

The Rise and Fall of the Patent Trolls:
How They Lost the Public Relations Battle

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Chapter 1

Introduction

Statement of the Problem

Like any market, the intellectual property market includes many participants at various stages of the lifecycle looking for new opportunities to create profit. Some of these contributions add value to the overall ecosystem, and some merely extract value for the benefactor with no contribution to the market. Distinguishing between the two is often a matter of perception, and effective public relations.

Whilst the chief litigator at Intel in the late 1990s, Peter Detkin hosted an internal contest to name a new phenomena in the IP market – nuisance patent infringement lawsuits filed against traditional companies like Intel by entities that owned patents they did not use. The winning term was “patent troll,” the literary creature who hides under the bridge he did not build to demand a fee from whoever wants to cross. (Wild, 2008).

Several years later, Detkin co-founded Intellectual Ventures, arguably one of the largest patent trolls, and took an entirely different stance on the value of this business model. “To get the maximum public benefit from new technology, inventors had to have the ability to license their inventions to others who would take on the actual production.” (Detkin, 2013).

The broader IP industry is similarly conflicted about the value of patent trolls, more politely called non-practicing entities. One group of scholars wrote to members of the United States Congress stating, “A large and increasing body of evidence indicates that the net effect of patent litigation is to raise the cost of innovation and inhibit technological progress, subverting the very purpose of the patent system.” Weeks later, a competing group of scholars countered,

“We write to express our deep concerns with the many flawed, unreliable, or incomplete studies about the American patent system that have been provided to members of Congress.” They also stated, “Those bent on attacking ‘trolls’ have engendered an alarmist reaction that threatens to gut the patent system as it existed in the Twentieth Century, a period of tremendous innovation and economic growth.” (Crouch, 2015).

Background of the Problem

Patent trolls garnered widespread attention in 2006 when NTP, a small non-practicing entity with wireless email patents, sued Research in Motion for patent infringement and nearly shut down the popular Blackberry network. After a prolonged legal battle, RIM settled, paying NTP \$612.5M for a license to its patents.

The RIM case was one of many nine- and even 10-digit settlements that alarmed executives in boardrooms around the globe. (PwC, 2015, p. 5). Practicing entities like RIM began mobilizing, garnering public support, forming lobbying groups and calling for patent reform. “IP has been an evolving field for nearly 500 years, and it has always been marked by a strong connection between its economic, legal and social aspects. When the balance is getting biased, there is always a way to correct it.” (Building a New IP Marketplace, 2006).

The public relations and lobbying efforts of these practicing entities led to the America Invents Act, which President Obama signed into law on September 16, 2011. It included several provisions designed to curb abusive troll practices, but the intensity of this debate continued to increase as patent litigation volumes and costs rose (PwC, 2015, p. 3). Realizing they too

needed the public on their side, several NPEs began mobilizing efforts and utilizing public relations to detail the benefits of their business model.

Purpose of the Study

As the debate continues and parties on both sides continue to call for patent reform, the question arises: what is best of the IP overall market? And how can NPEs utilize communications best practices to ensure their message is convincingly conveyed to key influencers who can shape the patent landscape moving forward?

By analyzing the historical use of public relations regarding patent trolls and comparing it to suggestions from industry experts, one can use the gathered information to strategize future communications plans in the intellectual property field.

Setting for the Study

This study will be performed as part of the data collection for a senior project at California Polytechnic State University, San Luis Obispo. Interviews will be conducted with three experts in the intellectual property industry. These experts will each be asked the same set of questions. The questionnaire is designed to ascertain their perceptions of the patent troll debate and fill in the gaps in existing literature on the topic of patent trolls.

Research Questions

This study used the following questions to answer fundamental gaps in the existing literature about patent trolls and their efforts to influence their PR image. Each question was

created after reviewing the existing information on the topic in order to obtain additional insight regarding the industry's perceptions regarding patent trolls and identify the impact of these perceptions.

1. How does the market currently perceive NPEs?
2. What value do NPEs provide the IP community?
3. How have NPEs conveyed their value of their business model to the market?
4. What communications mistakes did NPEs make? What did they do right?
5. How can NPEs improve their image moving forward?

Definition of Terms

The following terms are defined to clarify intellectual property industry language and assist the reader in understanding communications for the IP industry.

Non-practicing Entity: The less derogatory term than “patent trolls” for firms that focus on patent licensing. It is also a controversial term because a patent is a negative right that merely provides the owner the right to exclude others from making, using or selling the patented invention. Since many of the great inventors of the Industrial Revolution licensed some or all of their patents to others for development, NPEs believe they should merely be called “patent holders” (Detkin, 2013).

Patent Assertion Entity: A slightly less derogatory term for patent trolls, but more negative than the NPE term. PAEs don't produce a product, but rather wait for others to develop a comparable technology and then “extort some money” by asserting a patent infringement lawsuit and claim they own the technology upon which the other companies' products are built (Goldberg, 2013).

Patent Infringement Lawsuit: The patent holder claims that the infringer made, used, sold, imported or offered for sale a product that included technology covered by the patent. Remedies include an injunction against the infringer's use of the patented technology, compensation for lost profits from competing against the infringing product, and a reasonable royalty for the infringer's use of the patented invention (Goldberg, 2013).

Patent License: Allowing another entity the right to make, use or sell your patented invention, usually for a fee. Since many inventors don't have the resources or desire to build their own business, they license their invention to another entity that does have the ability to produce the product in order to get the maximum public benefit from new technology (Detkin, 2013).

Patent Reform: The America Invents Act of 2011 was the most significant change to the U.S. patent system since 1952. Parties on various sides of the patent debate continue to push for additional reforms. In his 2014 State of the Union address, President Obama called on Congress to "pass a patent reform bill that allows our businesses to stay focused on innovation, not costly and needless litigation" (Titch, 2015).

Patent Troll: A pejorative and controversial phrase coined by former Intel assistant general counsel Peter Detkin in 2001 to describe entities that broadly assert specious patents across an industry for the purpose of generating nuisance value settlements. Instead of actively developing a technology, a patent troll would acquire or register a patent in order to enforce the patent against potential infringers (Building a New IP Marketplace, 2006)

Organization of the Study

Chapter 1 includes the background of the problem, purpose of the study, and a definition of terms. Chapter 2 will identify the communications tactics and industry views of patent trolls by reviewing a variety of scholarly literature, IP journals and major media coverage regarding the topic. Chapter 3 will outline the methodology of the study. Chapter 4 will detail and analyze recipients' responses to the research questions. Chapter 5 will summarize the study's findings and include recommendations for IP communicators to successfully improve the image of non-practicing entities.

Chapter 2

Literature Review

The review of the literature focuses on industry perspectives regarding non-practicing entities, aka patent trolls, and the communications tactics used by these companies. The literature includes pieces from scholarly journals, IP-specific trade publications, major media publications, as well as IP industry press releases, blogs, contributed articles and other communications devices.

Defining the Trolls

One of the critical first steps in a communications campaign is to define the problem, but this was unusually challenging for those fighting against patent trolls. According to Wild (2008), an early attempt to call them “patent extortionists” generated a libel suit from the offended party. That led Intel chief litigator Peter Detkin to host an internal contest that generated the term patent troll. But this created a second problem: defining a troll.

The generally accepted definition of a patent troll is a company that acquires or registers a patent in order to enforce the patent against potential infringers and does not practice (ie. produce a product based on) the invention. (Building a New IP Marketplace, 2006). This definition, however, has some incredibly well respected exceptions such as famed inventors Thomas Edison, Eli Whitney, Dean Kamen, as well as university and government research institutes – who all acquire patents with no intention of practicing them. McDonough (2006, p. 198) proclaimed Edison the “king of trolls” and Goldberg (2013, p. 2) stated that “Eli Whitney, the famed inventor of the cotton gin, was among the first to generate proceeds from

patent infringement litigation. He did not achieve success in commercializing the cotton gin and spent years suing infringers.”

The industry has attempted several other titles such as non-practicing entity, patent assertion entity, IP-only company and other variations, but struggle to articulate an absolute negative definition that would justify banning their entire business model.

Ashtor, Mazzeo & Zyontz (2014, p. 19) stated, “Our findings suggest that the realities of PAE assertion practices are complex, and it is difficult to identify clear signs of abuse or misuse of their patents relative to other plaintiffs. Rather, the similarities we observe between PAEs and practicing entities highlight the risk that attempts to limit PAE’s enforcement rights or restrict the remedies available to them could inadvertently impact all patent-holders and cause adverse effects on the ability of practicing entities to enforce and otherwise monetize their patents.”

That is a key problem with clearly defining a troll, because much of what they do – generate licensing income from patents – is also done by the very companies trying to vilify the trolls. How can one argue that the same activity is good business sense when done by one company, and evil extortion when done by another? Building a New IP Marketplace (2006) asked, “In a perfect marketplace, should the value of that patent differ depending upon its ownership?” And Lemley & Melamed (2013, p. 50) concluded there isn’t much distinction, “Overall, it seems difficult to make the case that trolls impose greater costs on technology users than do practicing entities as a general matter.”

So the focus shifted from what they do to who they are. “There are other complaints about trolls that focus not on the fact that they are interested in only monetary compensation

for their patents, but on how they seem to behave.” (Lemley & Melamed, 2013, p. 30).

McDonough (2006, p. 1) asked, “But who are these trolls, and why are they so feared? Are they ghastly monsters suffocating a burgeoning patent system, or are they gentle giants poised to carry the United States patent system beyond the twenty-first century?”

Vilifying the Trolls

Legislators and large corporations such as Google and Facebook, backed by the media, mounted a concerted effort to stop the trolls. Google lawyer Allen Lo stated, “It’s well acknowledged that there is a patent troll problem in the United States.” (Nurton, 2013). Although they couldn’t clearly define a troll, those campaigning against them have been quite prolific with words to describe them: evil, extortionists, perverted, bottom feeders, innovation stiflers, parasites on successful businesses, the mold that eventually grows on rotten meat, who want glittering pots of gold in exchange for doing absolutely nothing, and have the power to literally obliterate startups. (McDonough, 2006, p. 196). Osenga (2014, p. 435) concluded, “Everyone hates patent trolls.”

Risch (2011, p. 462) found, “A simple Google search for ‘patent trolls’ yields more than 500,000 hits. The same search in Lexis’s LGLPUB database of law reviews and legal periodicals yields nearly 700 articles. The rhetoric is so heated, and the moniker ‘patent troll’ so pejorative, that blogs have been devoted to tracking NPEs and have been sued for defamation for doing so.”

Legal scholars have conducted extensive research regarding the negative impact of patent trolls. One of the most often cited was performed by Bessen & Meurer (2014, p. 43),

who found, “The direct costs of NPE patent assertions are substantial, totaling about \$29 billion accrued in 2011. This figure does not include indirect costs to the defendant’s business such as diversion of resources, delays in new products, and loss of market share. Even so, the direct costs are large relative to total business spending on R&D, which totaled \$247 billion in 2009, implying that NPE patent assertions effectively impose a significant tax on investment in innovation.... These findings imply that the recent surge in NPE litigation is a significant social problem associated with billions of dollars of socially wasteful expenditure each year as well as reduced innovation incentives for both small and large firms.”

Many scholars followed this theme, reinforcing how trolls damage the American economy. “Patent trolling adds no economic value. It is an affront to American ingenuity and threatens our innovation-based economy.” (Goldberg, 2013, p. 10). “The patent troll provides no value to the patent system, other than to line its own pockets. Rather, it stifles innovation and increases frivolous litigation. Patent troll litigation is on the rise, and it is time for targeted defendants to fight back.” (Luman & Dodson, 2006, p. 1) “Patent abuse is harming the U.S. economy. It interferes with market competition, stymies entrepreneurs and innovators, and ultimately costs consumers in higher prices and decreased availability of products and features.” (Titch, 2015, p. 11).

This sort of commentary has been pervasive across not just legal journals, but major media outlets. Lemley & Melamed (2013, p. 2) stated, “Complaints that trolls are perverting the patent system or interfering with innovation are legion. *NPR* has run feature stories on the problems with trolls. The *New York Times* and the *Wall Street Journal* have run front-page articles about them.” *The Economist* went so far as to suggest that the troll problem is so bad,

perhaps we should eliminate the entire patent system. (Question of Utility, 2015). Technical outlets such as *CNET* proclaimed the troll Intellectual Ventures is, “the most hated company in tech.” (Kerstetter, 2012).

This hostility extends far beyond traditional business and technology outlets, with thousands of articles in small town newspapers across the country encouraging Americans who likely know nothing about the patent system to hate patent trolls. Many newspapers picked up the *Associated Press* article, “Why You Need to Care About Patent Trolls--and Congress Should, Too.” (Flaherty, 2015). Editorials such as “Patent trolls drain money, innovation” appeared in countless newspapers. (Mantella, 2013). Even the popular HBO series *Last Week Tonight with John Oliver* included an 11-minute piece on the evils of patent trolls, proclaiming, “Most of these companies don’t produce anything, they just shake down anyone who does. So calling them trolls is a little misleading. At least trolls actually do something. They control bridge access for goats and ask people fun riddles. Patent trolls just sue the living shit out of people.” (Oliver, 2015).

Another extremely effective tactic has been to highlight the damage trolls inflict on hard-working Americans with clean, simple language. “The patent troll that came after my company forced us into court, made us bleed from legal bills and, in June, ultimately forced us to fold up shop. American Dream, meet the patent-extortion nightmare.... If someone threatens to break my legs unless I paid them off, we’d call it extortion and they could be arrested. But such threats happen every day in a world overrun by patent trolls. Pay your lawyer or pay your troll. There is no other choice.... I am the little guy and am thrilled Congress is stepping in to affirm my rights as a business-building, job-creating American entrepreneur. I urge Congress to

pass this common-sense reform now, so that the next fledgling business doesn't fall victim to the trolls." (Bloom, 2015).

This strong communications campaign to vilify the trolls began producing the desired outcome – government action designed to block their business model. "In the past two years the U.S. Justice Department, the Federal Trade Commission, the Patent and Trademark Office, and a White House task force have all launched studies of the growing NPE phenomenon. There are three important NPE-related cases awaiting argument before the U.S. Supreme Court this term and five major NPE-related bills pending in Congress. In January, President Barack Obama even trumpeted the need for patent reform to curb 'needless litigation' – a veiled reference to trolls—in the State of the Union address." (Parloff, 2014, p. 134).

According to Quinn (2014), the Patent and Trademark Office was so worried about the mounting rhetoric regarding patent trolls, they opted not to nominate the highly qualified Phil Johnson as the director of the USPTO. "It seems that Johnson's major flaw may be that he strongly supports the patent system, which is a very sad commentary. In fact, there are some starting to believe that the only candidate that may be acceptable to certain political forces is one who opposes the patent system on a fundamental level." The following year, Michelle Lee, former Google attorney, was appointed as the director of the USPTO.

In addition to the government action, all this attention also hurts the trolls' business model. Many companies, engineers, lawyers, and scholars have spent enormous amounts of time complaining about trolls. Some have even found an opportunity in the growing hatred of trolls and launched businesses to defend against them. Others have launched businesses that track the trolls. (Lemley & Melamed, 2013, p. 2) "All view trolls in a negative manner. That is, if

one is called a patent troll, whether in the media, in licensing negotiations or when communicating with a judge, it is always in a negative context.” (Rubin, 2007, p. 60)

Carbonneau (2015) found that all this negativity is seriously impacting the trolls’ bottom line. “Yet, the campaign above has definitely taken a toll on NPEs. Many of them who are public IP companies (aka PIPCOS) are now trading as “junk” stocks (e.g., Inventergy) or had to do an aggressive reverse stock split to avoid such fate (e.g., ITUS), while others have had to merge (e.g., Marathon and Uniloc) in order to survive. In most cases, their stock is in sharp decline compared to a year ago, reflecting a consensus that the NPE business model has been considerably damaged by the recent events. In Q2 of 2015, the best performing stock in all major PIPCOs was ironically that of RPX, a defensive NPE which benefits directly when patents are devalued as it can acquire them cheaper to prevent them from being asserted.”

Defending the Trolls

Although the anti-troll sentiment pervades media outlets, many argue trolls do provide unique value, or at least question the possibility. “Do IP-only companies really help get these independent inventions into the marketplace? While it is currently fashionable to decry IP-only firms, there is a long tradition in America of patent owners using lawyers and patent agents to license patents.” (Building a New IP Marketplace, 2006, p. 21)

Risch (2011, p. 458) questions the accuracy of the facts supporting the anti-troll campaign. “The results are surprising: they show that the conventional wisdom about patent trolls likely finds its basis in anecdotal, but infrequently occurring, events. Instead, the patents enforced by so-called trolls—and the companies that obtained them—look a lot like other

litigated patents and their owners.” Lemley & Melamed (2013, p. 54) found similar flaws with the data. “The analysis above suggests that many of the complaints about trolls as the source of problems with the patent system have little substance.” They believe the focus on trolls is something of a red herring designed to obscure more complicated problems with the patent system. “Patent trolls alone are not the problem; they are a symptom of larger problems with the patent system. Treating the symptom will not solve the problems. In a very real sense, critics have been missing the forest for the trolls.” (Lemley & Melamed, 2013, p. 5).

The problems with the patent system are indeed incredibly complex. Vastly different parties with vastly different objectives each lobby for their own desired reforms, creating a type of multi-pronged circular firing squad, with each prong negating the goals of the other. (Luman & Dodson, 2006, p. 2). Some award-winning economists argue the increase in patent litigation and troll-like behavior is merely a sign of the current innovation boom, pointing to similar periods in history where the two trends rose and fell in synch. (Crouch, 2015).

Some scholars willingly admit trolls are not altogether scary. “Do not fear the patent troll; armed with the principles and purposes of the patent system, the beast is easily vanquished, and the company remaining fosters innovation by providing patent marketplace liquidity.” (Rubin, 2007, p. 63). Other scholars expand on this point to proclaim that trolls actually benefit society. “These trolls act as a market intermediary in the patent market. Patent trolls provide liquidity, market clearing, and increased efficiency to the patent markets.” (McDonough, 2006, p. 190). Ashtor, Mazzeo & Zyontz (2014, p. 190) draws a similar conclusion, “Moreover, these results further indicate that modern patent assertion practices may yield unique efficiencies and benefits relative to traditional enforcement actions by practicing firms.

Unlike those vilifying the trolls with simple terms like extortion and parasite, proponents of the troll practice use more nuanced messages. “According to their proponents, NPEs create patent markets, and those markets enhance investment in start-up companies by providing additional liquidity options. NPEs help businesses crushed by larger competitors – competitors who infringe valid patents with impunity. NPEs allow individual inventors to monetize their inventions. These functions, the proponents argue, justify the existence of NPEs.” (Risch, 2011, p. 459).

Troll proponents also compare the business model to similar industries. “Patent holding companies thus create a marketplace and market liquidity for patent property. They create a secondary market much like the secondary market in the real estate mortgage context. No one questions when the real estate mortgage contracted through bank A is sold to bank B and grouped together into a pool of mortgages. Patent holding companies are providing a similar service and marketplace liquidity. They represent another way, and sometimes the only way, for an inventor to monetize his patent. By creating this liquidity they foster innovation, because smaller companies and inventors can afford to spend the time researching and developing, knowing that if a patent issues, they do not necessarily have to commercialize or litigate. They can spend time doing what they are good at: inventing.” (Rubin, 2007, p. 62)

McDonough (2006, p. 227) makes a similar argument, stating that the troll model creates an efficient market for innovation, similar to the banking system that created a market for capital and the insurance industry that created a market for risk. “Just as markets for intangibles like capital, debt, and risk have evolved over the past one hundred years, a market for patents has also taken form. The recent emergence of patent dealers within this market is

no cause for concern; rather, it signals progression, efficiency, and market evolution. Patent dealers function as market intermediaries, and by doing so, they increase patent liquidity, set market clearing prices, and foster efficiency in the idea economy. The use of derogatory labels and alarmist dialogue has no place in an area of law so vital to the U.S. economy. As a rule, understanding should precede action, lest uninformed haste cause a gentle giant to be mistaken for a ghastly troll.”

The “most hated” troll, Intellectual Ventures, followed this logic in a 21-page *Harvard Business Review* contributed article. “Fortunately, other industries have found ways to manage high risk. Insurance companies dilute risk by aggregating policies into large portfolios. They also distribute risk by spreading it around a well-developed reinsurance market. Pension funds, mutual funds, and other investment pools assemble large collections of assets to which many investors subscribe. We can apply these approaches to manage the risk inherent in new inventions.” (Myhrvold, 2010).

Myhrvold also compared his business to the venture capital market, the private equity market, the software market, government-funded and academic research, and several others. “For our part, Intellectual Ventures aims to be the first full-service invention capital firm. Like venture capital and private equity firms, we raise money from investors, create assets ourselves (by sponsoring inventors), and buy assets from others who would have trouble monetizing them effectively on their own. We actively manage those assets to maximize their value and then provide exit strategies to realize that value.” (Myhrvold, 2010).

Myhrvold concludes this new business model will transform the world: “A functioning invention capital market and industry can enable inventors around the globe to create

hundreds of thousands more inventions each year than are being made today. Sure, some of those inventions will be silly or useless. But what matters is the top 1% that will make our lives vastly richer and better. Create an invention capital market, nurture an invention capital industry, and the resulting virtuous cycle will surely transform the world.” (Myhrvold, 2010)

Failing to Defend the Trolls

The review of the literature for the pro- and anti-troll messages highlights the disparity between the two sides. Several articles took the rare step of criticizing the PR team’s tactics. “It turns out this was the question that completely threw him off and led the PR woman who was in the room with us to jump in and to try and shut down the interview. You'll hear her voice in the background.” (Glass, 2011).

Eventhough *CNET* was granted access to go “behind the scenes to understand what 40,000 patents and an unapologetic plan to make money from them really means,” that reporter was still denied access he’d been promised. “We'd have liked to ask Myhrvold ourselves, but through a spokesperson he declined repeated requests to even answer a short list of e-mailed questions. So we'll do our best to answer the questions for him.” (Kerstetter, 2012). And *CNET* did just that. “So why the disdain for Intellectual Ventures? Here in the company's offices, executives shrug at the question and say it's mostly because they're misunderstood. As Myhrvold uncomfortably put it at the D conference: ‘You want to have animosity, go ahead. I wasn't a popular kid in school and I guess I'm not here....’ Confused yet? Don't feel bad. It's an example of the opaque nature of Intellectual Ventures' business that triggers warning bells to so many in tech and the legal community.” (Kerstetter, 2012)

NPR's Glass (2011) had a similar experience with the “most hated company in tech” when they were granted access to the company’s executives, but then denied answers to their follow-up questions. “They told our reporters that they, if they wanted to understand what the company was all about, should talk to this inventor that Intellectual Ventures helped out. The guy is a patent holder named Chris Crawford. But when our reporters tried to contact Chris Crawford, he won't return any phone calls. He won't return emails.... That just made us curious, so we started digging around.” And they uncovered many issues with this patent once they began their “five-month odyssey, where things didn't exactly fit the story that Intellectual Ventures was telling us.” They found that the patent in question was one of 5,303 that covered the same basic invention, which happens often. Approximately 30% of US patents are essentially for things that have already been invented.

NPR found that Intellectual Ventures sold the patent in question to a shell company named Oasis Research that used it to sue 16 different tech companies. Their attempts to talk to the shell company led them to a lawyer who refused to speak with them. “Behavior like this makes it hard not to think, are you hiding something? When someone says, yes, I know, but I'm not going to tell you, it really makes you want to find stuff out.” So they continued tracking the shell company, which led them to a small town in Texas. “Our visit to Marshall made us realize, something big is going on here in Texas, and Oasis Research is part of it. 2,000 lawsuits making the same essential claim Intellectual Ventures makes. There's an inventor whose invention is being stolen, used without permission. But there were no inventors here, just corridors of empty offices and a lot of lawyers. It made us wonder, what else about Intellectual Ventures is not what it appears to be?” (Glass, 2011).

IP Watchdog similarly questioned the Intellectual Ventures storyline, “Yesterday Intellectual Ventures did what they said they would never do, but which so many feared they ultimately would do. After amassing one of the largest patent portfolios in the world, Intellectual Ventures unleashed three separate patent infringement cases.... While I do not begrudge any patent owner their day in court to seek redress for infringement, we really should at least notice the obvious hypocrisy of Intellectual Ventures, who for years said they were only amassing a defensive portfolio and had no interest in becoming what we all knew they could become: namely that most massive patent troll on the planet. There is no doubt in my mind that eventually we will look back to December 8, 2010, as a pivotal day in the history of patents, patent law and patent litigation. It will almost certainly become a day of infamy.” (Quinn, 2010)

BusinessWeek’s Vance (2014) asked Intellectual Ventures co-founded Edward Jung about their reputation. “‘It’s unfortunate that we have a bad reputation,’ he says. ‘I don’t get why we’re singled out so much as being particularly evil.’ As the conversation goes on, however, Jung moves from lament to anger. ‘I am not embarrassed by the inventions we come up with,’ he says. ‘If someone from Google or wherever wants to give us a hard time, I’d ask them, ‘How many of your inventions have saved 10,000 lives?’ If there are talented people out there who can solve these big problems, we should let them solve the goddamn problems.’” That article concluded, “According to the power brokers in Silicon Valley, IV remains a company with a dark soul that’s using the startup talk as a ruse. ‘I’ll believe it when I see it and not before.’”

Other NPEs took a different messaging approach with the major media outlets, claiming to be a benevolent troll. In a seven-page article in *Fortune Magazine*, RPX portrayed a decidedly

positive position. “In the crossfire between so-called patent trolls and big companies, RPX looks to provide a market solution to the nation’s most pressing legal challenge... This article is about a man who stands directly in the crossfire between NPEs and their corporate targets but claims to take no side in the combat. He co-founded and runs a public company whose raison d’être is to sidestep the hostilities. ‘Yes, we’re friends with trolls,’ Amster tells clients. ‘Yes, we take them out to dinner. We do business with them. And as a result, we save you a lot of money.’”

(Parloff, 2014). IP experts decried this overly positive article, claiming, “This biased PR piece with few actual facts was written by Mr. Roger Parloff, Senior Editor for Legal Affairs who fell hook, line, and sinker for the spin that RPX is putting out, aided by large corporations and those in academia who wish to weaken if not eliminate the U.S. patent system.” (Zeidman, 2014).

These details didn’t matter, RPX generated dozens of similar positive articles.

“But now comes news that has the potential to change the nature of the patent trolling business. RPX -- a company that strategically buys patent licenses to protect its clients from infringement lawsuits – is now offering its services to small and medium-sized businesses.”

Chapter 3

Methodology

This chapter presents the methodology used to collect data for the study including data sources, collection and presentation of the information, and delimitations of the outreach program.

Data Sources

The data collection for this study comes from three different experts from the intellectual property and marketing fields. The first is the general manager of IBM's intellectual property business. The second is an inventor from IBM Research who now works for the Office of the CIO. The final source is an expert in the area of branding, with a family history in intellectual property. The interview questions were created to highlight the current image of NPEs and determine if that image could be improved.

Participants.

Dr. William R. LaFontaine Jr. is the head of IBM's intellectual property business, with 25 years experience in IP and the enterprise. Bob Nywening is an inventor at IBM, with over 30 years at the company. And Dana Bryant is a branding and marketing expert with a family background in intellectual property.

Interview Design

The following questions were asked each of the experts and served as data sources for the study:

1. What is your perception of NPEs in today's market?
2. Based on your relationships throughout the IP industry, what do you believe the industry's perception of NPEs is in today's market?
3. Do you believe NPEs add any value to the IP community and, if so, what is that value?
4. Have NPEs effectively conveyed the benefits of their business model to the market?
5. What were some of the public relations mistakes or smart moves NPEs made?
6. What sort of communications strategy should NPEs employ to improve their image? Is it too late?

Data Collection

The data collection methodology for this study was individual interviews with each expert. The interviews were conducted during January 2016 and lasted approximately 30-45 minutes each. Throughout the interviews, the experts were asked questions from a single questionnaire regarding NPEs' current and potential future image, with follow-up questions and examples as appropriate.

Data Presentation

The data collected during the each interview was documented through audio recordings and were transcribed during and after the interviews. This method of data collection ensures the data is presented in the most complete and objective way possible.

Limitations

There are limitations to this study based on the continually evolving nature of the IP market. The US Supreme Court, US Patent and Trademark Office and US Congress continue to review possible changes to patent law that could impact the NPE business model, as was done when the American Invents Acts passed in 2011. The bulk of the research was conducted in late 2015 and early 2016 and reflect the current climate at that time.

Delimitations

There are limitations to this study based on the intricacy of the issues, the rapid change in the climate, and the opinions of the participants based on their backgrounds and expertise. Due to the locations of the three participants in the New York metro area, all interviews were conducted by phone. Although the audio from the interview was recorded and copious notes were taken, there are some potential limitations based on the clarity and informality of the interview.

Chapter 4

Data Analysis

Chapter 4 will provide descriptions of the experts interviewed in the study and summarize the respondents' answers to the questionnaire. Since the data was collected through recorded interviews lasting approximately 30-45 minutes, it will be presented in the form of direct quotations or paraphrased responses. The answers will then be analyzed and compared to the original research questions and the existing literature on NPEs as reviewed in Chapter 2.

Description of Participating Experts in Related Fields

Intellectual Property

Dr. William R. LaFontaine Jr. is General Manager, Intellectual Property and Vice President, Research Business Development at IBM. He is responsible for IBM's global IP business including technology licensing, patent licensing and sales, divestitures, joint development and Research collaborations. In Bill's previous position on the IP team, he was responsible for managing and commercially leveraging IBM's patent portfolio, as well as building IBM's revenue and profit opportunities through commercialization of the company's software and services IP assets. Bill previously held executive positions for IBM's Global Technology Services, Middle East and Africa; High Performance Computing, Analytics, and Cognitive Markets; and Technical Strategy & Worldwide Operations, IBM Research. Throughout his 25-year career, Bill had assignments in Japan, Singapore and South Africa. Bill holds a Bachelor's degree in Metallurgical Engineering from California Polytechnic State University, San

Luis Obispo, and received his M.S. and Ph.D. degrees in Materials Science and Engineering from Cornell University.

Inventing

Robert Nywening is Mobility and Workplace Services Manager for the Office of the CIO at IBM. Prior to this position, he spent 13 years as a Research Engineer at the IBM Watson Research Center in Yorktown Heights, NY. Throughout his 36-year career, he also held technical positions for IBM's Divisional Headquarters, Office Products Division, and Federal Systems Division. Bob has received several patents for integrated circuits as well as published in the Journal of Applied Physics for similar technology. Bob holds an AAS in Electronic Technology from Orange County Community College in Middletown, NY. He also studied Computer Science at Pace University, Pleasantville, NY.

Branding and Marketing

Dana Bartlett Bryant is currently Corporate Vice President of Brand Experience at New York Life. Dana's team is focused on developing an integrated and collaborative approach to enhancing brand engagements and building more memorable experiences. Dana is a brand engagement strategist with over 12 years experience with various consumer products and financial services companies including Kraft Foods, Citigroup and Gerber Life Insurance. Most of her career has focused on leveraging consumer insights and data to enhance interactions with various audiences, including consumer, prospects and partners. Working with consumer-centric brands has enabled her to leverage her creative and analytical abilities to conceptualize

and implement projects that connect products/services with consumers through personalized experiences. In 2012 Dana launched ENGAGE – a business development and brand engagement consulting service. Through ENGAGE, Dana works with small businesses to build strategic engagement and branding plans. Dana enjoys guiding her clients as they are facing the challenges of optimizing their brand experiences and building stronger consumer relationships. She also uses ENGAGE to provide pro bono services for non-profit organizations. Dana is a graduate of Tufts University and holds an MBA from Pace University. She also serves on an advisory board for an early childhood development center in her community and is an active member of Alpha Kappa Alpha Sorority, Incorporated.

NPEs' Perception Questionnaire

Each expert was asked to respond to the following questions and probes regarding the industry's perception of NPEs and their ability to improve their image.

1. What is your perception of NPEs in today's market?

Question #1 was asked to gain insight on the opinions regarding NPEs amongst experts in the intellectual property arena.

- Bill LaFontaine: "Overall, the NPEs are weakened. When you go look at who's suing whom, the activity in the microelectronic and consumer segments is dying off. That used to be the hottest areas for patent licensing and infringement suits, and it's much less now. I suspect it's because NPEs aren't getting a whole lot of money at trial. We just aren't seeing the billion dollar judgments any more. Not only is it a good delay tactic, it also bleeds the trolls dry. It costs trolls money to defend

themselves at PTAB hearings, a lot more than it costs the accused infringer to file a PTAB claim, which is only about \$250k. So filing PTAB is a lot cheaper than fighting a troll, and you have a good shot at winning, so of course operating companies file an IPR at PTAB.... They are basically opting to conduct efficient infringement. I wouldn't say they are going as far as willfully infringing, which has substantial legal consequences, but they are much more confident now that they won't be put out of business by a billion dollar infringement suit. So they don't really care anymore if someone comes after them. They say, 'I'll file an IPR at PTAB and chew you up for 18 months. If I win at PTAB, you're stuff is neutralized, you're patents are invalidated.'" (Appendix A)

- Bob Nywening: "From what I've seen, they are simply looking to get rich off other people's ideas. They buy up patents from bankrupt companies or however they get them, and then hire a bunch of lawyers to go around suing anyone they can. And lawyers can make any argument that anything infringes anything, it's all up for interpretation.... If you spend millions of dollars on R&D and get a bunch of patents on your products, you should feel confident that you're doing the right thing, and have the right to go make money off those inventions. The US government told you that you have a right to that invention. And if you make an honest mistake, OK, I'll give you some money for a license to your patent and we'll both go about our day. But the trolls aren't like that. If you make an honest mistake, and some lawyer decides you infringe their patent, you have to pay them millions of dollars." (Appendix B)

- Dana Bryant: “The very term non-practicing entity begins with a negative. It’s obviously better than the term troll, but you still don’t want to start off introducing your category as something you aren’t.... So that’s problem #1 with their perception, they’ve already set themselves up for failure from a brand positioning standpoint, they are already on the defensive. I’ve seen articles where they are asked if they are a troll and they simply can’t answer the question. They stumble along for a few minutes and finally conclude with a half-hearted ‘eh, maybe.’ That’s a pretty simple question that they should be able to answer in their sleep... The companies deserve a return on that expense and the inventors deserve a fair salary for their efforts. And it shouldn’t matter if the invention in question came from a big company or an individual inventor – people should be fairly compensated for their ideas. That is as American as apple pie and I dare anyone to say, “Oh that invention doesn’t count, I can rip it off because it came from someplace we don’t like very much.” Stealing is still stealing, and THAT should be the key message for NPEs.” (Appendix C)

2. Based on your relationships throughout the IP industry, what do you believe the industry’s perception of NPEs is in today’s market?

Question #2 was asked to gain insight on the broader opinions regarding NPEs throughout the industry. These experts regularly discuss the issues with colleagues and peers socially, at industry events, and through various other channels.

- Bill LaFontaine: “Interesting enough, there are operating companies who view them as being valuable because the market is consolidating behind a truckload of patents

and NPEs are the only channel to get rid of patents. If you're in a high-tech industry, they are a good channel to monetize. There are a lot of serious mergers going on right now, particularly in microelectronics, and that means a lot of companies have more assets than they need. So the only opportunity to monetize those excess assets is to sell to an NPE.... The other thing that's happening that's impacting the value for NPEs is the notion of proportionality. If I sue you for infringement, you're only entitled to a piece of the total of the product. In the old days ... I'd probably get to claim 10% of your profit because my patent was fundamental to your product... Now you're getting products with thousands of patents technologies in them.... So the only rational argument you can make now is to ask how much of my product is impacted... So I'll give you 10% of the profit divided by 1000 patents, here's \$5, leave me alone. Damages are being and will continue to be scaled down, so trolls they will only get a very very small piece of the profits. That's what's really going to hurt the NPEs, only getting a small fraction even when or if they will at PTAB and in court."

(Appendix A)

- Bob Nywening: "Most of the other inventors I talk to feel the same way. We work hard on our inventions, and we're proud when we see something we created become a product. That's what we really want, we want to know we're fixing a problem or making something better or easier or faster.... Very few of us are in it for the money ... our inventions are like our children, we want them to grow up to be contributing members of society. We want to know our inventions are out there in the world making it better. Not used in a lawsuit to make someone rich who didn't

add anything.... If NPEs give guys like him a fighting chance, then that's great. It's a great story, and I'd be all for that. But from what I've seen, that's not really how it works. And if it is how it works, why aren't they telling that story? I haven't seen anything about a garage inventor who finally got what he deserved thanks to a troll." (Appendix B)

- Dana Bryant: "They simply haven't done a good job of telling a compelling story. They've been on the defensive from the beginning and never got in front of it.... And when they did try to tell their story, it was entirely too complex and professorial." The message should have been, "We think stealing is bad. Invention, good. Stealing, bad." (Appendix C)

3. Do you believe NPEs add any value to the IP community and, if so, what is that value?

Question #3 was asked to challenge participants who may be biased against NPEs to look past their personal opinions and identify potential advantages of the NPE business model. It was also asked to gain insight on the potential storylines NPEs could leverage to improve their image.

- Bill LaFontaine: "I think where they do provide value is back to efficient infringement. Not all NPEs' patents are bad patents. The only option for many people to monetize their patents is through the trolls." The story of innocent business owners being sued by trolls is "more and more a red herring. I suspect that this is no longer as factual as it used to be, if it ever was a significant problem. It's very rare that someone comes after you without some level of work. But it's an

excellent red herring and it pushes all the right patriotic buttons to claim that good, hard working, entrepreneurial, job creating Americans are being driven out of business by evil trolls. The headlines write themselves. But we know it's not an accurate portrayal of what's really happening in the market." (Appendix A)

- Bob Nywening: "In theory, they could be. Helping the garage inventor. Ensuring the big companies don't run roughshod over the little guy. Consolidating all the small patent portfolios that are lurking out there and negotiating one fair license with the big companies. But I don't think there's much money in that, so I doubt they are actually doing that." (Appendix B)
- Dana Bryant: "Yes, I think they do ensure companies don't steal IP without paying for it. Are NPEs really helping the individual inventor? Probably not, there isn't a whole lot of money in that.... Their other argument is aggregating risk... overall, aggregating risk is a good thing. And inventing is an inherently risky business. Even the most successful inventors produce dozens or hundreds of failures for every success. So if you can aggregate that, at scale, that benefits the broader IP community. (Appendix C)

4. Have NPEs effectively conveyed the benefits of their business model to the market?

Question #4 was asked to identify benefits NPEs have effectively communicated, and also solicit input on ways they could communicate the benefits of their business model to the market.

- Bill LaFontaine: “They really haven’t. They’ll argue that they are making an efficient market so operating companies can negotiate with one NPE versus thousands of individual inventors, but they have little evidence to back that up. Their other argument is that they are helping the individual inventors monetize their patents, again with little to no evidence.... If you look at what RPX is doing, that’s interesting. They are acting as a trusted intermediary between trolls and practicing entities. Emphasis on ‘trusted.’ They are solving problems both real and imaginary. And when they solve those problems for one client, they also solve it for all their other clients.... [RPX] are still getting money for patent licenses, which is what the trolls want. But they positioned themselves as a white knight. They worked WITH the operating companies and took a ‘help me help you’ sales and marketing strategy versus a ‘pay me or I’ll sue you strategy. And it worked well for them.” (Appendix A)
- Bob Nywening: “I certainly haven’t seen it. But I’ve seen story after story talking about how they’re taxing operating companies. I even got an email from Newegg when they won a case against a troll, they were offering some sort of beat the troll discount to all their customers since they DIDN’T have to raise prices to pay the settlement.... It doesn’t look they even tried to tell a story. I mean, even seriously evil companies like tobacco and oil and Monsanto find a way to spin a story about how they aren’t completely evil....” (Appendix B)
- Dana Bryant: “No, they either aren’t talking, or talking so much that no one can find the benefit in their giant haystack of jargon. They didn’t own their own story. And

this is where the other side has done an outstanding job telling not only their own story, but also telling the trolls' story for them. " (Appendix C)

5. What were some of the public relations mistakes or smart moves NPEs made?

Question #5 was asked to separate the opinions of the NPEs' business model from their communications tactics. It was also designed to focus on how NPEs did or did not appropriately respond to the changing climate and adjust their communications strategies.

- Bill LaFontaine: "Well, they've allowed a few bad apples to get the majority of the bad press. And they've been pretty defenseless in the press.... Most of what they assert was created by operating companies who sold IV the patent to monetize it. They aren't defending the rights of the hard-working, downtrodden individual inventor, they just buy a few of those as a red herring. In general, they haven't done a good job, they don't have a strong narrative. The IVs of the world will say they enable inventors to get money, but it's the exception not the rule. (Appendix A)
- Bob Nywening: I think they could [improve their image] if they could get out of their own way. They have the money to hire the same spin doctors that tobacco hired, but it doesn't seem like they really care.... Most of these NPEs were created by really really smart engineers who simply don't understand the importance of being popular. They wear it like a badge of honor. I'm not sure if it's entirely because they don't understand how important it is, or they don't think there's anything they can do to change it." (Appendix B)

- Dana Bryant: “On the smart moves side, a few NPEs pivoted their messages and positioned themselves as a different category of company. For the most part, it was just a slight shift in the business model, but it enabled them to change the narrative, to tell a different story.... [Some of the NPEs evolved], and they have a shot at riding out the storm. The ones that kept hiding behind ‘no comment’ and shell companies, I just don’t see how they survive long term. Not when the courts are ruling against them time after time and there’s zero appetite to change the trajectory. All businesses have to adapt to the changing environment, that’s just good business.”

(Appendix C)

6. What sort of communications strategy should NPEs employ to improve their image? Is it too late?

Question #6 was asked to solicit input on best practices NPEs should employ moving forward. It also sought a opinion on the state of their business model and if it was possible to improve their image at this point in time.

- Bill LaFontaine: “It’s completely too late. Companies like Google and others have already set the narrative.... In a simplistic way, an NPE is a group of lawyers trying cover their billable hours, and I don’t think they could even try to spin a better narrative today. There was a time in the past where they could have changed the narrative. They needed to pool together and form some sort of industry association that could have done it. They really needed to get together and create a non-profit or something like Chamber of Commerce to convey their message.... I don’t think

- they appreciated the importance of that narrative.... But the other side DID understand the importance of grassroots publicity and spent a lot of effort to ensure they had the public on their side. And it worked.” (Appendix A)
- Bob Nywening: “I suspect it’s too late. They are so far deep in the hole, how could they crawl back out? It wasn’t like that a few years ago.... And now there are just too many examples of trolls being really underhanded. They hide their patents in a bunch of shell companies so no one knows what they have, they sue for a piece of the whole pie when their patent is just a tiny sliver of what goes into the product, and most of their patents are getting killed at PTAB, so they obviously don’t have legitimate IP that is legitimately being stolen.... There have always been organizations that focus on a piece of the invention ecosystem without doing everything themselves. ... There are folks throughout that entire process who could add value. So could trolls provide a valuable service, sure. Do they? No.” (Appendix B)
 - Dana Bryant: “For many of them, I think it is too late. But if I were them, I’d at least start trying in earnest. Look around at other industries and see how they responded to a negative image. Look at best practices. Look at what the other side is saying and identify ways to neutralize their story. Use their strengths – their size, their influence, whatever – against them. It doesn’t seem like they even acknowledge the need for better positioning, and that is perhaps their biggest mistake.” (Appendix C)

NPE Perception Research Questions

For this project, the following five research questions were created for the study to determine the current perceptions of non-practicing entities in the intellectual property industry, as well we determine how they might be able to improve their image.

Research question #1: How does the market currently perceive NPEs?

- According to Osenga (2014, p. 435), “Everyone hates patent trolls.”
- “All view trolls in a negative manner. That is, if one is called a patent troll, whether in the media, in licensing negotiations or when communicating with a judge, it is always in a negative context.” (Rubin, 2007, p. 60)
- Technical outlets such as *CNET* proclaimed the troll Intellectual Ventures is, “the most hated company in tech.” (Kerstetter, 2012).
- *BusinessWeek’s* Vance (2014) concluded, “According to the power brokers in Silicon Valley, IV remains a company with a dark soul that’s using the startup talk as a ruse. ‘I’ll believe it when I see it and not before.’”

Research question #2: What value do NPEs provide the IP community?

- According to Goldberg (2013, p. 10), “Patent trolling adds no economic value. It is an affront to American ingenuity and threatens our innovation-based economy.”
- Luman & Dodson (2006, p. 1) found, “The patent troll provides no value to the patent system, other than to line its own pockets. Rather, it stifles innovation and increases frivolous litigation.”

- “Patent abuse is harming the U.S. economy. It interferes with market competition, stymies entrepreneurs and innovators, and ultimately costs consumers in higher prices and decreased availability of products and features.” (Titch, 2015, p. 11).
- According to the *Last Week Tonight with John Oliver*, “Most of these companies don’t produce anything, they just shake down anyone who does. So calling them trolls is a little misleading. At least trolls actually do something. They control bridge access for goats and ask people fun riddles. Patent trolls just sue the living shit out of people.” (Oliver, 2015).

Research question #3: How have NPEs conveyed their value of their business model to the market?

- “According to their proponents, NPEs create patent markets, and those markets enhance investment in start-up companies by providing additional liquidity options. NPEs help businesses crushed by larger competitors – competitors who infringe valid patents with impunity. NPEs allow individual inventors to monetize their inventions. These functions, the proponents argue, justify the existence of NPEs.” (Risch, 2011, p. 459).
- McDonough (2006, p. 227) states that the troll model creates an efficient market for innovation, similar to the banking system that created a market for capital and the insurance industry that created a market for risk. “These trolls act as a market intermediary in the patent market. Patent trolls provide liquidity, market clearing, and increased efficiency to the patent markets.”

- Myhrvold (2010) also compared his business to the venture capital market, the private equity market, the software market, government-funded and academic research, and several others.

Research question #4: What communications mistakes did NPEs make? What did they do right?

- According to Lemley & Melamed (2013, p. 2), “Complaints that trolls are perverting the patent system or interfering with innovation are legion. *NPR* has run feature stories on the problems with trolls. The *New York Times* and the *Wall Street Journal* have run front-page articles about them.”
- Several articles took the rare step of criticizing the PR team’s tactics. “It turns out this was the question that completely threw him off and led the PR woman who was in the room with us to jump in and to try and shut down the interview. You'll hear her voice in the background.... They told our reporters that they, if they wanted to understand what the company was all about, should talk to this inventor that Intellectual Ventures helped out. The guy is a patent holder named Chris Crawford. But when our reporters tried to contact Chris Crawford, he won't return any phone calls. He won't return emails.... That just made us curious, so we started digging around.” And they uncovered many issues with this patent once they began their “five-month odyssey, where things didn't exactly fit the story that Intellectual Ventures was telling us.” (Glass, 2011).
- Eventhough CNET was granted access to go “behind the scenes to understand what 40,000 patents and an unapologetic plan to make money from them really means,”

that reporter was still denied access he'd been promised. "We'd have liked to ask Myhrvold ourselves, but through a spokesperson he declined repeated requests to even answer a short list of e-mailed questions. So we'll do our best to answer the questions for him." (Kerstetter, 2012).

- An article in Fortune (Parloff, 2014) highlights the benefits of a slight shift in marketing. "In the crossfire between so-called patent trolls and big companies, RPX looks to provide a market solution to the nation's most pressing legal challenge... This article is about a man who stands directly in the crossfire between NPEs and their corporate targets but claims to take no side in the combat. He co-founded and runs a public company whose raison d'être is to sidestep the hostilities."

Research question #5: How can NPEs improve their image moving forward?

- According to Parloff (2014), NPEs can take advantage of the negative publicity. "But now comes news that has the potential to change the nature of the patent trolling business. RPX -- a company that strategically buys patent licenses to protect its clients from infringement lawsuits -- is now offering its services to small and medium-sized businesses."
- IP Watchdog (Zeidman, 2014) highlights the errors in Fortune article, but concludes the tactic worked. "This biased PR piece with few actual facts was written by Mr. Roger Parloff, Senior Editor for Legal Affairs who fell hook, line, and sinker for the spin that RPX is putting out, aided by large corporations and those in academia who wish to weaken if not eliminate the U.S. patent system."

NPE Perception Data

For this study, it was important to identify what other experts said due to the relatively small amount of analysis that currently exists regarding the perception and communications strategies of NPEs. In order to acquire this data, Bill LaFontaine, an IP expert, Bob Nywening, an inventor, and Dana Bryant, a branding expert were interviewed for the study. They were each asked similar questions designed to answer the original research questions in individual interviews. The following tables represent the respondents' answers in the form of their individual perspectives on the original research questions.

Research question #1: How does the market currently perceive NPEs?

- This research question was studied in order to identify the current attitudes and perceptions of NPEs, and what they've done or not done to influence their image. A substantial amount of literature concludes, "Everyone hates patent trolls" (Osenga, 2014, p. 435).

This question was studied to gain insights into the current industry perception of NPEs. It is apparent from the literature that the overall attitude towards trolls is quite negative, even though many admit many of the reasons for their negative perception are red herrings.

Table 1 summarizes the answers to this question, which were fairly consistent with the current literature. All three respondents replied that they as well as the industry viewed trolls in a mostly negative light. Dr. LaFontaine mentioned that industry insiders were using NPEs to make money of their excess patents, but were still publically critical of their business model.

Table 1

NPE Perceptions

Respondent	Overall perception	Key reasons
Bill LaFontaine	Mixed	Weakened due to frivolous lawsuits; valuable for patent monetization particularly during M&A
Bob Nywening	Negative	Getting rich off the system without contributing
Dana Bryant	Negative	Can't define their own value proposition

Research question #2: What value do NPEs provide the IP community?

- This research question was studied to find what positive messages regarding NPEs have made it into the industry. Much of the literature concludes, “Patent trolling adds no economic value. It is an affront to American ingenuity and threatens our innovation-based economy.” (Goldberg, 2013, p. 10), despite NPEs attempts to define their benefits to the community.

This question was designed to challenge the respondents to identify benefits that NPEs provide the industry. Table 2 summarizes the answers to this question, which were more positive than the majority of the current literature.

Table 2

NPE Value to the IP Industry

Respondent	Provide value?	Key reasons
Bill LaFontaine	Yes	Efficient infringement; patent monetization for larger companies looking to offset R&D expenses
Bob Nywening	Possibly	Could help the garage inventor, doubtful that actually happens
Dana Bryant	Yes	Ensure big companies don't steal IP without paying for it

Research question #3: How have NPEs conveyed their value of their business model to the market?

- This research question was studied in order to find out if NPEs have done an effective job of conveying their value proposition to the IP industry. to influence their image. The literature mentions some possible benefits, stating that the troll model creates an efficient market for innovation, similar to the banking system that created a market for capital and the insurance industry that created a market for risk. "These trolls act as a market intermediary in the patent market. Patent trolls provide liquidity, market clearing, and increased efficiency to the patent markets." (McDonough, 2006, p. 227)

This question was studied to identify if NPEs have any benefits and if so, if they've effectively conveyed these benefits to the market. Given the overwhelmingly negative perception of trolls, have they been able to fight back against their detractors and tell a

possible story? Table 3 summarizes the answers to this question, which were fairly consistent with the current literature. The respondents stated NPEs haven't told their side of the story, and what little outreach they did was ineffective.

Table 3

NPE Benefits Messaging

Respondent	Conveyed positive story?	Key reasons
Bill LaFontaine	Mixed	Most make arguments with no supporting examples; a few have found a way to reposition themselves as a white knight against NPEs
Bob Nywening	No	NPE detractors have been extremely successful in describing why NPEs are so dangerous to the inventing community
Dana Bryant	No	Too little communication, and what is provided is much too complicated for the average reader

Research question #4: What communications mistakes did NPEs make? What did they do right?

- This research question was studied in order to identify specific communications tactics the NPEs took, and if they were effective. Several articles took the rare step of criticizing the PR team's tactics. "It turns out this was the question that completely threw him off and led the PR woman who was in the room with us to jump in and to try and shut down the interview. You'll hear her voice in the background. (Glass, 2011). That lack of transparency piqued the interest of the reporter, who went looking for more information. And found a lot of very unflattering details about the NPE business.

This question was studied to gain insights into the industry’s perception of what NPEs have done well and what mistakes they made. Much of the literature highlights their mistakes. Table 4 summarizes the respondents’ answers to this question, which more favorable than much of the literature. The respondents said they’ve made a lot of mistake, but some have found a way to leverage their own negative image by repositioning themselves.

Table 4

NPE Communications Mistakes and Smart Moves

Respondent	Mistakes	Smart moves
Bill LaFontaine	Allowed bad apples to get the bad press; defenseless in the press	Say the enable inventors to get paid for their inventions
Bob Nywening	Can’t get out of their own way; leaders don’t understand the importance of marketing and communications	None
Dana Bryant	Hid behind ‘no comment’ and shell companies; must adapt in order to survive	Some pivoted their messages to reposition themselves in a positive light; they evolved based on current market conditions

Research question #5: How can NPEs improve their image moving forward?

- This research question was studied in order to determine if there’s still an opportunity for NPEs to improve their image. According to Parloff (2014), NPEs can take advantage of the negative publicity. “But now comes news that has the potential to change the nature of the patent trolling business. RPX -- a company that

strategically buys patent licenses to protect its clients from infringement lawsuits – is now offering its services to small and medium-sized businesses.”

This question was studied to gain insights into the possibilities moving forward for NPEs. Although much of the literature is negative toward them, this question examined if there any opportunities for NPEs to improve their image, of if it’s too late. Table 5 summarizes the respondents’ answers to this question, which agreed with the literature that it’s too late. They would need to evolve their business model and their communications strategies in order to survive long term.

Table 5

NPE Image Enhancements Moving Forward

Respondent	Too late?	Key reasons and opportunities for improvement
Bill LaFontaine	Yes	Let opponents set the narrative; should have pooled together like Chamber of Commerce; opponents understood
Bob Nywening	Yes	Too far deep in the hole; too many bad examples; their patents are being invalidated whenever used in an infringement lawsuit
Dana Bryant	Yes	Let the other side tell their story for them; don’t acknowledge their need for better positioning; should look at what other industries with negative images have done

Chapter 5

Discussion and Recommendations

Summary

This study was performed in response to the growing interest around intellectual property. Once relegated to the dark recesses of corporate legal departments, IP has now become a major concern in boardrooms around the country as well as with average citizens. Multi-million and even billion dollar patent infringement cases regularly grab headlines in major media, and have even become storylines in movies, television dramas and reality shows. With such a vast array of opinions on the topic, it was essential to collect data from experts in intellectual property, inventing and branding to explore the various facets of the IP ecosystem. These experts were interviewed based on a single questionnaire designed to answer the following research questions:

1. How does the market currently perceive NPEs?
2. What value do NPEs provide the IP community?
3. How have NPEs conveyed their value of their business model to the market?
4. What communications mistakes did NPEs make? What did they do right?
5. How can NPEs improve their image moving forward?

Discussion

By analyzing the data collected from Chapter 4, connections made between the experts' responses during the interviews and the existing literature found in Chapter 2, it is possible to draw conclusions regarding the following original research questions.

Research question #1: How does the market currently perceive NPEs?

All three experts agreed the current perceptions of NPEs are quite negative, with some pockets of neutral opinions, mostly with IP industry insiders. Nywening and Bryant focused on NPEs' current image and how poorly people felt about trolls, while LaFontaine discussed how their bad image has impacted their business. According to LaFontaine, "Overall, the NPEs are weakened.... NPEs aren't getting a whole lot of money at trial.... Damages are being and will continue to be scaled down, so trolls will only get a very very small piece of the profits. That's what's really going to hurt the NPEs, only getting a small fraction."

The literature reflects a similar negative attitude, as well as a negative impact on the NPE business model. Rubin (2007, p. 60) highlighted how it impacts all discussions involving NPEs, "All view trolls in a negative manner. That is, if one is called a patent troll, whether in the media, in licensing negotiations or when communicating with a judge, it is always in a negative context." The literature also detailed how pervasive and uniform the the negative attitude is. According to Lemley & Melamed (2013, p. 2), "Complaints that trolls are perverting the patent system or interfering with innovation are legion. *NPR* has run feature stories on the problems with trolls. The *New York Times* and the *Wall Street Journal* have run front-page articles about them."

Overall, it is possible to conclude that the NPEs' image is nearly unanimously negative, and this bad public image is hurting their bottom line. There are a few areas within the industry where the attitudes towards NPEs are somewhat neutral, but those are relegated to complex scholarly pieces that do not reach the masses or possible NPE clients.

Research question #2: What value do NPEs provide the IP community?

The experts stated it is possible for NPEs to add value to the IP community and cited a few examples, but were overall skeptical of any significant value add. Specialization of skills has been a growing trend in many industries, with many companies focusing on their core competencies and partnering with others to make a complete product. The many complex stages within the IP ecosystem could also benefit from highly specialized participants, but the experts agreed trolls are focused on extracting as much money as they could, without contributing any significant value to the community.

The literature reflects this lack of value as well. Goldberg (2013, p. 10) and Titch (2015, p. 11) both stated trolls are detrimental to the US economy, while Luman & Dodson (2006, p. 1) found, "The patent troll provides no value to the patent system, other than to line its own pockets. Rather, it stifles innovation and increases frivolous litigation. Patent troll litigation is on the rise, and it is time for targeted defendants to fight back."

Overall, the IP community does not believe NPEs add any significant value to the community, even though they could, and instead believe NPEs look to profit from the hard work of others. Nywening concluded during his interview, "In theory, they could be. Helping the garage inventor. Ensuring the big companies don't run roughshod over the little guy. Consolidating all the small patent portfolios that are lurking out there and negotiating one fair license with the big companies. But I don't think there's much money in that, so I doubt they are actually doing that."

Research question #3: How have NPEs conveyed their value of their business model to the market?

All three experts agreed the NPEs have not effectively conveyed their message to the market. Some have made weak attempts, but it was no match for the barrage of negative press that already existed. Bryant summarized, “They either aren’t talking, or talking so much that no one can find the benefit in their giant haystack of jargon. They didn’t own their own story. And this is where the other side has done an outstanding job telling not only their own story, but also telling the trolls’ story for them.”

The literature was slightly more positive in this regard, with some scholarly articles comparing the NPE business model to other businesses that aggregate risk. Intellectual Ventures co-founder Myhrvold (Myhrvold, 2010) compared his business to the venture capital market, the private equity market, the software market, government-funded and academic research, and several others. Others, such as McDonough (2006, p. 227), focused on the efficiency NPEs add to the market, comparing it to the banking system that created a market for capital and the insurance industry that created a market for risk.

Overall, the NPEs have not conveyed the value of their business model to the market. Some have successfully repositioned themselves in order to avoid the negative impact to their business, but most have continued to make weak arguments that they cannot back up with legitimate examples.

Research question #4: What communications mistakes did NPEs make? What did they do right?

The three experts agreed that NPEs have made many communications mistakes, primarily that NPEs didn't aggressively position themselves and instead let their opponents set the narrative. Once the "troll" term and all the negative activities surrounding it permeated the press, NPEs couldn't (or perhaps wouldn't) correct it. Dr. LaFontaine commented, "They've been pretty defenseless in the press." Nywening believed the reason for their lack of response was that they simply didn't understand the importance of their image, "I'm not sure if it's entirely because they don't understand how important it is, or they don't think there's anything they can do to change it."

The literature similarly criticized NPEs for their weak communications tactics and lack of transparency. Eventhough *CNET* was granted access to go "behind the scenes to understand what 40,000 patents and an unapologetic plan to make money from them really means," that reporter was still denied access he'd been promised. "We'd have liked to ask Myhrvold ourselves, but through a spokesperson he declined repeated requests to even answer a short list of e-mailed questions. So we'll do our best to answer the questions for him." (Kerstetter, 2012). There were several other examples where reporters attempted to write unbiased pieces on NPEs, but were stonewalled once they began asking difficult questions. One of the most damning pieces on NPEs appeared on *NPR*, where a reporter was given a "good news" example, but then found an extensive list of problems with the example once he began digging. "That just made us curious, so we started digging around." And they uncovered many issues once

they began their “five-month odyssey, where things didn't exactly fit the story that Intellectual Ventures was telling us.” (Glass, 2011).

Overall, the mistakes NPEs made vastly outweighed their attempts to properly position themselves. NPEs have many well funded opponents who are highly motivated to put them out of business. The many communications mistakes they made have hurt their image, and potentially damaged the entire business model.

Research question #5: How can NPEs improve their image moving forward?

All three experts agreed it is too late for NPEs and there is very little they can do to improve their image moving forward. But Bryant said during the interview, they should at least still try. “If I were them, I’d at least start trying in earnest. Look around at other industries and see how they responded to a negative image. Look at best practices. Look at what the other side is saying and identify ways to neutralize their story.”

The literature reflects a similar perspective. The volume of negative synonyms for “trolls” and “parasite” that pervades the press is staggering. A few NPEs repositioned themselves and while criticized in the IP journals, the major media accepted their new positioning. *IP Watchdog* strongly criticizes *Fortune*, “This biased PR piece with few actual facts was written by Mr. Roger Parloff, Senior Editor for Legal Affairs who fell hook, line, and sinker for the spin that RPX is putting out, aided by large corporations and those in academia who wish to weaken if not eliminate the U.S. patent system.” (Zeidman, 2014). The fact that this spin worked with a magazine as sophisticated as *Fortune* demonstrates that it is possible for NPEs to receive positive press coverage that helps improve their image, if they deployed an effective communications strategy.

Overall, NPEs have a very challenging story to tell in a positive light. A few have accepted the importance of this challenge and taken steps to improve their image. Most, however, have failed to communicate a positive message. Bryant summarized during her interview, “It doesn’t seem like they even acknowledge the need for better positioning, and that is perhaps their biggest mistake.”

Recommendations for Practice

After completion of the study, substantial data has been collected and analyzed on the topic of non-practicing entities’ public relations image. Given the information, it is important to highlight the most relevant communications strategies and tactics and present it for future intellectual property professionals. Some recommendations for practice include clearly defining one’s own narrative, leveraging positive examples, and continually evolving as the changing industry climate requires.

Establish your own narrative

Nearly every company has opponents or competitors that criticize them, and NPEs are no different. NPEs’ opponents made a game out of branding NPEs as “trolls” because they understood that one of the critical first steps in a communications campaign is to clearly define the problem. Risch (2011, p. 462) found, “The rhetoric is so heated, and the moniker ‘patent troll’ so pejorative, that blogs have been devoted to tracking NPEs and have been sued for defamation for doing so.” Although there were several issues with the troll label and examples of how this activity has historically benefited American innovation, NPEs’ opponents did not waiver in continually decrying this category of company. And when opponents couldn’t clearly

define what makes a company a troll, they shifted from what they do to who they are. “There are other complaints about trolls that focus not on the fact that they are interested in only monetary compensation for their patents, but on how they seem to behave.” (Lemley & Melamed, 2013, p. 30).

NPEs allowed their opponents to set the narrative, and didn’t appropriately respond with their own message. Branding expert Bryant stated during her interview, “They didn’t own their own story. And this is where the other side has done an outstanding job telling not only their own story, but also telling the trolls’ story for them.” IP industry expert Dr. LaFontaine concurred in his interview, “I don’t think they appreciated the importance of that narrative.... But the other side DID understand the importance of grassroots publicity and spent a lot of effort to ensure they had the public on their side. And it worked.”

Leverage positive examples

Another critical tactic in an effective communications campaign is to highlight examples of your narrative. NPE opponents utilized examples of hard-working Americans whose businesses had been destroyed by trolls. David Bloom proclaimed in the *New York Business Journal*, “The patent troll that came after my company forced us into court, made us bleed from legal bills and, in June, ultimately forced us to fold up shop. American Dream, meet the patent-extortion nightmare.” (Bloom, 2015). Dr. LaFonaine, however, said during his interview that the facts didn’t entirely support Bloom’s storyline, “We’ve heard through back channels that that was a sham.... It’s a lot easier to cry foul and blame a troll than admit your business simply failed.” Lemley & Melamed (2013, p. 54) found similar flaws with the “trolls are destroying

businesses” storyline, “The analysis above suggests that many of the complaints about trolls as the source of problems with the patent system have little substance.”

Despite these facts, NPE opponents generated numerous examples of how companies were hurt by trolls, while NPEs struggled to identify any positive examples of how they benefited the IP industry. When they did attempt to provide examples, they were quickly contradicted when the journalist investigated the facts. These mistakes highlight how unsophisticated the NPE communications strategies have been. According to IP expert Dr. LaFontaine, giving a reporter an example that hasn’t been carefully vetted first is an amateur mistake. “Intellectual Ventures tried to claim they were defending the individual inventor, but couldn’t back up that claim.... Their storyline is a red herring and *NPR* saw right through it.”

Evolve as necessary

“All businesses have to adapt to the changing environment, that’s just good business,” said branding expert Dana Bryant. Several NPEs were able to effectively reposition themselves and actually take advantage of the anti-troll sentiment, while others ignored the problem. When asked if RPX simply changed the title of their revenue stream from “patent license” to “subscription,” IP expert Dr. LaFontaine confirmed this slight shift, “They are still getting money for patent licenses, which is what the trolls want. But they positioned themselves as a white knight. They worked WITH the operating companies and took a ‘help me help you’ sales and marketing strategy versus a ‘pay me or I’ll sue you’ strategy. And it worked well for them.”

Study Conclusion

In conclusion, given the general findings of the study, NPEs should make a concerted effort to develop and deploy an effective communications strategy that highlights the benefits they provide to the intellectual property industry with supporting examples that validate their position. These strategies should be routinely reviewed and adjusted as necessary to respond to the constantly changing climate within the IP market. Overall, the study presented the collective opinions of several experts in the fields and a comprehensive review of literature on the topic. While each NPE has its own unique business strategy and strengths/weaknesses, the general findings of this study can be applied to those companies who want to improve their image and potentially their bottom line. Any NPE looking or interested in improving their image may want to refer to this study for further research in this subject area.

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Appendix A

Interview Transcript: Bill LaFontaine

The following interview was conducted to get expert opinions from an intellectual property industry perspective based on a questionnaire about NPEs and their perception in the industry.

Interviewer: Liz Weber

Respondent: General Manager, Intellectual Property and Licensing, IBM (Bill LaFontaine)

Date of Interview: 1/21/2016

Interview Transcription:

Liz Weber: What is your perception of NPEs in today's market?

Bill LaFontaine: They have been significantly hurt. For example, the CEO of Acacia was just removed from his position. Many of the PAEs [Patent Assertion Entities] basically have one year's worth of cash before they are out of business. The perception in the market at the moment is that the NPEs' patents are being neutralized in the courts.

LW: At the Patent Trial and Appeal Board for the USPTO?

BL: Yes. When an NPE sues anyone for infringement, the first thing that company does is challenge the validity of the patent at PTAB. So the NPEs are focusing their efforts on segments where the CBM type of post-grant challenge isn't applicable. It's just a delay tactic to hopefully make the damages fees lower.

LW: Is that working? Are the damages being awarded lower?

BL: Yes. Overall, the NPEs are weakened. When you go look at who's suing whom, the activity in the microelectronic and consumer segments is dying off. That used to be the hottest areas for patent licensing and infringement suits, and it's much less now. I suspect it's because NPEs aren't getting a whole lot of money at trial. We just aren't seeing the billion dollar judgments any more. Not only is it a good delay tactic, it also bleeds the trolls dry. It costs trolls money to defend themselves at PTAB hearings, a lot more than it costs the accused infringer to file a PTAB claim, which is only about \$250k. So filing PTAB is a lot cheaper than fighting a troll, and you have a good shot at winning, so of course operating companies file an IPR at PTAB.

LW: So are operating companies getting more aggressive against NPEs?

BL: Yes, they are basically opting to conduct efficient infringement. I wouldn't say they are going as far as willfully infringing, which has substantial legal consequences, but they are much more confident now that they won't be put out of business by a billion dollar infringement suit. So they don't really care anymore if someone comes after them. They say, "I'll file an IPR at

PTAB and chew you up for 18 months. If I win at PTAB, you're stuff is neutralized, you're patents are invalidated."

LW: Is that true for both small and large operating companies?

BL: Not as much with the smaller companies. Trolls can clearly continue to go after the little guys who have no ability to defend themselves.

LW: Based on your relationships throughout the IP industry, what do you believe the industry's perception of NPEs is in today's market?

BL: Interesting enough, there are operating companies who view them as being valuable because the market is consolidating behind a truckload of patents and NPEs are the only channel to get rid of patents. If you're in a high-tech industry, they are a good channel to monetize. There are a lot of serious mergers going on right now, particularly in microelectronics, and that means a lot of companies have more assets than they need. So the only opportunity to monetize those excess assets is to sell to an NPE.

LW: So consolidation is driving an aftermarket for patents?

BL: Correct. With this much consolidation, everyone is starting to sell patents. No other operating company needs those excess patents, you often can't assert them against your competitors because that will just kick off WWII, so NPEs are the only option to monetize those patents.

LW: And a lot of folks are doing that?

BL: Yes, the companies who are buying each other, they are selling off excess patents.

LW: I'm surprised there's a market for those patents, what's their value?

BL: The market is really for folks who are desperate to sell anything they can sell. That's the opportunity – sell to a troll and let them go sue somebody and you can keep your hands clean. But it only works in a market with a lot of consolidation.

LW: So you're not seeing this aftermarket for patents in others markets that aren't consolidating?

BL: Not at all, only in consolidating markets.

LW: Are there other market forces impacting NPEs' business model?

BL: The other thing that's happening that's impacting the value for NPEs is the notion of proportionality. If I sue you for infringement, you're only entitled to a piece of the total of the

product. In the old days, if I had a patent on a three-legged stool, I could block you because there were only two or three patents that read on a stool, so it was easy to get an injunction against you selling that stool to anyone until you paid me a licensing fee for my patent. And I'd probably get to claim 10% of your profit because my patent was fundamental to your product.

LW: But today's products are much more complex and contain much more patented technology, right?

BL: Exactly. Now you're getting products with thousands of patents technologies in them. A typical laptop or smartphone or even refrigerator contains thousands of patents, so if I'm infringing ONE patent that you own, how can you claim 10% of my profits? So the only rational argument you can make now is to ask how much of my product is impacted? Ten percent times thousands of patents equals more than the product is worth, the old math simply doesn't work. So I'll give you 10% of the profit divided by 1000 patents, here's \$5, leave me alone. Damages are being and will continue to be scaled down, so trolls they will only get a very very small piece of the profits. That's what's really going to hurt the NPEs, only getting a small fraction even when or if they will at PTAB and in court.

LW: Do you believe NPEs add any value to the IP community and, if so, what is that value?

BL: I think where they do provide value is back to efficient infringement. Not all NPEs' patents are bad patents. The only option for many people to monetize their patents is through the trolls. There used to be a gentleman's agreement between operating companies – if I infringe, I will pay you. Not is not the case anymore, so for many people, their only option to monetize the patents they spent a LOT of money obtaining is through an NPE. The real issue is that the NPEs have filed a lot of suits in a frivolous manor. It's one thing to file suit and lose because the courts don't believe the operating company truly infringed, and there's a lot of room for interpretation of infringement. The real problem is frivolously suing without providing any real proof of infringement with the hopes the target will opt to pay up just to make the troll go away. And that happened a lot, a lot of folks listened to their lawyers who told them it would cost more in legal fees to fight and win than to simply pay up front.

LW: Is that still happening? Are the horror stories of the sweet little small business owner being forced to pay because their website infringed some random patent true?

BL: That's more and more a red herring. I suspect that this is no longer as factual as it used to be, if it ever was a significant problem. It's very rare that someone comes after you without some level of work. But it's an excellent red herring and it pushes all the right patriotic buttons to claim that good, hard working, entrepreneurial, job creating Americans are being driven out of business by evil trolls. The headlines write themselves. But we know it's not an accurate portrayal of what's really happening in the market.

LW: What about the story about the guy from Brooklyn who had the food app and had to close his business because a troll sued him?

BL: We've heard through back channels that that was a sham. For one, he was backed by Google, who is behind a lot of the anti-patent rhetoric. Second, we also understand that several small companies banded together to file a PTAB challenge to that patent and they won, so the patent had been invalidated BEFORE he claimed he was driven out of business. And third, he was competing with some very strong companies in that space, it's a lot easier to cry foul and blame a troll than admit your business simply failed.

LW: Have NPEs effectively conveyed the benefits of their business model to the market?

BL: They really haven't. They'll argue that they are making an efficient market so operating companies can negotiate with one NPE versus thousands of individual inventors, but they have little evidence to back that up. Their other argument is that they are helping the individual inventors monetize their patents, again with little to no evidence. Most of the patents NPEs use in suits are patents they bought from operating companies, so where are the individual inventors' patents going?

LW: Is anyone doing a good job conveying their benefits?

BL: If you look at what RPX is doing, that's interesting. They are acting as a trusted intermediary between trolls and practicing entities. Emphasis on "trusted." They are solving problems both real and imaginary. And when they solve those problems for one client, they also solve it for all their other clients.

LW: Have you worked with them?

BL: Yes. There was a portfolio of patents and part of the market was licensed to it, but we weren't. And there were several other companies that needed help. So RPX helped us pool together, and negotiated to buy them. They negotiated a sweet deal to buy them out so they didn't wind up in the hands of an NPE.

LW: How else are they helping operating companies?

BL: The other things that they do for us – they will buy patents based on the licensing requirement for some of their clients. So they will buy the patent, we will get a license to the patent and then if they eventually sell to an NPE, I'm already licensed so I don't have to worry about a troll coming after me on that patent since I have a license.

LW: Any other ways they help operating companies?

BL: Well, they also see the rate card for an NPE, they know how much folks have paid an NPE for a patent, and that's something we rarely get to see without going to court. They won't tell an operating company what the rate card is, but they can sort of short-circuit an assertion. Knowing what the rate card is, they might be able to negotiate some settlement. RPX's

challenge is that trolls aren't as scary as they once were. Court cases are much more challenging for trolls now, so they are starting to lose clients.

LW: It sounds like RPX only slightly shifted their business model, and took advantage of the negativity around trolls. A subscription that gets you a license is merely another name for a patent license, right?

BL: Right, they are still getting money for patent licenses, which is what the trolls want. But they positioned themselves as a white knight. They worked WITH the operating companies and took a "help me help you" sales and marketing strategy versus a "pay me or I'll sue you" strategy. And it worked well for them. They've got half the market, many of the big companies subscribe to their offering, and they are publically traded. They are now offering insurance, the only reason that works is because they are assuming that if clients have a troll problem, RPX will have to solve it anyway for their bigger clients, so why not help the smaller ones as well? The money they got from the smaller company was incremental, the real value to them is keeping their mainline clients happy, they can't lose mainline clients.

LW: What were some of their public relations mistakes or smart moves NPEs made?

BL: Well, they've allowed a few bad apples to get the majority of the bad press. And they've been pretty defenseless in the press. Intellectual Ventures tried to claim they were defending the individual inventor, but couldn't back up that claim.

LW: Right, they gave NPR that example, which turned out to be a disaster.

BL: Absolutely. Their storyline is a red herring and NPR saw right through it. As I said earlier, most of what they assert was created by operating companies who sold IV the patent to monetize it. They aren't defending the rights of the hard-working, downtrodden individual inventor, they just buy a few of those as a red herring. In general, they haven't done a good job, they don't have a strong narrative. The IVs of the world will say they enable inventors to get money, but it's the exception not the rule.

LW: Could they spin a better narrative?

BL: Not at this point. Not when you consider how they shake people down for money. It's pretty obvious they haven't checked to see if company really did infringe before they go and sue them.

LW: What sort of communications strategy should NPEs employ to improve their image? Is it too late?

BL: It's completely too late. Companies like Google and others have already set the narrative. The money Google and others have spent on publicity may be as great as their market cap. In a simplistic way, an NPE is a group of lawyers trying cover their billable hours, and I don't think

they could even try to spin a better narrative today. There was a time in the past where they could have changed the narrative. They needed to pool together and form some sort of industry association that could have done it. They really needed to get together and create a non-profit or something like Chamber of Commerce to convey their message.

LW: And why didn't they do that?

BL: I don't think they appreciated the importance of that narrative. "Who cares what a soccer mom in Kansas City thinks about patents, I'm making a lot of money." But the other side DID understand the importance of grassroots publicity and spent a lot of effort to ensure they had the public on their side. And it worked.

Appendix B

Interview Transcript: Bob Nywening

The following interview was conducted to get expert opinions from an inventor's industry perspective based on a questionnaire about NPEs and their perception in the industry.

Interviewer: Liz Weber

Respondent: Mobility and Workplace Services, Office of the CIO, IBM (Bob Nywening)

Date of Interview: 1/25/2016

Interview Transcription:

Liz Weber: What is your perception of NPEs in today's market?

Bob Nywening: From what I've seen, they are simply looking to get rich off other people's ideas. They buy up patents from bankrupt companies or however they get them, and then hire a bunch of lawyers to go around suing anyone they can. And lawyers can make any argument that anything infringes anything, it's all up for interpretation. That's probably one of the biggest issues with patents – the property lines are fuzzy. They are up for interpretation by lawyers who may or may not understand the technology all that well.

LW: Unlike other areas of property law?

BN: Right. On my family's farm, we tag the cows, they are our property, and if anyone tries to take their milk or take the cow, we call the cops and that other guy goes to jail. End of story. There's no debating over the cow's intention to give the other guy her milk. Maybe she thought he was really nice and wanted to follow him home, it's not his fault. What's mine is mine and everyone else knows they will go to jail if they try to steal it.

LW: Right, very clear cut.

BN: But not with patents. The property lines are so blurry, and they are open to interpretation, half the time folks don't honestly know if they are stealing someone else's property, especially if they own a patent that they think covers their products. If you spend millions of dollars on R&D and get a bunch of patents on your products, you should feel confident that you're doing the right thing, and have the right to go make money off those inventions. The US government told you that you have a right to that invention. And if you make an honest mistake, OK, I'll give you some money for a license to your patent and we'll both go about our day. But the trolls aren't like that. If you make an honest mistake, and some lawyer decides you infringe their patent, you have to pay them millions of dollars. Of course, I'll admit, defining an honest mistake is not exactly easy. Take the smartphone wars – Apple basically got a patent on a rectangular communications device. Well, EVERY phone is a rectangular communications device, so no one else in the world should be able to make a smartphone?

LW: Not according to Apple.

BN: Right, because Jobs thought he was the only one who ever thought of it, and basically had a hissy fit when Google and Samsung came out with Android. The same guy who stole windows from Xerox PARC claims no one else on the planet can make a phone. But at least in that war, both sides had skin in the game, both sides ... well, more than two sides, but two main camps spent billions on R&D to make what they thought was a better product. With the trolls, they aren't investing in R&D, they aren't building anything, they are just exploiting legal loopholes in the system.

LW: Based on your relationships throughout the inventor community, what do you believe the industry's perception of NPEs is in today's market?

BN: Most of the other inventors I talk to feel the same way. We work hard on our inventions, and we're proud when we see something we created become a product. That's what we really want, we want to know we're fixing a problem or making something better or easier or faster. If an engineer walks into a room, flips on the light switch, and the light comes on, we move on, there's nothing to fix. But when it doesn't turn on, we have something to fix. We are always looking for ways to solve problems or improve something. I've been invited to several invention mining sessions where I was certain I couldn't contribute, I'd already submitted all the ideas I had on the subject and it was a giant waste of time. But since they usually feed us well at those sessions, I went. And the folks leading the mining session would ask question after question, challenging us to solve a very specific problem. The challenge wasn't "build a faster semiconductor, write your answers here." Instead, they asked us how we would solve one very specific problem, how we'd overcome one hurdle. And damn if we didn't come up with about 10 ideas for every problem. Now they weren't necessarily 10 GOOD ideas, but there was usually a piece of a good idea, and we could build on that. There's nothing better than being told a problem is unfixable, and then finding the fix. I know some folks who keep a running list of the top reasons why their project will never succeed, all the reasons why it's impossible.

LW: And inventors enjoy overcoming the impossible?

BN: That's why we do what we do. Very few of us are in it for the money, if we were, then we made a pretty big mistake coming to work at a corporate lab. Our inventions are like our children, we want them to grow up to be contributing members of society. We want to know our inventions are out there in the world making it better. Not used in a lawsuit to make someone rich who didn't add anything.

LW: But about the NPEs' argument that they are enabling the individual inventor to do just what you said, helping the little guy get his invention out into the world?

BN: Well then that would be an entirely different story. The garage inventor doesn't have a lot of options, and it's pretty easy to steal from someone who doesn't have a lot of resources to protect himself. Look at the they guy who invented the windshield wiper thing – he basically ruined his life trying to get what he deserved from the big auto makers, who absolutely stole his

idea. They knew they were doing it and they knew they could get away with it. He didn't stand a chance up against their army of lawyers. If NPEs give guys like him a fighting chance, then that's great. It's a great story, and I'd be all for that. But from what I've seen, that's not really how it works. And if it is how it works, why aren't they telling that story? I haven't seen anything about a garage inventor who finally got what he deserved thanks to a troll.

LW: And you think they would be shouting that from the rooftops if it was happening?

BN: Absolutely, everyone loves an underdog. David and Goliath. It would be a phenomenal story. Maybe they have those examples and simply aren't sharing them, maybe they are really really bad at telling a good story, but I don't think those examples exist.

LW: So do you believe NPEs add any value to the IP community?

BN: In theory, they could be. Helping the garage inventor. Ensuring the big companies don't run roughshod over the little guy. Consolidating all the small patent portfolios that are lurking out there and negotiating one fair license with the big companies. But I don't think there's much money in that, so I doubt they are actually doing that.

LW: And there's big money in suing the big companies?

BN: There used to be. I remember hearing about billion dollar patent infringement cases. Or at least hundreds of millions. The most famous was Blackberry, look how much they had to pay for patents that we all knew were bogus, those patents never should have been issued, and they certainly shouldn't have been the basis for a multi-million dollar infringement case. But the system back then took forever to invalidate an issued patent, so Blackberry had to pay. Not so much anymore now that PTAB is killing most patents in dispute, and that is seriously hurting the trolls' business model.

LW: So have NPEs effectively conveyed the benefits of their business model to the market?

BN: If they have, I certainly haven't seen it. But I've seen story after story talking about how they're taxing operating companies. I even got an email from Newegg when they won a case against a troll, they were offering some sort of beat the troll discount to all their customers since they DIDN'T have to raise prices to pay the settlement. It was brilliant, I'm sure it went out to millions of people who know nothing about patent law, but they now know they are going to save 10% on their next router because Newegg beat a troll.

LW: That was pretty smart of them, a great way to get the public on their side. What are some of the public relations mistakes or smart moves NPEs have made?

BN: It doesn't look they even tried to tell a story. I mean, even seriously evil companies like tobacco and oil and Monsanto find a way to spin a story about how they aren't completely evil.

I love those Exxon commercials where they show the obligatory engineer in glasses talking about his research.

LW: So you don't believe Exxon is helping make the planet safer??

BN: Heck no, no one in the scientific community believes their BS. But they get away with it because they keep to the script, they keep talking about creating jobs and investing in the future, and blah blah blah. And it works, look at their profit margins, look at how little they pay in taxes. They spin a good story and they continue making a lot of money.

LW: Could NPEs do that? Could they spin a positive story?

BN: I think they could if they could get out of their own way. They have the money to hire the same spin doctors that tobacco hired, but it doesn't seem like they really care. And that's another point about engineers. For the most part, we were the ones getting beat up in the school yard. You've heard the joke about how you tell the difference between an introverted engineer and an extroverted engineer?

LW: Of course, the introverted engineer looks at his shoes while he's talking to you and the extroverted engineer looks at your shoes while he's talking to you.

BN: Exactly. We aren't exactly the most socially advanced people. Except me, of course.

LW: Of course.

BN: Most of these NPEs were created by really really smart engineers who simply don't understand the importance of being popular. They wear it like a badge of honor. I'm not sure if it's entirely because they don't understand how important it is, or they don't think there's anything they can do to change it.

LW: And you think they could change it? They could be popular?

BN: I think they could if they truly tried. I don't believe they prioritized it. Now, it's fun to hate the trolls.

LW: What sort of communications strategy should NPEs employ to improve their image? Is it too late?

BN: I suspect it's too late. They are so far deep in the hole, how could they crawl back out? It wasn't like that a few years ago. There were a few bad actors, like the guys who sued Blackberry, they seemed slimy, but maybe they were an outlier? And maybe Blackberry did steal their IP, who knows?

LW: And now?

BN: And now there are just too many examples of trolls being really underhanded. They hide their patents in a bunch of shell companies so no one knows what they have, they sue for a piece of the whole pie when their patent is just a tiny sliver of what goes into the product, and most of their patents are getting killed at PTAB, so they obviously don't have legitimate IP that is legitimately being stolen.

LW: Do you think that's true across the board? Do you lump them all into the category?

BN: No, there have always been organizations that focus on a piece of the invention ecosystem without doing everything themselves. Ford eventually figured out that you can't own everything from the rubber tree farm to the radio, companies have to focus on what they do best. And there are some that focus just on invention and then sell it someone else to manufacture it. Look at the TV show Shark Tank – they are basically paying inventors and entrepreneurs for their ideas and using their connections to get the product to market.

LW: And you wouldn't call them a troll, right?

BN: No, they are adding value to the product by helping get it to market. Of course, they are taking a cut of the profits, but that's fair. My boss likes to say, "100% of nothing is still nothing." So those inventors would get 100% nothing if the Sharks didn't help get their product to market. They are adding value, business sense, customer insight, relationships with retailers, whatever it is, it's valuable to a small business owner.

LW: And there are folks like that in the invention ecosystem?

BN: I think so. Companies like InterDigital or Dean Kamen or any law firm that files the patent applications. They all add value to the system. Inventing something is just the first step in a very long road to making a successful product. There are folks throughout that entire process who could add value. So could trolls provide a valuable service, sure. Do they? No.

Appendix C

Interview Transcript: Dana Bryant

The following interview was conducted to get expert opinions from a branding expert's perspective based on a questionnaire about NPEs and their perception in the industry.

Interviewer: Liz Weber

Respondent: Corporate Vice President, Brand Experience, New York Life (Dana Bryant)

Date of Interview: 1/28/2016

Interview Transcription:

Liz Weber: What is your perception of NPEs in today's market?

Dana Bryant: The very term non-practicing entity begins with a negative. It's obviously better than the term troll, but you still don't want to start off introducing your category as something you aren't. If someone introduced themselves by saying "Hi, I'm Dana and I'm not an idiot," the very first thing you're going to think is, "Idiot?" As Shakespeare would say, "The lady doth protest too much." So that's problem #1 with their perception, they've already set themselves up for failure from a brand positioning standpoint, they are already on the defensive. I've seen articles where they are asked if they are a troll and they simply can't answer the question. They stumble along for a few minutes and finally conclude with a half-hearted "eh, maybe." That's a pretty simple question that they should be able to answer in their sleep.

LW: And what should the answer be?

DB: It should be a clear and concise "no" followed with a short description of what they are, they should continually repeat their benefits.

LW: So, Dana, are you troll?

DB: No, I'm an invention advocate. My company helps inventors get paid for their ideas.

LW: Well, some of them tried that tactic but couldn't provide examples of an individual inventor who they helped.

DB: And inventors who work for big companies aren't still inventors? They aren't still people who deserve to be fairly compensated for their contributions? Their companies didn't pay them a salary? Their company doesn't deserve a return on their R&D expense? Didn't we learn in the last election that companies are people too?

LW: Oh good grief.

DB: Of course companies aren't people, but they employ people who spend a lot of effort to create these patents, and the companies deserve a return on that expense and the inventors

deserve a fair salary for their efforts. And it shouldn't matter if the invention in question came from a big company or an individual inventor – people should be fairly compensated for their ideas. That is as American as apple pie and I dare anyone to say, "Oh that invention doesn't count, I can rip it off because it came from someplace we don't like very much." Stealing is still stealing, and THAT should be the key message for NPEs.

LW: Based on your relationships throughout the IP industry, what do you believe the industry's perception of NPEs is in today's market?

DB: They simply haven't done a good job of telling a compelling story. They've been on the defensive from the beginning and never got in front of it. They let folks on the other side of the argument tell their story for them, and that's never a good thing. "No comment" is about the worst response you can ever have, it's essentially admitting that you did whatever horrible deed your opponent is accusing you of committing. And when they did try to tell their story, it was entirely too complex and professorial. Today's society is all about the sound bite, the punchy tag line. You can't combat powerful, simple messages like "troll" and "parasite" with some 7,500-word essay on the similarities to the private equity market. Half the country doesn't even know what private equity is.

LW: And the message should have been?

DB: We think stealing is bad. Invention, good. Stealing, bad. I mean, maybe not quite THAT rudimentary, but just about. Again, the American people want short, simple messages. Black/white. Off/on. Good/bad. They simply don't really understand shades of grey.

LW: And that's the story the other side told?

DB: Right. They made it as simple as possible. It's like a game of buzzword bingo, every article they put out talked about "job creators" versus "evil trolls just looking to make a buck off my hard work." This IS a complicated story, which is all the more reason why you need to simplify it and clarify it. It's not like the other side maintained 100% fidelity to all the nuances of the story. Doesn't mean they lied or misled anyone, they simply presented it in a way that the average person could understand that also happened to be the most favorable to them. That's been going on in sales and marketing since time began. That's just good business sense.

LW: Do you believe NPEs add any value to the IP community and, if so, what is that value?

DB: Yes, I think they do ensure companies don't steal IP without paying for it. Are NPEs really helping the individual inventor? Probably not, there isn't a whole lot of money in that. Most of the garage inventors are tinkering away on household items like snow shovels or kids toys. And most of the IP revenue is in extremely high tech areas like pharmaceuticals or semiconductors or telecommunications, areas that require incredibly expensive labs. Dora the Explorer isn't going to invent a carbon nanotube in her garage.

LW: Any other ways they add value?

DB: Their other argument is aggregating risk. This is the entire foundation of the insurance market, right. Everyone buys homeowners insurance on the off chance a tree falls on their house, and a handful of policy holders actually have a tree fall on their house. And it's a win-win for all parties – not that many trees fall on houses, so the insurance company doesn't have to spend more than they took in, the folks who file the claim obviously come out ahead, and even the people who never file a claim have peace of mind knowing they would be protected if something happened. So overall, aggregating risk is a good thing. And inventing is an inherently risky business. Even the most successful inventors produce dozens or hundreds of failures for every success. So if you can aggregate that, at scale, that benefits the broader IP community.

LW: Have NPEs effectively conveyed the benefits of their business model to the market?

DB: No, they either aren't talking, or talking so much that no one can find the benefit in their giant haystack of jargon. They didn't own their own story. And this is where the other side has done an outstanding job telling not only their own story, but also telling the trolls' story for them.

LW: What were some of their public relations mistakes or smart moves NPEs made?

DB: On the smart moves side, a few NPEs pivoted their messages and positioned themselves as a different category of company. For the most part, it was just a slight shift in the business model, but it enabled them to change the narrative, to tell a different story. That's what branding is all about – creating a differentiated name and image that helps position you for success. When something bad happens, when the public is no longer on your side, you need to shift if you want to survive. Look at the famous Tylenol tampering incident, when someone laced Tylenol with cyanide, that could have put the entire Johnson & Johnson company out of business. Their response was one of the smartest reactions to a catastrophe that any company could do. Not only did they save the company, they also improved the industry. Or look at Toyota, their tagline was something like "keep moving forward" when they had all those problems with accelerators that wouldn't stop. Of course they changed their tagline, they shifted their brand in response to the changing customer climate.

LW: And the trolls didn't evolve?

DB: Right, some of them did, and they have a shot at riding out the storm. The ones that kept hiding behind "no comment" and shell companies, I just don't see how they survive long term. Not when the courts are ruling against them time after time and there's zero appetite to change the trajectory. All businesses have to adapt to the changing environment, that's just good business.

LW: What sort of communications strategy should NPEs employ to improve their image? Is it too late?

DB: For many of them, I think it is too late. But if I were them, I'd at least start trying in earnest. Look around at other industries and see how they responded to a negative image. Look at best practices. Look at what the other side is saying and identify ways to neutralize their story. Use their strengths – their size, their influence, whatever – against them. It doesn't seem like they even acknowledge the need for better positioning, and that is perhaps their biggest mistake.