

# LITIGATORS CORNER: Stanford University – A Patent Troll?



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In my February, 2006 column, Patent Trolls – or Not? – as well as in several other columns throughout the years – I have written about individual inventors, real people who had to overcome difficult obstacles to achieve their inventions. Many of them made their inventions, too: catheters to cleanse the blood of persons with failed kidneys, color inks, instruments for knee surgery, remote controls for satellite television receivers, and bicycles for persons who cannot use their legs. Every one of these inventions is being used by major American and foreign corporations. But, under American law, none of these inventions had to be “made.” To suggest that inventors who do not themselves produce and market their own inventions should be deprived of the benefits of their creations not only disregards the truth of their experiences, which we have witnessed time and again. The derogation of inventors is also demagoguery, and ignores the law. Inventors and the law are entitled to more respect.

One invention by one individual can lead to big things. Xerox Corporation employs 55,000 people. Its revenue in 2005 was \$15,700,000,000. But, Xerox’s description of inventor Chester Carlson’s work says that it was “not until 1959, twenty-one years after Carlson invented xerography, that the first convenient office copier using xerography was unveiled.” Xerox also says that “Carlson had tried in vain to interest large companies in developing his findings, but no one was interested.” He negotiated rights with Battelle Memorial Institute in Columbus. Battelle is a non-profit, a charitable trust. It does not manufacture. It has filed at least one suit for patent infringement. But no one calls Battelle a troll.

An individual with a patent, confronted with an infringer who will not take a license, has two choices: abandon his patent, or get help to enforce it. Who can afford to enforce a patent? Certainly, individuals cannot. Patent infringement suits cost millions. The law firms that represent large corporations are too expensive. Kirkland & Ellis charged and got fees of one hundred million dollars for the United Airlines bankruptcy, and then cheekily requested a bonus of \$850,000. One of the Kirkland lawyers billed 10,232 hours in thirty-eight months. That’s quite a worker. Ten thousand hours in thirty-eight months works out to about nine hours a day, seven days a week, for thirty-eight months to run up his total. The lead lawyer billed \$850 per hour. Imagine what a large firm would charge for litigating a patent suit.

The only feasible method of enforcement for the solo inventor is a contingent-fee law firm, often coupled with one or more investors. Unfortunately, when this scenario occurs these days, the inventor and anyone associated with him often get the reputation of being evil patent owners – or “trolls.”

Individuals who do not manufacture are not the only ones getting patents. Universities do, too. According to statistics available at the Patent Office’s web site, universities got 601 patents in class 424, “Drug, Bio-Affecting and Body-Treating Compositions,” in 2003 alone. The top 100 research and development universities have gotten over ten thousand patents just

in 2000 to 2003. This is a huge amount of patenting activity.

Like individuals, universities license their patents. According to a presentation by David Mowery of the business school at Berkeley, university licensing of patents got a start in 1912, when a Berkeley professor and patent holder, Frederick Cottrell, set up a university corporation to manage patents. Mowery quotes Cottrell on his reason for doing this:

A certain minimum amount of protection is usually felt necessary by any manufacturing concern before it will invest in machinery or other equipment, to say nothing of the advertising necessary to put a new invention on the market. Thus a number of meritorious patents given to the public absolutely freely by their inventors have never come upon the market chiefly because “what is everybody’s business is nobody’s business.”

Cottrell had it right. Of course, Berkeley isn’t a manufacturing concern. It can create. It can patent. It can license. But it cannot make, use or sell an invention. Nonetheless, universities have profited without manufacturing or commercializing their inventions. Licensing income at Stanford has increased by a factor of 200 between 1970 and 1995, from \$180,000 in 1970 to \$36,000,000 in 1995, according to Mr. Mowery.

Stanford and the University of California at San Francisco obtained several patents on recombinant DNA cloning. According to an article by Roland Vogl at Stanford, the products sold under the licensing program include tissue plasminogen activators (TPA) for heart attacks, erythropoietin for dialysis patients (EPO, which may also be abused by athletes), insulin for the treatment of diabetes, growth hormones for children with growth deficiencies, and interferon for cancer patients. The licensees include major corporations, such as Amgen, Eli Lilly, Genentech, Johnson and Johnson, and Schering Plough. These licensing agreements have generated several hundred million dollars in royalties. Stanford doesn’t make any of these useful drugs.

According to “Software Licensing in the University Environment,” a 2002 article in *Computing Research News*, written by the Director of Stanford’s Office of Technology Licensing, Stanford has a patent on ranking web pages. It licensed the technology to Google. The same article says that royalty rates range from five percent for software

requiring extensive additional development by the licensee, to twenty-five percent for software that is ready to commercialize. The article says Stanford licenses its inventions to make them available to others. That's great. Stanford charges those who license its inventions. That is great, too. So why are individuals called "trolls," when they do the same thing as a university?

Herbert Shaw, a professor at Stanford, had about one hundred U.S. patents on optical gyroscopes, and other fiber-optic devices. He was at Stanford for forty years. His inventions generated thirty-four million dollars in royalties, according to Stanford's Office of Technology Licensing. Why isn't there an outcry about the money "extorted" by this "troll," which doesn't manufacture anything except ideas?

Stanford doesn't just license its patents. It enforces them, as well. One of its patents covers DSL modems. Of course, the last time I was around the campus in Shallow Alto, I didn't notice any factories with smoking chimneys, or any assembly lines. Stanford licensed its DSL modem patent to Texas Instruments, which feels fine about enforcing patents. It just won \$112,000,000 from Globespan Virata, a subsidiary of Conexant. According to Texas Instruments, the jury decided the infringement was willful, so the damages may be trebled. Why is it we do not hear the same kind of weeping and moaning about this verdict that we hear about the verdict against RIM, a company which managed to turn a fifty-three million dollar judgment against it into a settlement where it paid \$612.5 million? No one is accusing Stanford of being a troll because it participated in enforcing a patent on an invention that it never manufactured.

For anyone who owns a patent, profit is a motive. Carnegie Mellon University describes how it licenses intellectual property. It says that:

The financial terms of a license agreement can vary greatly. They may include, but are not limited to, up-front fees, license re-issue fees, minimum annual royalties, milestone payments, royalties and equity. Financial terms vary and are tailored to fit the specific nature of each invention and each license transaction.

A draft of an exclusive license agreement prepared by Carnegie Mellon provides for a royalty as a percentage of sales, and the University also charges interest at four percent on overdue royalty payments.

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Universities were encouraged to license by the Bayh-Dole Act, 35 U.S.C. §§ 200-212. Congress intended that inventions developed with federal funding should be commercialized. The Act allows non-profit organizations and small businesses to elect to retain title to inventions. The agreements that provide funds to these organizations must include requirements that any inventions be protected by patent applications. In the case of non-profit organizations, royalties must be shared with the inventors. Congress gave universities a profit motive.

While individual inventors are bashed and smeared, creators in other fields get sympathetic consideration. The *Chicago Tribune* reported on March 23 that the heirs of Solomon Linda, a South African who wrote "The Lion Sleeps Tonight," originally made famous here as "Wimoweh" by folksinger Pete Seeger, are finally receiving the financial recognition that their father was deprived of for decades. They are going to be paid twenty-five percent of both past and future royalties. That is quite a bit higher rate than the typical royalty rate inventors see from a patent license. Linda's song is beautiful. But is it any more worthy of protection and remuneration than a new type of knee surgery instrument?

Of course Stanford, MIT, Carnegie Mellon, and Berkeley are not trolls. I don't know if I consider the modern university a non-profit organization, but their patent activities and licensing are for the public good. Congress allowed universities and their inventors to share in the profits, too. Individual inventors only want the same rights that universities have. But they are left with nothing when the companies they negotiate with won't hear them out, or worse, file secret lawsuits during negotiations.

Maybe we should change the Constitution. Instead of saying "We the People of the United States," perhaps it should be amended to read "We the Corporations and Universities." That is what we are doing with patents: giving organizations greater rights than individuals. And, along the way, we are insulting people who may be the next Chester Carlson, the next Orville and Wilbur Wright, the next Thomas Edison, the next George Westinghouse. But even worse than insulting them is that we are taking away their incentive to invent. Will China and India be the idea power-houses of the 21st and 22nd centuries? **IPT**