Troll Control

By Sid Leach

A recent case in Arizona should serve as a deterrent to patent trolls — patent holders who attempt to use the high cost of defending patent infringement lawsuits as a means for extorting money from companies that do not actually infringe the asserted patents.

In an Arizona federal court, Hypercom Corporation struck back against a patent troll that sued the company on baseless claims of patent infringement. Hypercom succeeded in recovering $2.26 million on its claims for malicious prosecution and abuse of process. This appears to be the first case in which a patent troll has been found liable for these offenses.

More and more patent infringement lawsuits are being filed by patent trolls. Patent trolls are companies that operate in an industry described by Justice Anthony Kennedy in his concurring opinion in the Supreme Court's recent decision in *Ebay Inc. v. MercExchange LLC* as one "in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees." Patent infringement lawsuits or threats of lawsuits are used, according to Kennedy, as a "bargaining tool to charge exorbitant fees to companies that seek to buy license to practice the patent." Many patent-holding companies are legitimate enterprises. However, patent-holding companies have recently been used as instruments in patent litigation extortion schemes, and such abuse of our legal system must be stopped.

Patent infringement litigation seems to be particularly susceptible to use in litigation extortion schemes.

The *Hypercom* case represents a sinister development in patent troll lawsuits. Baseless patent infringement lawsuits were filed against Hypercom in Michigan, Texas and California. In addition, proceedings were brought against the company at the International Trade Commission in Washington, D.C., by a shell corporation that had no employees, no offices, no telephone, and no physical existence beyond a post office box in Austin, Texas. The patent troll in this case, Verve LLC, was created by an attorney in Austin. That attorney's law firm filed the lawsuits against Hypercom. Patents were allegedly transferred to this shell corporation so that it, not the real owner of the patents, could be named as the plaintiff.

During the litigation, Verve was ordered to produce documents that revealed it did not actually own the patents asserted against Hypercom. The patents were actually owned by Omron Corporation in Japan, which entered into agreements to split the proceeds from the lawsuits with Verve. Documents produced during the litigation revealed that Omron was not named as a party in the lawsuits in order to ensure that it would have "zero risk" in the scheme.

The first lawsuit against Hypercom was filed on September 11, 2003. This "9-11" attack by Verve set off a battle in the courts that lasted for 3½ years. Hypercom is to be commended for sticking it out until justice was done. Many other targets of Verve's scheme gave in and paid off the patent troll in order to buy peace.

Patent infringement litigation seems to be particularly susceptible to use in litigation extortion schemes. Patent cases are notoriously expensive to defend, even when a company is completely innocent of any infringement of the asserted patents. The cases are often technically complex, making it more difficult to demonstrate how baseless the patent infringement claims are. Few companies can afford the lengthy litigation battle that is often required in order to achieve vindication.

In the same month that a jury in Arizona returned a verdict against Verve, its owners and the Texas law firm that filed the lawsuits against Hypercom, a federal court in the state of Washington imposed sanctions on a patent troll in a similar extortion scheme in the case of *Eon-Net v. Flagstar Bancorp Inc.* However, the type of sanctions imposed in the *Eon-Net* case under Rule 11 of the Federal Rules of Civil Procedure are limited to the costs and expenses incurred by the defendant in that particular case. This often proves to be an insufficient deterrent to a patent troll who files multiple lawsuits, especially when they succeed in forcing a number of the defendants to pay money in order to "settle" them. In the Hypercom litigation, a number of other companies were sued, and the patent troll succeeded in collecting over $900,000 from those who chose to settle instead of fighting the baseless patent infringement charges. The patent troll, Verve, was sanctioned by an administrative law judge in the International Trade Commission under a rule equivalent to Rule 11, but the amount of the sanctions was limited to $30,000. The administrative law judge stated that he believed the amount of the sanctions was insufficient to achieve deterrence, but he felt bound by the limitations of the rule under which the sanctions were being imposed.

Claims of malicious prosecution and abuse of process, however, are not so limited. Punitive damages may be imposed that go beyond the costs and expenses that were incurred by the particular company that asserts such claims against a patent troll. In the *Hypercom* case, the amount ultimately recovered by Hypercom was more than twice the amount of profits that had been realized under the scheme. In cases where a patent troll engages in an illegal extortion scheme, effective deterrence cannot be achieved unless the patent troll is forced to pay an amount that is a multiple of the profits realized from the illegal actions.

Using a patent holding company to file baseless patent infringement lawsuits will not insulate a patent owner from liability if it is a participant in an illegal scheme. Malicious prosecution claims are not limited to the party that filed the malicious lawsuit. Anyone who was an instigator of the malicious lawsuits, or who knowingly aided and abetted the malicious litigation, may also be liable.

In addition to asserting counterclaims against Verve and its lawyers, Hypercom sued Omron Corporation in Arizona, alleging that Omron was an instigator of the malicious patent infringement lawsuits that Verve filed against Hypercom, and that Omron aided and abetted Verve in the commission of the illegal scheme. Omron was also alleged to be a participant in a civil conspiracy. After a jury trial resulted in verdicts against Verve and its lawyers, Omron agreed on the eve of trial to settle Hypercom's claims against Omron for $1.5 million.

The outcome of the *Hypercom* case should serve as a warning to anyone who considers using our legal system as part of an extortion scheme to force companies to pay money to get rid of baseless patent infringement lawsuits. The amount that a patent troll may ultimately have to pay if it pursues an illegal litigation extortion scheme can be a substantial multiple of any profits that might be realized from such guile. That should serve as a deterrent from engaging in any such improper conduct.

Sid Leach is a partner with Snell & Wilmer in Phoenix, where he specializes in intellectual property and patent infringement litigation.

Know Thy Juror: How Online Research Can Aid the Voir Dire Process

By David V. Dilenschneider

While sitting through *voir dire*, I watched the prosecutor and defense counsel perform their questioning of potential jurors and wondered whether they would have known I was an attorney if I had not disclosed that information on the juror questionnaire, whether they would know about my criminal background (if I had not disclosed that) or whether they could know if I had been related to a party, witness or attorney (if I had been, but had not disclosed it).

Those questions came to mind because I had recently read about a case in which a verdict had been overturned on appeal because a jury foreman failed to reveal information during *voir dire*. In 2002, a Florida appeals court overturned a $5 million plaintiff's verdict in a wrongful death case because the foreman of the jury failed to disclose not only that he had been represented by the plaintiff's counsel in his own 1992 lawsuit, but also that the opposing party in his lawsuit had been represented by the attorneys for the defendant in the wrongful death case. Simply put, the jury foreman had several conflicts of interest with the attorneys in the case, all of which the defense counsel failed to uncover until after they had lost at trial and decided to investigate the jurors.

After reading about that case, I searched for the jury foreman's name in docket information for the state of Florida. My efforts led me to records identifying the foreman's 1992 lawsuit (the one he failed to mention), which revealed the names of the attorneys and pinpointed the conflict. Upon finding this information, I realized that if the defense counsel in the wrongful death case had spent a few dollars conducting research on potential jurors before the trial started, they could have uncovered the information that might have resulted in the removal of the foreman — before spending their client's money to try the case and then appeal the adverse result.

These days, I'm reading more and more articles about jurors being dismissed. Just last year, two empanelled jurors were dismissed during deliberations in the racketeering and fraud trial of former Illinois Governor George Ryan because they failed to disclose their criminal backgrounds on jury questionnaires. Doing my own research, I easily discovered that one of the jurors in question had been convicted several times for DUI, and that the other had been arrested for a drug offense.

In response to these types of incidents, background checks on potential jurors seem to be gaining some acceptance in the legal community. As a result of the Ryan trial, it was widely reported that criminal background checks would be run on potential jurors in the trial of I. Lewis "Scooter" Libby. In addition, the Suffolk County (Mass.) District Attorney's office, after losing a murder case against a defendant (allegedly because four empanelled jurors had lied about their criminal backgrounds) vowed to "routinely run criminal background checks on empanelled jurors in all felony cases." Similarly, a few years ago, prosecutors in an Ohio murder case used a federal criminal records database to run background checks on jurors and discovered that two of them had allegedly lied during *voir dire* about their criminal pasts.

Such investigations are not limited to just criminal records. Cleveland-based jury consultant Daniel J. Young noted that, "In real life, juror backgrounding is usually limited to searching conviction, lawsuit and asset histories — all public records."

Today, with more courts providing Internet access in the courtroom, it's easier than ever to conduct real-time research on potential jurors. For starters, a quick search of a juror's name through Google or similar search engines might yield potentially relevant information, such as blog postings, personal Web sites and pages on social-networking sites, such as Facebook. In a recent $55 million lawsuit brought by the creators of "Will & Grace" against NBC, the judge dismissed a jury foreman who had criticized corporations, specifically NBC, on his Web site.

It's important to note, however, that not all information found through a Web search is true (gasp!). Recent well-publicized example of web hoaxes have involved the collaborative encyclopedia Wikipedia, as well as popular social-networking sites. An Oxford professor, an Australian High Court Judge, weather forecasters, teachers and even Paris Hilton are just a few of the individuals who have been the subject of fake pages.

Moreover, not all online information can be found via such a search. In fact, the vast majority of online information is hidden from general search engines. Thus, complementing a broad-based Web search with access to proprietary news and public-records databases online is a must.

Archived news is critical because what goes around comes around. For instance, following the blizzard that closed Denver International Airport in late 2006, the airport spokesman said that he'd like to "choke the person who came up with (the 'all-weather') term" for the airport. It was later discovered that the same spokesman bragged about the new "all-weather" airport in a 1992 interview. Jurors may have written articles, authored letters to the editor and even conducted interviews, and once in the public domain, this information can be a valuable resource for uncovering biases.

Public records can be similarly revealing. In virtually every jurisdiction, an individual is prohibited from serving as a juror if he or she is related (by a certain degree) to the parties, the witnesses or the attorneys involved in a lawsuit. Stories abound in which jurors have failed to disclose such relationships, which can be easily uncovered through a variety of publicly available information, such as marriage records, real estate records, etc.

Several Web sites offer free access to news and public records. Such sites can be a good starting point, but caution is warranted. First, the depth and breadth of content is usually quite limited. Google News claims to search 4,500 news sources; in contrast, some proprietary news databases contain up to 20,000 news sources. Second, free sites tend to disappear or convert to fee sites over time. Recent examples of converted sites include searchsystems.net and pretrieve.com. Having the rug pulled out from under you when you are under the gun is not an ideal situation.

Because these searches can also be time-consuming and expensive (when utilizing fee sites), researchers may want to utilize products that search numerous public records sources simultaneously — and with intelligence. Products such as LexisNexis SmartLinx, ChoicePoint Online DiscoveryPlus and others, compile various public records on an entity (whether a person or company) into a single report. More importantly, the relational algorithms employed by these products can pull public records that might not otherwise be found. For example, through these reports, you'd find out that I'm not only David Dilenschneider but also David Dilenschneiver, David Hneider, David Morezdilenschneid and David Vdilenschneid. Access to products that make such connections is essential because a regular public records search on my name (like one via a free Web site) would never reveal those name variants that exist in public records. These reports include other details about an individual, including phone numbers, current and previous addresses, gender, birthdates, filings (such as bankruptcy, judgment and lien), licensing information, voter registration records, associated entities (such as mortgage companies and banks), associated individuals (such as a spouse) and more.

Having such information about a potential juror could be critical. It might reveal relationships. It might reveal potential biases. It might reveal blatant lies. Who knows? But litigators armed with such information may be able to make more informed choices as to the makeup of their juries and, more importantly, avoid mistakes that could cost them and their clients great expense.

David V. Dilenschneider is a director of industry relations for LexisNexis. He was previously a litigator with Vorys, Sater, Seymour and Pease in Columbus, Ohio,where he practiced commercial and business litigation, in addition to criminal law.