Inhibiting Patent Trolling: A New Approach for Applying Rule 11

Eric J Rogers
Young Jeon
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There has been an alarming rise in the number of litigious entities, commonly referred to as “patent trolls,” that make no products but file dubious patent infringement lawsuits merely to extract money from commercially productive companies that actually make products. The problem is that extremely high litigation costs provides a fertile environment for an exploitive business model that uses shot-gun tactics to threaten enforcing patent infringement claims against numerous companies, many of whom make a purely financial decision to pay the patent troll rather than expending more money to defend the lawsuits. Sometimes the pay-off is a settlement strategically set below the potential cost of litigation defense (e.g. $200,000). Other times the pay-off is a license fee that is too small (e.g. $10,000) to justify expending any litigation costs to adjudicate the claim even if there is very strong suspicion it is frivolous.

In response, there is an increasingly negative cry against patent infringement lawsuits brought by patent trolls. Complaints come from various corners, such as small businesses, politicians and lobbyists representing major corporations. One of the main concerns with the rise of patent troll lawsuits is the overall economic waste associated with such patent litigation. More importantly, patent trolling can needlessly raise the price of using patented technologies and can block patented technologies from being practiced at all in a way that appears to be contrary to the fundamental goals of the U.S. patent system of promoting technological innovation.

During Congressional discussion of proposed legislation, Representative DeFazio cited a study that concluded “patent troll suits cost American technology companies over $29 billion in 2011 alone.” President Obama decried patent trolls, saying they “are essentially trying to leverage and hijack somebody else’s idea and see if they can extort some money out of them.” There is so much concern about the potential drag on the economy created by patent trolls that Congress is considering new legislation to implement a one-way, “loser-pays” system for patent litigation wherein a non-practicing entity would be required to post bond for the full cost to defend the lawsuit; if there is no infringement then the non-practicing entity would pay the prevailing party’s full costs, including reasonable attorney’s fees.

Patent infringement claims asserted by patent trolls are a type of nuisance lawsuit, a lawsuit in which the defendant often pays to make the suit go away just to avoid paying the considerable costs associated with litigation, not because the suit has any significant merit or chance of success. While nuisance lawsuits are not new, the direct, focused and large negative effects of nuisance patent lawsuits on innovation and productive entities by those neither innovating nor producing anything make these nuisance suits appear particularly damaging to society. In addition, the public’s negative perception of patent trolls filing baseless patent infringement claims endangers the legitimacy of the patent system. Most people agree something must be done, but there is little agreement on any specific solutions.

One purpose of Rule 11 of Federal Civil Procedure is to discourage abusive tactics. We propose a specialized implementation of the Rule 11 to combat some of the unique problems created by the patent trolling business model. A Rule 11-based solution is not only preferable to new legislation but also complementary because it is 1) immediately available without any...
legislative action, 2) flexible enough to handle evolving behaviors to exploit patent litigation using bad faith patent infringement claims, and 3) strong enough to deter much patent trolling behavior – whether conducted by a dyed-in-the-wool patent troll or a less predatory entity.

Part I of this article clarifies what is the patent trolling business model, which is based on the threat of nuisance patent lawsuits, and the unique ways patent trolling behaviors can manipulate patent litigation, settlements and patent licensing. Part II explains the predominant proposals and tactics recently proposed to inhibit patent trolling, which are predicted to be ineffective while indirectly weakening the patent system overall. Part III explains the current doctrine for imposing Rule 11 sanctions for patent infringement claims. Part IV proposes a new implementation of Rule 11 to immediately help alleviate the problems caused by patent trolling through a mechanism that identifies patent-trolling-predisposed claimants and delays the accretion of discovery costs.


The prominence of intellectual property in the economy and its importance to businesses have increased greatly during the past few decades. Similarly, this period has seen a rapid increase in the quantity of technology, especially in patented technologies related to products and services across all industries. Along with the rise in the prevalence and value of patents, there has been a concomitant rise in the misuse of patent rights for rent-seeking by entities, pejoratively referred to as “patent trolls,” who never plan to commercialize their patents and wait for others to commercialize technologies for which they can try to force into licenses or settlements at exorbitant prices.

The popularity of patent trolling might be due to a lack of economic demand for products in faltering economy, an increase in the U.S. Patent and Trademark Office (USPTO) issuing weak patents from the late 1990s until KSR, and/or the explosion of computer-related business method patenting after the State Street decision in 1998 that include so called “software patents,” and later growth in e-commerce applications. In addition, it might be ingrained in corporate culture to avoid litigation, especially at relatively cheap terms.

Patents have the potential to create value for their owners in many ways, such as 1) monopolizing a market by practicing the invention while excluding others from doing so, 2) licensing the patent rights for remuneration to others to practice the invention, 3) building a large patent portfolio for defensive purposes and 4) patent trolling, a type of patent monetization that relies on patent infringement litigation or at least the threat of litigation. The first two ways are by far the most common. These strategies produce value based on market factors in the real economy. The first way allows the patent rights holder to use supracompetitive pricing in the marketplace; however, the supracompetitive pricing is constrained by economic factors such that other goods or services can substitute as the price goes beyond an optimal market value. Similarly, the second way remunerates the patent rights holder based on some relationship with the value of the technology in the marketplace. However, both these strategies may require enforcement, or the threat of enforcement, of patent rights from time to time. The third strategy gives the patent rights holder the option of asserting counterclaims of patent infringement when others assert patents against them, which deters patent lawsuits and encourages cross-licensing arrangements between competitors.

The patent trolling strategy is when an entity that does not practice a patent tries to create value by leveraging the threat and cost of patent infringement suits to obtain settlements
and license fees because the default American Rule provides that each party is responsible for paying its own legal fees.\textsuperscript{16} A famous example is a non-practicing entity’s use of the Lemelson patents for bar code scanners to threaten patent infringement suits against hundreds of companies and produce over $1 billion in license fees.\textsuperscript{17}

A. The Patent Trolling Problem

Patent trolls are a type of patent asserting entity (PAE) that are typically classified as non-practicing entities (NPEs) and/or patent aggregators.\textsuperscript{18} Patent infringement suits filed by patent trolls are a type of nuisance lawsuit in which the accused infringer often makes a purely financial decision to pay to make the lawsuit go away just to avoid paying the considerable cost associated with defending against the claim, not because the claim has much merit or chance of success.\textsuperscript{19}

The patent-trolling business model can be characterized as rent seeking because patent trolls often collect never-practiced, never-licensed or never-asserted patents in order to go after those established businesses who might be unknowingly infringing those patents for years.\textsuperscript{20} In many instances, the patents are overly broad and thus invalid to some extent, if not in their entirety, or the allegedly infringing activity is not covered by the patents. Nonetheless, even if the targeted businesses feel the patent infringement claim is non-meritorious, they choose not to litigate on the merits, even to the summary judgment stage, and settle for a patent license because the cost of patent infringement defense is prohibitively expensive. Thus, patents can be used solely for rent seeking via nuisance patent infringement lawsuits because the average cost of patent right acquisition and assertion is often very small compared to the cost of the average patent infringement defense.

A patent trolling strategy’s success largely derive from the high legal costs associated with defending against a claim of patent infringement, even just to get the claim dismissed at the summary judgment stage of litigation. Patent litigation has become one of the most expensive and time-consuming types of commercial litigation, which increases the pressure to settle.\textsuperscript{21} Therefore, the ever-increasing cost of patent litigation drives the increasing popularity of the patent-trolling business model and makes patent infringement nuisance lawsuits one of the most lucrative forms of nuisance lawsuits today. The combination of the astronomically high cost of patent litigation, the increasing number of unused, overly broad patents, the notice-pleading rule and the default American Rule has created an environment in which patent trolling flourishes.\textsuperscript{22}

The American legal system generally disfavors a cost-shifting scheme based on who wins a civil suit.\textsuperscript{23} The American Rule is the default situation in the U.S. judicial system in which each party is responsible for paying its own attorney’s fees.\textsuperscript{24} However, the patent statute provides cost-shifting for “exceptional” cases where the court may order the patent infringement claimant to pay the attorney’s fees of the defendant.\textsuperscript{25} This harsh penalty has been used only sparingly, and judicial precedents for finding an exceptional are very limited and infrequent.\textsuperscript{26}

Businesses have trouble justifying the litigation costs even if they suspect the lawsuit is baseless because they could make the threat of litigation go away forever by paying the troll a sum much less than the defense costs. Often, the commercial value of a patent does not affect the size of settlements or license fees because patent defense costs are being substituted for commercial patent value. Consequently, settlement amounts and license fees are often driven by litigation costs instead of commercial market economics related to the value of the patent.\textsuperscript{27} Thus, some patent license fees represent an economic inefficiency as compared to their actual
commercial value – creating a significant amount of legal-system based, deadweight economic loss.²⁸

When a business encounters a threat of patent litigation, it has three main choices besides stopping their business: 1) design around the patent claims, 2) pay for a patent license or 3) litigate with the hope the patent can be shown to be invalid, unenforceable or not infringed. The litigation route might be the least attractive because of the high legal costs, the uncertainty associated with construing patent claims, the unpredictability of jury verdicts and potential negative effects to share prices.²⁹ In addition, the business decision to design around a possibly invalid patent may not be wise because of 1) the considerable research costs, 2) the uncertainty regarding a successful design-around and 3) the interruption to the business operation during the uncertain period.³⁰ That leaves the middle choice – pay the license fee and move on. Therefore, continuing business as normal and paying the license fee is often the most common choice. However, if the patent infringement claim is a dubious one and the fee is strategically set below the cost of litigation, then this situation probably represents a patent troll “shakedown” fee.

Based on the current patent litigation system, it appears economically efficient to settle some patent lawsuits as quickly as possible to avoid the legal costs of defending patent litigation, which averages nearly $5.5 million for cases with more than $25 million at risk and $650,000 for less than $1 million at risk cases.³¹ Usually, the legal fees and time merely to defend against an infringement surpass the “shakedown” fee; just to proceed through litigation to the claim construction and discovery phases to reach summary judgment could cost over $3 million and take 18 months.³² These litigation realities afford any patent rights holder the potential to use threats of patent infringement as a “scare tactic to obtain unwarranted licenses and settlements” by something akin to blackmail, extortion and a Mafioso-style “shakedown.”³³

This economic reality allows for a patent trolling business model wherein patents are used by PAEs solely for rent seeking via nuisance lawsuits. PAEs search to acquire patents wholesale or in bankruptcy auctions to target any businesses that are just superficially related to the subject of the patents. In addition, the cost of bringing a lawsuit need not occur because a patent troll can make money by merely threatening potential defendants with a cease and desist letter.³⁴ This allows patent trolls to perform an efficient first-pass screen by “fishing” with identical letters to all the companies active in a particular product market and forcing some proportion to pay licensee fees without ever drafting a complaint.³⁵ These legal “economies of scale” continue to occur after the first-pass to the later stages of patent trolling, filing nearly identical complaints against successive defendants without any additional work.

The patent trolling problem includes the creation of economic dead weight loss, the suppression of technology from getting to market and perhaps hurts innovation at large.³⁶ In addition, patent trolling hurts the public’s perception of the patent system. Patent trolling with cease and desist letters harasses members of the business community. Further, when a frivolous patent infringement claim is asserted without a bona fide belief that the claim has legal merit, it hinders judicial economy, interferes in fair competition, distorts the purpose of patent litigation, and lowers public opinion of the legal system and the legal profession.

B. Defining the Patent Troll

A patent troll can be loosely defined as a bad-faith legal actor that threatens a patent infringement suit against a product-manufacturing entity when the PAE does not practice, or even have the potential to use, their patented technology. Sometimes, whenever a cheap licensing
fee is rejected, the patent troll indiscriminately sues accused infringers without investigating if grounds exist to claim infringement.

It is difficult for society to police something that it cannot define, even loosely. It has been said that there is no satisfactory definition of a patent troll. This is because some of the conduct of patent trolls is considered to be proper when associated with other characteristics, such as those of NPE universities who develop their own technologies but do not commercialize it themselves. Most definitions of patent troll are over-inclusive because they often include NPE’s, such as individual inventors, inventive startup companies, failed businesses, and purchasers of patents from others. Below, we attempt to more precisely define what a patent troll is and what types of conduct could be classified as “patent trolling.”

We suggest that a “patent troll” is an entity that:

1) asserts a patent against a product-manufacturing company while at the time of assertion the patent is not being legally “practiced by anyone, i.e. neither licensed nor practiced by the owner” and the owner has no intention of ever practicing;

2) pursues a business model that aims “to acquire overarching, broad patents of suspect legal integrity” to make profits by threatening lawsuits against anyone that makes products even remotely related to its patented technologies in order to get favorable license arrangements and/or settlements;

3) does not plan to initially license or practice the patent it acquires but rather hides and waits for potential infringers to come along and then uses the patent primarily to obtain high license fees while never practicing the patent. (Alternatively, the patent troll can obtain broadly claiming patents after a technology has already been commercialized and a mature market of potential infringers has developed.)

We also suggest that a “patent troll” is an entity that exhibits the following types of conduct indicative of “patent trolling”:

1) Reasserting the same patent against a plurality of entities to achieve the advantage of economies of scale, whereas defense against patent infringement suits is usually done one defendant at a time.

2) Not manufacturing or practicing any patents, which means the entity has no fear of having to (a) defend against a counterclaim, (b) consider cross-licensing arrangements during license negotiations, (c) produce witnesses to be deposed or (d) expend additional legal costs to those of filing complaints and re-using documents and arguments made against previous defendants.

4) Joining multiple defendants with different attributes and locales in the same patent infringement suit for efficiency and to inhibit transfers of venue.

5) Not making any products, which means having no customer base, which shields the patent troll from public relations problems related to litigation.

6) Retaining attorneys under a contingency-fee agreement, which creates a nothing-to-lose, low-risk scenario for patent assertion.

The characteristics of a typical patent troll make them particularly difficult opponents in a lawsuit because they create asymmetries with patentees that commercialize their patented technologies. First, the typical patent troll has no risk of a patent infringement counterclaim because it does not actively manufacture any products. Second, the typical patent troll does not
have any of its own products at risk from an injunction. These first two asymmetries prevent cross-licensing solutions and peace-negotiations that are possible among competitors in most cases. Third, the typical patent troll will not suffer any reputational harm or retribution from the public because it has no customers. Fourth, “patent trolling” can be funded by contingency fee arrangements: this creates a market of patent cases for patent litigators to find and bring the most financially promising lawsuits or settlements, regardless of the intellectual value of patents or merits on the infringement claims. Lastly, contingency fee-based patent infringement representation is readily available for patent trolling entities, whereas there is no counterpart for the other side because accused infringers rarely receive large damage payouts. These legal asymmetries are typical in patent trolling cases. As a result, patent trolls are often analogized to gamblers playing with house money – they can win, but they cannot lose.50

C. The Main Problem is the Intent Behind the Litigation Behavior, Not the Patent Infringement Claimant’s Commercial Status

The hallmarks of a patent troll are that it makes no products of its own, licenses patent rights only after threatening litigation and primarily uses threats of patent litigation for the sole purpose of generating revenue from settlements and licensing because potential defendants would fear costly litigation and possibility of injunction.51 Should a patent troll be defined by its commercial characteristics, such as a lack of manufacturing and licensing activities prior to litigation, or by its litigious conduct, such as indiscriminately demanding market participants for patent licenses under threat of patent infringement or offering settlements for just under the legal cost of defending a patent infringement lawsuit? We think the intent behind the entity’s litigious conduct is more indicative of patent trolling than its commercial characteristics.

One litmus test for a patent troll is the lack of any good-faith intent at the time of patent acquisition to attempt to commercialize or otherwise practice a patent. Some NPE’s might obtain a patent with the intention of bringing the invention to market whereas the true patent troll “never has the intention of bringing the invention to market.” 52 Therefore, with some difference in degrees, patent trolls generally thought to inhibit or tax the commercialization of technologies, which benefits neither the inventors nor the public. However, once a patent is granted, then only a legal right to exclude others is created, not to practice the patent, nor is any obligation created to practice the patent or license patent rights to others.53

A patent troll is often identified by the way they acquire and enforce patents – usually acquiring patents that appear to be already infringed and then enforcing for litigation-based revenue in a predatory fashion. Patent trolls often acquire patents relatively cheaply from bankrupt companies or independent inventors.54

Also, the conducts identified as problematic above may be manifested by an originally innovative and commercially active company that changed its skin to patent trolling for revenue purposes.55 This means the competitive business place can drive oscillations from technological development to legal revenue generation through patent trolling, depending on the circumstances or the intentions of the board of directors. In addition, litigation markets now exist where investors can invest in patent rights in order to gain profits directly from patent trolling entities or sales of patents to PAEs for patent trolling purposes.56

Even a patent practicing entity can exhibit the behavior of patent trolling when it relates to patents “well outside the area in which they make products.”57 For example, if a commercially active electronics company acquires patent rights in an unrelated industry and then threatens active companies in this other industry with cease and desist letters asking for license fees, this
might be characterized as patent trolling, despite the lack of NPEs. In fact, cash-rich technology companies are often the most active in acquiring patents with no intent to ever commercialize the claimed technologies.\textsuperscript{58} This could lead to a later business decision to capitalize a portfolio of unused patents merely for patent trolling or to sell to others for patent trolling.\textsuperscript{59} 

Furthermore, a new practice called “patent privateering” has surfaced with the potential of being yet another form of patent trolling,\textsuperscript{60} in which specialized patent litigation firms like patent aggregators are assigned a patent just for litigation and/or technology transfer purposes.\textsuperscript{61} Patent privateering can help individual inventors and companies who develop inventions to recover profits from infringers by sharing a proportion of the damages received through litigation. In addition to outsourcing litigation, some companies create their own patent holding companies for the sole purpose of patent enforcement and licensing.\textsuperscript{62} Both of these approaches shield the sponsoring company from bad public relations, antitrust lawsuits and tortious interference with business lawsuits.\textsuperscript{63}  

**D. The Positive Effects of Patent Trolls and Patent Trolling**

*The Troll* by Linda Ellis

> If protecting my rights  
> in your eyes makes me a “troll,”  
> then I’ll wear the badge proudly  
> and keep fulfilling my role.

Some view patent trolling as a legitimate means to extract value from a patent.\textsuperscript{64} The fact that a patent infringement claimant is not practicing the invention does not disturb the basic setup of the patent system, which trades exclusive rights for a limited time in exchange for disclosure.\textsuperscript{65} Practicing the patented technology is not required as part of the bargain – it is only the disclosure that is required by law.\textsuperscript{66} In fact, a patent grant from the government does not confer the patentee with the legal right to use or sell the patented invention; for example the existence of a blocking patent might force the patentee to get a license before the patentee can practice its own patent.\textsuperscript{67}  

Once a patent is granted, a legal right to exclude others is created that is freely alienable.\textsuperscript{68} The right holder or how they acquired the right is generally irrelevant to the legality of enforcing the right – it is the conduct and intent in bringing the litigation that matters to patent trolling. Some NPEs, even if lacking good faith intent in acquiring the patent, provide beneficial values to society and should not be categorized as a patent troll, but more accurately they could be called a “patent monetizing entity” (PME) or “patent licensing entity” (PLE) that helps remunerate inventors who lack the resources to commercialize their inventions.\textsuperscript{69}  

Not all patent trolling is deadweight economic loss.\textsuperscript{70} Patent trolls can obtain patents from small inventive companies and individual inventors, which helps recoup losses for failed startups and reduces risk for inventors.\textsuperscript{71} This in turn provides an economic value to investing in startup technology companies because even if the company fails, its investors own a patent portfolio that can retain some value.\textsuperscript{72} In addition, some large companies might feel free to infringe individual inventors’ and small business patents because the patent owner cannot afford the legal costs of fighting in court. Transferring their patents to a patent troll might be an economically sound
decision that rewards them for their inventive contribution to society. Thus, patent trolls can provide patent liquidity to small businesses and individual inventors.

Contingency-funded patent assertion might enfranchise a greater population of patent rights that could be litigated and thus should drive down costs for patentees by expanding litigation, especially for small entity patent holders. But this legal phenomena might be out of balance because there is no off-setting enfranchisement for patent infringement defense litigators.

Thus, some NPE suits might promote invention, increase investment in research and development, allow financial risks to be offset for startup companies and their investors, and compensate actual inventors who cannot enforce patents. However, something seems out of balance when from 2000-2007 NPEs filed more than 80% of repeat patent lawsuits and owned more than 50% of the most-litigated patents.73

E. Who Is Not a Patent Troll?

Unlike the stereotypical patent troll - a shell company that purchases a patent as an investment for the sole purpose of enforcement to make profits as its sole business model - universities or inventors that do not practice their own patents rarely deserve the label of patent troll. The typical university exhibits most of the hallmarks of a patent troll because it does not make products of its own although it may license without threats of litigation and does rarely rely on patent litigation for revenue.74 This makes sense because economic theory suggests that a rational, profit-maximizing monopolist that could not bring a technology to market by itself should license it to others who can. In addition to universities, some startups or individuals can create an invention that is so revolutionary and pioneering such that it threatens established corporations.

These startups or individual inventors may choose to grant licenses to more established corporations for a modest return, or they may choose to exclude others, including established corporations, while bringing the invention to market. In either scenario, the established corporations would likely fight back by raising barriers to market entry, such that the most promising battle ground for the startups and lesser-funded entities might be by asserting intellectual property rights in court. However, once in litigation, startups and lesser-funded entities often find themselves up against a well-prepared litigation machine with a deeply-funded war chest.75 Thus, neither a research university, an individual inventor nor a startup company that developed and patented an invention with the good faith intention of commercializing the invention should be classified as a patent troll.

For many NPEs, like universities and individual inventors, if they are to receive compensation for their patents, then they need licensees or provable infringers that are commercially active. Individual inventors often lack access to capital and to channels of manufacturing, marketing and distribution. In response, these NPEs might be best served by washing their hands of their inventions by selling their patent rights to patent trolls and receive an immediate reward for their inventive activities. In addition, universities might have recently begun profiting from patent trolling.76

Another problem is that some commercially active companies that invest heavily in research and development might “find it profit-maximizing not to vertically integrate their R&D and manufacturing processes, choosing instead to set up patent-holding companies that focus on development, acquisition, maintenance and licensing of intellectual property.”77 In addition, universities often assign their patents to related entities for separate management.78 These patent holding companies appear as NPE patent trolls despite their close relationship to the original
inventive entity. Finally, some transaction-only firms aggregate patents just for collaborative cross-licensing/licensing alliance purposes and setting industry standards.

F. Weak, Borderline and Dubious Patent Infringement Claims are the Real Culprit

However, Professors Jay Kesan and David Schwartz have argued that the focus should be on the merits of the patent infringement lawsuits themselves instead of on the characteristics or conduct of the patent infringement claimant. This approach gets to the heart of the problem – a nuisance lawsuit is by definition a complaint without a sound legal basis but is just strong enough to survive a Rule 12(b)(6) motion to dismiss. One study reported that the troll-variety of NPE appears to rarely win judgments against wealthy defendants. Another article reported that patent trolls win on the merits from less than 10% to about 25% of the cases, according to different studies. Thus, the unsoundness of the legal basis of a patent infringement claim is the gist of the patent trolling problem.

In conclusion, the patent trolling problem is caused by the extortion of active market participants by commercially inactive entities using weak or meritless patent infringement threats and claims that produce profits based on the high costs of defending a patent infringement suit. “[T]rolls… make money by threatening companies with expensive lawsuits and then using that cudgel, rather than the merits of a case, to extract a financial settlement” before the lack of merit in the case is exposed. Although a patent troll is difficult to define, the assertion of credible patent claims versus nuisance claims can be policed. Instead of identifying the patent troll and then declaring the entire lawsuit as a nuisance, the courts should identify the nuisance patent infringement claim and then declare the patent infringement claimant as a patent troll. Like Justice Stewart wrote “I know it when I see it” with regard to pornography, one might not be able to define it, but one can identify a nuisance patent infringement claim when ones sees it. Then, each nuisance claim can be handled regardless of the characteristics or conduct of the patent infringement claimant, which may evolve over time.

II. Proposed Changes to Inhibit Patent Trolling

Many reforms have been proposed to combat the rise of patent trolling, which typically consists of NPEs’ exploitation of inefficiencies in the patent litigation system using broad, shotgun tactics to serially threaten numerous commercially active entities with dubious claims of patent infringement. These reforms include legislative actions, judicial opinions and private party tactics.

At least seven bills have been proposed in the last two years in the U.S. Congress for this purpose: 1) the Saving High-Tech Innovators from Egregious Legal Disputes Act, 2) the Innovation Act, 3) the End Anonymous Patents Act, 4) the Patent Litigation and Innovation Act, 5) the Patent Abuse Reduction Act, 6) the Patent Quality Improvement Act, and 7) the Stopping Offensive Use of Patents Act. Given the bipartisan nature of these proposals, the intensity of lobbying by the business community and the Obama administration’s interest, the likelihood for some kind of legislative reform continues to increase. Other solutions have been proposed, such as a patent clawback bounty to use to refund past patent litigation settlement payers that occurs once a troll loses to a new defendant in litigation.

A. The Federal Response
The federal response to the rise of patent trolling has involved proposed legislation and agency actions. Of the six proposed bills in Congress, the most significant bill is named the SHIELD Act (“Saving High-Tech Innovators from Egregious Legal Disputes”). The SHIELD bill would create a limited, loser-pays system that shifts the litigation costs to the non-prevailing party to patent infringement suits.\(^1\) This change aims to dissuade PAEs from bringing meritless patent infringement lawsuits by financially burdening them and aims to encourage accused infringers to defend the case instead of giving in to empty threats. This loser-pays system would be limited in that inventors, original assignees, universities and practicing entities would not be included in this cost-shifting. Thus, NPEs that are inventors, original assignees and universities could bring a patent infringement suit without fear of paying the other side’s costs even if it loses.

One of the proposed legislations on the same line considers requiring that courts award reasonable fees to the prevailing party “unless the court finds that the position and conduct of the nonprevailing party or parties were substantially justified or that special circumstances make an award unjust.”\(^2\) In fact, before the patent infringement claim is brought, the asserting entity would have to post bond for an amount to cover the litigation cost if the PAE loses.\(^3\) This shifting itself does not unjustifiably burden the patent right owners, although posting a bond for the litigation cost at the onset of litigation might be painful for a claimant that is an individual inventor and whose rightful compensation for the invention is being denied by a financially better situated defendant.

For the realm of the patent infringement, this legislation aims to alter the default American Rule, in which each side pays its own costs, and thereby unfortunately sets out an environment in which businesses have absolutely nothing to gain but much to lose if they choose to fight a patent troll. A common justification for the American Rule is that it provides everyone an opportunity to be heard by a court without worrying about financial calamity in case of an unfortunate or unexpected verdict against them.\(^4\) However, the American Rule has long been criticized because defendants may be hauled into court without much assurance that their legal expenses will be reimbursed even if the accusation was without merit and entirely frivolous.\(^5\) The proposed legislations intend to remedy the downside of the American Rule in the patent litigation context. However, variants of the SHIELD Act have repeatedly failed to pass Congress.

The Federal Trade Commission (FTC) announced a tightening of regulation of patent trolls. The FTC planned to begin an investigation focused on a few selected companies to see if they are stockpiling patents just for the purpose of suing others for patent infringement.\(^6\) The investigation would include using the FTC’s subpoena power to pierce the veil of secrecy that some patent trolls hide behind by using shell companies.\(^7\) This investigation also might consider anti-competitive behavior of the patent trolls and might suggest an antitrust investigation by the Antitrust Division.\(^8\) However, these investigations are for criminal collusions between entities that violate federal fair competition laws and should not have an impact on nuisance lawsuits by patent trolls.

In 2013, the Obama administration went on the offensive against patent trolls, recommending certain legislative actions. President Obama announced that it would take major steps to address the problem of patent trolls.\(^9\) In relevant parts, the announcement recommended legislations including 1) requiring patentees and applicants to disclose the “Real Party-in-Interest,” an action aimed to expose to the public the identities of patent trolls who frivolously demand a quick and cheap licensing agreement, 2) permitting more discretion in awarding fees to prevailing parties in patent cases, and 3) expanding the USPTO’s transitional program designed to provide an affordable alternative to patent litigations, among other things.\(^10\)
Also, the following three executive actions were proposed: (1) a rule requiring patent applicants and owners to regularly update ownership information with the USPTO in the hope registration records would reveal the Real Party-in-Interest, (2) training patent examiners on scrutiny of functional claims, which have been heavily exploited by patent trolls, and (3) expanding dedicated outreach and study with regard to patent polices and laws.107

B. Deficiencies in the various Federal Proposals

While many of the proposed reforms could have a major impact on patent litigation, none would provide a sufficient deterrent to the majority of patent trolling. First, the executive actions might not amount to much even if all the executive recommendations were implemented as planned. The recommendation of cost shifting legislation only adds support to the passage of the SHIELD bill with a similar proposal, and the recommendation to expanding studies of patent policies is merely a promise to find a solution. Second, the implementation of the SHIELD Act might cause a patent rights holder with limited financial resources to be discouraged from bringing a meritorious patent action against infringers who are known to be very successful and zealous in patent defenses. As a result, this legislative approach might have the unintended consequence of creating the core problem resulting from the English Rule thereby denying an opportunity for some legitimate claims of patent infringement from ever having their day in court.108

Other more minor proposals include expanding the covered business method review program, better training of patent examiners, heightened pleading standards for claims of patent infringement and revealing the “real party-in-interest.” The training of patent examiners to issue less vague and abstract patent claims109 and making patent review under the USPTO’s transitional program available to more patents would reduce the arsenal of patent claims available for patent trolling prospectively but would not directly stop patent trolling. The most likely result of revealing the “real party-in-interest” would not deter patent trolling but to assist receivers of cease and desists letters, some of whom have already taken private actions to compile the same information. Finally, the stricter pleading standards proposed by the Patent Litigation and Innovation Act would merely nationalize the local patent rules of several districts.

In summary, encouraging businesses to rise against patent trolls, making patent trolls less profitable, and reducing the arsenal available to patent trolls collectively have the effect of reducing patent trolling by an amount related to the economics and risk - thereby throwing the troublesome patent trolling problem to the market, after only slightly resetting the cost-risk parameters against them. However, small businesses cannot afford costly litigation, and even wealthy businesses would not willingly engage in litigation unless the licensing deal offered by patent trolls costs much more than litigation. The trolls will make every calculation before offering a deal to avoid this straight path to litigation. Thus, market participants would probably continue to pay off patent trolls to make these nuisance lawsuits go away, albeit at a lower price than at present. Therefore, these proposals serve, at best, as only a partial fix for the fundamental problem of patent trolling exploitation of patent litigation inefficiencies – by resetting the economic incentives somewhat against the patent troll. Notably, none of the preceding proposals to change federal law and the federal court system penalizes the patent trolls directly for their bad behavior.

C. One State Becomes the Vanguard in Fighting Patent Trolling
The states, as well as the courts, have realized patent troll’s exploitation of the patent system, and lawmakers backed by entrepreneurial money have tried to address the patent trolling problem at the state level. Their efforts focus on making the patent system more responsible to bad-faith patent assertion by creating a hostile environment for the filing of a patent infringement complaint, especially for those who are exploiting the system, by making it more likely that infringers accused in bad faith by patent rights holders get reimbursed for the accused infringer’s litigation costs.

The first state action occurred in 2013 when the State of Vermont filed a lawsuit against MPHJ Technology Investment, LLC, an entity allegedly with a track record of harassing Vermont businesses. Meanwhile, an act, taking effect on July 1, 2013, titled “Bad Faith Assertions of Patent Infringement,” was enacted.

The Vermont law allows targets of patent trolling to bring retaliatory actions (in state and federal district courts) to obtain compensatory damages and exemplary damages, plus costs and fees. The Vermont law created a factor-based test to determine when acts constitute bad faith patent assertions. The non-exhaustive factors that might indicate bad faith by the PAE include sending demand letters that lack basic information about the infringement claim or that seek payment of unreasonable royalty fees. On the other side, factors that suggest good faith patent assertion by an NPE include whether the PAE was the original inventor or an educational institution.

However, state actions face multiple limitations in restricting the activities of patent trolls. The long-term effect of these state actions is hard to predict, especially because this approach will eventually be judicially reviewed by federal courts regarding whether a state law restricting patent rights is, or is not, preempted by federal law. Individual state laws are subject to criticism for being non-uniform and suppressing the rights of patent holders. First, differing state laws might force multi-state corporations to employ state-specific defensive strategies against patent trolls; however, patent trolls are better equipped to formulate new manipulative strategies to overcome state actions. Second, state actions might impermissibly restrict the federal rights of patent holders thereby rendering the actions preempted. Hence, a better solution to the patent trolling problem would be a uniform approach throughout the states so as not to discourage legitimate patent infringement suits brought in good faith.

D. Private Party Tactics

One solution to the patent trolling problem is the creation of a public registry of demand letters. This enables small players to be aware of any shotgun tactics that are being used and why they might have been targeted by a cease-and-desist, license offer. An example is the Electronic Frontier Foundation’s Trolling Effects, which allows you to share and get information on demand letters.

Another solution is one where potential defendants can cooperatively form a litigation cost-sharing arrangement to lower individual costs; however, these contractual agreements often obligate members to litigate the suit to the judgment stage.

In conclusion, although all of those state and federal actions have their own merits, none of them is focused on the fact that the conduct of the patent trolls is wrong before the eye of the law and of equity. Rather, the state and federal legislators and administrative branches have echoed the outcry by businesses that the patent system is flawed and hurting the economy. Whereas none of the preceding proposals try to penalize the patent trolls for their bad behavior, they make the patent litigation less of a nurturing environment for patent trolls profitability,
especially by increasing the risk in losing a suit. However, the most progressive proposals also weaken the patent system as a whole by inhibiting the ability of some legitimate patent holders’ to litigate, good-faith, non-frivolous patent claims. The SHIELD Act or the Innovation Act might be overinclusive to include non-predatory PAEs with meritorious complaints. These unintended consequences and constraints on patent enforcement could inhibit legitimate claims, devalue patents, and endanger future innovation. In addition, these proposals might inhibit the free transfer of patents, which helps entities move assets in return for capital, such as for individual inventors, or allows the recirculation of capital to investors from failed companies.

III. The Rule 11 Analysis for Claims of Patent Infringement

Whatever one’s view on the positives or negatives of patent trolling, the economics of patent trolling rely on high patent litigation costs and inefficiencies in the patent litigation system to monetize patents by bringing dubious claims and forcing businesses to pay unwarranted license fees. Some of these inefficiencies stem from the sheer complexity and cost of patent litigation in general. However, other inefficiencies are caused by the structure and design of civil procedural rules, especially when those inefficiencies can be exploited. To combat the later, we propose that the judiciary should use Rule 11 sanctions against parties who objectively appear to be patent trolling.

A. Federal Rule of Civil Procedure Rule 11 Background

Manipulative behaviors of litigants to take advantage of inefficiencies in the legal system are not new. In 1937 when the Supreme Court of the U.S. proposed the Federal Rules of Civil Procedure (FRCP), the Court had concerns regarding frivolous lawsuits. Rule 11 of the FRCP clearly renounces any conduct before the court that is designed to serve “an improper purpose such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.”

The main purpose of Rule 11 of the FRCP (“Rule 11”) is to deter bad litigation conduct and to reduce the growing cost and burdensomeness of civil litigation. Rule 11 arises from the judiciary’s inherent power to sanction parties and attorneys for equitable reasons. This includes for frivolous or vexatious litigation.

In U.S. courts, an attorney of record must sign every pleading, written motion and other paper, unless the party is unrepresented. By signing, the attorney is representing to the court that the paper is certified as being nonfrivolous in its content and purpose to the best of the attorney’s knowledge, information, and belief. Similarly, an unrepresented party must certify every paper submitted to the court. Therefore in theory, neither side should intentionally engage in harassing, causing unnecessary delay, or needlessly increasing the cost of litigation, except under the threat of sanctions.

Rule 11 has requirements for both asserted facts and legal arguments. Rule 11 requires that factual contentions before a court “have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.” Rule 11 requires that “the claims, defenses, or other legal contentions” before a court must be “warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.”

If Rule 11 sanctions are proper, then the court has the discretion to impose sanctions on the attorney and/or the party. The power of the court to sanction attorneys for frivolous complaint filing was a continuation of former Federal Equity Rule 24, which punished perceived
litigation abuses by weeding out frivolous, unnecessary or unfounded pleadings.\(^{133}\) According to the 1983 amendment, Rule 11 sanctions were mandatory if the elements were met; however, such a strict approach turned out to be unsuccessful in practice, and Rule 11 was eventually modified such that sanctions are now available after a motion is filed by a party to the litigation.\(^{134}\) In addition, the district courts were expressly given discretion to file sua sponte motions for Rule 11 sanctions because courts appeared reluctant to intervene without a request from one of the parties to the litigation.\(^{135}\) Today, federal courts have tremendous discretion to proactively detect and punish Rule 11 violations in order to deter bad litigation conduct and to ensure the proper operation of the legal system.

**B. Rule 11 and Asserting Patent Infringement Claims: Reasonable Pre-Filing Investigation**

The following sections explain the current application of Rule 11 sanctions in the context of assertions of patent infringement. In a patent case invoking Rule 11 sanctions, “courts are often asked to weigh whether the substantive allegations are so weak that they are not grounded in fact and legally tenable.”\(^{136}\) A party claiming patent infringement must perform a good-faith, two-step analysis before filing the lawsuit or counterclaim. Rule 11 awards against signing attorneys are even rarer in patent infringement cases than are the cost shifting provisions provided for in the patent statute’s award for an “exceptional” case.\(^{137}\)

**1. Standards for Enforcing Rule 11 Sanctions for Bad Faith Patent Infringement Assertions**

Through appellate opinions, the Federal Circuit has shaped Rule 11 jurisprudence in the context of patent infringement.\(^{138}\) Generally, Rule 11 requires all factual contentions to have evidentiary support that is sufficient, or at least likely to be sufficient after discovery, and all claims to be warranted by existing laws or nonfrivolous argument to change the laws.\(^{139}\)

In the context of patent infringement, Rule 11 sanctions have been upheld by the Federal Circuit if the claimant’s attorney failed to perform a “reasonable inquiry,” i.e. due diligence in investigating the facts prior to filing the lawsuit or counterclaim. Rule 11 awards against signing attorneys are even rarer in patent infringement cases than are the cost shifting provisions provided for in the patent statute’s award for an “exceptional” case.\(^{137}\)

These Rule 11 requirements specific to patent law in district courts have to be applied under the regional circuits’ standards for Rule 11 because in reviewing patent cases the Federal Circuit defers to each regional circuit law as long as a certain issue is not exclusive to patent law.\(^{144}\) However, the regional circuit standards are generally uniform as all have adopted an objective standard, with only slight variations in specific language.\(^{145}\) The regional circuits’ consensus is that at the time of filing of a complaint for patent infringement i) the claimant must independently construe the patent claim, ii) the claim construction must be objectively sound and iii) the claimant’s infringement judgment must be made after exhausting all available methods publicly known.\(^{146}\)
2. Attorney’s Independent and Objectively Reasonable Construction of the Patent Claim

For the first reasonable inquiry requirement, the claimant must be able to provide adequate support for a claim construction that renders the alleged infringer’s conduct within the scope of the claim(s). Because this judgment depends on a question of law as to claim construction, it is subject to the Rule 11(b)(2) requirement that all legal arguments be non-frivolous. Therefore, an attorney seeking to prosecute a patent infringement claim should not rely solely on their client’s claim interpretation. Instead, the attorney has an affirmative duty to perform an independent claim analysis.

For example in S. Bravo, the plaintiff’s lawyers failed to independently construe the patent claims at issue and compare their claim construction with the accused devices or products. Although the patenteen conferred with the lawyer regarding his observation of the accused device, such blind reliance on a lay opinion was sanctionable.

In addition, the claim construction must read on the apparatus or process/method, and under the Rule 11(b)(3) there must be evidentiary support for all factual allegations as to the infringement. Because all questions of fact will be determined later in litigation, this requirement of evidentiary support is germane to not overstressing Rule 11 sanctions. In fact, the sufficiency of evidentiary support should be determined not based on the court’s (therefore the correct) claim construction but any independent, good-faith construction relied on in the complaint.

For example in Antonious, Rule 11 sanctions were not proper even though the plaintiff attorneys’ patent claim construction was inconsistent with the court’s claim construction because the claimant’s argued-for claim construction was not frivolous. Although the court’s claim construction did not read on the accused infringer’s products - and thus there could be no patent infringement - this was immaterial because the claimant’s construction was not frivolous when it was supported by the evidence and read on the accused infringer’s products.

Preclusive effects from concurrent proceedings can affect Rule 11 inquiries into sanctions. In Phonometrics, the patent infringement claimant owned a patent claiming a device that computed, recorded and showed the cost of long-distance phone calls via a digital display. Previously, the patent owner had brought patent infringement suits against various manufacturers and sellers of telephone equipment. In addition, the patent owner had concurrently brought patent infringement suits against various hotels. The complaint in Phonometrics was against a hotel and was based on a claim construction where a digital display showed the cost to anyone, including hotel employees.

In one of the manufacturing suits, the Federal Circuit ruled on its claim construction and disagreed with the patent owner’s construction to hold that the claim limitation “digital display” did not including a machine-readable device. Subsequently, the Federal Circuit concluded in a manufacturing suit that the claim scope of the “digital display” was limited by the language “substantially instantaneous;” as a result, only a hotel guest caller, but not hotel employees, must be able to perceive the cost of long-distance call through a digital display during and after the call.

The defendants in Phonometrics moved for Rule 11 sanctions against the attorney that filed the patent infringement complaint. The district court granted Rule 11 sanctions, and this decision was upheld by the Federal Circuit based on the following two premises: 1) the patent infringement claimant must voluntary dismiss any claims incongruent to a precedential claim construction, even if the precedents came down after the filing of the claim and 2) although there is a possibility of abolishing a precedential claim construction from a previous case during
litigation, the precedential claim construction is binding against subsequent litigants within the same context.\textsuperscript{164}

3. Infringement Judgment only after Exhausting All Publicly Available Materials and Information

For the second reasonable inquiry requirement, the claimant’s attorney must attempt to obtain or inspect an allegedly infringing product, apparatus or process before making an infringement judgment. Attempts to obtain or inspect must exhaust all publicly available methods, so far as it could be done without judicial recourses such as the discovery process.

In \textit{Jedin}, the Federal Circuit reversed a denial of Rule 11 sanctions ruling for a lack of due diligence in trying to obtain or inspect a non-consumer product, a barcode scanner used by the U.S. Post Office.\textsuperscript{165} This holding is particularly striking because the Federal Circuit showed very little leniency to the reality that the claimant’s claim construction obviated the necessity of a close inspection of the accused device.\textsuperscript{166} Thus, the second step could be written as follows: the claimant must at least attempt to obtain or inspect, albeit it might turn out to be impossible to do so, the accused infringer’s product or process regardless of the necessity in examining the product to conclude the patent claim reads on it.\textsuperscript{167}

In \textit{Q-Pharma}, the Federal Circuit affirmed a denial of Rule 11 sanctions although only a very cursory analysis of the defendant’s product was performed.\textsuperscript{168} Q-Pharma sued a lotion manufacturer for patent infringement of its patent related to lotions containing Coenzyme Q\textsubscript{10} ("CoQ\textsubscript{10}").\textsuperscript{169} Rule 11 sanctions were not imposed against Q-Pharma’s attorneys for failure to performing a chemical analysis before filing the patent infringement claims to confirm the composition of the allegedly infringing lotion.\textsuperscript{170} The court held that Q-Pharma attorneys met the Rule 11 requirements by 1) interpreting the patent and concluding the limitation “therapeutically effective amount” meant any amount with no specified threshold and 2) acquiring a sample of the CoQ\textsubscript{10} lotion to review its label and other advertising materials in order to conclude that the lotion contained at least some CoQ\textsubscript{10}.\textsuperscript{171}

In \textit{View Engineering}, the Federal Circuit affirmed an imposition of Rule 11 sanctions against a defendant who failed to exhaust the judicial process in its pre-claim investigation.\textsuperscript{172} View Engineering initially sued Robotic Vision Systems for patent infringement of View Engineering’s patent.\textsuperscript{173} In response, Robotic’s attorney brought counterclaims for patent infringement of several of Robotics patents.\textsuperscript{174} The pre-filing investigation by Robotic’s attorney merely consisted of obtaining advertising materials because “View refused to permit examination of its machine or drawings.”\textsuperscript{175} The Federal Circuit affirmed the sanctions against Robotic’s attorney by reasoning that the attorney “had the opportunity to file immediately for the protective order that eventually resulted in discovery.”\textsuperscript{176} Thus, the pre-complaint-filing inquiry should not stop until publicly available options are exhausted, including judicial recourses in case of counter-claims.

While the \textit{Q-Pharma} opinion is on the lenient side and the \textit{View Engineering} opinion is on the strict side, the Federal Circuit distinguished \textit{Q-Pharma} from \textit{View Engineering} in that “an infringement analysis can simply consist of a good faith, informed comparison of the claims of a patent against the accused subject matter.”\textsuperscript{177} The Federal Circuit held that Q-Pharma’s claim interpretation was independent and in good faith, and it obtained and analyzed the accused product to the point where the analysis led to a plausible infringement claim.\textsuperscript{178} Whereas in \textit{View Engineering}, Robotic’s attorney seemed to have quickly filed a counterclaim of patent
infringement without due diligence, perhaps because the attorney believed being accused of patent infringement excused a reasonable inquiry for any counterclaim of patent infringement.

4. Putting the Two Steps of the Reasonable Inquiry Together

The PAE must attempt to obtain or inspect infringing product or process regardless of its necessity determined upon the completion of the first reasonable inquiry step. However, the PAE may then stop at a point when observation or analysis of the accused apparatus or method leads to a plausible claim of infringement upon the independent and good faith claim construction from the first step.

A plausible excuse for stopping the second reasonable inquiry step, which might fulfill the Rule 11 duty, must be distinguished from a plausible claim of infringement. In View Engineering, Rule 11 sanctions were warranted when a party only asked the other party to cooperate, which turned out to be futile, and did not follow through with judicial recourses to compel the cooperation. Although the original defendant raised the excuse of the non-cooperativeness of the plaintiff regarding the defendant’s request to produce certain information to determine infringement, without exhausting available judicial recourses, the second step was inadequate under the Rule 11.

Nonetheless, there is an impracticability excuse for stopping the second step without obtaining adequate evidentiary support for infringement claims. Such an excusable circumstance was evidenced in Hoffman La Roche, Inc. v. Invamed, Inc., where a product made by a patented process was merely reversed engineered by a competitor. However, the details of the competitor’s manufacturing process were hidden from the public, which made the patent owner highly suspicious. The patent owner sued for patent infringement of its manufacturing process, and stated that “plaintiffs are presently not aware of any analytical technique which can be used to definitively establish that the [generic form of their proprietary drug] was made by use of the invention claimed in [Syntex’s patents].” In the course of litigation, the defendant disclosed the process at issue, and the plaintiffs voluntarily dismissed the suit after concluding non-infringement.

Subsequently, the defendant moved for Rule 11 sanctions. The Federal Circuit agreed with the district court’s denial of Rule 11 sanctions where, although the plaintiffs could have assumed a lack of factual support for non-infringement when the pre-filing investigation met a dead-end, they chose to file suit to engage in discovery. Therefore, the patent holder could seek a judicial recourse to investigate the infringement where there was no practical alternative to discovery, unlike asserting a counterclaim in on-going litigation.

The reasonable inquiry requirements under the Rule 11 can be detailed as follows: before filing a complaint, the claimant’s attorney 1) must independently construe the patent claims in good faith, which may differ from the court’s construction; 2) must initiate a factual investigation even though their independent claim construction obviated this necessity in the abstract; and 3) must not stop the factual investigation until the facts lead to a plausible claim of infringement or the investigation becomes impracticable by all publicly available means other than filing the complaint. In addition, it should be noted that the courts cannot base a Rule 11 sanction on a disagreement with the claimant’s claim construction.

5. New Legal Theories and Arguing for Change of Law

Despite preclusive effects and Rule 11 sanctions, parties to litigation are allowed to argue for a change in the law so long as it is a non-frivolous argument. However, the timing and
place of the argument for a change of law matters. In *Phonometrics*, the litigant’s insistence on the same claim construction despite previous final judgments against it resulted in a proper finding of Rule 11 sanctions. The Federal Circuit implied that if the attorney wanted to make argument for the change of law, they should have appealed the previous rulings rather than bringing suits against different defendants to then arguing for a change in claim construction. 

It is logical that a claimant may not argue for a change of the claim construction just because the lawsuit was brought against different defendants. While the claimant should not be discouraged in bringing lawsuits against other defendants after one lawsuit fails, the judiciary should not waste time and resources to read and interpret the same patent redundantly but should rely on the factual differences only if an opposite result is warranted.

6. Recent Developments in Rule 11 Jurisprudence - Acknowledging Patent Trolling

In *Eon-net*, the district court held that Eon-Net LP brought a baseless claim in bad faith because its patent claim construction was unwarranted by the written description and the lawsuit exhibited “indicia of extortion.” Eon-Net had filed nearly identical patent infringement complaints against almost one hundred different defendants and offered quick settlements at prices far lower than the cost of litigation. On appeal, the Federal Circuit upheld the district court’s imposition of Rule 11 sanctions against Eon-Net.

Eon-Net was a holding company for a patent portfolio of document processing systems. The district court found that Eon-Net did not perform an objective evaluation of the claim and, thus, failed to satisfy the Rule 11 requirements. The court ordered Eon-Net to pay over $600,000 in Rule 11 sanctions combined with attorneys fees and costs - after also declaring this an exceptional case pursuant to 35 U.S.C. § 285. This sum was approximately the cost of litigation to get to the summary judgment stage in the district court.

In *Eon-Net*, the plaintiff Eon-Net tried to examine the defendant’s website, which allegedly infringed Eon-Net’s patent on a document processing system; but the court noted that a proper pre-filing investigation “requires counsel to perform an objective evaluation of the claim terms when reading those terms on the accused device.” The district court had found that Eon-Net brought a baseless claim in bad faith because its claim construction was unwarranted by the written description. Furthermore, the court noted that Eon-Net showed “indicia of extortion” by bringing multiple claims with a demand for a quick settlement at a price far lower than the cost to defend the litigation. Because Eon-Net did not perform an objective evaluation of the claim, however well the claim construction read on the accused website, it failed to satisfy the Rule 11 requirements. On appeal, the Federal Circuit explained that the defendant did not infringe any claim at issue based on the patent disclosure, despite the plaintiff’s attempt to contradict its own patent disclosure.

In *Eon-Net*, the Federal Circuit acknowledged the tendency of the patent system to impose high costs on accused infringers regardless of their liability can be manipulated by NPEs because NPEs are immune to counter-claims. Eon-Net might lose “some licensing revenue should its patents be found invalid or if a court narrowly construed the patents” but it would not “face any business risk resulting from the loss of patent protection over a product or process.” Thus, Eon-Net would have little to lose while accused infringers face the possibility of being viewed as patent infringers by the public. Furthermore, defendants were required to answer complaints and comply with other court proceedings, including discovery, without an assurance of the recovery of litigation cost due to the American Rule. This is true even if the accused infringers are highly confident about their probability of success on the merits.
Notwithstanding the judiciary’s identification of Eon-Net as a patent troll that present inequities in patent litigation, the precedent created by Eon-Net falls short of Rule 11’s potential to prevent frivolous and unfounded pleadings because it relies on a defendant’s filing of a Rule 11 motion after incurring litigation expenses (such as discovery costs). As discussed in Part I, patent trolling behaviors pressure defendants to settle before the infringement lawsuit is ever filed, mainly because of the uncertainty of reimbursement for litigation costs, as well as the threat of an injunction against ongoing business. In addition, Rule 11 motions themselves are subject to Rule 11 sanctions, which add extra costs to filing of Rule 11 motions. Both the uncertainty and high costs of litigation make license fee and settlement payouts to patent trolls a sensible choice from the perspective of financial risk management.

In Raylon, a patent owner of a technology for a handheld, police-ticketing device sued multiple defendants for patent infringement, and the cases were consolidated in the Eastern District of Texas. The defendants of a patent infringement suit moved for Rule 11 sanctions, as well as attorneys’ fees and costs for being an exceptional case. The district court had considered whether the argued for damages were not credible and if the suit had been “brought only to coerce a nuisance value settlement.” The district court’s Rule 11 inquiry involved analyzing “Raylon’s damages model and early settlements to determine whether it brought its suits in good faith or merely to obtain nuisance value settlements.” The court opined that “in some situations, a plaintiff asserting a large damages model while making very low offers in the case may indicate that the plaintiff realizes its case is very weak or even frivolous” and that the amount of damages “may be indicative of the good-faith nature with which the case is brought.” The district court concluded that Raylon’s objective intent in bringing the suit was in bad faith and awarded Rule 11 sanctions but denied holding this an exceptional case.

On appeal, the Federal Circuit vacated the district court’s Rule 11 decision and its exceptional case decision. The Federal Circuit opinion reiterated that the standard for Rule 11 is an objective one, meaning the subjective intent of the patent infringement claimant in bringing the suit is irrelevant. Under Fifth Circuit precedent, “the standard under which an attorney is measured is an objective, not subjective standard of reasonableness under the circumstances.” The Federal Circuit found Raylon’s proposed claim construction to be frivolous because it’s argument about the pivotally mounted display being adjustable from the point of view of the viewer instead of relative to the device housing was “so unreasonable that no reasonable litigant could believe it would succeed,” iLor, LLC v. Google, Inc., 631 F.3d 1372, 1378 (Fed. Cir. 2011), and thus warrants Rule 11 sanctions.

IV. Proposal for a New Rule 11 Inquisition into Patent Infringement Claimants

Unfortunately, the current passive application of Rule 11 falls short of its potential to shield commercially active businesses from patent trolling. The main problem with the current application of Rule 11 is that defendants must proceed well into litigation, expending time and money, just to get to a potentially favorable Rule 11 motion ruling under which attorneys’ cost and fees may be awarded in favor of the defendants. Also, regardless of how the litigation turns out, the PAE may repeatedly go after other defendants, again aiming for income from either settlements or license fees.

However, we believe existing civil procedures under Rule 11 can help combat the patent trolling problem based on our proposed application of Rule 11 using a pre-defined suspect class for identifying parties with tendencies of bad faith patent assertion.
A. Applying Rule 11 Sua Sponte Using a Suspect Class to Combat Patent Trolling

As an equity rule, Rule 11 sanctions can be applied sua sponte, and the court has discretion as to the imposition of the sanctions. This equity-driven approach has significant advantages, flexibility and immediate implementation, over legislative and administrative actions. First, it can be applied flexibly because no set criteria are provided with respect to what specific types of conduct can be sanctioned by the court. This would be a great advantage against patent trolls who can adjust their quickly strategies to new statutes and requirements. Second, it requires no new legislation or agency rule-making because the legislative history and underlying policies of Rule 11 support this equity approach as being inherently within a federal court’s power.

A sua sponte approach is favored as a way to move the inquiry to an earlier stage in order to protect the commercially active defendant from legal costs just to get a chance to move for a Rule 11 motion in court. The sua sponte approach can be used to delay the proceeding, and the accumulation of legal costs to the defendant, before the defendant even is required to file its answer. By aggressively implementing sua sponte Rule 11 motions, courts can frontload a more stringent pleading burden on suspect patent infringement claimants. In order to satisfy the reasonable inquiry requirements of Rule 11, the PAE must persuade the court that its own claim construction reads on the accused apparatus or method. Unless there is showing of both legitimate factual and legal grounds supporting the infringement, the defendant would not have to meet any burden of proof until the Rule 11 motion is denied.

In addition, courts may use Rule 11 sanctions imposed for patent trolling to create preclusive-type effects or injunctions, such as a provisional ban on the PAE from filing another generic complaint of patent infringement against any defendant, unless the PAE can improve the grounds for its complaint by performing the sufficient pre-litigation investigation required to pass Rule 11 muster.

The proposed application of Rule 11 requires the court to be proactive in weeding out patent trolling and is based on defining a suspect class that is predisposed to patent trolling and thus is to be held to a stricter scrutiny for patent infringement assertions. The proposal involves identifying a suspect class based on the PAE’s complaint and applying a closer scrutiny for Rule 11 sanctions in situations where patent trolling is more likely. When a PAE is identified as a member of the suspect class, the court moves sua sponte for a Rule 11 hearing in which the plaintiff is required to prove that the legal complaint 1) is based on independent and reasonable claim construction and 2) is supported by sufficient facts leading to a conclusion of infringement or of an appropriate reason not to include such facts.

B. Suspect Class Factors Indicative of Bad Faith Patent Assertion

There are many characteristics and behaviors indicative of patent trolling, as mentioned in Part I. In order to create an easy to apply test, quantitatively measurable characteristics are preferable in order to relieve the court from having to do any in-depth inquiry while enabling a mechanism to avoid undue delay and diversion of the court system’s resources.

Some easily determinable characteristics indicative of a patent infringement claimant’s predisposition to patent trolling are 1) the litigant was not in privity of employment with the named inventor even through subsidiaries, affiliates, or its business predecessor or successor (leaving merely a relationship through contract originating from the transfer of intellectual property); 2) the litigant does not make available any commercial products or services (in relation with the patent); and 3) the lines of business in which the litigant has engaged for the
past three years has no commonality with the subject matter of the patent. If two or more of the mentioned characteristics describe an entity, the entity’s patent infringement complaint should be subjected to a higher scrutiny. 

These objective characteristics help a court discern whether the entity is driven by using technology for the good of the public or is merely relying on patents as a financial scheme or core business model. These indicia of patent trolling would serve to help define a suspect class that requires a higher scrutiny. In contrast, users of technology are presumed to be less likely to engage in bad faith patent assertion and are held to the traditional level of scrutiny. 

Although identifying patent trolling would be more accurate if the court looks directly into the conduct of the PAE, a predisposed suspect class is preferred. As mentioned in Part I, some patent trolling is used by entities that are not patent trolls, and similarly, some NPE’s have legitimate claims of patent infringement. The proposed suspect-class approach would trigger the specialized scrutiny even if the PAE is a not a patent troll, and the scrutiny would inquire into the claimant’s good faith on a claim-by-claim basis. Similarly, an NPE with a legitimate assertion of patent infringement should easily pass muster of the sua sponte Rule 11 inquiry.

For example, a patent holder may choose to send out cease and desist letters in bad faith. The letter offers a licensing deal for the amount just below the litigation cost, and the patent is invalid or not infringed. A bargain licensing deal for a worthless patent is very typical in patent trolling; however, to figure out if a patent is valid and infringed and if the offered licensing fees are sensible, the litigation must proceed beyond the Markman hearing stage. 

For example, during a Rule 11 motion hearing, the courts would inquire into previous litigations brought by the same party with regard to the same patent against other parties, as well as into the patent claim language. These previous litigations, if they have proceeded to the Markman hearing stage, would have left a precedent for the claim construction and might be inconsistent with the claimant’s current claim construction. However, Rule 11 explicitly allows “a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.” While this provides leeway to a complaint based on a frivolous construction, the purpose of the proposed sua sponte motion approach is to frontload the plaintiff’s burden of proof rather than deciding Markman hearing matters beforehand.

C. Examples of Applying the Proposed Suspect Class and Rule 11 Scrutiny Analysis

Because there are many characteristics and behaviors indicative of patent trolling, it helps to understand this proposed implementation of Rule 11 using some examples. Also, it is important to keep in mind those NPEs that are often not defined as being patent trolls: universities, individual inventors and startup businesses.

1. **Higher Rule 11 scrutiny should be triggered for the garden-variety patent troll**

   This proposed application of Rule 11 should trigger scrutiny for Rule 11 sanctions for any entity that fits the canonical features of a patent troll. If at least two of the three predispositions to patent trolling are present, then the court should move sua sponte for a Rule 11 inquiry. However, even a true patent troll who actively intends to extort a defendant and exploit a patent can pass muster of the proposed heightened Rule 11 scrutiny if their asserted infringement of their patent claim was objectively reasonable. This allows NPEs to assert the legal right that they own with only a small deviation in procedure and without any additional burden.

2. **Higher Rule 11 scrutiny should be triggered for all NPEs, whether troll or not**
This proposed application of Rule 11 should trigger scrutiny for Rule 11 sanctions for any NPE that has no affiliation with the inventive entity that produced the patented technology because at least of 2 of the 3 predispositions to patent trolling would be present. This would not trigger heightened Rule 11 scrutiny for patent infringement claimants that are universities if they invented the patented technology and the universities’ line of business could be considered to be developing technologies related to the patented subject matter.

Again, just as for bona fide patent trolls, if an NPE can pass muster of the proposed heightened Rule 11 scrutiny then any legitimate claim of patent infringement should avoid Rule 11 sanctions with little effort despite being brought by an NPE.

One downside of imposing the higher scrutiny is that bringing a legitimate claim can be hindered by the imposition. Even the most discerning imposition may result in some hardship to an innocent party, as in the following hypothetical situation. A group of inventors, newly formed less than three years ago, made a breakthrough that broadly covered an entire industry but was deprived of the deserved benefit because they lacked the resources to commercialize their invention and were not paid for the patent rights to the invention. The infringers knew that courts would not allow the inventor to proceed without satisfying reasonable inquiry for each defendant, which was prohibitively expensive for the inventor group with very limited resource.

Here, the inventor group’s only option is to bring an action against patent infringers and satisfy the reasonable inquiry requirements. If the patent infringement claimant succeeds on its first lawsuit then, other infringers would deem the patent rights more seriously. Consequently, even for this situation, the NPE with a legitimate claim of infringement would experience only a delay in compensation for the invention. Meanwhile, the court docket is cleared up because even meritorious complaints are filed after a single pilot complaint is filed and adjudicated.

In addition, this proposed application of Rule 11 should trigger scrutiny for patent trolling behavior, regardless of the type of entity, including universities. Thus, there is no specific exception for non-profit universities; however, universities should avoid Rule 11 sanctions with little effort if the patent infringement claim is based on patented technology it invented or if its pre-litigation investigation was objectively reasonable as required by Rule 11. Thus, this approach should only deter actual patent trolling by universities but not legitimate patent infringement suits by universities.

3. Higher Rule 11 scrutiny should be triggered for commercially active entities that turn to patent trolling

This proposed application of Rule 11 should trigger scrutiny for patent trolling behavior by any entity, regardless of the type of entity. This includes nonNPEs. Even commercially active entities might attempt to assert patent claims wholly outside the scope of any of the technologies present in their products or just tangentially related to their business. In other words, a nonNPE can go patent trolling. The proposed indicia bad faith patent assertion should classify these patent infringement claimants as a non-practicing entities for the patent claims at issue that protect products that are outside the scope of their products. Then if one other of the remaining two factors is present, a higher Rule 11 scrutiny should be triggered sua sponte by the court. In this way, tangential or unrelated patent infringement claims can only be asserted if the patent infringement claimant invented the technology itself or has some affiliation with the inventive entity stronger than merely being an assignee of the patent.

This aspect of the proposal is important because large, cash-laden corporations might soon do the most damage by patent trolling. In the past, this might have been suppressed by the
idea of mutual assured destruction. But in principle there is nothing in patent law, except competition laws/antitrust law, preventing the most commercially successful corporations from buying patents just to extort income from others or even to destroy smaller companies from developing new markets that merely hope to produce products for some day in the future. As long as the aforementioned legal asymmetries are present and manipulated, patent trolling by these “noncompeting but commercially active” entities does just as much harm to judicial efficiency and the integrity of patent system as NPE-type patent trolling.215

4. Patent aggregator goes patent trolling

By definition, patent aggregators are NPEs, but they might heavily license patent rights to commercially active entities. Although there is nothing particularly unique about aggregators in this discussion, the intent of the entity in asserting patent rights is important. Aggregators might be asserting patent rights for the sake of their licensees and for defensive purposes only, instead of as a bullying tactic for receiving income in a simple business model. Again, the analysis is focused on the legitimacy of the claim of patent infringement. Thus, aggregators will get no special treatment; however, the court should consider the licensing activity and potential injury to any licensee. In addition, aggregators might use patent pools to create industry standards. This type of behavior is economically beneficial to the public and should not be a burden when those patents are asserted, even if no one is yet actively practicing the patented technology. Again, the analysis is focused on the legitimacy of the claim of patent infringement.

5. Patent privateer closely related to an inventive, commercially active entity

With regard to their origination, patent privateers are very different from the typical patent troll because the original patent owner invested research into the invention with plans of practicing the technology. Then for legal convenience, the patents were transferred to a closely related entity that is tightly associated with the original inventive entity to monetize the intellectual property in order to recoup its investment. However, despite the entity’s history, there is nothing stopping the privateering entity from becoming a patent troll. Again, as long as the aforementioned legal asymmetries are present and manipulated, the proposed application of Rule 11 should sanction these entities for dubious claims of patent infringement. In the future, there might be a need for a more nuanced analysis of the affiliation factor indicativeness of a predisposition to patent trolling in the proposed inquiry into triggering a sua sponte Rule 11 scrutiny.

D. How Courts Could Consider Sua Sponte Rule 11 Motions for Patent Infringement Claims

We propose that whenever a federal district court encounters a patent infringement claim or counterclaim, the court should always apply the proposed Rule 11 scrutiny based on whether a claimant is a member of a suspect class.

The evaluation could work like this. When a patent infringement complaint is filed, the court would note the named inventor(s) and do a quick search of public PAIR and patent assignment records to find the first named assignee and any chain of title. Because the first assignee is often an entity involved in some relationship with the inventive entity, it may be presumed that the first named assignee is not a patent troll; if it is a patent troll then some reward has been passed to the inventive entity. Next, the court should consider the commercial activities of the claimant - a simple background search, such as by using Google, could reveal what type of
commercial operation, if any, the claimant is conducting. If the claimant 1) makes no products even distantly related to the patented technology and 2) is not the first assignee, then a presumption of a predisposition for patent trolling could be found that triggers Rule 11 scrutiny for sanctions. However, if there has been more than one assignment for reasons of merger or acquisition and no products are made, the scrutiny should be delayed for the time period a reasonable company needs to develop a product.

Once it is determined that the claimant is a member of the suspect class, then the court should move sua sponte for a Rule 11 hearing. The order below could be used as a template.

ORDER

On ______________, ________________ filed a patent infringement claim against ____________________ with the Court with regard to the U.S. Patent(s) No. ______________________________.

This Court subsequently read the public records of the United State Patent and Trademark Office with regard to said Patent(s) revealing the first named inventor, ________________________, and the recorded assignments of _________________________________. As such, the Court has concern that this lawsuit might not be grounded upon a reasonable inquiry as required by the Rule 11 of the Federal Rules of Civil Procedure.

This order would stay litigation until the claimant responds, thereby giving the accused a temporary reprieve from having to defend against the claim until the claimant passes Rule 11 scrutiny. This scrutiny requires that the claimant amend its complaint to include 1) a plausible claim construction for each patent claim allegedly infringed, 2) the name of attorney who independently and professionally construed the claim(s), and 3) sufficient facts leading to the infringement conclusion or an appropriate reason not to include such facts.

More importantly, the order needs not indicate why the Rule 11 scrutiny is triggered, and the claimant may not respond to the order by arguing why it should not be categorized as the suspect class. Because the Rule 11 applies to every complaint filed by anyone, the Rule 11 requirements must be present in every complaint filed by anyone. Although the claimant bears a much lower burden under the notice pleading rule, the rule only applies to pleading requirements but not to pre-litigation investigation. Thus, leaving out details of factual and/or legal support in complaints is not a sanctionable behavior, but not being ready to immediately provide support in response to a Rule 11 motion is sanctionable. Although courts might be reluctant to act sua sponte because of the effort and risk of being overturned, if the courts can act promptly and accurately with regard to indentifying a patent-trolling suspect class, then these concerns might fade.

E. A Parallel Sua Sponte Rule 11 Motion Approach based on Improper Purpose: Inquiry into Past Conduct

An alternative, to Rule 11 sanctions for failure to perform a reasonable inquiry before filing the claim of patent infringement is sanctioning parties for using litigation for an improper purpose. The courts’ analyses for the imposition of Rule 11 sanctions in patent infringement cases have focused exclusively on the soundness of infringement claims, thereby neglecting the improper purpose clause. Nonetheless, the improper purpose clause can be immediately implemented by district courts in addition to the pre-filing inquiry.
Federal courts can dismiss any complaint that shows improper purpose pursuant to Rule 11.\textsuperscript{216} Courts may rightfully disfavor plaintiffs found to be in use of harassing tactics during Rule 11 motion hearings, as the reasonable inquiry is not solely based on the claimant’s investigative conducts but also on the circumstances indicating bad faith of the complaint.\textsuperscript{217} A finding of improper purpose is very fact specific and should be made by the court case by case, but there is a wealth of precedents in which the court distinguishes similar kinds of litigation conduct based on the circumstances.\textsuperscript{218}

Anytime the court thinks it has encountered a patent trolling PAE, the court should move for a sua sponte Rule 11 motion based on either the reasonableness of the pre-filing inquiry or based on the suspicion of an improper purpose. Rule 11 gives the court the power to subpoena. Thus, the court can require the claimants to present past cease and desist letters and past patent infringement complaints filed regarding the patent-in-suit. This may or may not give the reason to suspect the plaintiff for harassing defendants; however, it at least provides patent trolls reason to think twice before filing a complaint against everyone entity they can dream up.

F. Goals of the Proposed Sua Sponte Applications of Rule 11 for Bad Faith Patent Infringement Claims

By determining the reasonableness of pre-filing investigation prior to the answer stage, courts may destroy patent trolls’ ability to threaten innocent businesses with the possibility of a temporary injunction during litigation. This would disrupt the patent troll’s business model significantly, delaying or removing the forecast of a large legal expenditure and the possibility of a negative public perception of the business caused by an accusation of infringement.

A court can never substantively discriminate against an entity without a statute’s mandate, but a court may procedurally subject any entity to a higher scrutiny under the same substantive legal standard. Whereas the economic consequences of frivolous patent litigations are in dispute, the shot-gun approach and the manipulative licensing offer employed by patent trolls are indisputably burdening the judiciary by increasing the volume of the court docket. They exhaust judicial resources, and they encourage companies not to seek justice by financially impelling them to give up without a legal fight. Therefore, by focusing on deterring entities from threatening the filing of infringement complaints and extracting unwarranted licensing fees, a court may achieve justice without substantively discriminating one active participant in the economy from another.

Also, the scrutiny should be nondiscriminative to any specific type of business, namely their commercial status as a PAE or NPE. Rather the criteria of scrutiny should focus on suppressing the types of conduct that are incongruent with saving judicial resources.

In applying a higher scrutiny to the suspect class of patent trolls, the court would initiate a sua sponte motion at an earlier time and shift the burden of proof to the patent infringement claimant prior to the accused infringer having to file an answer. In actual practice, however, sua sponte motion has been rarely initiated. Thus currently, one of the parties to the litigation must initiate a Rule 11 inquiry by filing a motion for Rule 11 sanctions, and the moving party must argue for the motion and explain why sanctions are justified. This burden of proof makes not only the imposition of sanctions difficult but also gives the leverage to the patent trolls by postponing the sanctions to later phases of litigation. Therefore, a court initiated motion is preferable in solving the patent-troll problem because it allows screening out abusive pleadings prior to the accused defendant having to take any action to defend against the suit.
In addition, because the “reasonable inquiry” requirements of Rule 11 must be satisfied at the time the plaintiff files the complaint, a sua sponte Rule 11 motion can precede the answer to the complaint and accordingly halt the proceeding before the defendant is compelled to act and forced to incur legal expenses.

This proposed implementation of Rule 11 would encourage the court to impose a higher scrutiny at an earlier time in litigation whenever a “suspect class” asserts a patent claim. We also lay out a set of criteria to help courts classify certain entities that are disposed to bad faith patent-trolling, e.g. asserting dubious claims of patent infringement to “shakedown” defendants for cash. In this way, Rule 11 sanctions can be used to pre-screen a variety of claimants before progressing into the post-complaint stages of patent litigation, where legal costs start piling up on accused infringers.

Summary

The gist of the proposed sua sponte Rule 11 motion is not screening out unlikely-to-succeed claims, which should be dealt under the motion to dismiss or summary judgment, but deterring frivolous claims by time-shifting scrutiny of the plaintiff’s claim in order to protect the defendant from having to incur legal costs to defend against a baseless claim of patent infringement. Under Rule 11, the independent interpretation of a patent claim must be objectively reasonable, and a frivolous claim based on an untenable claim construction would not survive the first reasonable inquiry requirement step as a matter of law and should be dismissed without prejudice.\textsuperscript{219} Also, the court can require the claimant to show that their proposed claim construction reads on the infringing apparatus or method. If the claimant has not done any investigation followed by an infringement analysis, the case may be dismissed or stayed until the claimant satisfies the reasonable inquiry requirements under Rule 11. Ordinarily, PAEs need not show this until discovery has begun and after a Markman hearing, by which time the defendants must have already expended significant legal fees in producing and supporting their own claim constructions and appearing before the court.

Our proposal to require some suspect infringement claimants to show that their claim construction and infringement analysis before entering the Markman hearing stage would not add any new burden to the parties; the burden on the claimant is only time-shifted but not increased. The goal of this frontloading of the plaintiff’s burden should greatly deter some patent trolling and protect some accused infringers from frivolous claims. Furthermore, because much patent trolling is brought by contingency-fee lawyers that prefer quick settlements,\textsuperscript{220} an ex parte Rule 11 hearing at the onset of the litigation should significantly deter some patent trolling behavior.

However, courts should be cautious not to infringe the realm of discovery because some infringement claims inevitably resort to factual investigation upon discovery. For example, there could be a case where even a dyed-in-the-wool patent troll has a perfect excuse for stopping their factual inquiry because there was no available method to obtain the infringing apparatus or its equivalent because of the type of technology or some other difficulty. Some suits brought by bona fide patent trolls may have legitimate infringement claims that should not be denied merely based on the asserting entity’s predatory business model.

Conclusion

While nuisance lawsuits are not new, the direct and largely negative economic drag created by nuisance patent lawsuits on innovation and productive entities by those neither
innovating nor producing anything makes patent trolling nuisance suits particularly damaging to an increasingly technological society. The patent trolling problem can be defined as attempts to monetize low quality, excessively broad patents.

Patent trolling distorts the underlying purpose of the patent system. The most lucrative patents for patent trolling are not necessarily the most beneficial disclosures of technology to the public. Patent trolls select patents that maximize their rent-seeking behavior. Thus, patents targeted for patent trolling are probably not co-aligned with useful patents for society but rather are proxies for wealthy and/or volume infringers. Therefore, the positives of patent trolling that flow back to individual inventors, universities and startups are not optimal for society.

Society has already provided patent trolls with issued patents that legalize collecting toll fees, and society believes that “toll” fees are an essential part of the patent system. Therefore, it would do more harm than good if society tries to change the rules regarding who can collect what from whom in which manner. After all, it would be unfair to punish one who relies on a legal right that was expressly and intentionally created by the legal system.

The patent system rests on the idea that a patent is to be presumed valid and enforceable in order to promote progress and innovation in technology. When a patent troll enforces or threatens to enforce a patent, its focus is on exploiting litigation procedures to obtain instant money or other types of rent seeking. However, this might not be pure economic waste characterized as rent seeking because some inventor somewhere in time put forth the effort to create the patented invention issued by the USPTO. Patent rights are granted by the government for the benefit of society, and their tying up from use by a patent troll cannot be stopped by society simply because the use of the patented technology benefits the society.

Otherwise, for example, investment into research and development of many pharmaceutical drugs would never occur, if the patent right could be easily taken away. Many of the various legislative proposals mentioned in Part II might unintentionally weaken the enforcement of nonfrivolous patent infringement claims asserted by patent right holders entities and/or undercut remuneration to individual inventors, failed startup companies and universities that might have promoted the original inventive activities and risk taking.

What can society do about the patent trolling problem? Society would not destroy a useful bridge to stop trolls living beneath the bridge from robbing travelers crossing the bridge. Courts sitting in equity should never reward this thieving conduct by maintaining the expense and duration of patent litigation by denying defendants a quicker way to escape untenable patent infringement claims. Even the purchaser of a patent might have the intent to commercialize the technology, to go patent trolling or to turn around and sell it. Only the middle choice should be punished.

We believe that the wide use of sua sponte Rule 11 motions by courts could punish patent trolls bringing lawsuits and deter patent trolling behaviors in general. Rule 11 has a built-in judicial discretion for sua sponte motions that might make a weaker rule than a compulsory sanction based on patent trolling. The flexibility of judicial discretion is preferred to handle unique patent trolling behaviors, evolving exploitation of the inefficiencies in the legal system and, most importantly, the difficulty in defining a patent troll in statutory language, which could easily be gamed. If the court focuses on objective indicia of patent trolling rather than the subjective intent of the patent infringement claims by NPEs, the sanctions as well as its ultimate results are justified. In other words, good faith claimants might be haled into Rule 11 hearings, or they might be discouraged from filing a complaint or expending too much resource in preparing the complaint due to the uncertainty whether they satisfied the Rule 11 requirements.
However, none of the ultimate results render the judicial scrutiny inequitable as long as the Rule 11 hearings are only initiated upon the finding of trolling behavior that is waste of judicial resources and no extra resources are expended because of the higher scrutiny compared to the expenditure throughout the full litigation.

Patent trolls bog down the progress of technological development and commercialization just as the mythical trolls hid under bridges to facilitate surprise attacks on travelers. Who would repair the bridge to get rid of the squatting trolls if the toll fees are cheaper than the cost of removing the trolls from under the bridge? Patent trolls ask for license fees that are too small to justify expend even preliminary litigation costs to prove the illegitimacy of the patent troll’s claim. Thus, currently, there is little incentive for defendants to fight the troll and drive it away from the bridge? The courts can easily join the melee to shield the defendants from incurring legal costs until the patent infringement claimant can pass scrutiny.

More broadly, the very existence of a quick and cheap “offramp” prior to the Answer stage during patent litigation system might significantly deter patent trolling.224 Rule 11 provides a safe harbor for defendants to escape a patent infringement suit at the earliest time possible, avoiding legal expenses by obtaining a complaint dismissal. “If a troll knows he can no longer trap a defendant in expensive and lengthy litigation, his interest in the suit will diminish substantially” and the amount of pay-off that can reasonably be demanded will drop.225

We add this article as support to the argument made by others for courts to take the initiative because “[t]he onslaught of litigation brought by ‘patent trolls’ … has slowed the development of new products, increased costs for businesses and consumers, and clogged our judicial system… Lost in the debate, however, is that judges already have the authority to curtail these practices: they can make trolls pay for abusive litigation. Judges know the routine all too well, and the law gives them the authority to stop it. We urge them to do so.”226


2 See Randall R. Rader, Colleen V. Chien and David Hricik, _Make Patent Trolls Pay in Court_ , N.Y. Times, June 4, 2013 (“While not being clearly defined, the patent trolls are pictured by news media as an entity who ‘buy[s] up a slew of patents’ and ‘sues anyone and everyone,’ and they are blamed for the struggling economy because they burden the development of new products and eventually burden the consumers with higher price tags, not to mention clogging the judicial system.”); National Public Radio, _When Patents Attack!_ on “This American Life” aired July 22, 2011.

4 See John A. Amster, The Patent Troll Toll, Intellectual Property Magazine, June 2013 (RPX Corporation conducted a cost study of NPEs and concluded that, on average, litigation legal expenses represented at least 50% of the total costs to resolve the dispute, meaning even if the parties agreed on licensing terms before trial, the average transaction cost was about equal to the value of the patent license eventually obtained.).


8 H. R. 845 Sec. 285A. (a) and (b) (the bond amount will be determined by the court on a case-by-case basis).

9 The nuisance lawsuit problem is not new. Adam Mossoff, The Rise and Fall of the First American Patent Thicket: The Sewing Machine War of the 1850s, 53 Ariz. L. Rev. 165, 183-84 (2010) (noting from the early 1850s, individual inventors have been complaining about corporations who refuse to pay fair license fees for their inventive works.); Wills, Matthew B., Gold, Neil, Attorneys’ Fees in Litigation: Time to Discard the American Rule, 4 Litigation 31 (1977-1978) (“nuisance suits are at the heart of the medical malpractice insurance crisis”).


12 FDIC v. Maxxam Inc., 523 F.3d 566, 586 (5th Cir. 2008).


http://dx.doi.org/10.2139/ssrn.1677785 (last accessed May 5, 2013); United States Government Accountability Office, Assessing Factors That Affect Patent Infringement Litigation Could Help Improve Patent Quality, Report to Congressional Committees August 2013 (hereinafter “GAO Report”) (After the State St. decision, software patenting jumped from 1,000 patents per year to 2,500 patents per year. In more details, the GAO Report found that by 2011, a majority of patents were software-related. Also, from 2007 to 2011, the quantitative statistics of patent infringement lawsuits were significantly enlarged. The number of lawsuits increased 31 percent in 2011 from 2010. Between 2007 and 2011, the number of defendants increased by 129 percent, 89 percent of which were software-related patents).


18 Peter N. Detkin, Leveling the Patent Playing Field, 6 J. Marshall Rev. Intell. Prop. L. 636, 636 (2007) (Mr. Detkin claimed to have coined the term “patent troll” in 2001 to mean “somebody who tries to make a lot of money off a patent that they are not practicing and have no intention of practicing and in most cases never practiced.”). Often referred to as patent trolls are entities like Acacia Research Corporation (who owned over 400 patent families), Conversant Intellectual Property Management Inc. (previously Mosaid Technologies that owned over 700 patent families), Intellectual Ventures Management, LLC (estimated to own over 10,000 patents), and Round Rock Research LLC (who owns over 1,200 patent families). Tom Ewing and Robin Feldman, The Giants Among Us, 2012 Stan. Tech. L. Rev. 1. (2012)


21 See Bessen, supra n. 6.


24 Payne, supra n. 23.

25 35 U.S.C. § 285 (attorneys fees may be awarded for “vexatious or unjustified litigation or frivolous suit”). The purpose of the “exceptional” case statute has been described as compensation to the prevailing party for its legal costs. Cent. Soya Co. v. Geo. A. Hormel & Co., 723 F.2d 1573, 1578 (Fed. Cir. 1983).

26 Since the creation of the statutory “exceptional” patent case in 1952, there have been about 2,395 cases that cite the “exceptional case” statute based on a Westlaw search on October 25, 2013. Of these, 1,483 cases are at the district court level, 496 cases at the Federal Circuit, and 21 cases at the Supreme Court of the United States.


29 See Anna Mayergoyz, Lessons from Europe on How to Tame U.S. Patent Trolls, 42 Cornell Int’l L.J. 241 (2009) (noting that about 50% of all appealed patent litigation decisions are reversed). In the short term, defending a patent infringement suit can cause stock prices to drop. See Bessen, supra n. 6 (estimating the median decline in common stock value of defendant corporations in patent infringement suits brought by NPEs at $20.4 million).


31 American Intellectual Property Law Association, Report of the Economic Survey 2011, at 36, I-153 to I-156 (reporting that the median litigation costs, for a patent infringement lawsuit as follows: when less than $ 1 million was at risk, $350,000 and $650,000; when more than $1 million but less than $ 25 million at risk, 1.5 million and
$2.5 million; and when more than $25 million is at risk, $3 million and $5.5 million, through the discovery phases and final disposition respectively); Mayergoyz, supra n. 29.

32 Testimony of John G. Boswell, Senior Vice President and General Counsel of the SAS Institute, at the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet (Mar 14, 2013) (arguing one cause of the patent trolling problem is the high cost of discovery such that it might cost an accused infringer $8 million in legal costs just to get to the summary judgment stage).


34 Johnson, supra n. 28 at 487 (extortionary royalty payments “constitute a ‘tax’ that ultimately leads to less product development and higher prices for consumers”).

35 Patent trolls use the tactic of joining multiple but unrelated defendants in the same patent infringement suit to keep costs of discovery and final disposition respectively) $2.5 million; and when more than $25 million is at risk, $3 million and $5.5 million, through the discovery phases and final disposition respectively) $2.5 million; and when more than $25 million is at risk, $3 million and $5.5 million, through the discovery phases and final disposition respectively) $2.5 million; and when more than $25 million is at risk, $3 million and $5.5 million, through the discovery phases and final disposition respectively) $2.5 million; and when more than $25 million is at risk, $3 million and $5.5 million, through the discovery phases and final disposition respectively.

36 See Bessen, supra n. 6 (“a substantial part of the direct costs of NPE litigation is a deadweight loss to society”); see also Randall R. Rader, Colleen V. Chien and David Hricik, Make Patent Trolls Pay in Court , N.Y. Times, June 4, 2013 (“The practice by patent trolls buying up patents from bankruptcy auctions and suing everyone who is in the industry related to the trolls is slowing the development of new products, increasing costs for businesses and consumer prices, and clogging down the judicial system”).


43 See Funk, supra n. 37.


45 See eBay, 547 U.S. at 395 (Kennedy, J., concurring) (“An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees.”); see Bessen, supra n. 6 at 2.

46 See Bryant, supra n. 37; Funk, supra n. 37.

47 An NPE has far fewer documents to produce, fewer witnesses and a much smaller legal bill than a commercially active company that makes products, sell products or offer services.

48 Patent trolls use the tactic of joining multiple but unrelated defendants in the same patent infringement suit to keep the trial in the venue of their choice, typically the Eastern District of Texas. See Bryant, supra n. 37.
Inventors Act of 2011 tried to end this, but consolidation for pre-trial purposes is still available. In re Bear Creek Technologies, Inc., 858 F. Supp. 2d 1375 (Judicial Panel on Multidistrict Litigation, 2012).


53 Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405 (1908) (holding that it was the essence of the patent to exclude others without question of motive and establishing the principle that patent holders have no obligation to use their patent.) This principle, which is more than a century old, has not changed. See Alexander Poltorak’s letter to The Wall Street Journal, Inventors, Trolls, Patents and Improving the System, The Wall Street Journal, June 26, 2013, available at http://online.wsj.com/news/articles/SB10001424127887324577904578559632006573250 (last accessed May 5, 2013).

In fact there are many reasons for which patent owners may not practice their own patents, including government regulations, blocking patent and antitrust implications. See Janice M. Mueller, Introduction to Patent Law, Aspen Publishers (2006).

54 When Bankruptcy courts approve the transfer of patent rights, the transfer is without any encumbrances. See e.g. In re PBPC, Inc., 484 BR 860 (14th Cir. 2013).


57 See Bessen, supra n. 6; RPX Corp. Study, supra n.1 (referring to these entities as “noncompeting but commercially active”); Ashby Jones, Patent Troll Tactics Spread, The Wall Street Journal, July 8, 2012.

58 See Joff Wild, The Entities that Own the 100 Biggest US Patent Portfolios Own Over 30% of All Active US Patents, IAM Magazine Blog, February 4, 2013, available at http://www.iam-magazine.com/blog/Detail.aspx?g=840f9fef-ef84-4e4f-951d-b163251dd47d (last accessed May 5, 2013) reporting that while 140,000 entities own at least one active U.S. patent, the top 100 entities own well over 30% of all currently active U.S. patents.


60 See Jones, supra. n. 57.

61 See Klein, supra n. 51 (In 2004, Asure Software, known then as Forgent Networks, sued forty companies worldwide for patent infringement and expects to receive more than $1 billion in licensing fees as a result.).

62 Spine Solutions v. Medtronic Sofamor Danek USA, 620 F. 3d 1305, 1317-18 (Fed. Cir. 2010) (holding the parent company and sister company of the plaintiff lacked standing for patent infringement claim unless they were an exclusive licensee).

63 However, some proposed bills in Congress would allow fee-shifting to non-prevailing parties to reach the true controlling entity of such “shell” companies. See e.g. H.R. 3309.


65 An uncommercialized patent is like a blueprint for a technology that no one can use; however, society would rather have more blueprints for “bridges” than no bridges at all under the disclosure theory of the patent system to increase the storehouse of knowledge. But see Steven J. Moore, A Fractured Fairy Tale: Separating Fact & Fiction on Patent Trolls, available at http://www.ipwatchdog.com/2013/07/29/a-fractured-fairy-tale-separating-fact-fiction-
on-patent-trolls/id=43697/ (last accessed December 10, 2012) (analogizing patents to bridges and trolls to bridge builders that lockup the resources found on the other side of their bridges).

66 Supra n. 54.

67 Id.


69 Rembrandt Technologies, LP v. Harris Corporation, C.A. No. 07C-09-059-JRS (Del. Superior Court 2009) (“Alternatively, if the patents could not be acquired, the partnership would form a joint venture or limited partnership with the patent owner and/or financing partners, frequently resulting in the creation of a patent licensing entity”) (internal quotation omitted).

70 Chien, supra n. 3.


74 Cotropia, supra n. 1.


79 Johnson, supra n. 28.

80 E.g. RPX Corporation, Defensive Patent Aggregation.

81 Cotropia, supra n. 1; see also GAO Report 2013, supra n. 14, at 45.

82 Johnson, supra n. 28, at 477-88

83 Bryant, supra n. 37.


86 Many people view any case brought by patent a troll as meritless, regardless of the accuracy of that view in any specific case. Also, many companies refer to anyone suing them for patent infringement as patent trolls, regardless if it is appropriate.

87 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart J., concurring).
88 H.R. 845 (The SHEILD Act first proposed cost-shifting of winning defendants’ legal fees and costs to infringement claimants as a “loser pay system” – similar to the default English rule except when the claimant is an original inventor, substantial investor, university or technology transfer organizations.).
89 H.R. 3309 (suggesting a variety of reforms including fee shifting based on the outcome of the case, having the requesting party pay the cost of discovery and delaying discovery until after claim construction).
90 H.R. 2024 (targeting the use of shell companies to disguise the “real party in interest”).
91 H.R. 2639 (proposing changes to the rules for pleadings, joinder and discovery in patent litigation, as well as delaying discovery until preliminary motions are resolved).
92 S. 1013 (proposes shifting the major costs of discovery to the requesting party).
93 S. 866 (proposing an expanded scope for post-grant challenges to business method patents under the Covered Business Method review program).
94 H.R. 2766 (The Stopping Offensive Use of Patents (STOP) Act would expand post-grant challenges to business method patents under the Covered Business Method review program).
96 This approach would remedy unjust enrichment of patent trolls for settlement gained at the cost of previous defendants by disgorging past, ill-gotten gains. However, mandating a clawback for freely contracted licensing agreements might be viewed perverse to the principle of freedom of parties to contract to their own terms. Cite something?
97 It’s limited in the sense that it shifts the cost only one-way, from claimants to accused infringers.
98 S. 1612.
99 Id.
103 Id. (the public comment period for the proposal has been extended through December 16, 2013)
104 Id.
106 Id.
107 Id.
108 See “Inventors’ Letter” to Congress (Nov. 19, 2013) at 6, available at http://democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/InventGrp131119.pdf (last accessed Dec. 10, 2013) (The U.S. “rejected the British system in large part to allow all citizens access to courts, in which disputes would be resolved on the merits. Over the years, when Congress has granted exceptions to the American Rule, it has generally been for the purpose of encouraging litigation by creating ‘private attorneys general’ to conduct litigation to enforce public policies that might otherwise be too risky to pursue.” Examples include the seminal Civil Rights and Voting Rights Acts of the mid-1960’s, the Equal Access to Justice Act, the Truth in Lending Act, the Fair Credit Reporting Act and the Freedom of Information Act.).
109 Supra n. 105.
111 See Complaint of State of Vermont v. MPHJ Technology Investments, LLC, filed before the State of Vermont Superior Court Washington Unit, Civil Division (Docket No. 282-5-13Wncv) available at

See e.g. Trolling Effects threat-letter site available at https://trollingeffects.org/letters (last accessed on December 31, 2013)

Testimony of C. Graham Gerst, of Global IP Law Group, LLC at the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet (Mar 14, 2013) (urging Congress not to pass the Shield Act or other patent reforms involving cost-shifting).

Authority to do so has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested to do so by one of the parties.

35
See supra n. 25.


See e.g. S. Bravo, 96 F.3d 1373 (vacating district court order denying Rule 11 sanctions and remanding for further consideration, where attorney had apparently failed to conduct an adequate inquiry).

See 95 A.L.R. Fed. 107 III Sec. 6 (a); Biodex Corp. v. Loredan Biomedical, Inc., 946 F.2d 850, 857-58 (Fed. Cir. 1991) (“our practice has been to defer to regional circuit law when the precise issue involves an interpretation of the Federal Rules of Civil Procedure or the local rules of the district court”).

S. Bravo, 96 F.3d at 1375. See e.g. S. Bravo, 96 F.3d at 1375 (The Federal Circuit found the district court abused its discretion because “there [was] no evidence that either of [patentee’s] attorneys ever compared the accused devices with the patent claims.” The Federal Circuit opined that blind reliance on a lay client for the factual and legal questions of infringement would rarely constitute a reasonable inquiry under the Rule 11). Antonious v. Spaulding & Evenflo Cos., 275 F.3d 1066, 1074 (Fed. Cir. 2002) (“[A]n attorney violates Rule 11(b)(3) when an objectively reasonable attorney would not believe, based on some actual evidence uncovered during prefilng investigation, that each claim limitation reads on the accused device literally or under the doctrine of equivalents.”).

See Judin, 110 F.3d at 784. S. Bravo, 96 F.3d at 1374.

Id. at 1375 (The Federal Circuit found the district court abused its discretion because “there [was] no evidence that either of [patentee’s] attorneys ever compared the accused devices with the patent claims.” The Federal Circuit opined that blind reliance on a lay client for the factual and legal questions of infringement would rarely constitute a reasonable inquiry under the Rule 11).

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Judin, 110 F.3d at 781.
Id. at 783 (Since “a more thoughtful pre-filing examination would not likely have deterred Judin’s interest in the suit,” the lawyer reasonably believed Judin “will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”).


Q-Pharma, Inc. v. Andrew Jergens Co., 360 F.3d 1295, 1306 (Fed. Cir. 2004).

Id. at 1297-98.

Q-Pharma, 360 F.3d at 1297, 1300.

Id. at 1301.

View Engineering.

Id. at 982.

Id.

Id. at 985.

Id. at 986.

Q-Pharma, 360 F.3d at 1302.

Id.

View Engineering, 208 F.3d at 986.

Id.

Hoffman La Roche, 213 F.3d at 1361.

Id.

Id. at 1364.

Id. at 1362.

Id. at 1362-63 (Defendant Torpharm “refused to disclose the manufacturing processes because of a confidentiality agreement it had with the manufacturer.”).

Id. 1364-65 (“[the plaintiff in Cambridge] had tested a sample of the allegedly infringing product had commissioned further chemical analyses and acquired documentary evidence that appeared to confirm that the product alleged to infringe fell within the chemical specifications of the patented method. Without the aid of discovery, any further information was not practically obtainable.”)(quoting Cambridge Prods. Ltd. v. Penn Nutrients Inc., 962 F.2d 1048 (Fed. Cir. 1992)).

Supra n. 159.


349 F.3d at 1362-63.

See Id. at 1363. (“However sincere Phonometrics and Mr. Sutton may be in their belief that the construction of the limitation at issue stated in Northern Telecom, and reiterated and followed ‘[u]nder principles of stare decisis’ in Choice Hotels (Choice Hotels, 21 Fed.Appx. at 912) and by the district court in case after case brought by Phonometrics, is incorrect, their position is simply without legal merit.”)

Eon-Net LP v. Flagstar Bancorp, 653 F.3d 1314, 1326 (Fed. Cir. 2011).

Id. (Eon-Net’s previous settlement offers were based on sales by the defendant, such as $25,000 for sales less than $3,000,000; $50,000 for sales between $3,000,000 and $20,000,000; and $75,000 for sales between $20,000,000 and $100,000,000.).

Id. at 1328-29.

Id.

Id. at 1320.

Id. at 1329.

Id. at 1326.

Id. at 1329.

Id. at 1323.

Id. at 1327.

Id. at 1328.

Id. at 1327.


Id.

Id. at 1368.

Id. at 1368.
Id. at 1371.  

Id. at 1372.  

Id. at 1368 (citing Whitehead v. Food Max of Mississippi, Inc., 332 F.3d 796, 803 (5th Cir. 2003)).  

Id. at 1368 (The claims of the patent were limited to a “display being pivotally mounted on said housing.” Raylon argued for a claim construction that included a “display being capable of being moved or pivoted relative to the viewer’s perspective” without any support for this in the patent and contrary statement made during prosecution.).  

Fed. R. Civ. P. 11 Advisory Committee’s Note (1993 amendment)(“the power of the court to act on its own initiative is retained”)  

See Phonometrics, 349 F. 3d at 1358.  

RPX Corp. Study, supra n.1.  


Judin, 110 F.3d at 784.  

See e.g. Q-Pharma, 360 F.3d at 1302 (a simple reading of the product label satisfied the Rule 11 inquiry because the plaintiff was in good faith belief that inclusion of any miniscule amount of the chemical to the product would infringe the patent); View Engineering, 208 F.3d 981 (sanction granted because, for the counterclaim, a court order for adequate pre-filing investigation was available); Hoffmann-La Roche, 213 F.3d 1359 (reverse engineering to analyze the product was known to be impossible in order to determine whether it infringes a process claim); Cambridge, 962 F.2d 1048 (for a process claim, factual inquiry is somewhat relieved).  


See supra n. 5.  

See supra n. 64.  

Supra n. 54.  


Id.  

Rader, supra n. 36.