

THE HUB



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Patent Trolls and Transportation Companies

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Patent Trolls and Transportation Companies

The way transportation and logistics providers conduct business will change for the better with advancing technology. This is particularly the case where optimizing logistics networks helps with the development of efficiencies in their supply chains. However, be forewarned: the TMS, WMS, OMS, RF systems used to meet the needs of transportation and logistics companies are all targets of patent trolls.

HOW PATENT TROLLING WORKS

Patent trolls, or non-practicing entities (NPEs), are companies that obtain rights to patents for the sole purpose of licensing them to others for a profit or threatening litigation if not paid, rather than using the patents to produce their own products or services. These companies often purchase portfolios of electronics-related patents and then sue every user of a product that infringes, or potentially infringes, on their patents. Buying up overly broad and somewhat vague intellectual property (IP) patents, the patent troll bullies unsuspecting companies that use technology potentially governed by these patents into paying to avoid litigation. Patent trolls count on the threat of a potential patent trial or the cost of abandoning technology that has been integrated into the company's business being more expensive than an out-of-court settlement.

Patent trolls review the functionality provided by a technology to determine if it is a candidate. If the functionality falls within the scope of a broad patent, the patent troll has an opening to argue that its patent controls that technology, and the use of that technology by a transportation or logistics company violates the NPE's patent. Before making a purchase, companies should consider the source of the underlying technology for, say, a logistics software program, including the scanner, the RF device or the GPS device. If possible, identify who developed and owns that technology. Transportation or logistics companies that use a website

should endeavor to ensure that licenses were purchased for each feature in the website program. Recently, for example, a patent troll sued all users of a website function that was not properly licensed, but which was embedded as part of the product.

DEFEATING THE TROLL

The best way a transportation and logistics provider can protect itself from patent troll license fees, court costs and potential infringement damages is to carefully negotiate the technology agreements that support hardware and software licenses, leases or development for key technology used by these companies, and to engage in strong and complete due diligence before purchasing hardware/software and, in particular, all-in-one products. Due diligence may require some help from



those with expertise in this technology. A transportation or logistics company also can protect itself by negotiating favorable provisions in technology purchase agreements or leases, including representations and warranties of ownership of the technology by the provider, as well as by negotiating strong indemnification provisions backstopped by insurance maintained by the seller or lessor of the technology.

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Choice of Legal Forum

Limitations on the activities of patent trolls are also being addressed by the United States Supreme Court, the United States Congress and various state legislatures. Recently, the U.S. Supreme Court, in the case of *Heartland v. Kraft*, restricted where patent lawsuits can be filed. The Court held that patent cases must be filed where the infringement took place or where the defendant has an established business. Until this recent decision, the patent trolls' favorite place to bring suit was in the U.S. District Court for the Eastern District of Texas, a forum that has rules and juries that favor the patent trolls. The *Heartland* decision is starting to reduce the number of cases filed by patent trolls, who will have to try to enforce their patents in less-favorable jurisdictions. If a transportation company chooses to fight a patent troll's claims, it can now do so in its own backyard, and not in a small Texas town where the odds would be stacked against it.

Heightened Pleadings Standards

On December 1, 2015, the U.S. Supreme Court adopted amendments to the Federal Rules of Civil Procedure passed by Congress requiring heightened pleadings standards for lawsuits filed by patent trolls. Until the amendment, patent trolls could file austere complaints consisting merely of the title of the patent, the patent number and a bare allegation of infringement. Following this amendment, patent trolls have to do more work to file lawsuits against alleged infringers, coming forward with facts at the outset of a lawsuit about the infringement and showing in particular that the claim of infringement is actually "plausible." As a result, the patent trolls will be required to invest additional time and money in conducting investigative work and due diligence prior to filing a lawsuit of direct patent infringement. This small deterrent is expected to make the patent troll think more carefully before engaging in a patent infringement lawsuit.

Another development that aids companies against litigation filed by patent trolls is the U.S. Supreme Court opinions in *Octane Fitness, LLC. v. ICON Health & Fitness, Inc.* and *Highmark Inc. v. Allcare Health Management Systems, Inc.* Following these cases, courts reviewing claims that are brought in bad faith or in an abusive manner may more easily require a patent troll to pay the attorneys' fees of their opponents to defend such claims.

SUMMARY

In addition to the courts, state governments are fighting back. As of 2016, 32 states have passed laws aimed at limiting patent trolls' use of demand letters. Typically, these new statutes provide that if a court decides that a patent holder's demand letter is unreasonable, it can impose penalties on the patent troll making the threats.

Notwithstanding the efforts by government and the courts to limit the activities of these patent trolls, the patent trolls continue to file lawsuits against users of their allegedly patented technology. Thus, even though courts and legislatures balance the tactics of the patent trolls, every transportation company needs to be wise and aware of the risks it faces when purchasing or leasing technology. A transportation or logistics company must be aware not only of the technology it purchases but also of the demand letter that arrives in the mail from a patent troll. Seek counsel. A patent lawyer can help you on either front.

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Dashcams: Not Just for Viral Videos

Mauril Aldophe thought he had a personal injury payday coming from Beck's Towing of Boynton Beach, Florida. He told police and a medical clinic that a tow truck had rear-ended him. The problem for Aldophe: the tow truck involved in the crash was equipped with a dashcam. The dashcam footage showed what really happened; Aldophe stopped abruptly in the middle of the road in front of the tow truck. When the tow truck driver reacted in time to avoid a collision, Aldophe drove forward several feet and threw his car into reverse, slamming the rear of his vehicle into the front of the tow truck.

This recent U.S. news story is an extreme example, but it illustrates why dashcam use has been growing exponentially across the globe in recent years. According to [WardsAuto](#), a study by Accident Exchange shows that as of October 30, 2017, use of dashcam footage in auto insurance claims had risen 285 percent since January 2015. Russian drivers have been, perhaps, at the forefront of this trend – YouTube viewers have been entertained for years by hours of footage uploaded to the site showing vehicular carnage on Russia's snow-covered roads. Russian drivers reportedly began recording their commutes because of widespread insurance scams such as the one Aldophe tried in Florida.

Although use of dashcams originally sprang from the desire to protect against insurance scams, the increasing sophistication and decreasing cost of these devices are no doubt fueling the continued growth of their use by commercial drivers. The most basic models can be found on Amazon.com for less than \$20. They can be set to begin recording automatically when the vehicle is turned on and will record in a continuous loop – overwriting unneeded footage of uneventful commutes and trips to soccer practice.

More sophisticated dashcam models, which can be purchased for less than \$200, can sense a collision to automatically save relevant footage and can affix GPS location information to the recording. Other features for these dashcams include wide-angle recording, improved low-light quality for night driving, advance collision warning, speed data recording, audio recording, and synchronized interior and exterior views showing the driver's actions in sync with road conditions.



The benefits for commercial trucking companies and their drivers are obvious. Like Beck's Towing, companies and drivers can protect themselves from scammers looking for a quick payday. There are benefits for less egregious cases, too. A case in Kendall County, Illinois, centered on whether (1) a trucking defendant's driver veered across the fog line onto the shoulder of a dark rural highway to strike an intoxicated pedestrian or (2) the drunken man had wandered into the lane of travel. Dashcam footage would have answered that question immediately – likely avoiding the multiyear litigation that resulted. And dashcam footage could be useful in evaluation of damages, too. Footage of a supposedly injured plaintiff walking around following an accident can be useful in

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probing a claimant's credibility regarding the extent of a claimed injury.

Of course, dashcam footage also could be a double-edged sword, showing a truck driver's distracted driving. A year ago, a Polish truck driver was sentenced to 10 years in prison after he plowed into stopped traffic, killing a woman and her three children. Dashcam footage showed him looking down scrolling through his cell phone in the seconds before impact. In another case in Arizona, a truck driver was found to have been looking at photos of scantily clad women on his cell phone as he careened into stopped highway traffic. Evidence such as this can quickly open a defendant trucking company to significant exposure. Evidence of this misconduct might otherwise have been discovered through analysis of a cell phone or the records of the service provider.

These dashcams also may allow companies to monitor their drivers' activities to confirm regulatory compliance and compliance with company rules. The known existence of these dashcams may serve as a deterrent to misconduct by drivers who will certainly be aware of the fact that their activities are being recorded.

Another consideration regarding the use of dashcams is that in many states laws restrict placement of potential obstructions on vehicle windshields. Evidence that a dashcam was positioned in violation of such a law, or that a dashcam obstructed the driver's view, could provide a claimant with some leverage to the extent they can show that the dashcam's placement might have contributed to an accident. Still another consideration is that audio recording of in-cab conversations may run afoul of eavesdropping laws. Most dashcams allow for audio recording to be disabled to comply with such laws.

In the near future, self-driving trucks and cars may remove the human equation altogether. The data used to power these vehicles and to "drive" them – including GPS location, speed, video, proximity and extensive data-monitoring systems – likely will be available to investigate accidents that aren't prevented by the self-driving technology. Until self-driving vehicles arrive and become commonplace, dashcam footage is another valuable data point that commercial trucking companies and drivers can add to their fleets to aid in investigation of crashes.

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Potholes Ahead for Marijuana-Impaired Driving Regulation

Despite the federal Schedule I status of cannabis, more and more states are legalizing marijuana in some form. The nationwide increase in cannabis use means a rise in the number of cannabis-impaired drivers.

Most people know that driving impaired is illegal, regardless of the substance. Yet many people don't realize how difficult it is to reliably test for cannabis intoxication. Determining actual impairment following marijuana use is far more complex than the simple and reliable tests used to detect alcohol impairment.

When alcohol is consumed, it is readily absorbed into the blood system via the gastrointestinal tract. While factors such as the presence of food may influence this process, it occurs in a consistent manner over time. Peak blood alcohol concentration (BAC) is normally achieved within approximately 20 minutes after one stops drinking. Impairment increases with growing alcohol concentration and wanes with reduced alcohol concentration. The correlation between impairment and alcohol concentration has allowed the use of BAC to infer the individual's degree of impairment in a reliable and scientifically accepted manner.

WHAT DOES "UNDER THE INFLUENCE" MEAN IN TERMS OF CANNABIS USE?

Unlike alcohol, there is great variability among the states in their approach to driving under the influence of drugs (DUID). Fifteen states presently have drug "per se" (zero tolerance) statutes (AZ, DE, GA, ID, IL, IN, IA, MI, MN, NC, RI, SD, UT, VA and WI). Others require a certain threshold of tetrahydrocannabinol (THC) in a person's system to be considered under the influence, determined by either urine or blood sample. Moreover, a small number of states judge cannabis impairment based on the driver's behavior, regardless of the actual amount of marijuana in the system.

With alcohol, widely accepted field tests and blood alcohol tests are available to provide the basis for probable cause for arrest. No universal test for cannabis consumption is presently available.

Chemical Tests

In many states, a driver suspected of impaired driving may be arrested and taken to a facility to submit to a blood or urine test. Although there is no standard limit for active THC, several states accept five nanograms of THC as the limit. In states with a *per se* limit, any amount of THC is grounds for a criminal offense. Blood tests check for THC levels in whole blood and provide grounds for filing charges if the state's legal limit is exceeded.



This is problematic because THC, which is fat-soluble, can remain in tissue for weeks after ingestion, which can result in positive test results that have no bearing on the individual's actual level of intoxication. A regular user will likely have measurable THC metabolites regardless of recent ingestion. Moreover, a reliable biomarker of marijuana intoxication has not been identified. Impairment can vary based on (1) the consumed THC concentration, (2) whether the person is a frequent or heavy user, (3) the time elapsed since cannabis ingestion and (4) the ingestion method. A recent study from the

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American Automobile Association (AAA) found that even blood tests looking only for active THC – excluding residual THC from prior use – are not a reliable indicator for driving fitness.

Recently, some California municipalities and the California Highway Patrol have tested oral swab examinations in place of more complicated blood and urine tests to detect drugs. These tests work by identifying trace amounts of cannabis in a driver's saliva. "Oral swab testing is still an unproven technology," Dale Gieringer, director of the California National Organization for the Reform of Marijuana Laws (NORML) said, "there's no evidence that oral swab testing results have any correlation to impaired driving." Moreover, trace amounts of cannabis can be present in saliva up to three days after consumption.

Observed Impairment Tests

Many other jurisdictions use driver behavior as well as physical factors, such as tongue color and pupil dilation, to determine if one is potentially impaired while driving. Common field sobriety tests include the horizontal-gaze nystagmus test, the one-leg stand test, and the walk and turn test.

The horizontal-gaze nystagmus test usually is administered by an officer moving a finger or an object from side to side in front of a driver's face in order to detect an involuntary jerking of the eye associated with high levels of intoxication. After being strained beyond a 45-degree angle, a person's eye is believed to jerk naturally. But, if the eye begins to jerk at or before the 45 degree point, this reaction can be referenced as evidence that a driver is impaired. This test is estimated by the National Highway Traffic Safety Administration (NHTSA) as 77 percent reliable. Of course, those results are cold comfort for the 23 percent of sober drivers on the wrong end of a failed test.

During the one-leg stand, the suspect is instructed to raise his or her foot, hold still, count and look down. If hopping, swaying or putting the foot down are observed, the officer has grounds for an arrest. According to NHTSA estimates, this test is effective only 65 percent of the time.

Another divided attention test, the walk and turn test, also referred to as the "walk the line test" splits the attention of a person suspected of driving under the influence of cannabis between mental and physical tasks. The officer provides instructions to the driver and looks for loss of balance, inability to stay on the line, beginning before instructed, breaks in walking and the wrong number of steps. This is estimated by the NHTSA to be effective 68 percent of the time.

Of course, the reliability of observational testing is limited by the skill of the person administering the test, and the results are inherently subjective. Also, it is more difficult than a chemical test to prove in court, coming down to the judgment of the officer who may or may not possess the skills to accurately determine the driver's impairment.

PROBLEMS AND RECOMMENDATIONS FOR DUID DETECTION TECHNOLOGY

Currently, there are no evidence-based methods to detect marijuana-impaired driving. It is understandable that both the public and lawmakers have a strong desire to create legal limits for impairment in the same way we do with alcohol. "In the case of marijuana, this approach is flawed and not supported by scientific research," said AAA CEO Marshall Doney. "It's simply not possible today to determine whether a driver is impaired based solely on the amount of the drug in their body."

Following a recent study analyzing lab results of drivers arrested for driving under the influence of marijuana, the AAA Foundation for Traffic Safety recommended replacing technology with specifically trained police officers to determine driver impairment, followed by a test for the mere presence of THC, rather than a delineated threshold.

Other organizations have called for states to consider making the presence THC in the system a traffic violation. Studies supporting this approach show that marijuana-impaired driving roughly doubles the risk of a crash. By comparison, however, talking on a hands-free cell phone while behind the wheel *quadruples* the risk, and driving with a BAC of .12 – which is about the median amount in drunk driving cases – increases crash risks *15-fold*.

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According to the NHTSA, scientific studies are consistently finding that marijuana-impaired drivers pose a comparatively nominal accident risk. The largest-ever controlled trial assessing cannabis use and automobile accidents concludes that after controlling for age and gender, marijuana-impaired drivers possess virtually no statistically significant risk of crash compared with drug-free drivers. Still, more data must be collected to support definitive conclusions and policy decisions.

In its [July 2017 Marijuana-Impaired Driving Report to Congress](#), the NHTSA recommended that efficient methods for training law enforcement personnel be instituted, including drug recognition experts to increase each officer's overall knowledge of the general manifestations of marijuana impairment and to be able to recognize these indicators in encounters with drivers.

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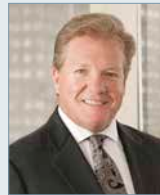
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Brian Del Gatto and Stuart Miller, co-chairs of Wilson Elser's national Transportation, Cargo & Logistics practice, can assist you with any and all legal or regulatory matters relative to the transportation industry. The practice offers extensive claims handling and litigation management experience together with major trial sophistication. Our nationwide 24/7 response program helps ensure that team members are engaged during the first critical hours following a catastrophe.



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