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Patent Trolling Isn't Dead — It's Just Moving to Delaware

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For years, the small East Texas town of Marshall has held a special status in patent litigation: poster city for opportunistic "patent trolling" lawsuits brought by nonpracticing entities, firms that amass patents for the sake of pursuing license fees and litigation. Thanks to last month's Supreme Court ruling in *TC Heartland v. Kraft Foods Group*, Marshall's dominant position as a patent trolling venue may soon end. But will patent trolling be reduced overall? Unlikely.

Patent trolling has risen to prominence in the past decade, driving explosive growth in patent

litigation against firms of all sizes. It imposes huge costs on firms (and the economy at large) and chills venture capital investment, eventually leading to significant reductions in innovation at targeted firms — roughly 20% of R&D investment.

Patent trolls are known to "shop" for favorable litigation venues. They bring 43% of all their lawsuits in a single jurisdiction: the sleepy town of Marshall. Why? Marshall has specific procedural rules regarding trial speediness and a reputation for plaintiff-friendliness.

Trolls have been able to bring their lawsuits in Marshall (instead of, say, in the places where their targets are based) because of a 27-year-old Federal Circuit precedent that granted broad leeway in the choice of venue. The *TC Heartland* decision changes that. Now, patent lawsuits can only be brought in the state where the defendant is incorporated, or "where the defendant has committed acts of infringement and has a regular and established place of business."

In practice, this means that most patent lawsuits will move out of Marshall (although some are trying to hang on). Many argue that forced relocation will deal a critical blow to patent trolling. But the data suggests otherwise.

The second most common venue for nonpracticing entity litigation is Delaware: It alone sees as many cases as the next six most popular venues combined — over 20% of cases overall. And as we've computed using data from RPX, non-practicing entities' Delaware patent suits end with loss or dismissal only 8% of the time, a scant difference from the 4% rate in Marshall.

The Geography of Patent Trolling in the U.S.

Cases brought against publicly traded firms by nonpracticing entities, 2005–2015.

JUDICIAL DISTRICT	CASES	PERCENTAGE OF TOTAL CASES IN THE U.S.
Texas Eastern	4,846	43%
Delaware	2,222	20
California Central	620	5
California Northern	619	5
Illinois Northern	433	4

NOTE TOTALS DO NOT ADD UP TO 100% BECAUSE NOT ALL U.S. DISTRICTS ARE SHOWN.
SOURCE "THE GROWING PROBLEM OF PATENT TROLLING," BY LAUREN COHEN ET AL., *SCIENCE*, 2016

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The *TC Heartland* decision will force trolls to work where their targets' headquarters or primary operations are based, but for most firms that includes Delaware. Sixty-four percent of all publicly traded firms are incorporated in Delaware, and 90% of IPOs happen there — so even under the new ruling, Delaware is a viable, and seemingly favorable, site for nonpracticing entity litigation.

Moreover, one of the biggest threats patent trolls bring to bear is not full litigation but the long interval between initial filing and the lawsuit actually being processed. During that period, defendants often have problems with financing or suppliers, and sometimes face injunctions, forcing them to settle even lawsuits they most likely would have won. The Delaware patent lawsuit docket is already packed, so delays will be significant. And *TC Heartland* will make it more crowded still.

Combining these observations, we see that the *TC Heartland* decision doesn't change the basic economics of opportunistic patent litigation. Patent trolls may have to move out of Marshall, but they can just as easily set up shop in Delaware.

So what *would* slow down abusive patent litigation? Most proposed solutions have focused on post-trial penalties for opportunistic litigation. But post-trial penalties do little for defendants staring down expensive, uncertain multiyear trials. Instead, we need a solution that puts up-front costs on patent trolls and screens out low-quality lawsuits early. In new work with University of Texas at Austin law professor John M. Golden, we propose such a solution and show that it would also help bolster high-quality lawsuits brought by small innovators.

We suggest a prelitigation review board that would examine infringement claims up front and provide preliminary assessments of their merits. The low-cost and efficient initial review would follow the case through any further actions, strengthening high-merit cases and reducing the incentives for pursuing low-merit ones. Additionally, the majority of the review process costs would be borne by the plaintiff; this would neutralize the up-front cost advantages trolls currently have.

The bottom line: Reports that *TC Heartland* will kill patent trolling have been greatly exaggerated. It is likely that the decision will just be a troll relocation package. If we want to solve the patent

trolling problem, we need change the fundamental incentives that promote trolling – not just change the trolls' zip codes.

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