

Rethinking Patent Liquidity

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Some have called for dramatic increases in the amount and frequency of maintenance fees in order to combat the “patent troll” problem. It is reasoned that high maintenance fees may help prune the patent thicket by encouraging patent holders to abandon non-essential patents, as well as making it very costly for trolls to maintain large litigation arsenals.

It is unclear whether and to what extent raising maintenance fees may keep patents away from those who would troll. The patent monetization industry is evolving and may soon achieve a level of sophistication and complexity comparable to that of the financial industry in monetizing unique assets that require large capital investments (e.g., real estate). It is only a matter of time before trolls will develop creative ways of financing their operations that dampen or distribute the impact of any increase in maintenance fees. At the same time, patentees who are faced with high—and more frequent—maintenance fees may decide to downsize their non-essential patent holdings sooner. Because the most prolific patentees tend to be corporate entities—many of whom are increasingly under pressure from their boards to monetize their patents—the downsizing will likely take the form of a sale (possibly to a troll), rather than abandonment.

A synergistic relationship between corporate patenting and the trolls’ business model has emerged, but scant attention has been paid to the fact that this synergistic relationship is largely facilitated by the liquidity of patents, which are currently freely-assignable. Drawing on lessons from the financial industry, this Article evaluates whether restrictions on the alienability of patents may have salutary effects for both the “patent thicket problem” by discouraging the filing of patent applications on marginal inventions, as well as the “patent troll problem” by making it more likely that a non-essential patent may be abandoned rather than sold.