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Trolls make habit of lurking under intellectual property bridges

This article goes to press on Dec. 21, the last day of the Mayan calendar, but more optimistically, the first day of winter. At least in North America, it is the first day of winter. I am reminded of the distinction because I was invited to make a presentation recently in beautiful Punta del Este, on the coast of Uruguay, where Dec. 21 heralds the first day of summer. In that lovely setting, I was asked to speak on the topic of "Trademark Trolls."

A complete understanding of that term requires reference to "patent trolls" and "copyright trolls." But first, a brief etymological excursion is necessary for a complete understanding of this colorful legal terminology.

Trolls are creatures from Norwegian folk tales. They are strong, but rather dim-witted, creatures that live in caves or under bridges. Most children know about trolls because of the tale of "Three Billy Goats Gruff." The term came into the intellectual property lexicon in 2001 when some lawyers at Intel used the term "patent troll" to refer to some litigious opponents who owned patents but did not manufacture any goods under the patent.

The modus operandi of a patent troll is to buy patents inexpensively often out of bankruptcy, even though the purchaser has no intention of manufacturing or selling the patented article. A patent troll's focus is solely on licensing the patent rights to others or enforcing those rights through litigation. This is permissible, as patent law allows one to own and enforce patent rights regardless of whether the patent holder uses the patented technology. Because of the high cost of patent litigation and the risk of huge jury verdicts, patent trolls can often extract sizeable settlements and licensing fees.

More recently the troll terminology has been used in copyright cases. An example is seen in the practices of Righthaven LLC. Righthaven purportedly obtained from several newspapers the right to enforce their copyrights. It then filed a spate of lawsuits against

bloggers and others who used photos or posted copies of news articles online. Righthaven filed or threatened to file hundreds of suits, demanding a relatively modest settlement for each.

The prospective defendant was faced with the choice of paying a license fee or spending even more litigating fair use issues. The courts were not very receptive to Righthaven's litigation tactics and, in several cases that did not quickly settle, Righthaven was forced to pay attorney fee awards. As a result, the company has apparently become insolvent.

Which brings us to "trademark trolls." It has been written that in the U.S. "there is no such thing as a trademark troll," D. Bernstein, 99 Trademark Reporter 1037 (2009), since U.S. law requires as a fundamental basis for trademark rights that the trademark owner actually use the mark on goods (or services) that have been produced and sold in interstate or local commerce. A nonpracticing entity can own a valid patent or a valid copyright, but an entity that does not use a trademark in commerce cannot own valid trademark rights.

However, if we view the concept of a troll more broadly to include someone who asserts trademark claims, but does not necessarily own valid trademark rights, then the U.S. most certainly does have trademark trolls. Much has been written about one particularly noxious specimen of this creature — the infamous Leo Stoller. It is right here in Chicago that one can find this paragon of trademark trolls.

In the most notable of the many court decisions involving Stoller (a suit in which Stoller sued George Brett, a baseball star for the Kansas City Royals in the 1980s), the 7th U.S. Circuit Court of Appeals wrote "were there a Hall of Fame for hyperactive litigators, Stoller would be in it. And like George Brett, he would have gotten in on the first ballot." Stoller and his affiliated companies owned numerous trademark registrations. His most popular weapon was his Stealth trademark and at one point he had

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about 50 different registrations just for the Stealth mark. Yet, as described below, it was the Stealth mark that was probably the coup de grace that brought down his trolling industry.

Stoller's modus operandi was to obtain (most likely through false declarations of use in commerce) a large number of federal trademark registrations. He would then aggressively police the use of any remotely similar term by third parties and demand that the user enter a license and pay a license fee. If the party refused, Stoller would file a trademark infringement lawsuit in federal court in Chicago. The federal judges in Chicago quickly became aware of Stoller's litigation abuses and his lawsuits met with no success. In fact, "no court has ever found in-

fringement of any trademark allegedly held by Stoller or his related companies in any reported opinion." A. Folgers, 3 Seventh Circuit Review 452, 454 (2007).

In *Central Manufacturing v. Brett* (7th Cir. 2007), the court of appeals found that Stoller completely failed to show that he actually used the Stealth mark in connection with an ongoing business prior to Brett's adoption of the mark. Without evidence of actual use, Stoller had no valid trademark rights to assert against Brett, despite owning a registration.

The court's response to Stoller's meritless claim was significant. Under Section 1119 of the Lanham Act, a court can order the cancellation of a federal registration. "Where, as here, a registrant's asserted rights are shown to be invalid, cancellation is not merely appropriate, it is the best course." The court canceled Stoller's registration of the Stealth mark for baseball products. The court also (as had many other courts) required Stoller to pay the opposing party's attorney fees.

Stoller has repeatedly been sanctioned for his trolling activities. The Northern District of Illinois' Executive Committee issued an order barring him from filing new lawsuits without leave from the committee. The 7th Circuit entered an order barring him from filing any new appeals until he paid a fine of \$10,000 (he never paid it). Even the U.S. Supreme Court has issued restrictions on Stoller, noting that he had "repeatedly abused this court's process" in his many petitions for certiorari.

As in the "Billy Goats Gruff" story, the troll was vanquished. The numerous fee awards assessed against him caused him to file bankruptcy. That process also did not end well for Stoller: The penultimate humiliation came in December 2010 when Stoller was indicted for making false statements under oath in his bankruptcy case.

He pleaded guilty. The final chapter of the Stoller trademark troll saga — his sentencing by U.S. District Judge Rebecca R. Pallmeyer for the criminal charges — is expected soon.

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