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**PATENT TROLLING: SHINING A LIGHT UNDER THE  
BRIDGE**

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*Disclaimer: the opinions expressed herein are those of the author; they do not represent or reflect the views of Baker Botts L.L.P.*

## I. INTRODUCTION

Patent trolls are not a new phenomenon. In fact, even John Oliver, the comedian and talk show host, has heard of patent trolls—and he is not very fond of them. On his HBO show, titled *Last Week Tonight*, Mr. Oliver let his true feelings towards patent trolls be known during a ten-minute diatribe stating:

Most of these companies don't produce anything—they just shake down anyone who does, so calling them trolls is a little misleading—at least trolls actually do something, they control bridge access for goats and ask fun riddles. Patent trolls just threaten to sue the living shit out of people, and believe me, those lawsuits add up.<sup>1</sup>

While “patent trolls” is a catchy phrase, most people do not fully understand what exactly a patent troll is or the complex issues that have arisen because of patent trolls. This paper will shed light on these issues. First, patent trolls and the issues associated with patent trolling will be defined. Second, the true history of patent trolls and their predecessors will be explored. Third, the impact that patent trolls have had on patent law will be analyzed. And finally, solutions to the complex issues which surround patent trolls will be proffered.

## II. PATENT TROLLING: WHAT’S THE BIG DEAL?

Patent trolls may sound like a folktale; however, these entities are real and have dramatically influenced patent law.<sup>2</sup> “Patent trolling” is generally perceived as allegations of patent infringement made by a person or business entity who owns, but does not work, the patent in question.<sup>3</sup> The actual “troll,” the person or business entity owning the patent, tends to wait until a potential infringer has integrated the

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<sup>1</sup> John Oliver, Last Week Tonight: *Patent Trolls*, HBO (Apr. 19, 2015).

<sup>2</sup> See Miranda Jones, *Permanent Injunction, a Remedy of any Other Name is Patently not the Same: How eBay v. MercExchange Affects the Patent Right of Non-Practicing Entities*, 14 GEO. MASON L. REV. 1035 (2007); Vincent R. Johnson, *Minimizing the Costs of Patent Trolling*, 18 UCLA J. L. & TECH. 1 (2014); Eric Rogers & Young Jeon, *Inhibiting Patent Trolling: A New Approach for Applying Rule 11*, 12 NW. J. TECH. & INTELL. PROP. 291 (2014).

<sup>3</sup> See *Cascades Comput. Innovation LLC v. RPX Corp.*, No. 12-CV-01143 YGR, 2013 U.S. Dist. LEXIS 10526, at \*5 (N.D. Cal. Jan. 24, 2013) (defining a “patent troll” as an “an entity that “enforces patent rights against accused infringers in an attempt to collect licensing fees, but does not manufacture products or supply services based upon the patents in question”).

technology into a process that is vital to his business.<sup>4</sup> The troll then threatens patent infringement litigation against the potential infringer with the hopes of securing a lucrative license agreement.<sup>5</sup>

While a patent troll has many names, and many more definitions, the basic principle underlying all patent trolls is that they do not collect money by practicing their patented invention.<sup>6</sup> Instead, they gain a monetary return on their patented invention by using the threat of litigation, and sometimes even litigation itself.<sup>7</sup> However, while patent trolls have a negative connotation associated with them today, mainly for their scavenger like qualities in feeding off the patent system, they are not void of positive qualities<sup>8</sup> and, if managed correctly by the judicial system, can actually be part of a healthy patent ecosystem.

### A. Definition of a Patent Troll

Patent trolls have many names and even more definitions. Because the term “patent troll” is pejorative and potentially prejudicial in the court system, other names have evolved over time:<sup>9</sup> including non-practicing entities (“NPEs”) and patent assertion entities (“PAEs”).<sup>10</sup>

However, no matter what name is used, what is truly important is the definition associated with that name. A practicing attorney has defined a NPE as “one whose only ‘business’ is to generate maximum patent licensing revenue via litigation or the threat of litigation.”<sup>11</sup> The business world tends to think of NPEs as an entity who “owns many

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<sup>4</sup> See Stefania Fusco, *Markets and Patent Enforcement: A Comparative Investigation of Non-Practicing Entities in the United States and Europe*, 20 MICH. TELECOMM. & TECH. L. REV. 439, 444 (2014) (“irreversible investments”).

<sup>5</sup> Joel B. Carter, *Responding to a Patent Troll's Threats*, 48 ARK. L. 30 (explaining that the licensing royalty is often “much less than the alleged infringer would pay defending a claim”).

<sup>6</sup> *Overstock.com, Inc. v. Furnace Brook, LLC*, 420 F. Supp. 2d 1217, 1218 (D. Utah 2005), *aff'd* 191 F. App'x 959 (Fed. Cir. 2006) (“A patent troll is somebody who tries to make a lot of money off a patent that they are not practicing and have no intention of practicing and . . . [have] never practiced.”) (quoting Elizabeth D. Ferrill, *Comment, Patent Investment Trusts: Let's Build a PIT to Catch the Patent Trolls*, 6 N.C. J. L. & TECH. 367, 367 (2005)).

<sup>7</sup> *Id.*

<sup>8</sup> See Jones, *supra* note 2, at 1043 (stating that a positive quality of NPEs is that they help protect small inventors by preventing their intellectual property rights from being stolen by “corporate titans”).

<sup>9</sup> *DNT, LLC v. Sprint Spectrum, LP*, No. 3:09 CV21, 2010 WL 582164, at \*4 (E.D. Va. Feb. 12, 2010) (granting plaintiff's motion to preclude the use of the term “patent troll” because “the prejudicial impact outweighs any probative value”).

<sup>10</sup> See Johnson, *supra* note 2, at 4.

<sup>11</sup> Robert H. Resis, *History of the Patent Troll and Lessons Learned*, BANNER WITCOFF (2006), [https://bannerwitcoff.com/\\_docs/library/articles/HistoryOfPatentTroll.pdf](https://bannerwitcoff.com/_docs/library/articles/HistoryOfPatentTroll.pdf).

patents without the intention of actually developing a product based on it” but rather “acquires patents for a business strategy wherein they earn income by licensing patents or collecting settlements from patents.”<sup>12</sup> A leading intellectual property website defines a NPE generally as someone who “acquire[s] patents from inventors or companies . . . and then turn[s] around and sue[s] giants of industry for patent infringement.”<sup>13</sup>

A common problem with many definitions, regardless of the name, is that they are overly broad.<sup>14</sup> Many definitions of NPEs include universities and individual inventors.<sup>15</sup> This is because universities and individual inventors create new technologies and receive patents on it, but they often do not commercialize the technology due to a lack of capital.<sup>16</sup> Thus, they often try to license the patent(s) to large companies who can make the technology profitable. This paper proposes that inventors and universities should be excluded from the definition of a true NPE. Patents were created by the federal government to protect, for a limited time, the inventor’s right to exclude others from making, using, offering to sell, or selling his patented invention.<sup>17</sup> There is nothing in the statutes that require an inventor to use the invention in commerce to secure these rights. Instead, the statutes say the exact opposite: no patent owner can be denied relief in a patent infringement case for “refus[ing] to license or use any rights to the patent.”<sup>18</sup> Because of this, solutions to the NPE problem, discussed in Section V, focus on deterrence rather than a complete prohibition.

## B. Defining the Patent Trolling Problem

NPEs, or individuals who engage in “patent trolling,” are generally disfavored by all non-NPE entities.<sup>19</sup> This is because many view NPEs as bottom dwellers who gorge on the pickings that slip through the

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<sup>12</sup> Prableen Bajpai, *The Impact Patent Trolls Have On Innovation*, NASDAQ (Feb. 11, 2016, 10:10 AM), <http://www.nasdaq.com/article/the-impact-patent-trolls-have-on-innovation-cm578479>.

<sup>13</sup> *Patent Trolls*, IPWATCHDOG (Apr. 19, 2014), <http://www.ipwatchdog.com/patent-trolls/>.

<sup>14</sup> Jim Spencer, *Patent Trolls Collect "Nuisance Fees" and Political Enemies*, STAR TRIBUNE (June 15, 2013), <http://m.startribune.com/business/?id=211615651> (quoting Rep. Paulsen) (“There is abuse that’s going on . . . the challenge is to target the abusers in an effective way without casting too wide a net.”).

<sup>15</sup> Rogers & Jeon, *supra* note 2, at 301.

<sup>16</sup> *Id.*

<sup>17</sup> 35 U.S.C. §271(a) (2012).

<sup>18</sup> *Id.* at §271(d).

<sup>19</sup> See F. Scott Kieff & R. Polk Wagner, *Testing Patent Protections*, WASH. TIMES, at A14 (May 30, 2006) (noting the “outcry over ‘patent trolls’ who supposedly ambush business with junk patents”).

cracks in patent law. For example, the business model behind patent trolling is similar to a greedy landlord seeking superfluous rent money.<sup>20</sup> NPEs often try to make an easy penny by asserting “never-practiced, never-licensed, or never-asserted rights”<sup>21</sup> against an established business who may have been unknowingly infringing the NPE’s patents for years.<sup>22</sup> And, in many cases, the patents are overly broad and do not actually cover the infringing activity.<sup>23</sup> However, a targeted business, even if it believes the patent infringement claim lacks merit, will likely decide to pay a licensing fee rather than litigate.<sup>24</sup> This is because litigation costs are prohibitively expensive,<sup>25</sup> and the possibility of having a permanent injunction levied against a vital product or component could be disastrous for an established business. Accordingly, the mere threat of litigation is a NPEs greatest weapon to secure a profit,<sup>26</sup> and each time a NPE is successful, the self-deprecating cycle continues.

The reason NPEs are successful is because patent litigation has become one of the most expensive types of commercial litigation.<sup>27</sup> According to a 2011 survey, the total cost per side in a patent case where \$1 million was at stake was \$916,000 and the total cost of a case where \$25 million was at stake was \$6 million per side.<sup>28</sup> Consequently, in most cases the cost of paying a NPE a licensing fee can be smarter financially because the cost of successfully defending a patent litigation suit is more expensive than settling out of court.<sup>29</sup>

In addition to the lucrative NPE business model stemming from exorbitant patent litigation costs, NPEs also adversely affect society.<sup>30</sup> Recent estimates have found that NPEs cost society about \$30 billion per year, which adds up to \$500 billion within the past twenty years.<sup>31</sup> Furthermore, there is little to no evidence suggesting that NPEs reinvest

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<sup>20</sup> See Robert P. Merges, *The Trouble with Trolls: Innovation, Rent-Seeking, and Patent Law Reform*, 24 BERKELEY TECH. L. J. 1583, 1590 (2009).

<sup>21</sup> Rogers & Jeon, *supra* note 2, at 298.

<sup>22</sup> Merges, *supra* note 20.

<sup>23</sup> Rogers & Jeon, *supra* note 2, at 298.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See James E. Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 CORNELL L. REV. 387, 412–13 (2014) (stating that “NPE patent litigation has exploded” and costs defendants about \$29 billion annually).

<sup>28</sup> AM. INTELLECTUAL PROP. LAW ASS’N, Report of the Economic Survey 2011 I-153-56 (2011).

<sup>29</sup> Rogers & Jeon, *supra* note 2, at 299 (stating that “it is often economically efficient to settle some patent lawsuits as quickly as possible to avoid legal costs”).

<sup>30</sup> See Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2119 (2013).

<sup>31</sup> *Id.*

the money into research and new technologies.<sup>32</sup> Accordingly, not only do NPEs fail to promote innovation, but they also increase the cost of consumer goods because manufacturers must pass off the increased manufacturing costs from licensing fees and infringement suits to the customer.<sup>33</sup>

Nonetheless, some scholars believe NPEs can have beneficial purposes. First and foremost, NPEs may aid small inventors by protecting them from “corporate titans.” The rationale behind this is that “through the purchasing and licensing of patents, NPEs contribute to making markets in which inventors can profit from their patents.” NPEs have also been compared to middlemen that match patents with companies seeking to practice the patented invention. However, this rationale only holds true in a small subset of cases. Whenever a person or entity buys patents with the underlying intent of maximizing profits through threatened litigation, this rationale begins to crumble. Thus, in Section V, the possible solutions to the NPE dilemma start with determining the intent of the potential NPE so that judicial actions can be crafted to de-incentivize particular behaviors that are detrimental to the patent system.

### III. THE REAL HISTORY OF PATENT TROLLING

While patent trolling is a term that has gained widespread notoriety in the twenty-first century, the true history of patent trolling in the United States is often misunderstood. When the Federal Circuit first began hearing cases in the early 1980s, most patent infringement suits were between competitors actively engaged in the manufacturing, making, or selling of the patented product.<sup>34</sup> More recently, there has been a dramatic increase in the number of patent infringement cases initiated by NPEs.<sup>35</sup> But, the fact that patent infringement suits initiated by NPEs has increased substantially in recent years does not mean that NPEs were non-existent prior to this.<sup>36</sup> In actuality, NPEs have been around since the founding of the United States<sup>37</sup> and will likely persist into the twenty-second century. However, the effectiveness of NPEs can be negated, and their deleterious effects prevented, by properly

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<sup>32</sup> See, e.g., *Overstock.com, Inc., v. Furnace Brook, LLC*, 420 F. Supp. 2d 1217, 1222 (D. Utah 2005), *aff'd* 191 F. App'x 959 (Fed. Cir. 2006) (“[Patentee, an alleged patent troll,] made no efforts to practice its patent or otherwise enhance the technology”).

<sup>33</sup> See Johnson, *supra* note 2, at 4.

<sup>34</sup> Resis, *supra* note 11.

<sup>35</sup> See Johnson, *supra* note 2, at 5 (noting that recent estimates say “67 percent of all patent infringement cases nationwide are filed by patent trolls”).

<sup>36</sup> Resis, *supra* note 11.

<sup>37</sup> *Id.*

understanding the true history of NPEs.

### A. Pre-Federal Circuit

The most common misconception is that NPEs are a relatively new occurrence, when in fact NPEs have existed for as long as the United States.<sup>38</sup> For people whose definition of a NPE encompasses an inventor who tries to sell or enforce patent rights to or against a company, instead of making and selling his invention, then many of America's larger than life characters would be considered patent trolls. One of these characters is Eli Whitney.<sup>39</sup>

Mr. Whitney, the famous inventor of the cotton gin, sent his patent application directly to Thomas Jefferson in 1793.<sup>40</sup> After meeting personally with Mr. Jefferson, the patent was approved and later issued in 1794.<sup>41</sup> The economic effects of the cotton gin were readily felt in the South where cotton exports increased from 0.14 million pounds in 1792 to 17 million pounds in 1800.<sup>42</sup> However, unlike the plantation owners in the South who grew rich on Mr. Whitney's invention, Mr. Whitney himself saw no financial gain.<sup>43</sup> This is because Mr. Whitney was unable to secure licensing agreements with Southern plantation owners. Because the cotton gin was easy to replicate and Mr. Whitney's company was a Northern one, Mr. Whitney was unsuccessful in trying to enforce his patent rights in Southern courts and, after ten years of litigation, he was left penniless.<sup>44</sup> While Mr. Whitney may not seem like the quintessential NPE, many NPE definitions would include him because he tried to exploit his patent by obtaining license agreements with those who were potential infringers.

A second historical example, and one that is more on par with current definitions of NPEs, is George Selden. Mr. Selden was a patent attorney who "expressly set out to be a patent troll."<sup>45</sup> After filing a patent application for the modern automobile in 1879, done by predicting where he thought the industry was heading, Mr. Selden purposefully delayed issuance of his application for sixteen years, waiting for the automobile industry to expand.<sup>46</sup> When he determined the time was right, Mr. Selden allowed his patent to issue and

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

immediately threatened suit against all the major automobile manufacturers of the time.<sup>47</sup> Mr. Selden was successful in his endeavor and secured a number of licensing agreements.<sup>48</sup> However, Henry Ford refused to contract with Mr. Selden, and a patent infringement case ensued.<sup>49</sup> The court held that Mr. Selden's patent did not cover the Otto-type engine, which was being used by auto manufactures, and instead only covered the outdated Brayton-type engine. Thus, there was no infringement.<sup>50</sup> Because of Mr. Selden's efforts to use a patent specifically to obtain licensing agreements with all the major companies in a technology sector, he is considered by many to be the first true "patent troll."<sup>51</sup>

A third example, the famous Alexander Graham Bell, is another historical figure who was a potential NPE in his time. Mr. Bell invented a communication device for "transmitting vocal or other sounds telegraphically."<sup>52</sup> Today, it is simply called the telephone. Shortly after Mr. Bell received his patent on the telephone in 1876, he offered to sell the patent to Western Union for \$100,000.<sup>53</sup> After Western Union rejected his offer, Mr. Bell went on to start Bell Telephone.<sup>54</sup> In 1879, Bell Telephone filed suit against Western Union for infringing the telephone patent.<sup>55</sup> The case was settled before trial and Western Union has never fully recovered.<sup>56</sup> In this example, Mr. Bell was not using his patent to make anything at first, instead he was only trying to sell his patent rights for monetary gain. Therefore, according to some definitions, before he started Bell Telephone he may have been a NPE. While these historical examples may not be on par with NPEs as people understand them today, they set the precedent for what would later come.

## B. Post-Federal Circuit

The current NPEs which have amassed in the years after the Federal Circuit was created, have taken a page out of the history book and doubled down. Instead of inventors who try to delay the issuance of their patent until the exact time when litigation and licensing agreements can be most valuable, current NPEs are like investment

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Columbia Motor Car Co. v. C. A. Duerr & Co.*, 184 F. 893 (2d Cir. 1911).

<sup>50</sup> *Id.* at 916.

<sup>51</sup> Resis, *supra* note 11.

<sup>52</sup> U.S. Patent No. 174, 464 (claim 5).

<sup>53</sup> Resis, *supra* note 11.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

companies that snatch up as many broad patents as possible to add to their vast patent portfolios.<sup>57</sup> They then attempt to secure licensing agreements or large monetary awards by filing infringement suits against major corporations.<sup>58</sup> These companies are known as mass patent aggregators, and they have substantial working capital from investors.<sup>59</sup> This allows them to continually reinvest in acquiring new patents and filing heedless litigation against unsuspecting companies.

Thus, because the overwhelming majority of patent trolls today are patent investment groups whose investors are essentially betting on larger corporations acquiescing to license agreements or the judicial system providing compensation,<sup>60</sup> the solutions presented in Section V will focus on these companies rather than universities or small inventors who are only trying to reap monetary awards for their work. This is because mass patent aggregators, not universities and small inventors, have dramatically shaped the patent landscape in the past decade, as will be shown in Section IV. However, while most of the influential cases highlighted in Section IV were in some way designed to limit the viability of patent trolling, the aftereffects of these cases have had unintended consequences.

#### IV. HOW PATENT TROLLING INFLUENCED CURRENT LAW

In the post-Federal Circuit landscape, NPEs have significantly impacted patent law throughout the United States. As the seminal cases in this Section will show, many of the newest changes in patent law were initiated by the judiciary as a reactionary measure against litigious NPEs. Specifically, injunctive relief, patent-eligible subject matter, fee shifting, and venue standards have all been influenced by NPEs.

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<sup>57</sup> See Tom Ewing & Robin Feldman, *The Giants Among Us*, 2012 STAN. TECH. L. REV. 1, 1 (2012) ("In a few short years, a handful of entities have amassed vast treasuries of patents on an unprecedented scale . . . [as many as] 30,000-60,000 patents worldwide").

<sup>58</sup> See Gerard N. Magliocca, *Blackberries and Barnyards: Patent Trolls and the Perils of Innovation*, 82 NOTRE DAME L. REV. 1809, 1813 (2007) ("[M]ost of these cases never get to court. So long as there is significant uncertainty about whether an infringement suit will succeed, defendants will tend to settle.").

<sup>59</sup> See Johnson, *supra* note 2, at 5.

<sup>60</sup> *Non Practicing Entities Listed In The NPE Tracker*, IP CHECKUPS (Dec. 21, 2012), <https://www.ipcheckups.com/blog/a-list-of-some-npes/> (listed a number of the largest mass patent aggregators who function like a patent investment group).

## A. Permanent Injunctions

One of the most influential cases in the modern NPE era is *eBay Inc. v. MercExchange, L.L.C.*<sup>61</sup> This case pitted the online auction mega-giant eBay against a tiny Virginia-based patent-holding company.<sup>62</sup> The litigation began after communications regarding the sale of MercExchange's patents broke down. At the U.S. Court for the Eastern District of Virginia, the jury found eBay liable for nearly \$30 million.<sup>63</sup> However, the judge denied MercExchange's request for a permanent injunction.<sup>64</sup> This ruling was extremely rare because in previous cases a successful plaintiff in a patent infringement case almost always won a permanent injunction. The judge reasoned that MercExchange's lack of "activity in practicing the patents" rebutted the presumption of irreparable harm, an element that is required for a court to grant a permanent injunction.<sup>65</sup>

After eBay and MercExchange both appealed to the Federal Circuit, the case was heard on appeal.<sup>66</sup> The Federal Circuit reversed the denial of a permanent injunction.<sup>67</sup> However, the court did not mention the four-factor equitable test that is used to determine whether a permanent injunction is appropriate. Instead, the court stated that the "general rule is that a permanent injunction will issue once infringement and validity have been adjudged."<sup>68</sup> Subsequently, the Supreme Court granted Certiorari.<sup>69</sup> The Supreme Court held that the Federal Circuit erred by failing to apply the four-factor test and vacated the judgment.<sup>70</sup> This overruled the previous standard used by courts in presuming irreparable harm when a plaintiff is successful in a patent infringement case. The reasoning behind this judgment is seen in Justice Kennedy's concurring opinion, in which he stated that NPEs should not be able to automatically procure a permanent injunction.<sup>71</sup> Justice Kennedy reasoned that:

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<sup>61</sup> 547 U.S. 388 (2006).

<sup>62</sup> *Supreme Court Buries Patent Trolls*, FORBES (May 16, 2006, 6:00 AM), [https://www.forbes.com/2006/05/15/ebay-scotus-patent-ruling-cx\\_jh\\_0516scotus.html#43281e467378](https://www.forbes.com/2006/05/15/ebay-scotus-patent-ruling-cx_jh_0516scotus.html#43281e467378).

<sup>63</sup> *MercExchange, L.L.C. v. eBay, Inc.*, 275 F. Supp. 2d 695 (E.D. Va. 2003)

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 712

<sup>66</sup> *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323 (Fed. Cir. 2005).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1338 (citing *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1246–47 (Fed. Cir. 1989)).

<sup>69</sup> *eBay Inc. v. MercExchange, L.L.C.*, 546 U.S. 1029 (2005).

<sup>70</sup> *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

<sup>71</sup> *Id.* at 396.

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 . . . . For these firms, an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent.<sup>72</sup>

Essentially, NPEs affected the patent system in such a way that the Supreme Court overruled the traditional practice of granting permanent injunctions to protect practicing entities. Because NPEs use the threat of a permanent injunction in securing license grants with major companies, the Supreme Court removed the presumption of irreparable harm, thus making it more difficult for a successful plaintiff to win a permanent injunction. While this was seen as a win by many opponents of NPEs, the ruling has not stopped NPEs.<sup>73</sup> In fact, the ruling had an unintended consequence. Many NPEs and practicing entities alike, have flocked to the International Trade Commission (“ITC”), instead of the federal courts, because the ITC uses a more lenient standard when deciding whether to grant a permanent injunction.<sup>74</sup> In addition, another consequence of this ruling is that practicing entities who are successful in a patent infringement case, now must face a more difficult challenge in trying to procure a permanent injunction since irreparable harm is no longer presumed.

## B. Restricting Patent-Eligible Subject Matter

Two recent cases have dramatically influenced the landscape of patent-eligible subject matter, and NPEs likely played a role in the outcome of these cases. The first is *Bilski v. Kappos*<sup>75</sup> and the second is *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*.<sup>76</sup>

The *Bilski* case dealt with the patentability of business method patents.<sup>77</sup> Bernard Bilski applied for a patent based on methods of hedging risk for commodities trading.<sup>78</sup> However, the Patent and

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<sup>72</sup> *Id.*

<sup>73</sup> Gene Quinn, *Happy 5th Anniversary: The Impact of eBay v. MercExchange*, IP WATCHDOG (May 15, 2011), <http://www.ipwatchdog.com/2011/05/15/happy-5th-anniversary-ebay-v-mercexchange/id=16894/>.

<sup>74</sup> *Id.*

<sup>75</sup> *Bilski v. Kappos*, 561 U.S. 593, 130 S. Ct. 3218 (2010).

<sup>76</sup> *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014).

<sup>77</sup> Michael Barclay, *Bilski v. Kappos: The Supreme Court Declines to Prohibit Business Method Patents*, ELECTRONIC FRONTIER FOUNDATION (June 29, 2010), <https://www.eff.org/deeplinks/2010/06/bilski-v-kappos-supreme-court-declines-prohibit>.

<sup>78</sup> *Id.*

Trademark Office (“PTO”) denied his application because the subject matter was not patent-eligible.<sup>79</sup> The Federal Circuit then upheld the PTO’s denial stating that the application failed the “machine-or-transformation test.”<sup>80</sup> This test allows a process to be patented if it is tied to a machine or transforms an article.<sup>81</sup> In *Bilski*’s case, the process was purely mental and was not connected to a machine or apparatus. The Supreme Court then upheld the ruling but stated that the “machine-or-transformation” test was not the sole test for patentability.<sup>82</sup> The Court then held that *Bilski*’s application was not patentable because it was an abstract idea.<sup>83</sup> However, the Court did not definitively state whether business method patents in general were patent-eligible subject matter.<sup>84</sup> Many expected the Supreme Court to make a definitive ruling on business method patents since a majority of NPEs exclusively use business method patents when trying to procure lucrative licensing deals with companies.<sup>85</sup> However, the Supreme Court punted on the issue, and the ambiguities regarding patent-eligible subject matter remained.

Because the ambiguities over patent-eligible subject matter remained, four years after *Bilski*, the Supreme Court heard another important case dealing with patent eligibility. In *Alice*, the Court was faced with determining whether an abstract idea was patent-eligible subject matter if it was tied to computer implementation.<sup>86</sup> The Court held that “the mere recitation of a generic computer cannot transform a patent-ineligible abstract idea into a patent-eligible invention.”<sup>87</sup> This significantly narrowed the scope of patent-eligible software patents.<sup>88</sup> While this ruling has made prosecuting software patent applications before the PTO extremely difficult, it also struck a blow to patent trolls. One intellectual property lawyer has said that *Alice* is “making the lives of trolls hell” because “NPEs have always wanted claims where they can just look at your device and determine it’s infringed,” and now

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<sup>79</sup> *Id.*

<sup>80</sup> *In re Bilski*, 545 F.3d 943, 966 (Fed. Cir. 2008).

<sup>81</sup> *Id.* at 961–62.

<sup>82</sup> *Bilski v. Kappos*, 561 U.S. 593, 604 (2010).

<sup>83</sup> *Id.* at 611–12.

<sup>84</sup> *Id.* at 612.

<sup>85</sup> Steve Lohr, *Bilski Ruling: The Patent Wars Untouched*, *The New York Times* (June 28, 2010, 7:31 PM), <https://bits.blogs.nytimes.com/2010/06/28/bilski-ruling-the-patent-wars-untouched/>.

<sup>86</sup> *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014).

<sup>87</sup> *Id.* at 2358.

<sup>88</sup> Sarah Jeong, *A judge wants to make patent trolling a first amendment issue*, *THE VERGE* (Oct. 7, 2016, 3:43 PM), <https://www.theverge.com/2016/10/7/13199570/judge-patent-trolling-first-amendment-symantec>.

“most of those claims are invalid under *Alice*.”<sup>89</sup> Whether or not the Supreme Court was thinking of NPEs when making its ruling in *Alice* is unknown; however, the consequences of the decision have had major impacts on the patent system. The number of potential patents that NPEs can use to threaten companies has narrowed, but all Americans now face a difficult challenge in procuring software patents.<sup>90</sup>

### C. Fee Shifting

In the American judicial system, fee shifting is generally not allowed and both parties in a lawsuit are expected to cover their individual costs.<sup>91</sup> However, in patent law this is not always the case. Federal statutes give the courts discretion in awarding attorney fees to the prevailing party in “exceptional cases.”<sup>92</sup> In *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*,<sup>93</sup> the Supreme Court provided guidance on what constitutes “exceptional” cases. The court said that “a district court may award fees in the rare case in which a party’s unreasonable conduct—while not necessarily independently sanctionable—is nonetheless so ‘exceptional’ as to justify an award of fees.”<sup>94</sup> The Court also said that “subjective bad faith or exceptionally meritless claims” can provide a basis for fee shifting. Based on this logic, a District Court judge has recently decided to use fee shifting to fight back against NPEs.

In *Gust, Inc. v. AlphaCap Ventures, LLC*,<sup>95</sup> Judge Denise Cote from the Southern District of New York made a resounding ruling aimed at curbing NPEs. Judge Cote held the plaintiff and the plaintiff’s lawyers personally responsible for the defendant’s attorneys’ fees.<sup>96</sup> In the

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<sup>89</sup> Daniel Fisher, *Hard Times For Patent Trolls And Challengers As Courts, Targets Fight Back*, *Forbes* (Mar. 24, 2017), <https://www.forbes.com/sites/danielfisher/2017/03/24/hard-times-for-patent-trolls-and-challengers-as-courts-targets-fight-back/2/#3bdae2e871a0>.

<sup>90</sup> Eric Goldman, *The Problems With Software Patents*, *FORBES* (Nov. 28, 2012), <https://www.forbes.com/sites/danielfisher/2017/03/24/hard-times-for-patent-trolls-and-challengers-as-courts-targets-fight-back/2/#3bdae2e871a0>.

<sup>91</sup> David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the “American Rule” and “English Rule”*, 15 *IND. INT’L & COMP. L. REV.* 583, 585 (stating that “the ‘American rule,’ which has stood for over 200 years, is one in which each party must bear its own costs for litigation, regardless of the outcome).

<sup>92</sup> 35 U.S.C. § 285 (2012).

<sup>93</sup> 134 S. Ct. 1749 (2014).

<sup>94</sup> *Id.*

<sup>95</sup> 226 F. Supp. 3d 232 (S.D.N.Y. 2016).

<sup>96</sup> *Id.* at 254 (“Gust is awarded \$492,420 in attorneys’ fees and \$15,923 in costs, for a total of \$508,343, jointly and severally against AlphaCap Ventures, LLC and Gutride Safier LLP.”).

opinion, Judge Cote stated that the case was exceptional for two reasons.<sup>97</sup> “First, AlphaCap’s lawsuit against Gust was ‘frivolous’ and ‘objectively unreasonable’ in light of *Alice* and its progeny. Second, the manner in which AlphaCap litigated its claim was unreasonable, insofar as AlphaCap’s goal was to extract a nuisance settlement from Gust.”<sup>98</sup> Judge Cote also made it clear that awarding attorneys’ fees in this case would deter future abusive NPE litigation.<sup>99</sup>

This case shows that NPEs have impacted the patent system in such a way that courts are now willing to grant attorneys’ fees—an exceptional occurrence—to prevailing parties. Another impact of this case is its possible deterrence effect on law firms who decide to represent NPEs in patent litigation cases.<sup>100</sup> After this ruling, many firms will think twice before representing a NPE because they may be left holding the bill for the other party’s legal fees—a bill that can easily be in the millions.<sup>101</sup>

#### D. Restricting Forum Shopping

Arguably the most influential recent patent case, *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*,<sup>102</sup> was influenced by NPEs. *TC Heartland* changed the nature of what constitutes appropriate venue in patent infringement cases. Before *TC Heartland*, twenty-five percent (25%) of all patent suits filed in the United States were filed in the Eastern District of Texas, and a significant number of these cases involved NPEs.<sup>103</sup> The reason why this specific District was so popular is multifaceted. First, the District’s rapid litigation timetable puts added pressure on defendants to settle cases with NPEs.<sup>104</sup> Second, local practices tend to hurt defendants.<sup>105</sup> In the Eastern District, parties are first required to seek permission from the court to file a summary judgment motion, and permission is not always granted.<sup>106</sup> Also, defendants’ summary judgment motions in this District are only granted eighteen percent (18%) of the time, well below the national average of

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<sup>97</sup> *Id.* at 241.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 245.

<sup>100</sup> Evan Schuman, *A potentially fatal blow against patent trolls*, COMPUTERWORLD (Jan. 3, 2017).

<sup>101</sup> See *supra* text accompanying note 28.

<sup>102</sup> *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017).

<sup>103</sup> Daniel Nazer & Vera Ranieri, *Why Do Patent Trolls Go to Texas? It’s Not for the BBQ*, ELECTRONIC FRONTIER FOUNDATION (July 9, 2014), <https://www.eff.org/deeplinks/2014/07/why-do-patent-trolls-go-texas-its-not-bbq>.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

thirty-one percent (31%).<sup>107</sup> Third, one single judge in the Eastern District hears a majority of all the patent cases.<sup>108</sup> In 2013, 1,495 patent lawsuits were filed in the Eastern District and Judge Gilstrap heard 941 of those cases.<sup>109</sup> This opens the door for repeat players to foster relationships with the most important player in the patent litigation world which may have led to favoritism. And last, but also most important, from 1994 to 2005 patent plaintiffs in the Eastern District won eighty-eight percent (88%) of all jury trials and seventy-five percent (75%) of all bench trials.<sup>110</sup> The national plaintiff win rate in patent cases during this same time was only sixty-eight percent (68%) of all jury trials and forty-seven percent (47%) of all bench trials.<sup>111</sup>

The implications of *TC Heartland* essentially closed the door on the Eastern District of Texas for a number of patent lawsuits. Before this case, any court that had personal jurisdiction over the accused infringer was an appropriate forum.<sup>112</sup> As long as there were contacts with the jurisdiction, venue was proper. Since many patented articles are used by someone in every state, there were many venue options available to plaintiffs.<sup>113</sup> Therefore, plaintiffs tended to forum shop and file suits in the most advantageous jurisdictions.<sup>114</sup> For many of these plaintiffs, that was the Eastern District of Texas.<sup>115</sup> But, in *TC Heartland*, the Supreme Court changed this stating that venue for patent cases was only proper in the jurisdiction where the defendant is incorporated or where the defendant “has committed acts of infringement and has a regular and established place of business.”<sup>116</sup> While the meaning of “regular and established place of business” is still being determined in courts,<sup>117</sup> one thing is certain—the number of jurisdictions where venue is appropriate

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Joe Mullin, *The year in patent litigation: More trolling, more Texas*, ARS TECHNICA (May 14, 2014, 1:27 PM), <https://arstechnica.com/tech-policy/2014/05/the-year-in-patent-litigation-more-trolling-more-texas/>.

<sup>110</sup> Marius Meland, *Eastern District of Texas: A Plaintiff's Best Bet*, LAW360 (Dec. 9, 2005, 12:00 AM), <https://www.law360.com/articles/4738/eastern-district-of-texas-a-plaintiff-s-best-bet>.

<sup>111</sup> *Id.*

<sup>112</sup> Dennis Crouch, *Federal Circuit: TC Heartland changed the law; pre-decision waiver of venue challenges are nullified*, PATENTLY-O (Nov. 15, 2017), <https://patentlyo.com/patent/2017/11/heartland-challenges-nullified.html>.

<sup>113</sup> Josh Landau, *TC Heartland Attacks The Heart Of Patent Forum Shopping*, PATENT PROGRESS (May 23, 2017), <https://www.patentprogress.org/2017/05/23/tc-heartland-attacks-heart-of-patent-forum-shopping/>.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1514 (2017).

<sup>117</sup> *In re Cray Inc.*, 871 F.3d 1355 (Fed. Cir. 2017).

has been significantly reduced.<sup>118</sup> Thus, the ability of NPEs to file suit in their preferred venue—the Eastern District of Texas—has also been significantly reduced.<sup>119</sup> Some commentators have said that *TC Heartland* has curtailed “the ability of patent trolls to extort settlements based on cost of litigation rather than merit.”<sup>120</sup> But, regardless of whether the decision in *TC Heartland* was due in part to NPEs, the impact is effectively the same: the judiciary is taking measures that make it more difficult for NPEs to succeed.

## V. SOLUTIONS TO THE PATENT TROLLING PROBLEM

As Section IV highlighted, NPEs have played a hand in shaping the patent system. However, one question remains: has the patent system overcorrected itself, and, if so, what are the best solutions moving forward?

There is evidence that obtaining and protecting patents has become more difficult today, especially for smaller entities and individual inventors that lack significant capital, as a result of the changes the patent system has undergone in response to NPEs. For example, the Supreme Court made it clear in *eBay v. MercExchange*<sup>121</sup> that permanent injunctions were no longer automatic for a successful plaintiff in a patent infringement case. The goal, per Justice Kennedy’s concurrence, was to limit the effectiveness of NPEs.<sup>122</sup> Because NPEs use the threat of a permanent injunction against companies to obtain lucrative licensing agreements,<sup>123</sup> increasing the difficulty in obtaining a permanent injunction should decrease the bargaining power of NPEs. While this may be true, NPEs and practicing entities alike have responded by filing more suits at the ITC.<sup>124</sup> This is because the ITC has many advantages for patent owners compared to the District Courts. First, the ITC rarely grants stays while post grant proceedings like inter partes reviews (“IPRs”) are occurring.<sup>125</sup> Because the ITC rarely grants

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<sup>118</sup> See Landau, *supra* note 113.

<sup>119</sup> *Id.*

<sup>120</sup> Vera Ranieri, *Appeals Court Limits Ability of Patent Trolls to File Suit in Far-Flung Districts*, ELECTRONIC FRONTIER FOUNDATION (Sept. 21, 2017), <https://www.eff.org/deeplinks/2017/09/appeals-court-limits-ability-patent-trolls-file-suit-far-flung-districts>.

<sup>121</sup> 547 U.S. 388 (2006).

<sup>122</sup> *Id.* at 396.

<sup>123</sup> See Carter, *supra* note 5.

<sup>124</sup> Daniel E. Yonan et al., *The return of the ITC as the forum of choice*, STERNE, KESSLER, GOLDSTEIN & FOX, [http://www.skf.com/uploads/1535/doc/The\\_Return\\_of\\_the\\_ITC\\_as\\_teh\\_Forum\\_of\\_Choice.pdf](http://www.skf.com/uploads/1535/doc/The_Return_of_the_ITC_as_teh_Forum_of_Choice.pdf).

<sup>125</sup> *Id.* (stating that the ITC rarely grants stay whereas the districts courts grant

stays, NPEs can still obtain exclusion orders (the ITC equivalent of a permanent injunction) while a defendant is trying to invalidate the patent in an IPR proceeding. Second, the ITC resolves cases more efficiently than the District Courts.<sup>126</sup> The average time of a case at the ITC is nine months whereas cases in the District Courts can take up to three years.<sup>127</sup> The shortened timeframe gives patent owners like NPEs more leverage because defendants must decide quickly whether to settle. Third, and most important, the ITC can grant exclusion orders on infringing articles imported into the United States, and unlike the District Courts, the ITC is not bound by federal court precedent.<sup>128</sup> Thus, the *eBay* case has not affected how exclusion orders are granted.

Other examples showing how the patent system may have overcorrected itself in response to NPEs include the ambiguity surrounding patent-eligible subject matter<sup>129</sup>—in particular, the patentability of business methods and computer software—as well as the uncertainty regarding the meaning of “regular and established place of business” as it relates to proper venue for patent cases.<sup>130</sup> The ambiguities present in all these areas are a result, at least to some degree, of NPEs. However, unlike the Band-Aids that the judiciary has tried to use to fix the NPE problem, which has adversely affected all those involved in the patent system, this paper proposes solutions aimed solely at preventing the effectiveness of NPEs that do not hurt others involved in the patent process. But, as addressed at the beginning of this paper, before these solutions can be applied, a proper definition of NPEs must first be determined.

One of the shortfalls of some definitions of NPEs is that universities and inventors who do not practice their inventions are captured in the definition.<sup>131</sup> Because the patent system was made to protect inventors by allowing them to reap a monetary award for their hard work for a limited time, any inventor, university, or company that represents inventors should be excluded from the definition of NPEs. Instead, the definition should focus on investment companies who acquire large patent portfolios that use the threat of litigation to obtain lucrative licensing agreements or who actually litigate to obtain monetary awards against practicing entities. One easily quantifiable way to determine whether an entity is a NPE is to require that, to be an NPE, the entity must generate over fifty percent (50%) of its revenue through licensing

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stays 65.7% of the time).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See *supra* text accompanying notes 75–90.

<sup>130</sup> See *supra* text accompanying notes 117–119.

<sup>131</sup> Rogers & Jeon, *supra* note 2, at 301.

fees and litigation awards and that the entity must have more than five patents. Furthermore, the inventors must not work for, or have worked for, the entity during prosecution of the patent at issue. This definition, without being overly broad, would capture most, if not all, of the abusive NPEs in existence. Now, with this test in hand, solutions to the problems surrounding patent trolls can be provided.

### A. Rule 11 Sanctions

One interesting approach to inhibiting the effectiveness of NPEs involves Rule 11 sanctions<sup>132</sup>—every attorney’s worst nightmare. Scholars have already proposed using Rule 11 sanctions in patent cases to prohibit needless litigation and to deter NPEs.<sup>133</sup> Since Rule 11 is already available without any legislative actions, it can be used immediately,<sup>134</sup> and the rule is flexible enough to prevent bad faith infringement claims.<sup>135</sup>

Rule 11 can be applied by first determining if the entity asserting a patent infringement claim meets the definition of a NPE. Then a preliminary judgment can be made on the merits of the case. For frivolous claims, Rule 11 sanctions can be levied on both the plaintiff and the plaintiff’s attorneys. However, the difficulty comes in determining whether the case is frivolous. One approach to determine this involves looking at a number of factors that are indicative of a bad faith patent assertion by a NPE. Some easily determinable characteristics include:

- 1) the litigant was not in privity of employment with the named inventor, including 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 to the patent; and
- 3) the litigant's lines of business for the past three years share no commonality with the subject matter of the patent.<sup>136</sup>

If these factors are all satisfied and there are any elements of bad faith involved in the case, the court can *sua sponte* issue a Rule 11 sanction. This would inhibit the effectiveness of NPEs because their strongest

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<sup>132</sup> FED. R. CIV. P. 11.

<sup>133</sup> Eric Rogers & Young Jeon, *Inhibiting Patent Trolling: A New Approach for Applying Rule 11*, 12 NW. J. TECH. & INTELL. PROP. 291 (2014).

<sup>134</sup> *Id.* at 291.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 327.

bargaining tool, the high cost of patent infringement defenses, would be eliminated. Also, the rule would prevent future suits and would deter firms from accepting cases from NPEs.

### **B. Fee Shifting**

Another possible solution involves fee shifting. Federal statutes already give judges the discretion to award attorneys' fees to the defendant in "exceptional" patent cases.<sup>137</sup> Thus, using factors, like those set forth in the previous section, a judge can determine whether the plaintiff is a NPE and whether the suit is frivolous. This has already been implemented by one District Court judge.<sup>138</sup> However, widespread implementation and use across the country would significantly deter NPEs from litigating claims and would also deter most law firms from representing NPE clients. Thus, more widespread use of fee shifting that targets NPEs could solve many of the issues surrounding NPEs while not harming other parties. It also would not affect the overall structure of patent law.<sup>139</sup>

### **C. Federal Legislation**

Since many courts may be hesitant to make use of Rule 11 sanctions or fee shifting to inhibit the effectiveness of NPEs, federal legislation, specifically tailored to NPEs, could be implemented to solve this problem. Currently, there is no specific federal legislation that gives defendants a cause of action against NPEs for frivolous litigation or threats. However, Congress could change this. For example, a tort action for damages can be created that gives defendants in a frivolous NPE suit a cause of action.<sup>140</sup> Since tort actions are used to "redress misuse of the legal system," a specifically tailored tort action against NPEs could easily be implemented.<sup>141</sup>

Also, a new cause of action could be created that provides trolling targets, regardless of whether litigation was filed against them, possible

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<sup>137</sup> 35 U.S.C. § 285 (2012).

<sup>138</sup> *Gust, Inc. v. AlphaCap Ventures, LLC* 226 F. Supp. 3d 232 (S.D.N.Y. 2016) (defendant in a patent infringement case brought by a NPE was "awarded \$492,420 in attorneys' fees and \$15,923 in costs, for a total of \$508,343, jointly and severally against AlphaCap Ventures, LLC and Gutride Safier LLP").

<sup>139</sup> See *supra* text accompanying notes 75–90 (showing that cases like *Bilski* and *Alice*, which have arisen in part because of NPEs, have added ambiguity to patent-eligible subject matter).

<sup>140</sup> Vincent R. Johnson, *Minimizing the Costs of Patent Trolling*, 18 UCLA J. L. & TECH. 1, 22–23 (2014).

<sup>141</sup> *Id.*

remedies.<sup>142</sup> New Jersey has already drafted a bill aimed to do just that.<sup>143</sup> The bill lists a number of factors that courts can consider when making this determination.<sup>144</sup> Furthermore, trolling targets would have multiple remedies at their disposal such as: "(1) equitable relief; (2) damages; (3) costs and fees, including reasonable attorney's fees; and (4) exemplary damages in an amount equal to \$50,000 or three times the total of damages, costs, and fees, whichever is greater."<sup>145</sup> Thus, a new cause of action, especially if created at the federal level, would greatly expand the potential liability of NPEs who file questionable patent infringement suits. Thus, in cases where NPEs are beyond the reach of Rule 11 sanctions or the exceptionally high bar required for fee shifting, trolling targets would still have remedies available to them. Not only would this increase the overall equity of the patent system, but it would also function as a deterrence mechanism against future questionable NPE litigation.

## VI. CONCLUSION

NPEs and their impact on the patent system has been profound. While some disagree on the exact definition of a NPE, no one can argue that many NPE practices have hurt the patent system, especially those who have been attacked by NPEs. However, the judicial responses to NPEs has been slow and lacking. In fact, many responses have had unintended consequences and have created more problems than solutions. Thus, to truly solve this issue and significantly reduce the effectiveness of NPEs, solutions must be created that specifically target NPEs. The best methods for doing this, without creating more problems, is to use tools that are already available to the courts, like Rule 11 sanctions and fee shifting. However, due to the hesitancy of most judges in using these tools, Congress should draft new legislation that gives trolling targets specific remedies. This would not only increase equity and fairness but would also provide significant deterrence, both to NPEs and to law firms who represent NPEs. Thus, with these specifically tailored remedies targeting patent trolls, we may finally be able to shine a light under the bridge and limit the effectiveness of the patent trolling game.

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<sup>142</sup> *Id.* at 26.

<sup>143</sup> Assemb. 2462, 216th Leg., 1st Ann. Sess. § 3(b) (N.J. 2014).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*