for a "system and method for facilitating bilateral and multilateral decision-making," Findthebest.com shot back that such a practice was fundamentally beyond the reach of any patent. The judge agreed, finding that the patent in question was an attempt to patent matchmaking it-

self, which he called "a fundamental process that has occurred all through human history."

4. Investigate and do research.

Begin by investigating some basic questions:

- **Does the plaintiff actually own the patent?** If they don't properly own the patent or others own some or all of the patent (prior employers, ex-spouses, etc.), their case may be invalid.
- **Has this same patent troll previously filed claims on this patent?** If so, investigate the arguments and outcomes. What defenses and claims were raised?
- **Has the patent troll done all the requisite pre-trial inquiry?** Some patent trolls do not do their due diligence before sending out sheaths of letters to defendants. If that's the case, Rule 11 may be of use. Rule 11 requires an attorney to make an objectively reasonable inquiry into the facts and law prior to filing a case. This is especially relevant when trolls level charges against a large number of defendants at once. If they haven't done this work, then they may be sanctioned, including court costs and attorneys fees. Such an action will have a chilling effect on future attacks from other trolls.

5. Seek attorney's fees. The surest way to defend against future attacks is to develop a reputation as an aggressive adversary who's not worth the trouble. If you successfully defend a claim, be sure to seek attorney's fees. Recently, judges have proven increasingly amenable to such requests, both as remuneration for a wronged defendant and as a punitive measure against patent trolls who overreached. Although fees are normally awarded only in exceptional cases, in *Octane Fitness v. Icon Health & Fitness*, the court expanded the notion of exceptionality to any case "that stands out from others with respect to the substantive strength of a party's litigation position ... or the unreasonable manner in which the case was litigated." This broader definition has since received sufficient support that district courts now employ much greater discretion in determining when to award fees.

IN SUM

There's a storm coming. With the number of medical device patents on the rise and the

THE SECRET WEAPONS OF NPES

They don't care what you think.

Since NPES aren't well known and don't sell anything, they have no need to protect their brand. In many cases they further insulate themselves from negative publicity by using shell companies to bring actions.

They don't make or sell any products, so they can't be counter-sued.

When one practicing company sues another for patent infringement, they risk a countersuit – an effective deterrent against filing borderline or unfounded cases. Without a product of their own, NPES have no such risk.

They often don't wait for evidence of infringement.

Because many defendants seek to settle quickly rather than risk costly litigation, some NPES assert claims without searching for actual evidence of infringement.

Their legal costs are minimal.

NPES often use contingency-fee lawyers who do not cost them any legal fees unless they settle or win damages. NPES also have little or no documents or witnesses and therefore they have little or no discovery costs or disruptions. NPES also file infringement cases in volume, and therefore develop economies of scale. Once the NPE has completed the initial filing process, it costs very little to add defendants.

They are highly profitable.

There is a huge spread between the cost of acquiring a patent and the value it can bring through settlements or favorable judgments. For example, NPES typically seek damages on an entire product even though the patent only relates to one small feature. As long as this disconnect persists, trolls will continue to collect patents by the fistful.

damages figures for the industry dwarfing the median numbers elsewhere, it's a sure bet that large, well-funded patent aggregators will continue to build out their portfolios and ready themselves for attack.

To prepare, do your homework early. Anticipate areas of risk and address them before they become issues. Dig in and show that you aren't an easy mark for settlement. Preventive moves and confident, aggressive response are the best protection for your company and your intellectual property.

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— *IN VIVO*, December 2014 [A#2014800194]

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HOW TO SPOT A TROLL

To help distinguish between patent trolls and the practicing entities, here are common characteristics of non-practicing entities, condensed from a list developed in a June 2013 report issued by the White House, "Patent Assertion and US Innovation."

NPEs do not use patents to manufacture or develop any technology, or engage in technology transfer, nor do they intend to. Instead, they acquire patents for the purpose of suing for infringement or making licensing demands.

NPEs often wait to bring claims against operating companies until after those companies have made irreversible investments.

They seek to acquire patents with broad and vague terms, such as "streaming video," then ask for license fees from any company they argue meets their definition of the broad and vague terms.

NPEs sometimes hide their identities using shell companies and require defendants who settle to sign non-disclosure agreements. Both of these tactics help them fragment the market and prevent defendants from collaborating.

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