

You can call me troll

Erich Spangenberg, founder, owner and CEO of IP Navigation Group, has been described by one critic as “the most notorious patent troll in America”. But what does he care? Business is booming – and growing IP awareness outside of the United States is presenting a wealth of new opportunities

By Jack Ellis

The ‘patent troll’ label gets thrown around a lot these days. But it could well have been thrown at Dallas-based IP Navigation Group (IPNav) and its founder and CEO, Erich Spangenberg, more often than at anyone or anything else. In fact, he and his company have been called ‘patent troll’ so many times that their names have become almost synonymous with the term itself.

It is certainly true that Spangenberg runs a lucrative business based on asserting patents for financial gain – a practice that many critics of the patent monetisation industry would regard as sure evidence of trolling. But there are plenty of scare stories out there about Spangenberg that have added weight to his ‘first among trolls’ persona.

Market players who have done business with Spangenberg tell tale of someone who can be tranquil and charming one minute, incandescent with rage the next. The man himself told the *New York Times* that he is ready and willing to “go thug” where necessary, and that he would prefer to settle at least some of the disputes he is involved in by duelling or street fighting. Even if such things were said in jest, Spangenberg’s activities have got him into hot water in the past; in one incident, he was found

by a US federal court to have engaged in witness tampering for inducing a lawyer to “intimidate a witness on the eve of trial”.

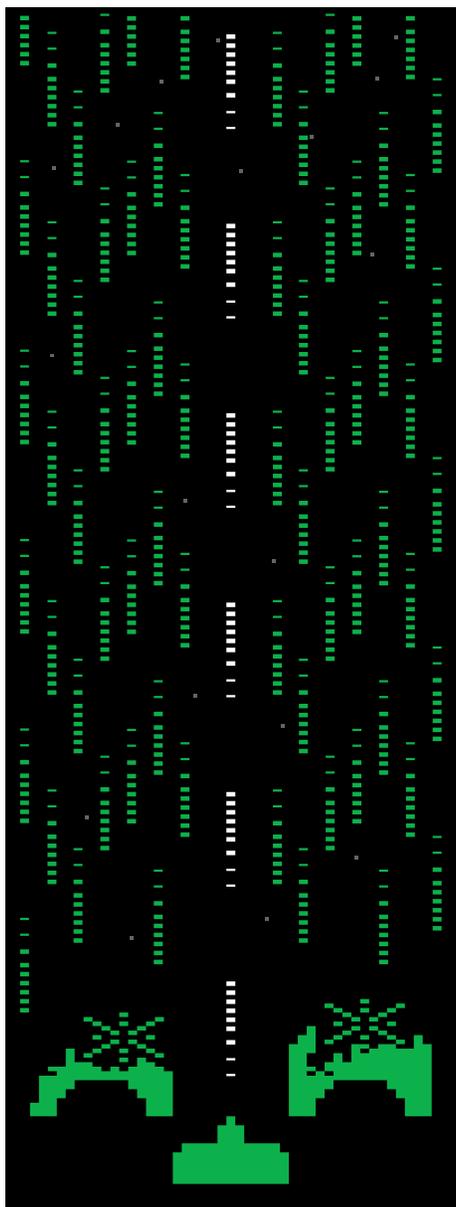
But when *IAM* asked Spangenberg whether his reputation troubled him – whether he worried that it could end up damaging IPNav’s future business opportunities – the answer was an immediate and unapologetic “no”.

His response is perhaps unsurprising. Given that he personally earns north of US\$25 million each year, according to the *New York Times*, it would appear that things are going very well indeed for Spangenberg. And with foreign markets opening up and board-level executives keener than ever to monetise their companies’ intellectual property, it looks like the opportunities will only increase for his self-built enterprise.

Formative experience

Spangenberg’s journey towards becoming arguably the most notorious personality in the patent world began in the late 1990s when – following stints as a corporate lawyer and an investment banker – he took up the post of president at a small telecoms company called Smartalk. Not long after his arrival, Smartalk was hit with a patent infringement lawsuit by renowned inventor and licensor Ronald Katz. Spangenberg says that one law firm quoted him between US\$3 million and US\$4 million to take the fight to court – but he eventually decided to try to resolve the issue directly with Katz. “I was just fascinated by the process,” he recalls. “I’d never read a patent in my life. So I got a copy of this patent, looked at it, thought it was interesting and went to talk to [Katz].”

The experience of being sued by a non-practising entity (NPE) proved pivotal for Spangenberg. Inspired by Katz, he acquired



a few patents of his own with the intention of monetising them. He just needed to find the experts to help him do it. “In 2003 I jumped on a plane and flew around the country, convinced that there had to be someone who could manage this asset,” he says. “I met with a number of law firms, but to my surprise there really wasn’t anybody out there who could do the full scope of what you need as a patent owner.” Unable to find the right people, Spangenberg decided to seize the initiative and go it alone. And when his DIY monetisation campaigns started reaping rich rewards, he began to get an increasing number of phone calls from other entities that were seeking to assert and license their patents. “The service I wanted in 2003 didn’t exist at the time,” he explains. “But as more and more third parties began contacting us around 2007–2008, I realised that there was an opportunity to start an advisory business using the experience I had picked up as a patent owner.”

According to Jonathon Skeels, IPNav’s director of business development, the firm today principally serves as a consultant to IP owners. “IPNav acts as an adviser and makes recommendations to the client as to what strategy to pursue,” he explains. “But ownership of the patents and ultimate decision-making authority are not transferred over to IPNav in those situations, and for many patent holders that is a very attractive element of the business model.” This structure sets it apart from major competitors such as Acacia, WiLAN and IPValue, he says, and “is often a draw for many clients who understand that difference”.

This approach allows IPNav’s clients – which include small-to medium sized enterprises, large corporations, universities and research institutions, NPEs and individual inventors – to retain a level of control over their patent rights. Skeels points out that another potential benefit is that patents from multiple clients are not aggregated together in licensing deals. “Each patent owner is a unique, individual client in the IPNav model, versus others where they are combining patents from multiple clients,” he continues. “So it is very clear and transparent when we are dealing with a client as to the money that comes in due to the monetisation process and what the revenue-sharing relationship is between IPNav and the client in those circumstances.”

Skeels – who was previously an analyst focused on the patent market – suggests that the fact that IPNav is entirely owned by its founder, rather than publicly traded



Erich Spangenberg, CEO, IP Navigation Group

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Deirdre Leane, president, IP Navigation Group

“[We are] renowned for being aggressive. But you know what? You have to be in this business; otherwise, you will just get rolled over”

or backed by institutional investors like several of its key competitors, also appeals to prospective clients. “We don’t have any outside pressure from investors or the overall market expecting us to generate a certain amount of licensing revenues or monetisation proceeds in a given timeframe,” he says. “Therefore, we are able to focus on truly maximising the value of those assets for our clients – and I think we can achieve that privately far easier than through a public vehicle.”

The business model also gives IPNav the flexibility to offer more to its clients than just advice on licensing and assertion strategies. One example is patent-backed lending through the firm’s financing arm, IPNav Capital. This aspect of the business developed as a result of instances where IPNav had identified significant value creation potential in a client’s patents, but where for various reasons the owner was unable or unwilling to monetise its assets through enforcement. “We can lend money using the patent assets as collateral for the loan,” says Skeels. “Traditional bank financing is very tough to come by in those circumstances – so we saw the opportunity to step in and fill that void by evaluating the patent assets, determining what their monetisation value is and using that as a basis to lend what is essentially growth capital. And ultimately, for us, that creates relationships with businesses that may down the line become a true patent monetisation client for us.” IPNav has recently expanded its lending



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operations with the launch of IP Claims Management – a service aimed at raising litigation defence finance for cash-strapped companies on the receiving end of patent infringement suits.

Troll wrangler?

As Skeels explains, IPNav stands out from many companies that are typically described as NPEs, patent assertion entities (PAEs) or ‘trolls’ in that it does not own any patents and therefore does not file any patent infringement suits itself. On that basis, it would seem rather odd that so many people have IPNav down as one of the biggest ‘patent trolls’ there is.

However, other players in the IP market would tell you a different story about the IPNav model of monetisation. Defensive patent aggregator (and anti-‘troll’ solution provider) RPX identified the firm as the most litigious NPE in the United States in its 2012 NPE Activity Report. According to the study, IPNav both filed the most cases in 2012 (305) and added the most defendants to cases during the same period (357). These figures were reached working from the basis that Spangenberg owns – either outright or in part – many of the patent-owning companies that IPNav advises. For his part, Spangenberg makes no secret of the fact that, as a patent owner himself, he has set up holding vehicles in order to license assets in the past: “IPNav hasn’t, but as a patent owner on the principal side, I have done it. But setting up companies to hold assets is something that’s done thousands of times a day.”

Daniel Nazer, a staff attorney and policy analyst at the Electronic Frontier Foundation (EFF) – one of the fiercest critics of so-called ‘trolls’ – suggests that ‘troll wrangler’ might be a better title for Spangenberg and the IPNav business model. “Ultimately, it doesn’t really matter who is a patent troll,” he says. “What matters is whether someone’s conduct is harmful. PAEs – such as those that IPNav represents – impose huge costs, yet deliver almost no benefit to inventors. Less than 25% of payments made by productive companies to patent trolls go to inventors – and this doesn’t even include the indirect costs that trolls impose, such as employee time lost to litigation.”

For Alan Schoenbaum, senior vice president and general counsel at Rackspace, IPNav falls squarely under the ‘troll’ umbrella. “The term ‘patent troll’ is a catch-all label for people that buy discarded or unsuccessful patents, threaten large numbers of businesses with demand letters, and file suits against them and use the threat of expensive defence

costs to extort settlements,” he says. “As to IPNav, from what we understand, this self-styled ‘full service patent monetisation firm’ is owned and managed by Erich Spangenberg, and the IPNav website states that he ‘owns companies that actively engage in enforcement, acquisition, commercialisation and monetisation transactions’. Therefore, I don’t see much difference between IPNav and other PAEs – except that Erich is perhaps more visible than most of the others.”

Whatever the case, Spangenberg is nonchalant about the ‘troll’ title that he and his company are regularly given. “The labels become meaningless, so I embraced the ‘troll’ name because I knew that eventually everybody that owned a patent would be seen as a troll,” he says. IPNav president Deirdre Leane goes on to argue that the firm’s fierce reputation – ‘troll’ or otherwise – is what has allowed it to gain its leading position in the patent monetisation marketplace. “We view all press as good press,” she says. “We absolutely don’t hide our aggressive nature – Erich is renowned for being aggressive. But you know what? You have to be in this business; otherwise, you will just get rolled over.” She points out that the large corporations that IPNav is often asserting against can be just as uncompromising – or more so – in protecting their interests. “For us to go up against them, we need to be super-tough, because we are representing our clients and have to do the best for them,” she continues. “And IPNav’s name carries a lot of weight. When we pick up the phone and call companies like Apple, Samsung, Microsoft, Facebook – they all know who we are and they listen to us, because they know we mean business.”

But with concerns about the perceived negative economic impact of ‘trolls’ at an all-time high, many stakeholders have been lobbying for legislative reform to address supposed litigation abuses perpetrated by NPEs, and essentially to make patent assertion less profitable. Many reform proponents hope that these changes could sound the death knell for patent monetisation businesses such as IPNav.

Need for speed

It may thus come as a surprise to those campaigning for patent litigation reform that Spangenberg actually supports many of the measures that have been proposed. “I am absolutely in favour of ‘loser pays’; I am absolutely in favour of reforming discovery – I think it is a mess; I am absolutely in favour of early Markman hearings; and I am absolutely in favour of customer stays,” he says. “I am in favour of anything that will shorten litigation.”

While IPNav has largely focused on US patent owners, it is now attracting more clients from further afield as boardrooms the world over begin to recognise the potential in their IP assets. Much of the firm's work with non-US clients is concerned with US assets, but IPNav is currently mulling over the monetisation opportunities presented by foreign assets as well.

"We are looking for the first time at asserting a portfolio in China," says IPNav President Deirdre Leane. She suggests that evolving cultural attitudes among Asian corporates towards intellectual property mean that Asia is fast becoming a key source of new clients. "Traditionally, Asian companies were about defence," she explains. "They would acquire companies and patent portfolios, and would continue to patent their technology and protect their ideas from a pure defence perspective. So whenever they got to the thousandth patent in a particular area, they would think they were in good shape." However, economic uncertainty and financial constraints are leading to a shift in that corporate mindset. "It used to be that the GC would go to the C-suite and ask for a cheque for US\$250,000 to maintain the portfolio for the next quarter," she says. "Now, the C-suite is realising that by licensing the portfolio, they can be the ones that receive the cheques." Leane also reports that IPNav is

increasingly instructed by European companies, though her general perception is that they may be rather slower on the uptake when it comes to understanding the potential value in their patent portfolios. "I think that is because there is a lot of fear around asserting," she suggests. "There is still fear around the idea that you if hit your competitor over the head and sue it with a number of patents, it will just countersue you. Also, some of the European portfolios are still quite young, simply because the patent structure isn't as advanced as it is in the US."

Europe is also proving to be a highly effective venue for existing clients to maximise the value of their portfolios. In particular, IPNav has been defaulting to the German litigation system more and more in its efforts to achieve satisfactory – and speedy – results for patent owners. "For the right client, Germany is great," says Spangenberg. "It moves much quicker through the first instance than the US system, because there is very limited discovery and you get a highly educated group of three judges to hear your case. It is incredibly efficient, so I am a big fan."

IPNav also appreciates Germany's bifurcated patent litigation system, in which a patent's validity can be decided separately from – and more quickly than – infringement claims. "If you have an invalid

patent, do you really want to litigate over it for four or five years and at the end of that find out it is invalid?" asks Spangenberg. "It is crazy that [IPNav's critics] would have you believe that what we advocate is some system where you can obfuscate and delay, delay, delay. That is the last thing we want! We are not in the litigation business; we are in the licensing business. If the patent is invalid, I want to know that right away."

Spangenberg also praises the benefits of other European systems – and IPNav will seek to make use of them if those jurisdictions are covered in the relevant patent family. "We've also had cases in France, and the patent court being centralised in Paris is a big plus," he says (the Paris court was granted sole jurisdiction over patent disputes in November 2009). "It is not as quick as we'd like it to be, but it is certainly quicker than the US and avoids many of the antics and theatrics that go on in the US. So I think the French system is evolving quite nicely as well."

Spangenberg is excited by the prospect of the forthcoming Unified Patent Court (UPC) – which, if all signatory countries ratify the UPC agreement, will have jurisdiction over at least 25 of the European Union's 28 member states. "I am a big fan of the unitary system that will be coming into effect, because I expect it to be efficient," he says.

That said, Spangenberg is less enthusiastic about other proposals. He suggests that certain provisions aimed at increasing transparency of patent ownership – such as legislation targeted at identifying the 'real party in interest' in a patent dispute – could have unintended negative consequences for a vast number of patent owners. "I don't know the right way to do it, but I think you should easily be able to determine who the owner of a patent is – in other words, the person who has the power to license it and who can grant you a licence," he says. "A different issue is the 'real party in interest'. There, what they are trying to do is reach through to the people who have a financial interest in the patent. I think that's dangerous, because it means that the small companies and lone inventors out there will never be able to license their patents – because they won't be able to afford to do it."

IPNav explains its objection to legislating for disclosure and joinder of interested parties on its blog (<http://www.ipnav.com/blog/goodlattee28099s-proposed-patent-reform-good-newsbad-news/>), where it states: "If you need to finance the licensing effort, why drag in the person that provided you financing? If you find a bank that wants to support your licensing campaign, why should they be part of the litigation? If a patent owner wants to sell her patent and keep an interest in licensing proceeds, why should

that be discouraged?... Patent owners would end up receiving less favorable terms. NPEs would pay other patent owners less for patents to make up for the fact that they are getting less favorable terms from advisory and finance firms... We object to including 'interested parties' in the disclosure when the goal is to joinder them to a lawsuit and make them responsible for recovery of legal fees in the event the patent owner loses the case."

Meanwhile, Nazer suspects that Spangenberg may have been somewhat rash in expressing approval for many of the proposed measures. He believes that entities such as IPNav will be hamstrung by provisions such as those outlined in the Innovation Act, which was introduced into Congress in October 2013. "My view is that Spangenberg is making a tactical mistake by supporting fee shifting," he says. "Evidence from overseas suggests that fewer NPEs sue under fee-shifting regimes. Indeed, PwC's 2013 Patent Litigation Study found that when NPEs are forced to litigate to judgment, they lose more than 75% of the time."

Schoenbaum is less convinced that IPNav stands to lose out significantly if any of the reform laws make it onto the statute books. "The [Innovation Act] could reduce the number of frivolous suits, those that are simply shakedowns based on the threat of defence costs," he says. "I don't know if IPNav's business model will suffer



IPNav CEO Erich Spangenberg talks business

– but I do think that PAEs in general will be forced to abandon the game of using low-value, low-quality patents to generate quick settlements.”

Quality control

Indeed, patent monetisation businesses often face this same accusation: that they buy up and assert low-quality patents to extort operating businesses. But Spangenberg would refute this, claiming that IPNav’s success is rather down to a laser focus on identifying and leveraging extremely high-quality assets. “In a way, you’re forced to do that,” he says. “With *inter partes* review, *ex parte* review, covered business method review and so on, you could spend a couple of million bucks, and if you’ve got a patent coming out of the starting blocks that is of low quality, you’re going to find yourself with nothing to show for it at the end of the day.”

However, none of the legislative proposals brought before the US Congress has directly addressed the issue of the quality of patents being issued by the US Patent and Trademark Office (USPTO). “We have an output problem – some bad patents have been getting through the system,” says Spangenberg. “But the thing to do is to fix it at the input end. It is just curious that they [Congress] keep diverting money from the USPTO, which certainly generates enough money on its own to pay for hiring more and better examiners and to give them access to better databases and records. There has been no legislation regarding that – in fact, quite the opposite.

We’ve had people in Congress who have said that they would veto anything that says the USPTO doesn’t have to divert fees. It’s absolutely crazy. I don’t know anybody [interested] in the patent system who isn’t a fan of better analysis, better databases and higher-quality patents coming out.”

Attack on value

While backing the concept of reform, Spangenberg declares some wider concerns about the current wave of patent scepticism that has engulfed the US public. “There are a fair number of anecdotes out there, but there is no good or reliable data,” he says. “Take the Boston University study that is cited all the time, which says that there is a US\$29 billion problem with patent trolling. That is fundamentally flawed; but let’s just take it as accurate. My problem is that we need to consider what the patent and R&D business is worth to the economy – I’ve seen estimates way into the trillions of dollars. Why would you stand the trillions on its head for a sub-three-digit billion-dollar problem?”

He also expresses anxiety that some reforms – both those that are being proposed and several that have already been implemented under the America Invents Act – could significantly affect the value of patents. “We are now looking at a situation where there could be potentially endless challenges against patents,” he says. “I think people that who want to challenge patents absolutely have the right to do so, but they should get one shot at it. You do it either in the court or in the patent office – but once you pick one, you shouldn’t get to use the other one. That is important, because we could eventually devalue the underlying asset to nothing.” Spangenberg suggests that, as a society, we need to consider the value of and purpose of patent rights more carefully: “If we devalue patents far enough, people will quit filing – and for small companies, that will be the end for a large number of them, because they can’t keep what they are doing as a trade secret once they have revealed to the public what their product or service is.”

In addition to his IPNav business, Spangenberg invests in a number of medical device and high-tech start-ups. He illustrates his point about patent value from his perspective as an investor. “If [the business presenting the investment opportunity] doesn’t have a protectable idea, I’m not interested,” he says. “If it launches a great product, but doesn’t have it protected, some huge company with a ton of money can just copy it. And what can I do as an investor in that small company? Nothing. So

Patents and products

IPNav also leverages its patent expertise in helping operating companies to roll out products. President Deirdre Leane gained extensive experience in handling IP commercialisation projects before joining the firm in early 2011. One IPNav client which she is currently assisting in this capacity is a medical device company spun out of a US university. “I have been advising them on clinical trials and also now as they are running through FDA [US Food and Drug Administration] regulatory checks and CE marking”, she explains. “Because their lead surgeon is in surgery every day, the business might not be top of mind for him. So I meet with him regularly to advise on commercial strategy. I also get them into industry events where the leading treatment clinics have a presence, because ultimately they want to get to the point where they are an acquisition target for those clinics.”

In many situations, the client’s ambition to bring its intellectual property to life as

a product or service may blinker it to the realistic prospects of commercial success. “We get portfolios all the time where the owners say: ‘We think this is a great commercialisation play’,” Leane continues. “But they can end up spending all of this money and not have a hope of making it because the big boys in their industry are just so far ahead of them. So we will look at the portfolio and tell them that they may be better off going down the route of a licensing campaign.” In either case, IPNav can nurture the relationships it develops through offering commercialisation advisory services. Commercialisation clients may one day become monetisation clients – or prospective licensees to other portfolios that the firm has under management, Leane explains: “We always keep the companies we have assisted in a commercialisation context in mind as potential licensees to support their products moving forward and to help them in their product development.”

[reformists] need to understand the impact this can have on investment far beyond the quote-unquote ‘US\$29 billion problem’ they think they have. Otherwise, they are going to have a far, far bigger problem.”

Positioning the argument

With that in mind, Spangenberg believes that patent owners – and operators in the patent monetisation business in particular – need to do more to improve the public image of patents and demonstrate their economic benefits. But he predicts that much of the current hysteria surrounding ‘trolls’ will phase out over time as fear of the new gradually transitions to acceptance. “I am old enough to recognise that new businesses are usually misunderstood, and often criticised,” he says. “When I worked on Wall Street, we had things called ‘sin stocks’: companies that sold alcohol and operated casinos. If I went up to a young trader today and said ‘sin stock’, he’d look at me and think: ‘What are you talking about?’ And so the images of businesses change over time.”

Spangenberg acknowledges that patent monetisation players face a tough task in reversing some of the negative publicity that their activities have attracted – especially from a certain company based in Mountain View, California. “I give Google a lot of credit for how they have managed to position this argument,” he says. “They have used nice, short quips – ‘No one likes a troll’; ‘No one likes abusive

litigation’. They’ve got everybody using those terms.”

According to Spangenberg, it is now up to the monetisation industry to collect data to support its cause and promote stories of how many patent owners – particularly smaller businesses and individual inventors – have ultimately benefited from monetising their intellectual property with the help of NPEs and firms such as IPNav, enabling them to invest more resources in innovation. “In the United States, our founding fathers realised that in England, patents would generally be the exclusive domain of the aristocracy,” he concludes. “And one of the great things they did was to democratise patents – they said, affirmatively, that you don’t have to practise them. You can just be an inventor. And what did we have over time as a result of that? The Wright Brothers, Edison, Lemelson – people who invented for a living. Now we have whole successful businesses just like that – Qualcomm, for example. I don’t understand why we want to discourage them from being what they are, and I don’t think you should put the company or the individual that wants to invent stuff out of business. Patent owners and companies in the patent monetisation business need to get the word out and do a better job of explaining that they perform an important function.” *iam*

Jack Ellis is assistant editor of *IAM*

Action plan



IP Navigation Group (IPNav) supports legislative reforms in the United States that would:

- Introduce a ‘loser pays’ rule for patent litigation – as long as it applies to losing defendants as well as plaintiffs.
- Streamline discovery.
- Introduce early Markman hearings.
- Bring greater IP specialisation to the US courts.
- Stay lawsuits that target customers using allegedly infringing products – in addition to, or instead of, the manufacturer of the products – until the manufacturer can be brought into the case.

IPNav opposes legislative reforms that would:

- Require patent owners in dispute to identify ‘real parties in interest’ and enable those parties to be joindered in litigation.
- Expand the covered business methods review programme that was introduced under the America Invents Act.

IPNav also supports measures that would:

- Improve the quality of patents being issued by the USPTO by allowing it control over how all of its fee revenues are spent.
- Make patent validity an issue solely to be handled by the US Patent and Trademark Office.
- Enable the collection of more definitive data on the benefits of patent monetisation to the US economy.
- Promote stories of businesses and inventors that have benefited from patent monetisation.