PATENT TROLLING AGAINST INNOVATION: STATUS, TRENDS, THREATS

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Among the most important trends of development of intellectual property law it is possible to separate one – in the field of patent law, which has considerable economic, world outlook and legal influence with many spheres of business and consumption. The question is about activity of patent trolls. Patent troll is the company or entrepreneur, which business involves only receipt of license payment for the use of patens that belong to it. This definition was proposed by American lawyer Peter Detkin, who has worked in Intel Corporation. He has described by this term activity of the company TechSearch and its lawyer Raymond Niro on prosecuting of Intel Corporation. Earlier Detkin has used the term "patent extortionis".

Note: the quantity of companies ("patent trolls"), activity of which is directed to the income generation by means of "patent war", in USA was increased during one year to 602 (information as of 2010) instead of 496 as of year before.

American lawyers note that during last 5-6 years almost all high-tech companies became victims of patent trolls – small companies that buy patents and

then prosecute certain inventors. Some years ago companies Microsoft, Intel and IBM filed with Congress of the USA a request on limitation of recompenses, which can be demand by patent holder. Besides that, many independent experts multiply criticized modern patent system for range of legal omissions, upon which such companies parasitize. It is estimated that patent troll has patent portfolio, but makes no products, provides no services and conducts no researches (possible excluding particularly theoretic), concerning its patents. But along with this it actively defends its patent, pursuing in court companies that use inventions that belong to it. Such American companies as NTP Inc. and Intellectual Ventures can be named as examples of patent trolls. Company MercExchange is famous for the fact that it was officially called patent troll ex cathedra of Supreme Court of the United States. One of important aspect of patent trolls is the fact that they are immune to counter-claims. Considering that they don't produce anything except statements of claims, they can't be accused of patent infringement.Theoretically activity of patent troll can be limited by this, and its patents can be real and good inventions. Practically in many cases with the purpose of rise of income trolls commit different unfair acts. Typical action of troll is to file range of applications for advanced case scenarios of technologies, which are formulated in general terms. The only way is to wait when someone really invents them, namely creates efficient construction and starts realisation. Then trolls make a claim against this inventor.

Company IBM (which is by the way for many years a world leader in quantity of received invention patent) tries to receive amazing patent. Patent application № 20070244837 describes "system and methods of reaping the benefit for portfolio of assets, for example, patent portfolio". System lies in the fact that patent holder has a right to give some of his patents on "temporary lease" to partner company, which will get profit by them in many ways, for example, amercing and getting license fee

from the companies that violate these patents. Generally partner company can practice typical patent trolling [1]. It should be noted that US Patent and Trademark Office is not going to give to IBM this absurd patent, this fact does credit to it.

Late June, 2012 American researches from Boston University J. Bessen and M. J. Meurer published their research "The direct costs from NPE disputes" [2]. Main financial costs estimate, as a result of actions of patent trolls in USA economy, is given in the work. As it will be shown later, conclusions of the research is not consolatory. Authors conclude that the biggest direct and indirect expenses bear small and medium innovative companies, which more often give an opportunity to young researchers to approve themselves, develop new technologies, provide employment opportunities and keep positive competition. Big amount of claims are lodged on inventions in the field of software, including in such sphere as Internet.

Research has showed that patent trolls not only damage but also erode main principles, which underlie patent law that is why it is more often criticised. Really patent trolls limit conduction of researches, inhibit business initiative, and deprive their clients of sufficient reward and stable business relations. As a result they redirect their clients from inventions of pioneer, emerging technologies to patenting mass, easily understood and almost standard procedures with minimal inventive step, because precisely these patents will be licensed and will bear the biggest profit to aggressive defenders.

Unicity of conducted research based on the gathered information that earlier was difficult of access for learning: judicial claims of patent trolls against organisations of small and medium business, expenses on judicial dispute resolutions, and also amount of license payment for use of patents that were claimed by organisations, which do not practise. Non-practicing entities, NPE, or patent trolls – physical or legal entities, which hold patents, but do not use patented technology for

production goods or services, but instead hold judicial demands against organisations that produce such goods and services. They appeared for the purpose of help to inventors, which do not have enough assets or experience for patent commercialisation and patent defence, as early as XIX century "patent sharks" are criticised for abuse of rights. Usually among NPE are not only odious patent trolls, but also range of other organisations – universities, individual inventors, noncompeting organisations (which defend their patents not in the sphere where they carry on their commercial activity). But authors of the research first of all were interested in kind of NPE, which specialisation is only defence of patents that are not used by them, in other words patent trolls.

In American legal case Highland Plastics, Inc. v. Sorensen Research and Development Trust (2011) court held that it is entirely allowable to use term "patent troll" in official materials, pointing out that "this term is widely used and is understood clearly in patent court proceedings and that it is not so disparaging to admit use of it inappropriate" [2].

Today activity of non-practicing entities considerably increases business expenses. Also last years quantity of court proceedings, opened by patent trolls, is considerably increased. For example in 2005 NPE opened approximately 1400 court proceedings. And in 2011 2150 companies had to defend themselves from claims of NPE in 5842 court proceedings.

General statistics of court proceedings, opened by patent trolls in 2005-2011

http://lexdigital.ru/wp-content/uploads/2012/07/Без-имени3.jpg

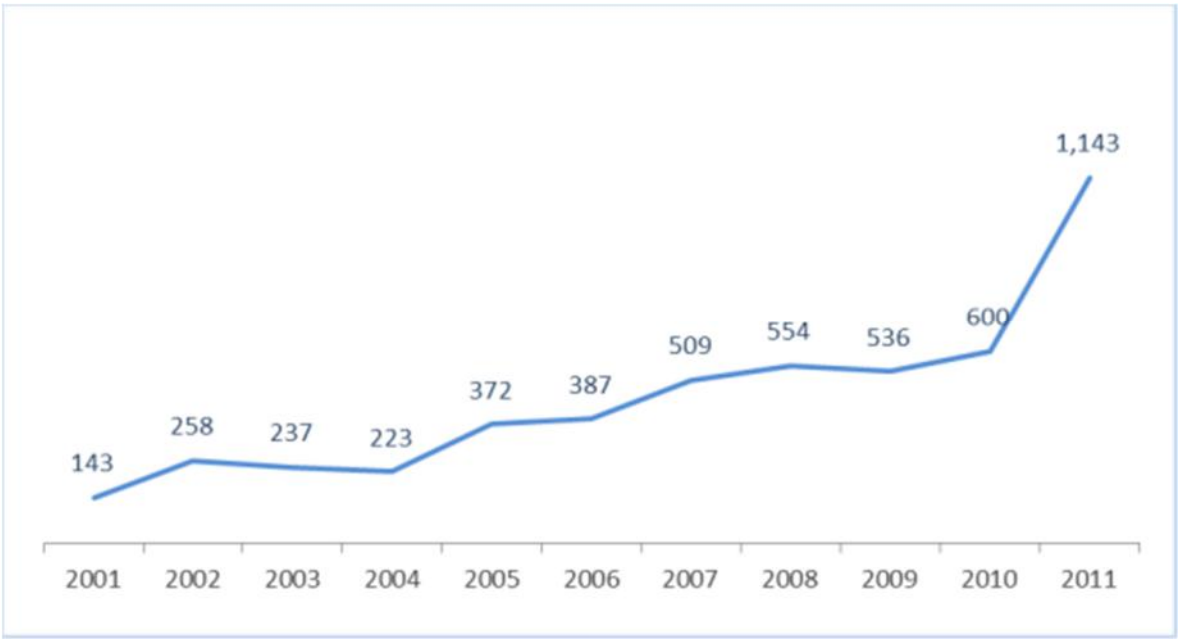
	Statistics on companies that are discovered				General statistics			
	Company	Cases, in which company is defendant	Quantity of court proceedings for company	Average revenue (млн$)	Company	Cases, in which company is defendant	Quantity of court proceedings for company	Average revenue (млн$)
uantity	82	1184	14,4	12 474,7	9 385	20 565	2,2	3 243,3

Closed case		784				15486		
Percent of closed cases		66%				75%		
Company size	percentage	percentage			percentage	percentage		
Small/medium	44%	13%	2,7	297,1	90%	59%	1,4	82,6
Big (revenue from 1 bln $)	56%	88%	14,9	22 005	10%	41%	9,0	16 666,4
Sphere of company activity								
Software Electronic commerce, Finances	37%	26%	6,7	7 103,1	22%	31%	3,1	3654,8
Hardware	63%	74%	11,2	15573,7	78%	69%	1,9	3 087,2
Public company	72%				14%			

As it is seen from the table patent trolls prosecute small and medium companies more often than big companies. Small companies, which bear damages because of the patent trolls' activity, have to limit investment in innovations, shut down business. As a result business competition in the market is infringed, technological development slow down, consumer interests suffer.

Authors of the research show also data concerning expenses of companies, connected with demands of NPE. Average amount of legal expenses (expenses on external consultants and lawyers, document preparation etc.) in one court proceeding is 1.37 mln. $ (420 thous. $ is for small/medium companies, 1 mln 520 thous. $ is for big companies). Taking into account much lesser profit of small companies, in relative terms they bear much bigger legal expenses in comparison with big companies. Because of the high asymmetry of real numbers (for example, in 5% of cases of big companies size of court expenses exceed 22 mln $) median of these expenses will be considerably less: 0.2 mln $ in one case, 0.07 mln $ for small/medium and 0.23 mln $ for big companies.

Growth dynamics of courts' quantity by participation of patent trolls



Source: PatentFreedom

For litigation settlements (royalty payment, penalty and other expenses) companies on the average expend 6.53 mln $ (1.33 mln $ - small/medium companies, 7.27 mln $ - big companies). Median is 0.22 mln $ in one case, 0.18 mln $ for small/medium companies and 0.23 mln $ for big companies. These expenses on litigation settlements related to company is much bigger, because most of experienced companies had to take part in proceeding as of from 2005 to 2011 on more than one occasion. On the average companies expend on this 58.38 mln $. Small/Medium companies expend 7.06 mln $, big – 88.47 mln $.

Information, got from NPE, on sum received by them during extrajudicial dispute settlement procedure, is shown in the research. Naturally is that this information is not absolutely accurate. Firstly, it is so because of the fact that the most amount of NPE flinched from giving information. Secondly, it is so because it is impossible to get information about major part of companies, which expend facilities to save themselves from claims of patent trolls without court proceedings. But still

given information is rather demonstrative. They show two trends. The first one is that extrajudicial dispute settlement procedure is less expensive (on the average companies expend 29.75 mln $, big companies 42.43 mln $). The second one is that not big companies have to pay more: in comparison with expenses beared during court proceedings 7.06 mln $ they extend during extrajudicial dispute settlement procedure 8.14 mln $. Authors of the research consider that absence of internal legal resources make those companies more often pay for expensive external resources, expenses on which are compared with expenses on legal costs.

Researches are sure that facilities given to patent trolls extrajudicially are main direct business expenses from such patent litigations [2]. Really given information let us suppose that main interest of NPE in big companies, which have not enough financial and legal assets that can be used for defense, in practical work leads to big amount of such claims and sizes of recovered expenses. Small companies very rare inform about the fact that they became victims of just another attack of patent trolls.

Reuters agency not so long ago published information that touches – “patent trolls” filed in 2012 more than half of all the patent claims in USA. Such range of activity is achieved for the first time.

Dynamics of patent claims connected to NPE

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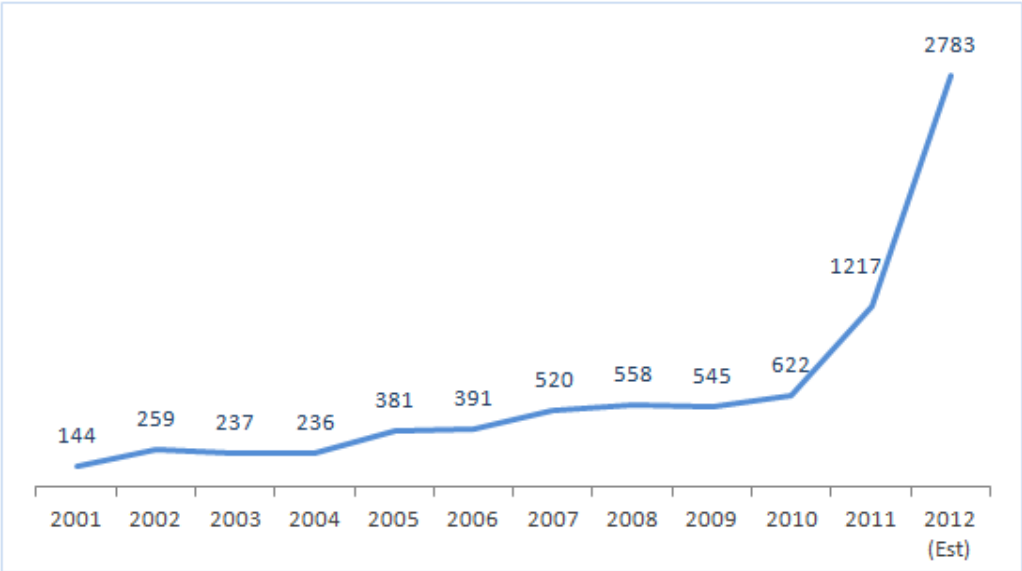

Source: PatentFreedom

Research of the situation with patent claims was conducted by professor of law Colleen Chien from the Santa Clara University. According to his calculation, percentage of claims, filed by patent trolls is 61% from the whole amount of patent claims filed in USA from the 1st of January to the 1st of December, 2012. Last year this characteristic value was 45%. Five years ago it was 23%. Rapid increase of percentage of patent claims filed by "trolls" shows the fact that system of defense of intellectual property right turned into mechanism of wealth accumulation and needs radical reformation. More claims are filed by those, who produce no goods, than by those, who produce goods. More often young companies, which have just got investments for development of their business, become victims of "trolls". Statistics shows that 35% of such companies, which got from 50 to 100 mln $, and 20% of companies, which got from 20 to 50 mln $, receive an attack of patent trolls [3].

What are approximate general expenses of companies, which have practice connected to expenses for the benefit of patent trolls? Estimated total made by authors, sizes of expenses (on court and extrajudicial procedures) are approximately:

2005 – 6.574 bln $; 2006 – 6.874 bln $; 2007 – 11.334 bln $; 2008 – 12.603 bln $; 2009 – 13.726 bln $; 2010 – 22.303 bln $; 2011 – 29.213 bln $.

In contrast with statements of some of NPE representatives that they levy facilities mainly from the few biggest violators, data shows that for percentage of small/medium companies there are 59% of court proceedings and those companies pay 37% from funds received by NPE. Quantity of small companies, which fulfill demands of patent trolls without court proceeding, in practical work, as it was shown, makes up much bigger percentage. Also beyond the research remained indirect expenses, connected to actions of patent trolls. They also are considerable sums of expenses and losses, caused by leading and engineering outflow, delay of production or improvement of goods, loss or delay of income, and also by credit limitation. In the estimation of authors (Bessen, 2011), indirect expenses in terms of losses of market capitalisation of affected companies are approximately 80 bln $ per year, namely sum that is more than twice as much as average annual amount of direct expenses.

Then researches touch such widespread, propagandized by them attempt to exculpate activity of patent trolls, as defence of interests of non-experienced inventors from big aggressive patent market players. Analysis shows that average income of inventor-companies, which use services of patent trolls is approximately the same in comparison with average profit of companies, which are pursued by patent trolls (6.3 mln $ against 10.8 mln $). That is why this attempt to exculpate is ineffective.

As a result positive influence of patent trolls on innovative development is more than doubtful. Firstly, their help is expressed not in defense of non-experienced inventors from big business-sharks but in competitive pressure on analogous inventors, especially in their most active period (research showed that risks to

become victim of NPE is much higher after conduction of scientific and research as well as research and development works (R&D) and release of new innovative products). Secondly, only 21% of received by patent trolls funds go to small inventors-clients of NPE, while pursued companies expend much bigger sums (by means of direct and indirect expenses) this fact has a negative impact on innovative practice. NPE cause to small/medium companies more losses than those NPE later invest in development of inventions. Thirdly, widely played up help to non-experienced inventors in licensing of their technologies comes across obvious unwillingness not to buy these technologies from the side of those, who understand what losses they will bear during any proceeding against NPE. In conclusion, activity of patent trolls makes their clients not to make advanced inventions, which are in stark contrast, but to create widespread, typical technologies with minimal inventive step, because they are the most perspective in relation to filing claims against wider range of entities.

Taking into account the fact that expenses on R&D in 2009 are approximately 247 mln $, expenses on NPE claims settlement are considerable “tax” on investments in innovations. But how necessary is it?

In 2008-2009 American company PAT filed two claims against Russian company “Лабораторія Касперського” and also against 34 companies on a charge of use of another person's patented technologies. Special aspect of American patent system is that according to it not only ready invention can be patented but also unrealized idea in wide sense. On early 90th this “special aspect” was expressed in the fact that big amount of patents on different “technologies” with patent formulas, which suddenly “cover” very nearly all innovations, were received. For example, choose of smiles, upgrade of characters in on-line game, autosuggestion in web-forms, activation of products with activation code, online shopping “one-click”, etc.

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After four years of desperate fight, on June, 2012, United States District Court for the Eastern District of Texas pronounced a decree in the IPAT Company legal action and entirely dropped all charges from "Лабораторія Касперського", what is more important charges were dropped under mark "With prejudice", in other words IPAT can not file new claim concerning those patents! "Лабораторія Касперського" spent 3.5 years of work, 2.5 mln $ and much time and resources. As it is noted by company executive – it is not just another successful action. Firstly, Russian IT-company won from American troll in its territory in game by its rules. Secondly, it was the only one company of 35 companies that did not compromise with trolls and fought to a finish against trolls. Thirdly, it was a successful action against very strong multilevel troll system, which for a long time for many times had similar successful actions. At last it is laid foundation of very good trend by showing that it is possible and needed to fight against trolls and any amicable settlement with them threaten to increase their impudence and appetite, to appear new claims and negatively reflect on development of IT-industry [4].

For 20 years software trolls evolved. They are not small bureaus that work for small payment, but multilevel, well thought-out schema. Their main instruments are patents. Trolls chase old, monitor new, buy available and also receive patents by themselves. Invention patents are perused, list of potential victims is made, chances are calculated, position is processed and claim machine starts working. There are "battlelike" trolls and trolls- aggregators. The first type files claim, "fights" in court, does not despise money-grubbing, allusions, attacks on partners-defendants and others. The second type are positioning as defenders from the first type. When pressure on defendant starts to increase "aggregator" appear and suggest for reasonable sum (less than size of first-level troll) to join their patent pool. Accidentally on purpose it is emerged that "aggregator" has agreement with bad

"battlelike" troll about licensing of that patent. It is noted that annual "license fees" for use of patent pool can be from several dozens to millions of dollars (known maximum is 7 million $).

This activity became profitable kind of business. For example, one of the most active troll with such self explanatory name Acacia Research Corporation in the 1st quarter, 2012, gave a summary of income in 99 mln $, 50 mln $ of them are net profit. Relative to IPAT establishment – RPX Company for that year has sales revenue in 44 mln $ and 8.6 mln $ of net profit. At the same time many trolls successfully trade shares in stock market!

This negative occurrence reached Ukraine. There was a discussion on this topic during hearing within the Science and Education Committee of Verkhovna Rada of Ukraine "Industrial property in innovative economy of Ukraine: effectiveness of application of legislation and state regulation" (on the 5th of October, 2009). "Today patent law in Ukraine turned into instrument, with the help of which it is possible to take away from the market undesirable competitor, to decrease sizes of production, to block or to stop activity of any enterprise, to make it bankrupt. Patents on (utility model) technical solution known by centuries are granted by Intellectual Property Department. For example Ukrainian patent № 43497 "The Process of grave and keeping of the body of dead" (in fact crypt), Ukrainian patent №34764 "Vine stake" (in fact club). Most crucially is the fact that the last decision is admitted as pioneer, namely that has no analogs in the world! Situation with industrial designs is not better. For example, Ukrainian patent № 10188 is granted on the package of shapes known for more than 30 years and produced by many producers as in Ukraine, so in the whole world" [5, p. 252]

Imperfection of national patent legislation leads to serious irregularities and economic losses. It is enough to give several examples. Let's remember international

scandal connected with Japanese company Bridgestone - international manufacturer of automobile tires, which arose after Mr. B. from Dnepropetrovsk after registration of industrial design patent on those tires began through the instrumentality of customs service prohibit delivery of those tires to Ukraine. There was diplomatic intervention, after which the patent by judicial procedure was declared invalid. Later that raider, after receiving industrial design patent on carbody of Lanos Sens, tried to prohibit their delivery to Ukraine. Responsibility for abuse of the right, unfairness of patent applicant is not provided by legislation.

As it is considered by experts, imbalances in patent system, which can be solved by reevaluation of main principles in the field of patent law, increasingly put on the alert. Pharmacy, gene engineering and IT-industry are spheres, in which discussion on optimal regime of patent defense is the most critical. In the interim courts and other regulatory authorities should have reliance on provided, even if inconsiderable in number, ways of achievement of balance in all participants' interests, for example, use of FRRAND concept – licensing [6].

Not so long ago company Article One Partners (New York), which is specialised on researches and analytics in the field of practical patenting, suggested new service for its clients. With the help o this service it is possible to limit activity of "patent trolls", which parasitize on big brands, by means of judicial appeals against their patents and new products. New service Litigation Avoidance, which is suggested to big clients by the company, is directed to removal of opportunity to earn profit be means of filing by "patent trolls", which live at the expense of buying patents and claims, court claims, in other words on elimination of "unsatisfactory patents". The first participant of the Litigation Avoidance service became Microsoft Corporation [7].

Such measures are suggested for the fight against patent trolls: quality improvement of patent expertise made by patent department of country; establishment of limitation on maximum size of recompense for patent infringement; workout of effective mechanism of forced licensing in case of invention non-exploitation by company [8, p.7]. President of USA Barack Obama approved law that reforms American patent system. The law comes into effect on March, 2013. New rules let enterprises to learn just granted patents and appeal against their grant over the period of nine months; this potentially can eliminate the danger of court claims. The law also applies restrictions on trolls – they can not file claims against several companies at the same time, if there are no evidences of agreement. New principle "one claim – one defendant" should decrease quantity of subpoenaed companies.

Actuality "against trolls" activity is very high: technology of prosecution for as if illegal use of patented technologies is worked out, and activity of companies, which work on the creation of new real technologies, become more complicated exactly in consequence of patent claims.

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ПАТЕНТНИЙ ТРОЛІНГ ПРОТИ ІННОВАЦІЙ: СТАН, ТЕНДЕНЦІЇ, ЗАГРОЗИ

Андрощук Г.О.

У роботі подано економіко-правовий аналіз явища патентного тролінгу. Показано, що основні фінансові витрати, викликані діями патентних тролів, несуть малі й середні інноваційні компанії. Патентні тролі підривають принципи патентного права, завдають шкоди, обмежують проведення наукових досліджень, інноваційну діяльність, стримують підприємницьку ініціативу. Як наслідок – порушується конкуренція на ринку, сповільнюється технологічний розвиток, страждають інтереси споживачів. Це негативне явище набуває поширення і в Україні.

Ключові слова: патентні тролі, порушення патенту, винахід, ліцензійні платежі, роялті, судові витрати.

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ПАТЕНТНЫЙ ТРОЛЛИНГ ПРОТИВ ИННОВАЦИЙ: СОСТОЯНИЕ, ТЕНДЕНЦИИ, УГРОЗЫ

Андрощук Г. А.

В работе дается экономико-правовой анализ явления патентного троллинга. Показано, что основные финансовые затраты, вызванные действиями патентных троллей, несут малые и средние инновационные компании. Патентные тролли подрывают принципы патентного права, наносят ущерб, ограничивают проведение научных исследований, сдерживают инновационную деятельность, предпринимательскую инициативу. В результате, нарушается конкуренция на рынке, замедляется технологическое развитие, страдают интересы потребителей. Это негативное явление получает распространение и в Украине.

Ключевые слова: патентные тролли, нарушение патента, изобретение, лицензионные платежи, роялти, судебные затраты.

PATENT TROLLING AGAINST INNOVATION: STATUS, TRENDS, THREATS

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In this paper the economic and legal analysis of the phenomenon of patent trolling. It is shown that the main financial costs caused by the actions of patent trolls, are small and medium-sized innovative companies. Patent trolls undermine the principles of patent law, damage, limit research, hinder innovation, entrepreneurial initiative. As a result, distort competition in the market, slowing technological development affects the interests of consumers. This negative phenomenon is spreading in Ukraine. In order to combat patent trolls offers the following measures: improving the quality of patent examination patent offices of countries, introduction limits on the maximum amount of compensation for infringement of patents, an effective mechanism for testing compulsory licensing in case of firm disuses his invention. The new rules allow companies to explore the newly issued patents and challenge their issuance for nine months, which could potentially eliminate the risk of lawsuits. The Act also imposes new restrictions on the trolls - they will not be able to file lawsuits against several companies at once if there is no proof of collusion. The new principle of "one action - one respondent" should reduce the number of firms, brought to court.

Keywords: patent trolls, patent infringement, the present invention, license fees, royalties, court costs.