Patent trolls drain businesses of billions of dollars a year. And if you have a website—any website—you are a potential target. Here’s what you need to know if they come after you.

“I felt like I’d been mugged.” Chris Friedland is fed up with the patent system. In the past two years, he has been hit with 18 patent-infringement claims. Friedland’s Chico, California–based company isn’t the type you would think would bump up against a lot of high-tech innovations. He runs a basic e-commerce site, Build.com, which sells home improvement and plumbing supplies. But in 2009, Friedland received a letter accusing Build.com of violating a patent for Web server technology. The claim struck Friedland as ridiculous. By his reading, the patent was so broad that it would affect anyone who had ever used the Internet. But when he consulted his lawyer, it became clear that this was no joke.

The letter came from a type of company known as a nonpracticing entity, which owns patents but never uses them to create anything. These companies make money solely by pursuing potential patent infringers and demanding license fees. This particular NPE (Friedland can’t name names because of a nondisclosure agreement) had a compelling case, said Friedland’s attorney. The infringement letter referenced several large companies that had already paid license fees for the patent. “We wrote a check and thought they’d go away,” he says. “But then the trolls just rushed in.”

Troll is a derogatory term for the most aggressive types of NPEs. Friedland isn’t sure how word of the settlement leaked to Troll Town, but he says that after he paid the fee, he was inundated with infringement letters from trolls. The patents in question were amazingly broad: There was one for transferring data through a network, another for using images on a website, another for having a computer that connects to a database. “I mean, if you own the patent for connecting computers to a database, you should go after Facebook or Google, not some stupid…"

Patent Trolls

by Kris FrieswicK

I llustrations by john burgoyne
WHO’S BEHIND THE TROLLS? Here are some of the people running the show, according to public records.

The best business to be in right now is being a patent troll, and that sucks. They’ve got nothing to lose.

The shakedown
Patent trolls have become a drain on small and midsize businesses, which often lack the resources to fight back.

In 2011, patent trolls cost U.S. businesses more than $29 billion in legal bills and settlement costs. The average company targeted by patent trolls has $10.8 million in annual revenue. Threatened with the cost of going to court, most companies give in to the trolls’ demands. 90% of defendants in software-patent cases settle before going to trial.

The hunt for solutions
Because of these issues, some business leaders, including venture capitalist Fred Wilson and investor Mark Cuban, have called for an end to software patents. People who defend software patents say they do protect genuine inventions and argue that efforts to weed out trolls will hurt innovation. “A number of people look at the problem and say, ‘Abolish software patents,’” says Mark Lemley, a patent-law professor at Stanford University and a founding partner at intellectual-property law firm Durie Tangri. “But there are really useful inventions in software that we want to protect. There’s a really hard line-drawing problem.”

He points to the software that enables a Toyota Prius hybrid engine to switch from gas to electric. “That controller—that’s a piece of software,” he says. Besides, says Lemley, the countless companies that have software patents will fight hard to keep them. “Depending on how you count,” he says, “there are between 500,000 and a million software patents. People who defend software patents say they do protect genuine inventions and argue that efforts to weed out trolls will hurt innovation. "A number of people look at the problem and say, ‘Abolish software patents,’” says Mark Lemley, a patent-law professor at Stanford University and a founding partner at intellectual-property law firm Durie Tangri. “But there are really useful inventions in software that we want to protect. There’s a really hard line-drawing problem.”

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Some in Congress are still trying to fix the troll issue. Vermont Senator Patrick Leahy, who co-authored the America Invents Act, has been conducting hearings on the impact of NPEs on small business. And Congressmen Peter DeFazio of Oregon and Jason Chaffetz of Utah have proposed a bill, called the Saving High-Tech Innovators From Egregious Legal Disputes (or SHIELD) Act, that would force NPEs to pay defendants’ legal costs if a judge determines that a patent lawsuit didn’t have a reasonable chance of succeeding.

In the private sector, some are also working on solutions with the patent office. In August, Google launched a new administrative method, called a post-grant review, intended to help weed out bad patents without litigation. However, many of these provisions apply only to new patents.


tuguing Mad

Chris Friedland of Build.com, which sells plumbing supplies, has been hit with 18 patent-infringement notices. Now, he’s rallying other companies to stand up to trolls.

Meanwhile, several tech companies, including Build.com, founded by Joel Spolsky and Jeff Atwood, teamed with the patent office to launch Ask Patents. The site uses crowdsourcing to find prior art and assess the claims of new patents.

Vicinanza warned the troll that he had evidence that invalidated the patent and was going to request a reexamination. Soon after, Project Paperless dropped the suit. All told, Vicinanza estimates he spent about $50,000 on the suit, but he considers that a victory. People kept telling me that this would cost $1 million; he said. “They want to make a fraction of the fee I would have had to pay if I had settled. And if I had settled, I would’ve gotten agita when I wrote that check.”

Drew Curtis, founder of Fark.com, a news aggregation site, has also encouraged entrepreneurs to fight. Curtis’s company was sued in 2011 by BlueWave Computing, an Atlanta-based IT company, over a Web form used to create and send out press releases online. Fark doesn’t do anything like that, but the troll didn’t have to prove infringement in order to file a lawsuit. “These are just attorneys who have made the decision to ruin people’s lives,” says Curtis. “It’s capitalism at its purest and worst.”

ENTREPRENEURS FIGHT BACK

Unfortunately, none of these initiatives will make the kind of broad changes needed to stop the troll attacks against small and medium-size businesses. For now, the best recourse is to stand and fight.

Steve Vicinanza is one of those launching a counteroffensive. About a year ago, his company, BlueWave Computing, an Atlanta-based IT consulting firm, received an infringement claim from an NPE called Project Paperless. It owns a patent on scanning paper documents directly into an e-mail attachment. The patent was issued in the late 1990s and had gone through a series of owners before passing to Project Paperless in 2011. The troll demanded that BlueWave, which has more than 100 employees, pay a one-time license fee of $1,000 per employee. But BlueWave doesn’t make office equipment—it just installs it. The claim struck Vicinanza as so crazy that he ignored it.

But then Project Paperless sued him—and named 100 of Vicinanza’s clients as co-defendants. The troll claimed these customers were also infringing thanks to the printers and IT firms that, like BlueWave Computing, had set up for them. Vicinanza could either go to court or pay the license fee, which was now double—more than $200,000.

Though his attorney advised him to pay the fee, Vicinanza didn’t like the idea. “I know a lot about this stuff,” he says. “I pulled their patent. I said, ‘This is crap!’ I’m Italian, and we know how this stuff works. When people try to extort money out of me, I fight back.”

Vicinanza had a Seattle firm ask $5,000 to conduct a prior-art search. When he had enough ammunition, Vicinanza warned the troll that he had evidence that invalidated the patent and was going to request a reexamination. Soon after, Project Paperless dropped the suit. All told, Vicinanza estimates he spent about $50,000 on the fight, but he considers that a victory. “People kept telling me that this would cost $1 million,” he said. “They want to make a fraction of the fee I would have had to pay if I had settled. And if I had settled, I would’ve gotten agita when I wrote that check.”

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Many other companies, including AOL, Yahoo, and Digg, also got hit with the suit. Curtis refused to pay up. “I was the only guy in the lawsuit that wasn’t a conglomerate or venture-backed company; guys who had war chests,” says Curtis. “I was just an entrepreneur.”

Curtis explained his experience at a TED Conference last year. “And I was the only guy that fought it,” he said. After Curtis made several discovery requests—asking Google to provide, for example, screenshots demonstrating Fark.com’s violation of the patent—the troll decided to settle. Curtis refused to sign a non-disclosure agreement or pay a settlement fee. To his surprise, the troll backed down. (Curtis won’t divulge how much it cost him to settle.)

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“When he made it clear he was ready for a fight, the majority of the trolls backed down,” he says. But a few sued. Friedland started calling other defendants, most of whom were not direct competitors, and asking them to join him and share resources. “I would tell them that we have mutual interest,” says Friedland. “And that if we work together, we can get it resolved in the best way possible for all of us.” As a group, we are stronger than as individuals.” For one suit, Friedland managed to persuade all the co-defendants to fight, even though many initially wanted to settle. The case is still ongoing, and there are more battles ahead. Friedland is still involved in six other disputes and continues to get new infringement notices from other patent trolls.

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For him, the long-term answer is changing the patent law. (He would like to see the life of a software patent reduced from 20 years to two patents and 20 years ago patents go only to the original inventor or company that commercializes the invention.) Until that happens, he encourages companies to reject the nondisclosure agreements that trolls routinely insist upon as a condition of settlement. Instead, he says, companies need to share their experiences with one another. “It’s like being an abuse victim,” he says. “If you don’t talk, you perpetuate it.”

Kris Frick was the June 2012 issue of Defy Ventures, a program that teaches ex-cons to be entrepreneurs.