

A Stumbling Blog Before the Blind?
The Troll Tracker and IPWatchdog Cases

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I. Introduction

There are a multitude of web logs or “blogs” currently available on the Internet on the subject of intellectual property law, and particularly on the subject of patent law. This is a testament to the technological savvy and creativeness of intellectual property attorneys such as patent attorneys. Indeed, the authors of this paper have over eighty-five (85) patent blogs on their own blogroll at the *Anticipate This!*TM | *Patent and Trademark Law Blog*.

The diversity of topics covered by patent blogs, which one would possibly believe to be fairly limited given the subject matter, is actually quite considerable. Some patent blogs are academic in nature. These patent blogs typically provide detailed summaries of court opinions, observations, and statistical analyses relevant to the patent practice. Other patent blogs are more news-oriented, and promulgate information of interest to patent practitioners such as Federal Register Notices and New Releases from the U.S. Patent and Trademark Office (USPTO). Then there are patent blogs that focus more on the law for entertainment, and provide interesting and humorous insights into patent law practice. Some patent blogs simply cannot be categorized.

Instances have occurred where authors of patent blogs have been sued based on the posts in their patent blogs. Recently, the content of two notable patent blogs, the *Patent Troll Tracker* (<http://trolltracker.blogspot.com>), and the *IPWatchdog* (<http://www.ipwatchdog.com>), has resulted in litigation. We would categorize these two patent blogs as news-oriented in style, but the facts of the litigation surrounding these blogs differ considerably.

The purpose of this paper is to identify a few blogging tips and pointers for current and prospective authors of patent blogs, especially in view of the litigation in the *Patent Troll Tracker* and *IPWatchdog* cases. Armed with this information, authors will be better equipped to identify and avoid the potential “stumbling blocks” associated with patent blogging.

II. Troll Tracker Summary

The term “patent troll” is a pejorative label commonly used for a person or company that enforces patents against one or more alleged infringers in a manner considered unduly aggressive or opportunistic. Typically, the patent troll does not have an intention to manufacture or market the patented invention. The less pejorative expression “non-practicing entity” or NPE is sometimes used interchangeably with “patent troll”.[†]

The “Patent Troll Tracker” blog was started anonymously on May 9, 2007 as a news-oriented blog. The tagline of the blog was “[j]ust a lawyer, interested in patent cases, but not interested in publicity”. The stated goal of the Patent Troll Tracker blog was “to educate the world on how many patent cases are out there that are filed by trolls.”[‡] The Patent Troll Tracker blog provided regular news articles about patent trolls and patent reform, case summaries, and a monthly installment called the “Troll Call” where patent troll or NPE litigation statistics were reviewed.[§]

The Patent Troll Tracker blog reported on legal actions involving many NPEs during the roughly nine months it was published. A number of posts were critical of lawsuits involving Raymond Niro. Niro is a cofounder of the Chicago plaintiff’s firm Niro, Scavone, Haller & Niro, and is one of the first persons whom the term “patent troll” was used to describe.^{**} In addition to being critical of Niro’s activities, one entry in a haiku contest at the Patent Troll Tracker blog recited:

[†] Patent Troll, Wikipedia, http://en.wikipedia.org/wiki/Patent_troll (last visited June 6, 2010) (defining the term).

[‡] Declaration of Richard Frenkel in Support of Richard Frenkel’s and Cisco Systems, Inc.’s Motions to Quash Subpoena and Motions for Protective Order, at paragraph 4. (N.D. Cal. 08-0075-JF, April 4, 2008).

[§] Id. at paragraph 5.

^{**} Ambroqi, Robert J., *Offering Reward, Lawyer Aims to Unmask Blogger*, IP FRONTLINE (Jan. 31, 2008), <http://www.ipfrontline.com/depts/article.asp?id=17412&deptid=3>.

*Pesky ethics rules.
Conflicts mean nothing to trolls
Help me, Ray, Help me!*^{††}

Additionally, a reader of the Patent Troll Tracker blog posted a comment that stated: "If you shoot and kill Ray Niro tonight, I would consider it a justifiable killing."^{‡‡} In view of these various posts and readers' comments, Niro began to publicly decry the blog, and wrote several emails to the anonymous author of the Patent Troll Tracker blog in which he sought the author's identity.^{§§}

Unsuccessful in repeated attempts to identify the author of the Patent Troll Tracker blog himself, Niro publicly offered a bounty for the identity of the author in IP Law & Business. Specifically, he stated that "I'll offer \$5,000 to anyone that can provide information that leads me to the identity of Troll Tracker." He further stated "I view these people [anonymous bloggers] as know-nothings, afraid to reveal their identity."^{***} Niro also is on record stating ". . . anyone should be held responsible for what they say and have the courage to express their views by putting their names on whatever it is they publish."^{†††} He would later increase the bounty for the identity of the Patent Troll Tracker blog author to \$10,000, and then again to \$15,000.^{‡‡‡}

^{††} Mullin, Joe. Is the Patent Troll Tracker a reporter? The Prior Art. May 8, 2008. Accessed August 13, 2010. <http://thepriorart.typepad.com/the_prior_art/patent_troll_tracker/index.html>.

^{‡‡} Michael Orey. Busting a Rogue Blogger. Bloomberg Businessweek, http://www.businessweek.com/magazine/content/08_14/b4078075822107_page_2.htm (Mar. 27, 2008)

^{§§} Declaration of Richard Frenkel in Support of Richard Frenkel's and Cisco systems, Inc.'s Motions to Quash Subpoena and Motions for Protective Order, at paragraph 6. (N.D. Cal. 08-0075-JF, April 4, 2008)

^{***} John Bringardner, A Bounty of \$5,000 to Name Troll Tracker. LAW.COM (JULY 26, 2010 OF ARTICLE), <http://www.law.com/jsp/article.jsp?id=1196762670106> (Subscription required).

^{†††} Stephen Albainy-Jenei, *Raymond Niro Responds to Patent Troll tracker*, PATENT BARISTAS (Dec. 12, 2007), <http://www.patentbaristas.com/archives/2007/12/12/raymond-niro-responds-to-patent-troll-tracker/>.

^{‡‡‡} *Id.*; Dan Slater, *Bounty Hunter Outs Author of Patent Troll Tracker Blog*, WALL ST. J.L. BLOG (Feb. 26, 2008, 9:01 AM ET), <http://blogs.wsj.com/law/2008/02/26/bounty-hunter-outs-author-of-patent-troll-tracker-blog/>.

In October 2007, the Patent Troll Tracker blog featured a pair of posts in which the patent infringement case of ESN, LLC (ESN) v. Cisco Systems, Inc. (Cisco) was discussed.^{§§§} The first post by the Patent Troll Tracker stated, in part:

Well, I knew the day would come. I'm getting my troll news from Dennis Crouch [author of the PatentlyO blog] now. According to Dennis, a company called ESN sued Cisco for patent infringement on October 15th, while the patent did not issue until October 16th. I looked, and ESN appears to be a shell entity managed by the President and CEO of DirectAdvice, an online financial website. And, yes, he's a lawyer. He clerked for a federal judge in Connecticut, and was an attorney at Day, Berry & Howard. Now he's suing Cisco on behalf of a non-practicing entity.

I asked myself, can ESN do this? I would think that the court would lack subject matter jurisdiction, since ESN owned no property right at the time of the lawsuit, and the passage of time should not cure that. And, in fact, I was right:

The patent infringement action in question was filed by attorneys Eric Albritton and John Ward, Jr. in the Eastern District of Texas district court. The action claimed infringement by Cisco of U.S. Pat. No. 7,283,519 (the '519 patent), entitled "Distributed Edge Switching System for Voice-Over-Packet Multiservice Network". The Patent Troll Tracker blog post observed that the electronic timestamp of the filing was October 15, 2007. However, the '519 patent did not issue until October 16, 2007. Therefore, ESN apparently had no standing to file with the district court on October 15.^{††††} The case in the Eastern District of Texas was later dismissed, on November 2, 2007, with an agreement of the parties that rendered the dispute over the filing date meaningless.^{‡‡‡‡}

In a subsequent post, the Patent Troll Tracker blog further reported that the filing date had been changed without notice or motion to the court. Specifically, the blog stated:

^{§§§} Declaration of Richard Frenkel in Support of Richard Frenkel's and Cisco Systems, Inc.'s Motions to Quash Subpoena and Motions for Protective Order, at paragraph 9. (N.D. Cal. 08-0075-JF, April 4, 2008).

^{****} Mullin, Joe. "Troll Tracker sued: Judge Ward's son is one of the plaintiffs". The Prior Art. March 11, 2008. Accessed July 26, 2010. http://thepriorart.typepad.com/the_prior_art/2008/03/judge-wards-son.html.

^{††††} Mullin, Joe. Troll Tracker Defamation Lawsuit: Trial Underway. Patent L. Blog (Sept. 18, 2009, 12:38PM), <http://www.patentlyo.com/patent/2009/09/troll-tracker-defamation-lawsuit-trial-underway.html>.

^{‡‡‡‡} Massey, Michelle. Patent troll tracker sued for defamation Mar. 13, 2008 11:52 AM. <http://www.setexasrecord.com/news/209237-patent-troll-tracker-sued-for-defamation>.

I got a couple of anonymous emails this morning, point out that the docket in ESN v. Cisco (the Texas docket, not the Connecticut docket), had been altered. One email suggested that ESN's local counsel called the EDTX court clerk, and convinced him/her to change the docket to reflect an October 16 filing date, rather than the October 15 filing date. I checked, and sure enough, that's exactly what happened - the docket was altered to reflect an October 16 filing date and the complaint was altered to change the filing date stamp from October 15 to October 16. Only the EDTX Court Clerk could have made such changes.

Of course, there are a couple of flaws in this conspiracy. First, ESN counsel Eric Albritton signed the Civil Cover Sheet [stating] that the complaint had been filed on October 15. Second, there's tons of proof that ESN filed on October 15.

You can't change history, and it's outrageous that the Eastern District of Texas may have, wittingly or unwittingly, helped a non-practicing entity to try to manufacture subject matter jurisdiction.

This is yet another example [of] the abusive nature of litigating [patent] cases in the Banana Republic of Texas.^{§§§§}

It was later revealed in trial that Albritton's assistant began filing the ESN complaint before midnight on October 15, 2007, and finished the next day on October 16, 2007. When the assistant realized the complaint was stamped a day early, she called the district clerk's office to request the date be changed. She was then told by deputy district clerk that the date would not be changed, and that Albritton must either file a motion to change the date or call the U.S. district clerk's office to request the change. The request was subsequently made to the U.S. district clerk, and the clerk agreed to change the date to October 16, 2007.^{*****}

Meanwhile, the bounty that was offered by Ray Niro was effective in outing the author of the Patent Troll Tracker blog. On February 23, 2008, under pressure from someone who indicated that he would identify him if he did not do so himself, Rick Frenkel voluntarily disclosed his identity as the author of the Patent Troll Tracker blog.^{††††} Frenkel had worked as

^{§§§§} Massey, Michelle. Patent troll tracker sued for defamation Mar. 13, 2008 11:52 AM. <http://www.setexasrecord.com/news/209237-patent-troll-tracker-sued-for-defamation>.

^{*****} Massey, Michelle. Albritton's tearful testimony wraps up arguments in Troll Tracker defamation trial. Sept. 21, 2009, 11:44 AM. <http://www.setexasrecord.com/news/221193-albrittons-tearful-testimony-wraps-up-arguments-in-troll-tracker-defamation-trial>.

^{††††} Ward, Jacob. Patent Troll Tracker Identity Revealed. February 24, 2008. <http://anticipatethis.wordpress.com/2008/02/24/patent-troll-tracker-revealed/>.

an attorney in the Intellectual Property Legal Department at Cisco since February 2006, and had been a Director of Consumer & Emerging Technologies at Cisco since April 2007, approximately one month before he began publishing at the Patent Troll Tracker blog.^{****} Niro claims that he did not have to pay the bounty reward of \$15,000.

It is notable that the lawsuit ESN filed before issuance of the '519 patent involved Cisco, Frenkel's employer at the time. Soon after Frenkel acknowledged his identity as the author of the blog, both he and his employer, Cisco, were sued by ESN's attorneys Eric Albritton and John Ward, Jr. in Texas and Arkansas, respectively. The complaints stated, in part, that "Frenkel posted false, scandalous, and defamatory allegations about Albritton and Ward Jr. on his internet blog" and that "Frenkel published a written statement alleging that Albritton and Ward Jr. had 'conspired' with others to 'alter documents to try to manufacture subject matter jurisdiction where none existed'".^{§§§§} Albritton and Ward Jr. asserted that Frenkel alleged they engaged in criminal conduct in altering the date of the patent infringement complaint, so that it would not be filed before their client's patent had issued. Albritton and Ward Jr. sought damages for shame, embarrassment, humiliation, mental pain, and anguish, and stated injuries to their "business reputation, good name, and standing in the community."^{*****}

What followed was a complex sequence of events in both the Eastern District of Texas and the Western District of Arkansas, including motions to dismiss or transfer, oppositions to the motions, replies and surreplies, and four days of testimony in Texas in which Ward Jr., Albritton, and Frenkel took the stand. We will not attempt to unravel the details of these events in this

^{****} Elinson, Zusha. "Cisco Blogger Decamps to Wilson Sonsini" August 6, 2008. <http://www.law.com/jsp/article.jsp?id=1202423562886>; Declaration of Richard Frenkel in Support of Richard Frenkel's and Cisco Systems, Inc.'s Motions to Quash Subpoena and Motions for Protective Order, at paragraph 2. (N.D. Cal. 08-0075-JF, April 4, 2008).

^{§§§§} Plaintiff's Original Complaint, John Ward, Jr. v. Cisco Systems, Inc. and Rick Frenkel, paragraph 9, (Docket No. 08-4022, U.S. District Court, Western District of Arkansas).

^{*****} Massey, Michelle. Patent troll tracker sued for defamation. March 13, 2008, 11:52 AM. <http://www.setexasrecord.com/news/209237-patent-troll-tracker-sued-for-defamation>.

paper. However, Albritton was reported as stating during the testimony that "[t]hose folks called me a criminal. People are out there saying Albritton is a criminal, out there doing bad things."

††††† Ward Jr. stated, "I remember Eric being in my office, and we pulled up the blog to look at it, and we were both just incredulous. We came up with a plan: 'Let's get this shut down.' That was our first reaction." ††††† Frenkel was also reported as stating, "[y]ou know, I think I was outraged over a situation ... and I used words that were strong. But I sure didn't mean to hurt anyone by it." §§§§§

Following the testimony, the judge ruled that the jurors would have to find "actual malice" in order for Albritton to win the punitive damages he was seeking.***** In view of the "actual malice" requirement imposed by the judge, a confidential settlement agreement between Albritton and Frenkel, as well as between Albritton and Cisco, was reached in the Eastern District of Texas on the day before the jury was set to begin deliberations.††††††† Ward Jr. also dropped Frenkel from his defamation lawsuit, which had been transferred to the Eastern District of Texas †††††††, and later settled his defamation lawsuit with Cisco.§§§§§§§

††††† ††††† Massey, Michelle. Albritton's tearful testimony wraps up arguments in Troll Tracker defamation trial. Sept. 21, 2009, 11:44 AM. <http://www.setexasrecord.com/news/221193-albrittons-tearful-testimony-wraps-up-arguments-in-troll-tracker-defamation-trial>.

††††† Mullin, Joe. Johnny Ward and Eric Albritton on Troll Tracker blog: "Let's get this shut down." <http://thepriorart.typepad.com>. September 18, 2009. Accessed July 26, 2010. http://thepriorart.typepad.com/the_prior_art/2009/09/johnny-ward-and-eric-albritton-on-troll-tracker-blog-lets-get-this-shut-down.html.

§§§§§ Mullin, Joe. Rick Frenkel takes the stand in Troll Tracker defamation lawsuit. September 17, 2009. Accessed July 26, 2010. http://thepriorart.typepad.com/the_prior_art/2009/09/rick-frenkel-on-the-stand-in-troll-tracker-defamation-lawsuit.

***** Mullin, Joe. Troll Tracker defamation case settles before going to jury. September 22, 2009. Accessed July 26, 2010. http://thepriorart.typepad.com/the_prior_art/2009/09/troll-tracker-defamation-case-settles-before-going-to-jury.html.

††††† Mullin, Joe. Trial Over Former Cisco Lawyer's Blog Post Ends in Secret Settlement. <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202433986929>. September 23, 2009. Accessed August 8, 2010.

††††† Massey, Michelle. Cisco reaches agreement with attorney in second Troll Tracker suit. Jan. 12, 2010, 4:58 P.M. <http://www.setexasrecord.com/news/224076-cisco-reaches-agreement-with-attorney-in-second-troll-tracker-suit>, 4:58 PM.

§§§§§§§ Carvel, Kristin. "Cisco Statement on Resolution of Ward Litigation. Feb. 5, 2010. http://newsroom.cisco.com/dlls/2010/corp_020510.html.

In the aftermath of the Albritton and Ward Jr. lawsuits, the Patent Troll Tracker blog stopped publishing openly, and is now open only to invited readers. Indeed, the blog was taken offline and made unavailable on March 6, 2008, within 48 hours of Frenkel having learned about the lawsuits against him. Frenkel also voluntarily left Cisco in August 2008 to become Of Counsel at the Silicon Valley firm of Wilson Sonsini Goodrich & Rosati.***** Frenkel has stated that he has no plans to resume his writing at the Patent Troll Tracker blog.

***** Mullin, Joe. Troll Tracker blogger Rick Frenkel moves to Wilson Sonsini. http://thepriorart.typepad.com/the_prior_art/2008/08/ptt-blogger-moves-to-wilson.html. August 4, 2008. Accessed July 26, 2010

III. IPWatchdog Summary

The *IPWatchdog* blog was started in October 1999 by author Gene Quinn, a patent attorney, law professor, and commentator on patent law and procedure.^{††††††††} The *IPWatchdog* blog “is dedicated to providing a free, reliable and easily understandable resource on intellectual property law and related topics.”^{‡‡‡‡‡‡‡‡}

The *IPWatchdog* blog has long been critical of invention promoters, which are sometimes also referred to as invention promotion firms or invention promotion companies. The term “invention promoter” is defined under the American Inventors Protection Act (AIPA) of 1999, with certain exceptions, as being “any person, firm, partnership, corporation, or other entity who offers to perform or performs invention promotion services for, or on behalf of, a customer, and who holds itself out through advertising in any mass media as providing such services.”^{§§§§§§§§}

The AIPA was passed in order protect inventors from unscrupulous invention promoters.^{*****} In fact, the AIPA requires invention promoters to disclose the number of positive and negative evaluations of inventions they have given over a five-year period, and information about the percentage of inventors who make money from their patents. The AIPA also provides for statutory or actual damages, and treble damages for intentional or willful violations, to inventors harmed by the failure of an invention promoter to disclose the required information.

The USPTO and the Federal Trade Commission (FTC) have also been highly critical of certain invention promoters. The USPTO maintains a list of published complaints against invention promotion companies, and goes as far as providing a downloadable form that may be

^{††††††††} Quinn, Gene. Ipwatchdog.com. <http://www.ipwatchdog.com/about/>. Accessed July 26, 2010.

^{‡‡‡‡‡‡‡‡} *Id.*

^{§§§§§§§§} United States Patent & Trademark Office, 35 U.S.C. 297 Improper and deceptive invention promotion. http://www.uspto.gov/web/offices/pac/mpep/documents/appxl_35_U_S_C_297.htm#usc35s297. Accessed July 26, 2010.

^{*****} Pantros IP. Ipfrontline.com. <http://www.ipfrontline.com/depts/article.asp?id=8893&deptid=2>. January 4, 2006. Accessed July 26, 2010.

completed and submitted to the USPTO for such complaints.^{††††††††} The USPTO also publishes a brochure on scam prevention that details the various “hooks” that are used by invention promotion companies to lure inventors into scams.^{††††††††} Furthermore, the FTC provides general facts for consumers, with good advice on what to look out for when dealing with an invention promotion company.^{§§§§§§§§}

One of the invention promoters on which the *IPWatchdog* blog commented was the Invention Submission Corporation (ISC), doing business under the trade name InventHelp[®].^{*****} Although many of the posts in which InventHelp was mentioned were no longer available at the time this paper was prepared, titles of the posts include: 1) Beware Invent Help Press Releases, dated January 10, 2008; 2) Invent Help Engaging in Unauthorized Practice of Law?, dated January 26, 2010; 3) Avoiding Invent Help & Other Invention Scams, dated December 12, 2008; and 4) Invent Help Sues IPWatchdog Alleging They are Not a Scam, dated January 22, 2010. Quinn acknowledges that he has written that it is his belief that InventHelp and the services it provides are a scam.^{††††††††}

InventHelp markets itself as “America's largest inventor service firm”.^{††††††††} As further explained on its website, InventHelp “can assist . . . in trying to submit . . . inventions or new product ideas to industry in an attempt to attain a good faith review”, and uses “a variety of

^{††††††††} United States Patent & Trademark Office.

http://www.uspto.gov/inventors/scam_prevention/complaints/index.jsp; United States Patent & Trademark Office.<http://www.uspto.gov/forms/index.jsp>

^{††††††††} United States Patent & Trademark

Office.<http://www.uspto.gov/web/offices/com/iip/documents/scamprevent.pdf>.

^{§§§§§§§§} *FTC*, Retrieved July 26, 2010. <http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro21.shtm>>; Jake Ward, *IPWatchdog Sued by Invention Submission Corporation (dba InventHelp)*, ANTICIPATE THIS! BLOG (Jan. 27, 2010), <http://anticipatethis.wordpress.com/2010/01/27/ipwatchdog-sued-by-invention-submission-corporation-dba-inventhelp/>.

^{*****} Inventhelp[®] is a registered trademark of Invention Submission Corporation (ISC).

^{††††††††} Declaration of Eugene R. Quinn, Jr. In Opposition to Plaintiffs Motion for a Preliminary Injunction (NDNY, 5:10-CV-74) at paragraph 79.

^{††††††††} *InventHelp*, <http://www.inventhelp.com/inventhelp-about.asp>. Accessed July 26, 2010.

Plaintiff's motion for a preliminary injunction is long on page length, but short on content. It is supported by hearsay and self-serving statements that lack the specificity required by the laws Plaintiff seeks protection under. Although damage is alleged, it is unsupported and nonspecific. Preliminary relief is an extraordinary remedy. Plaintiff's submission lacks the requisite proof necessary to support such relief, and its motion should be summarily denied. §§§§§§§§§§

On Thursday, March 25, 2010, a hearing was held regarding the Motion for Preliminary Injunction. During the hearing, ISC requested a narrower injunction than was originally sought in its motion. The judge stated that a broad injunction would not be entertained, but that he would consider a more limited injunction if Quinn's comments were "literally false".***** The judge then requested that the parties meet to discuss the scope of a proposed Order, which opened a channel of communication between Quinn and InventHelp.

On Thursday, April 22, 2010, a meeting between the parties and their representatives was held in Pittsburgh, Pennsylvania, at the offices of Friedman & Friedman. At the meeting, the parties realized that the disagreement was, in fact, a business dispute that could be solved. Over the next several weeks, concessions were made by both Quinn and InventHelp, and an agreement was crafted in order to prevent future, similar litigation. ††††††††††††

On July 9, 2010, an apparently joint statement was posted on the IPWatchdog blog to announce that a settlement agreement had been reached, and that the lawsuit was over. †††††††††††† The post summarized the facts of the case, provided links to all papers filed by both parties, and stated the following:

While the terms of the Settlement Agreement will remain confidential, it is appropriate and mutually agreeable to state that the parties both achieved an end to this litigation that satisfied their own primary objectives. For example, as

§§§§§§§§§§ Declaration of Eugene R. Quinn, Jr. In Opposition to Plaintiff's Motion for a Preliminary Injunction. (NDNY, 5:10-CV-74).

***** Author's Interview with Eugene Quinn, July 8, 2010.

†††††††††††† Gene Quinn, *Settlement Announcement: Lawsuit Against IPWatchdog Over*, IPWATCHDOG (Jul. 8, 2010), <http://www.ipwatchdog.com/2010/07/08/invention-promotion-lawsuit-settled/id=11558/>.

†††††††††††† Id.

discussions progressed, it became clear that InventHelp wanted a few articles removed from the pages of IPWatchdog.com. Of primary importance to IPWatchdog was that there be no prohibition moving forward against truthfully writing about the invention promotion industry, including ISC or InventHelp, or discussing this lawsuit in general. Other objectives of the parties were likewise set forth and satisfactorily achieved, which is evidenced by the settlement of the dispute. In the end, it is fair to say that those aspects most important to both parties were achieved, in some cases with hard swallowing on the part of each, which likely demonstrates an appropriate resolution has been achieved.

Based on the common ground achieved at the April 22, 2010 meeting and the subsequent finalization and effectuation of settlement, the parties now believe that had a dialogue occurred earlier this lawsuit probably could have been avoided. During the Fall of 2009 attempts were made to bring the parties together, with the parties communicating through a third party that was believed to be attempting to act as an intermediary. It would appear that much of what was communicated to this third party was not relayed, or at least not relayed as intended. This worsened an already antagonistic atmosphere of distrust, which ultimately lead to the parties never speaking directly. While it is admittedly difficult to see a path that could have been followed given the distrust between the parties at that time, better efforts could have resulted in the avoidance of litigation.*****

Although the Settlement Agreement is confidential, it is clear from a review of the IPWatchdog blog that many posts in which ISC and InventHelp were mentioned are no longer available. A search on an Internet search engine for the terms “InventHelp” and “IPWatchdog” provides links to related posts on the latter’s blog. Clicking on any such links will bring one to a page at the IPWatchdog blog, which states “Page Has Moved”.

As previously noted, Quinn and InventHelp wrote the joint post on July 8, 2010, found at <http://www.ipwatchdog.com/2010/07/08/invention-promotion-lawsuit-settled/id=11558/>, in which the facts of the case and the common ground achieved in the Settlement Agreement were detailed. The substantive documents filed by each party during the dispute are preserved at the joint post.

It is also clear that there is no “gag order” in place under the terms of the agreement, as Quinn is free to speak about the lawsuit and to post in the future about InventHelp on the IPWatchdog blog. Indeed, it is observed that many of the posts at the IPWatchdog blog about

***** Gene Quinn, *Settlement Announcement: Lawsuit Against IPWatchdog Over*”, IPWATCHDOG (Jul. 8, 2010), <http://www.ipwatchdog.com/2010/07/08/invention-promotion-lawsuit-settled/id=11558/>.

which InventHelp complained remain on the IPWatchdog blog. As examples, the following articles are still publicly available:

- 1) Invention Promotion Companies, dated December 31, 2007 (<http://www.ipwatchdog.com/inventing/invention-promotion-companies/>);
- 2) Companies Don't Accept Confidential Submission of Ideas or Inventions, dated February 18, 2010 (<http://www.ipwatchdog.com/2010/02/18/companies-dont-accept-confidential-submissions/id=9125/>);
- 3) Invention Promoters and the American Inventors Protection Act, dated January 30, 2010 (<http://www.ipwatchdog.com/2010/01/30/invention-promoters-and-the-american-inventors-protection-act/id=8659/>);
- 4) Not All Invention Promotion Companies are Created Equal, dated August 27, 2009 (<http://www.ipwatchdog.com/2009/08/27/not-all-invention-companies-are-created-equal/id=5369/>); and
- 5) Falling Prey to Invention Promotion Scams, dated June 15, 2009 (<http://www.ipwatchdog.com/2009/06/15/falling-prey-to-invention-scams/id=4112/>).

Many other pages critical of invention promotion companies, from before the IPWatchdog blog litigation was commenced, also remain unedited and unchanged. Quinn continues to regularly publish on the IPWatchdog blog on topics of interest to patent practitioners.

IV. What Can We Learn?

- A. Be Measured – Patent bloggers are journalists, even though they may not be classically trained as such, and should not be afraid to express their opinions. However, they should be measured in what they write. Also, patent bloggers should carefully consider practical, as well as legal, consequences of their words before posting. Additionally, while it is certainly advisable to “write what you know”, one should always be careful to not share information that one is ethically bound as an attorney to maintain in confidence. We should also be aware that the standards to which we will be held as attorneys may differ from that of citizen-journalist bloggers.

- B. Be Transparent – Blogging anonymously can lead to undesirable consequences. Even if you are not doing anything untoward, it may lead others to believe that there are inappropriate reasons for which you choose anonymity. The mere appearance of impropriety may have undesirable consequences that the blogger did not intend. Additionally, if you are providing an opinion on a subject, be diligent in saying so, in order that your words will be taken as opinion and not fact by your readers. Be warned, lest a bounty be placed on your identity!

- C. Be Mindful of Resources – In case one should find himself or herself being sued, for example, with a Strategic Lawsuits Against Public Participation (SLAPP) intended to censor, intimidate, and silence by burdening the author with the cost of a legal defense, one resource available to bloggers is the Media Bloggers

Association (MBA).^{*****} The MBA is a nonpartisan nonprofit organization that promotes, protects, and educates its members; supports the development of "blogging" or "citizen journalism" as a distinct form of media; and helps to extend the power of the press, with all the rights and responsibilities that entails, to bloggers.^{†††††††††††††}

- D. Be Insured – Patent bloggers should consider insurance that is available for websites. Some legal malpractice policies may provide coverage. The MBA has also worked to develop media liability insurance for bloggers. Furthermore, the MBA has a network of 75 attorneys operating in 20 states who are available to offer members basic risk assessments in the event of legal threats for defamation, privacy violation, and copyright violation.^{‡‡‡‡‡‡‡‡‡‡‡‡‡}
- E. Be Copyright-Respectful – This does not necessarily pertain to either the *Troll Tracker* or the *IPWatchdog* case, but it is important nonetheless. Like anyone else with a website, patent bloggers should respect copyright laws, always ask for permission to repeat others’ statements when referencing posts at other patent blogs and websites, and should give attribution via citation quite liberally. The copyrights of graphics should also be respected.

^{*****} SLAPP. Wikipedia. http://en.wikipedia.org/wiki/Strategic_lawsuit_against_public_participation (last visited June 6, 2010) (defining the term).
^{†††††††††††††} Media Bloggers Association Website. About Page. <http://www.mediabloggers.org/about>. Accessed August 8, 2010.
^{‡‡‡‡‡‡‡‡‡‡‡‡‡} Gene Quinn Presentation to Toledo Intellectual Property Law Association (TIPLA), *The Law, Ethics & Business Reality of Blogging* (April 13, 2010)

V. Conclusion

Patent blogging has become a significant source of information for patent practitioners. Patent blogs provide a vehicle for practitioners to stay current, even up-to-the-minute, on the patent laws. Blogs also provide solutions and commentary on many of the shared prosecution and litigation problems practitioners face. Patent bloggers are journalists and serve a useful function in disseminating news about developments in intellectual property law. Opinions expressed on these developments are just as useful as the facts of the developments themselves. Current and prospective patent bloggers should be encouraged to express their opinions and views, but understand the potential consequences of their expression in view of the litigation summarized in this paper.