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In Defense of Patent Trolls: Patent Assertion Entities as Commercial Litigation Funders

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IN DEFENSE OF PATENT TROLLS: PATENT ASSERTION ENTITIES
AS COMMERCIAL LITIGATION FUNDERS

JEAN XIAO*

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* J.D./Ph.D. in Law and Economics, expected 2017, Vanderbilt University Law School. "For of Him and through Him and to Him are all things, to whom be glory forever. Amen." Romans 11:36. First and foremost, I give thanks to my Lord and Savior Jesus Christ, who gave me the passion, persistence, and strength to complete this work. Next, I thank Professor Brian Fitzpatrick for encouraging me to undertake this project, for reading prior drafts, and for giving me an opportunity to present my ideas in his Advanced Litigation Seminar. I also thank my classmate Matthew Doster, who read a previous draft of this paper and provided helpful feedback. Next, I thank the Vanderbilt Law and Economics Program, which provided me financial support for submitting this piece to law journals. Last, but certainly not least, I thank all of the members of the Chicago-Kent Journal of Intellectual Property that were involved in the editing of this piece.

INTRODUCTION

In the past few years, different governing entities have labored to reform patent litigation. The 114th Congress has introduced eight reform bills.¹ The Patent and Trademark Office (“PTO”) has launched a website to help consumers understand patent litigation and sought public input on improving the clarity of software patents.² The Federal Trade Commission (“FTC”) has investigated companies that have sent vague demand letters in which they request royalties for patent use and threaten lawsuit initiation if the royalties are not paid.³ State legislatures have also enacted or introduced bills to curb these vague demand letters.⁴ The Supreme Court has attempted to discourage vague and frivolous claims by lowering standards for awarding attorney’s fees in patent cases and for invalidating patents.⁵

In the midst of these reform efforts, one player in patent litigation has stood out: the patent troll—an entity that does not practice its patents but seeks to monetize them through royalty demands and lawsuit initiations.⁶ Many commentators argue that the term “patent trolls” should not include inventors and universities because the latter patentees are valuable sources of innovation.⁷ Such patentees are also not very litigious, in contrast to trolls

1. Trade Protection, Not Troll Protection Act, H.R. 4829, 114th Cong. (2016); Venue Equity and Non-Uniformity Elimination Act of 2016, S. 2733, 114th Cong. (2016); Targeting Rogue and Opaque Letters Act of 2015, H.R. 2045, 114th Cong. (2015); Demand Letter Transparency Act of 2015, H.R. 1896, 114th Cong. (2015); Innovation Project Act, H.R. 1832, 114th Cong. (2015); PATENT Act, S. 1137, 114th Cong. (2015); STRONG Patents Act of 2015, S. 632, 114th Cong. (2015); Innovation Protection Act, H.R. 9, 114th Cong. (2015).

2. Andrew S. Baluch, *Patent Reform 2015: A Comprehensive Guide to Current Patent Reform Developments in Congress, the Executive Branch, the Courts, and the States*, SOCIAL SCIENCE RESEARCH NETWORK, Jan. 23, 2015, at 36–37.

3. *Id.* at 33–34.

4. *See id.* at 42 (“More than half the 50 states have enacted or introduced a law in their state legislatures to . . . make [it] illegal to send ‘bad faith’ patent demand letters to residents of those states.”).

5. *See* *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014) (lowering the standard for awarding attorney’s fees in patent litigation); *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2129 (2014) (raising the notice standard so that a patent can more easily be invalidated).

6. *See* Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2118 (2013) (“Patent trolls [are] patent owners whose primary business is collecting money from others that allegedly infringe their patents”); James F. McDonough III, Comment, *The Myth of the Patent Troll: An Alternative View of the Function of Patent Dealers in an Idea Economy*, 56 EMORY L.J. 189, 189 (2006) (“A patent troll is a person or entity who acquires ownership of a patent without the intention of actually using it to produce a product.”); Sannu K. Shrestha, Note, *Trolls or Market-Makers? An Empirical Analysis of Nonpracticing Entities*, 110 COLUM. L. REV. 114, 115 (2010) (“[Patent trolls] are firms that rarely or never practice their patents, instead focusing on earning licensing fees.”).

7. *See* Christopher A. Cotropia et al., *Unpacking Patent Assertion Entities (PAEs)*, 99 MINN. L. REV. 649, 656–57 (2014) (suggesting that universities and original inventors should not be labeled as patent trolls); Mark A. Lemley, *Are Universities Patent Trolls?*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 611, 612 (2008) (arguing that “universities, although nonpracticing patent owners, are not necessarily patent trolls”); Eric Rogers & Young Jeon, *Inhibiting Patent Trolling: A New Approach for*

whose primary activity is patent enforcement.⁸ Thus, in this paper, the term “patent trolls” does not include inventors and universities but incorporates only entities that buy patents from others.

In 2012, trolls initiated sixty-two percent of all patent lawsuits.⁹ They filed 448 cases in 2010; that number increased to 2,278 in 2012.¹⁰ Many commentators blame trolls for the problems associated with patent enforcement including weak and vague legal claims, high litigation costs, impenetrable patent portfolios, and inconvenient timing of assertions.¹¹ Accordingly, many have publicly denounced trolls. For example, in 2006, in his concurring opinion in *eBay Inc. v. MercExchange, L.L.C.*, Justice Kennedy accused trolls of using the threat of injunctive relief to coerce potential licensees into paying exorbitant fees.¹² In 2014, President Obama condemned trolls for not offering actual goods or services and for extorting money from other companies.¹³ Other commentators have attacked trolls as “unsavory characters,”¹⁴ “parasites on successful businesses,”¹⁵ and “mold that eventually grows on rotten meat.”¹⁶ Only a handful of commentators are troll advocates. For the most part, advocates have highlighted the value of

Applying Rule 11, 12 NW. J. TECH. & INTELL. PROP. 291, 303 (2014) (arguing that universities and inventors should not be considered patent trolls); David L. Schwartz & Jay P. Kesan, Essay, *Analyzing the Role of Non-Practicing Entities in the Patent System*, 99 CORNELL L. REV. 425, 429–30 (2014) (explaining that many commentators do not view individual inventors and universities as patent trolls).

8. See Michael Risch, *Patent Troll Myths*, 42 SETON HALL L. REV. 457, 488–89 (2012) (“[U]niversities are rarely patent plaintiffs . . . [S]olo-inventor and university plaintiffs have fewer (or even single) patents, limiting their choices about which patents to pursue.”).

9. Colleen Chien, *Patent Trolls by the Numbers 1* (Santa Clara Univ. Sch. of Law, Legal Studies Research Paper No. 08-13, Mar. 13, 2013), <http://ssrn.com/abstract=2233041>.

10. See Cotropia et al., *supra* note 7, at 674 fig.1 (adding up the numbers for the large aggregator and patent holding company categories); see also Daniel P. McCurdy, *Patent Trolls Erode the Foundation of the U.S. Patent System*, PATENT REFORM, Fall/Winter 2008–2009, at 78, 79 (“Over the past year—from October 1, 2007 through September 30, 2008—389 litigations were filed involving the PatentFreedom-tracked [non-practicing entities], compared with 297 in the prior year.”).

11. See *infra* Part I.

12. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396 (2006).

13. Ali Sternburg, *Obama Calls For Patent Reform in the State of the Union*, PATENT PROGRESS (Jan. 29, 2014), <http://www.patentprogress.org/2014/01/29/obamas-state-union-executive-actions-call-patent-reform/>; see also Edward Wyatt, *Obama Orders Regulators to Root Out “Patent Trolls,”* N.Y. TIMES (June 4, 2013), <http://www.nytimes.com/2013/06/05/business/president-moves-to-curb-patent-suits.html> (“[T]he Obama administration is cracking down on what many call patent trolls . . .”).

14. Steven Pearlstein, *Big Firms Caught with Their Patents Down*, WASH. POST (Dec. 2, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/01/AR2005120101509.html>.

15. William M. Bulkeley, *Aggressive Patent Litigants Pose Growing Threat to Big Business*, WALL ST. J. (Sept. 14, 2005), <http://www.wsj.com/articles/SB112666647063840131>.

16. Tim Wu, *Weapons of Business Destruction*, SLATE (Feb. 6, 2006, 3:04 P.M.), http://www.slate.com/articles/news_and_politics/jurisprudence/2006/02/weapons_of_business_destruction.html.

these entities in providing capital to inventors.¹⁷ However, they have shied away from addressing trolls' role in patent enforcement.

This paper is the first to tackle headfirst the role of patent trolls in litigation. Part I argues that trolls are either not the sole source of problems associated with patent assertions or not responsible for these problems in the first place. Part II explains that these entities provide the same litigation-related benefits as commercial litigation funders, which, like trolls, supply capital for patent lawsuits. Both entities are engaging in "trollidom," which the Seventh Circuit recently defined as "the seeking of financial advantage by buying or otherwise obtaining a legal claim (as distinct from filing a legal claim in order to seek redress for injury)."¹⁸

Commercial litigation financiers are entities other than litigants, attorneys, and insurers.¹⁹ They invest in large-stakes lawsuits, such as patent and antitrust cases, by offering plaintiffs capital in exchange for a portion of case proceeds.²⁰ Thus, financiers receive no returns from unsuccessful litigation. Patent lawsuits make up approximately twenty to thirty percent of general funders' portfolios.²¹ For example, as of June 30, 2015, \$28.5 million out of \$142.2 million (or twenty percent of) Juridica's investments were in cases involving patents and intellectual property.²² Some financiers, such as Altitude Capital Partners, specialize in funding patent lawsuits.²³

Both commercial litigation funders and patent trolls offer capital for lawsuits, mitigate risk differences between litigants, and provide valuable

17. See, e.g., Nathan Myhrvold, *Funding Eureka!*, HARV. BUS. REV., March 2010, at 1, 1–4 (explaining how Intellectual Ventures, a patent troll, fosters a market of capital for inventors and the benefits of such a capital market for innovation).

18. *Carhart v. Carhart-Halaska Int'l, LLC*, 788 F.3d 687, 691 (7th Cir. 2015).

19. See AMERICAN BAR ASS'N COMM'N ON ETHICS 20/20, WHITE PAPER ON ALTERNATIVE LITIGATION FINANCE 1 (2011), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf ("Alternative litigation finance ('ALF') refers to the funding of litigation activities by entities other than the parties themselves, their counsel, or other entities with a preexisting contractual relationship with one of the parties, such as an indemnitor or a liability insurer.")

20. GARBER, RAND CORP., ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWN, AND UNKNOWN 13 (2010), http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf; Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 96 (2010).

21. See Joanna M. Shepherd, *Ideal Versus Reality in Third-Party Litigation Financing*, 8 J.L. ECON. & POL'Y 593, 601 (2012) (noting that in May 2011, Juridica had 28 percent of its investments in patent infringement cases); *The Fund*, JURIDICA INVESTMENTS LTD., <http://www.juridicainvestments.com/about-juridica/the-fund.aspx> (last visited June 30, 2015) (showing that 20 percent of the company's investments were in patent cases).

22. JURIDICA INVESTMENTS LTD., *supra* note 21.

23. *Firm Overview*, ALTITUDE CAPITAL PARTNERS (2009), <http://www.altitudecp.com/firm.html>.

expertise as repeat players.²⁴ Because of these benefits, funding commentators have portrayed financiers as saviors of cash-strapped, risk averse plaintiffs: “litigation funding serves a real need”;²⁵ “[b]y enlisting the help and cash of a third party, the plaintiff may be able to bolster its negotiating position vis-à-vis the defendant”;²⁶ and “[f]or small and midsize plaintiffs, [financing] can mean the difference between thriving, surviving[,] or even going bust.”²⁷ While funding is not exempt from disapproval and “unflattering metaphors,”²⁸ even skeptics and those that question this business practice recognize its benefits to plaintiffs.²⁹ In contrast, troll commentators have ignored the aforementioned litigation-related benefits and have largely criticized trolls for their role in patent enforcement. Hopefully, by demonstrating that these entities provide the same benefits as funders in Part II, future commentators will take into consideration these positive contributions and more accurately assess the troll business practice.

Finally, Part III shows that targeting trolls in policymaking is not the panacea to curing patent litigation’s ills. A decrease in these entities will only lead to an increase in trolling behavior by practicing entities and a rise in litigation funding investment.³⁰ The first effect is undesirable because unlike trolls, practicing entities seek out their competitors in patent enforcement and have a higher likelihood of reducing market producers than non-practicing entities, due to a greater ability to obtain injunctions.³¹ The second effect is undesirable because legal financing implicates three issues that are avoided by the troll business model: (1) decision-maker conflicts of interest, (2) waivers of attorney-client privilege and work-product doctrine protection, and (3) the undue influence of funding on the attorney.³²

24. See *infra* Part II.A.

25. Robert W. Wood, *Litigation Funding Lures Investors, Plaintiffs & Lawyers*, FORBES (Feb. 20, 2014), <http://www.forbes.com/sites/robertwood/2014/02/20/lawsuit-funding-lures-investors-plaintiffs-lawyers/>.

26. Molot, *supra* note 20, at 97.

27. Judith Messina, *Litigation-Finance Firms Bet On the Little Guy*, CRAIN’S N.Y. BUSINESS (Feb. 10, 2015), <http://www.crainsnewyork.com/article/20150210/SMALLBIZ/302089990/litigation-finance-firms-bet-on-the-little-guy>.

28. See W. Bradley Wendel, *Litigation Trolls*, 12 N.Y.U. J.L. & BUS. 725, 726 (2016) (“Litigation financiers have been likened to gamblers in the courtroom casino, loan sharks, vultures, Wild West outlaws, and busybodies mucking about in the private affairs of others.” (citations omitted)).

29. See, e.g., Roger Parloff, *Have You Got a Piece of This Lawsuit?*, FORTUNE (June 28, 2011), <http://fortune.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit-2/> (recognizing the benefits of funding while discussing the “troubling new business”).

30. See *infra* Part III.

31. See *infra* Section III.A.

32. See *infra* Section III.B.

I. CONFRONTING CRITICS' LITIGATION-RELATED COMPLAINTS AGAINST TROLLS

Many commentators blame trolls for problems that plague patent litigation: weak and vague legal claims, high litigation costs, impenetrable patent portfolios, and inconvenient timing of assertions.³³ This Part defends trolls against these lawsuit-related complaints. Opponents of trolls often make allegations without considering empirical evidence or countervailing incentives. Further, they often fail to recognize that the problems associated with patent litigation are not unique to trolls.

A. Weak and Vague Patents

First, opponents complain that trolls bring cases premised on weak and vague patents.³⁴ It is unknown to what degree trolls are vindicating patents of a lower quality than those of other plaintiffs. Empirical evidence suggests that at least some troll litigation is based on patents that are comparable to the ones enforced by practicing entities. Using common measures of patent quality including the number of citations by other patents and the number of legal claims in the patent document, Allison et al. (2009), Shrestha (2010), and Risch (2012) concluded that non-practicing entities, which include trolls,³⁵ hold patents that are at least as valuable as those held by practicing entities.³⁶ Measuring patent quality by litigation success (e.g., the percentage of cases won at trial), Shrestha (2010) and Risch (2012) discovered that non-practicing entities are just as successful as practicing entities.³⁷ Allison et al. (2011) and Mazzeo et al. (2013) found the opposite result, but Mazzeo and his coauthors showed that the lower success rate of non-practicing entities is driven by universities and individual inventors, not

33. See, e.g., Spencer Hsieh, *Patent Trolls and the New Tort Reform: A Practitioner's Perspective*, 4 I/S: J.L. & POL'Y FOR INFO. SOC'Y 75, 78 (2008) ("Perhaps the most common refrain in the patent debate is that plaintiffs will bring frivolous cases to extort unjustified settlements."); Lemley & Melamed, *supra* note 6, at 2117 ("Patent trolls are increasingly blamed for the growing costs of patent litigation and seemingly excessive damages awards and patent royalties."); Jason Kirby, *Patent Troll or Producer?*, FIN. POST (Jan. 14, 2006), <http://www.financialpost.com/story.html?id=1509d361-0144-4432-b6dc-2c14026c98d6> ("Critics argue that patent trolls, or patent holders who threaten companies with costly court battles unless they're offered licensing fees, are a serious threat to legitimate businesses.").

34. See, e.g., Shrestha, *supra* note 6, at 119 ("One of the most prominent criticisms against [patent trolls] is that they acquire weak and obscure patents and use them to pursue 'baseless' litigation.").

35. Non-practicing entities are entities that do not practice their patents and can include independent inventors, universities, and patent trolls.

36. John R. Allison et al., *Extreme Value or Trolls on Top?: The Characteristics of the Most-Litigated Patents*, 158 U. PA. L. REV. 1, 28–29 (2009); Risch, *supra* note 8, at 480; Shrestha, *supra* note 6, at 118.

37. Risch, *supra* note 8, at 481–82; Shrestha, *supra* note 6, at 157–58 tbl.4 & 5.

trolls.³⁸ In sum, these studies suggest that the legal claims of trolls are of a similar quality to those of practicing entities.

Even if the weak-and-vague patent issue is unique to trolls, these entities are not the creators of the legal claims and therefore should not be blamed for their quality. Inventors are the ones who craft the claims in the patent document.³⁹ The PTO is the agency that has the authority to approve the document.⁴⁰ Just as the creators of a contract control its wording, those who fashion the patent—inventors who write the application and the PTO that validates it—dictate its wording. Inventors and the PTO, not trolls, are responsible for the quality of patent claims.⁴¹

B. High Litigation Costs

Second, critics gripe about the costs of troll lawsuits.⁴² Bessen and Meurer (2014) estimated the sum of direct costs on defendants of non-practicing entity (including troll) litigation to be approximately twenty-nine billion dollars.⁴³ Beyond direct lawsuit expenses, opponents argue that troll patent assertions also impose indirect costs, such as the disruption of business operations and loss of market share.⁴⁴ When examining the time period from January 2007 to October 2011, Bessen et al. (2011) found that defendants' total loss of wealth resulting from non-practicing entity litigation was eighty-three billion dollars per year.⁴⁵

38. John R. Allison et al., *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO. L.J. 677, 693 fig.4 (2011); Michael J. Mazzeo et al., *Do NPEs Matter? Non-Practicing Entities and Patent Litigation Outcomes*, 9 J. COMP. LAW & ECON. 879, 889–901 (2013).

39. See CRAIG ALLEN NARD, *THE LAW OF PATENTS* 39–51 (3d ed. 2014) (explaining the process of applying for and obtaining a patent).

40. See *id.* (explaining the patent application process); see also Mark A. Lemley & Bhaven Sampat, *Is the Patent Office a Rubber Stamp?*, 58 EMORY L.J. 181, 187–202 (2008) (providing empirical evidence that the patent office is quite active in dealing with applications and not just a rubber stamp of approval).

41. See McDonough, *supra* note 6, at 202 (explaining that patent quality issues should be attributed to an understaffed patent office).

42. See, e.g., Lemley & Melamed, *supra* note 6, at 2161 (“[T]he idea that dealing with troll patents is more costly than dealing with practicing entities seems to resonate with those facing troll suits.”).

43. James Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 CORNELL L. REV. 387, 389 (2014).

44. *Id.* at 390 (“Indirect costs . . . include . . . business disruption costs such as loss of goodwill, loss of market share, and disruption of innovative activities.”); Marc Morgan, *Stop Looking Under the Bridge for Imaginary Creatures: A Comment Examining Who Really Deserves the Title Patent Troll*, 17 FED. CIR. B.J. 165, 169 (2008) (“The patent enforcement activities of [patent trolls] may prevent some products from reaching consumers because vendors face large costs just to research patent infringement claims.”).

45. James Bessen et al., *The Private and Social Costs of Patent Trolls*, 34 REGULATION 26, 31 (2011).

While patent cases financially burden defendants, they also necessitate large capital investments from plaintiffs including trolls—a point that critics have failed to recognize.⁴⁶ For a median-value patent lawsuit between one and twenty-five million dollars, a plaintiff pays about two million dollars in litigation costs.⁴⁷ Unless a troll believes that the expected value of the case exceeds the expenses, it will not initiate the legal action.⁴⁸ Further, there is no empirical evidence that suggests troll litigation imposes higher costs on defendants than that of practicing entities. In fact, patent assertions by practicing entities are likely more burdensome for defendants due to the discovery needed to investigate these entities' products or services.⁴⁹

C. *Impenetrable Patent Portfolios*

Third, critics complain about trolls building large patent portfolios and then asserting them against practicing entities.⁵⁰ A defendant facing a broad array of patents in a lawsuit often settles because at least one of them is probably valid; it may be less costly to pay for a license that covers the entire array than to continue with litigation.⁵¹ Additionally, because a portfolio frequently contains alternative technologies, defendants find it difficult to negotiate the royalties down by threatening to license a substitute from another patentee.⁵²

Although trolls do collect patents, this practice is not unique to them.⁵³ Practicing entities accumulate patents related to their business activities, as well as buy unrelated ones like trolls do.⁵⁴ For example, smartphone companies are practicing entities that are well known for their collections.⁵⁵

46. Shrestha, *supra* note 6, at 120.

47. *Id.*

48. See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 390 (2004) (“The plaintiff will sue when his cost of suit is less than his expected benefits from suit.”).

49. Lemley & Melamed, *supra* note 6, at 2162–63.

50. See *id.* at 2153 (“A common complaint about trolls . . . is that they aggregate large numbers of patents and that the aggregation of large numbers of patents in the hands of a single entity overwhelms alleged infringers by giving them little choice but to pay for a license for the bundle of patents . . .”).

Note that potential defendants are all practicing entities, since only practicing entities provide products or services that may infringe patents.

51. See *id.* at 2127 (“[T]he patent aggregator has so many patents that read on a particular target that a challenge to the validity of the patents makes little sense.”).

52. *Id.* at 2153.

53. See *id.* (“[T]here is no reason to think that aggregations by trolls are more likely to give rise to these problems than aggregations by practicing entities.”).

54. *Id.* at 2155.

55. *Id.*

In 2011, Google purchased the right to Motorola Mobility's 17,000 patents.⁵⁶ Also, in 2011, a group of companies including Apple, Ericsson, Microsoft, RIM, and Sony bought 6,000 Nortel Networks' telecommunications patents.⁵⁷ Thus, trolls are not the sole source of impenetrable patent portfolios.

D. Inconvenient Timing of Patent Assertions

Finally, opponents accuse trolls of waiting for companies to invest in technologies covered by trolls' patents so that these businesses will face switching costs if they choose not to license these technologies later on.⁵⁸ Critics also argue that trolls have a lower incentive than practicing entities to show off their patents.⁵⁹ Practicing entities attempt to deter potential plaintiffs by highlighting their portfolios to signal the possibility of counterclaims; that is, these entities will assert their own patents in response to the initiation of a lawsuit.⁶⁰ In contrast, trolls need not worry about others suing them because they do not offer products or services that could encroach on others' patents.⁶¹

While the switching costs of technology investment may motivate trolls to hide their patents, countervailing incentives exist to encourage them to bring cases in a prompt manner. First, trolls must file suit before the patent expiration date, which is twenty years after the application date.⁶² Second, in patent litigation, the defendant can raise the defense of laches if "the plaintiff delayed filing suit an unreasonable and inexcusable length of time after the plaintiff knew or reasonably should have known of its claim against the

56. Thomas H. Chia, Note, *Fighting the Smartphone Patent War with RAND-Encumbered Patents*, 27 BERKELEY TECH. L.J. 209, 209 (2012); Yongwook Paik & Feng Zhu, *The Impact of Patent Wars on Firm Strategy: Evidence from the Global Smartphone Market* 11 (Harvard Bus. Sch., Working Paper 14-015, 2013), http://www.hbs.edu/faculty/Publication%20Files/14-015_82697dd2-5915-45fd-8973-d2751a87f9ef.pdf.

57. Chris V. Nicholson, *Apple and Microsoft Beat Google for Nortel Patents*, N.Y. TIMES (July 1, 2011), http://dealbook.nytimes.com/2011/07/01/apple-and-microsoft-beat-google-for-nortel-patents/?_r=0; Paik & Zhu, *supra* note 56, at 11.

58. Lemley & Melamed, *supra* note 6, at 2165; Shrestha, *supra* note 6, at 122; see Gerard N. Magliocca, *Blackberries and Barnyards: Patent Trolls and the Perils of Innovation*, 82 NOTRE DAME L. REV. 1809, 1814–17 (2007) (explaining the problem of trolls enforcing dormant patents).

59. Lemley & Melamed, *supra* note 6, at 2164–65; McCurdy, *supra* note 10, at 82.

60. See Lemley & Melamed, *supra* note 6, at 2164 ("[P]racticing entities often like to draw attention to their large patent holdings in order to deter assertions against them by other practicing entities . . .").

61. See Magliocca, *supra* note 58, at 1817 ("But trolls are immune from this constraint because they are the quintessential one-shot players who are not interested in cooperative pooling arrangements.")

62. 35 U.S.C. § 154; see Brief of Various Law & Economics Professors as Amici Curiae Supporting Respondent at 20, *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006) (No. 05-130) [hereinafter Law & Econ. Professors' Brief] ("All patents are wasting assets, with less than a 20 year life . . .").

defendant; and . . . the delay resulted in material prejudice or injury to the defendant.”⁶³ The defendant’s switching costs may constitute an economic prejudice or injury.⁶⁴

Not only does a troll have reasons to quickly bring its claims but it is also not the sole party that affects the timing of technology development and litigation. Companies that invest in technology and original inventors also contribute to patents being enforced after switching costs have materialized. First, companies can conduct a patent check before investing in the usage and advancement of technologies; *ex ante* due diligence can mitigate enforcement surprises later.⁶⁵ Second, trolls buy from inventors who cannot afford to enforce their own patents.⁶⁶ Thus, patents may have been dormant due to previous owners’ economic inability to bring lawsuits, not strategic action on the part of trolls.⁶⁷

II. TROLLS OFFER LITIGATION-RELATED BENEFITS

Part I defended trolls against four litigation-related criticisms by recognizing empirical evidence, countervailing incentives, and the non-exclusive nature of patent litigation ills (i.e., these ills are not confined to trolls). Not only should commentators refrain from accusing trolls of causing

63. *Wanlass v. General Elec. Co.*, 148 F.3d 1334, 1337 (Fed. Cir. 1998) (quoting *Gasser Chair Co., Inc. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 773 (Fed. Cir. 1995)); *see* Law & Econ. Professors’ Brief, *supra* note 62, at 20 (“All patents are . . . subject to the defenses based on laches and estoppel.”).

64. *Wanlass*, 148 F.3d at 1337 (“Economic prejudice may arise where a defendant and possibly others will suffer the loss of monetary investments or incur damages which likely would have been prevented by earlier suit.” (citation omitted)); *see also* *In re Bogese*, 303 F.3d 1362, 1366 (Fed. Cir. 2002) (suggesting that prosecution laches may apply to dismiss a patentee’s application “when the industry has developed and matured to such a point as to be more financially beneficial to the applicant and hence more harmful or prejudicial to the public [and the industry]”).

65. *See* Shrestha, *supra* note 6, at 123 (“The problem . . . could be avoided if the manufacturer conducted a ‘patent clearance’ before sinking substantial resources into developing and marketing a product.”); Gene Quinn, *Difference Between Patent Searches & Infringement Clearance*, IP WATCHDOG (Jan. 21, 2010), <http://www.ipwatchdog.com/2010/01/21/difference-between-patent-searches-infringement-clearance/id=8521/> (explaining what a patent clearance search is).

66. *See* Schwartz & Kesan, *supra* note 7, at 428 (“[Patent trolls] purchase patents from these patentees who cannot afford to enforce their own patents.”).

67. *See* FED. TRADE COMM’N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 68 (2011), <https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf> (“[I]ndependent inventors have great difficulty negotiating royalty payments from large operating companies because they cannot credibly threaten expensive infringement suits.”); McDonough, *supra* note 6, at 210 (“Individual inventors and small entities rarely have the financial resources to commence and sustain a lawsuit.”); *see also* Robert P. Merges & Jeffery M. Kuhn, *An Estoppel Doctrine for Patented Standards*, 97 CALIF. L. REV. 1, 35 (2009) (explaining that inventors cannot evade laches by assigning their patents to another entity).

problems for which these entities are not responsible or that are not unique to them, but they should also recognize trolls for their positive contributions.

The oft-cited benefit of these entities is provision of capital to inventors.⁶⁸ An innovator does not receive a financial reward for obtaining a patent.⁶⁹ In fact, applying for one is costly and time-consuming. Patent approval takes approximately 25.3 months on average,⁷⁰ and attorney's fees related to filing an application for an "extremely simple" invention are approximately five to seven thousand dollars.⁷¹ In order to profit from a patent, the innovator has to commercialize, license, and/or sell the invention.⁷² Entities of all types—solo inventors, universities, nonprofit research organizations, distressed or bankrupt companies, startups, and *Fortune* 500 companies—have taken advantage of the option of selling their patents to trolls.⁷³ Once they pass off their patents, they can shift their focus from litigation to other business activities.⁷⁴ These companies may use proceeds from the sale to commercialize inventions, develop new products and services, or launch advertising campaigns.⁷⁵

68. See, e.g., Myhrvold, *supra* note 17, at 1–4 (explaining how a patent troll contributes capital to inventors).

69. See *id.* at 1 (“[I]nventions are too intangible to generate sufficient profits by themselves.”); McDonough, *supra* note 6, at 208 (“[O]nce the patent is granted, the inventor . . . has yet to realize the economic benefit.”); Shrestha, *supra* note 6, at 126 (“An independent inventor does not realize any financial gains simply by obtaining a patent.”).

70. Data Visualization Center, U.S. PATENT AND TRADEMARK OFFICE (Sept. 2016), <https://www.uspto.gov/dashboards/patents/main.dashxml>.

71. Gene Quinn, *The Cost of Obtaining a Patent in the US*, IP WATCHDOG (Apr. 4, 2015), <http://www.ipwatchdog.com/2015/04/04/the-cost-of-obtaining-a-patent-in-the-us/id=56485/>.

72. See Shrestha, *supra* note 6, at 126–27 (“An independent inventor does not realize any financial gains simply by obtaining a patent. She has to either develop a product and commercialize it or license the patent to a third party.”).

73. See, e.g., Magliocca, *supra* note 58, at 1817 (“[P]atents come[] from distressed start-ups that either go bankrupt trying to bring their inventions to market or sell their portfolio for pennies on the dollar because they do not have any other assets.”); Myhrvold, *supra* note 17, at 8 (listing the types of inventors that Intellectual Ventures, a patent troll, has purchased patents from); Risch, *supra* note 8, at 488–89 (explaining that a “large portion” of the patents held by the non-practicing entities in the sample were held by individuals and a small percentage was from companies that were “demonstrably defunct”).

74. See, e.g., FED. TRADE COMM’N, *supra* note 67, at 68 (explaining how patent sellers can use sale proceeds for other business activities).

75. *Id.* (“Both large and small companies are better able to find buyers for patent portfolios that they no longer need or wish to maintain. Selling those portfolios allows companies to recoup some return on the associated R&D investment and raise funds that can be used to support other innovative efforts.”); Magliocca, *supra* note 58, at 1818 (“[T]rolls invest in undercapitalized firms and thereby make a significant contribution to research and development.”); Shrestha, *supra* note 6, at 127 (“[Patent trolls] encourage [independent inventors] to engage in further inventive activity.”).

Both opponents and supporters of trolls have recognized the positive effects of providing capital to inventors,⁷⁶ but neither group has acknowledged the litigation-related benefits that trolls offer. In this Part, I expressly define these benefits by looking to commercial litigation funders, which participate in the same market as trolls. In March 2011, the FTC, which is the agency responsible for enforcing antitrust laws and is therefore known for its expertise in evaluating and defining markets, issued a report titled “The Evolving IP Marketplace.”⁷⁷ The agency placed commercial litigation funders in the ex post patent transaction and litigation market along with trolls such as patent enforcement and licensing companies.⁷⁸

Below, Section II.A explains that trolls provide the same three litigation-related benefits as funders: making available capital for lawsuits, mitigating risk differences, and offering repeat-player expertise. Section II.B rebuts arguments that despite being in the same market, trolls are fundamentally different from and worse than funders because the former buy the right to bring the patent claim and are thus entitled to one hundred percent of the lawsuit proceeds.

A. Litigation-Related Benefits

Funders and trolls offer the same litigation-related benefits: providing resources for patent cases, bearing lawsuit risk, and serving as a repeat player

76. See, e.g., Bessen & Meurer, *supra* note 43, at 409 (acknowledging provision of capital to inventors as a benefit of non-practicing entities); Myhrvold, *supra* note 17, at 1–4 (explaining how a patent troll contributes capital to inventors).

77. FED. TRADE COMM’N, *supra* note 67, at 1; *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, FED. TRADE COMM’N (July 2008), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>.

78. FED. TRADE COMM’N, *supra* note 67, at 62–65. The FTC used the general term “litigation finance firms,” instead of “commercial litigation funders.” However, the agency’s description of these funders as “firms [that] raise money from institutional investors and other resources to support the patent enforcement efforts of small companies and independent inventors” clearly refers to commercial litigation funders.

There are three segments of the litigation finance industry: companies that finance individual plaintiffs of personal injury lawsuits (consumer litigation funding), businesses that fund plaintiffs’ law firms (law firm funding), and entities that finance plaintiffs involved in commercial litigation such as patent or antitrust lawsuits (commercial litigation funding). GARBER, *supra* note 20, at 8–9.

For more information about consumer litigation funding, see Nicholas Beydler, Comment, *Risky Business: Examining Approaches to Regulating Consumer Litigation Funding*, 80 UMKC L. REV. 1159, 1163 (2012); Martin J. Esteveao, Comment, *The Litigation Financing Industry: Regulation to Protect and Inform Consumers*, 84 U. COLO. L. REV. 467, 474 (2013); and Jean Xiao, Note, *Heuristics, Biases, and Consumer Litigation Funding at the Bargaining Table*, 68 VAND. L. REV. 262, 265 (2015).

For more information about law firm funding, see GARBER, *supra* note 20, at 13; Molot, *supra* note 20, at 98; and *Attorney Funding*, EXCALIBUR FUNDING PROGRAMS, <http://www.excaliburlegal.com/AttorneyPricing.html> (last visited Oct. 18, 2015).

in the litigation game. First, both offer resources for initiating or sustaining patent assertions. Launching a lawsuit requires a substantial upfront capital investment to obtain a settlement or judgment in the remote future.⁷⁹ Since commencing a legal action may lower stock prices or decrease consumer demand, businesses find it hard to justify such a large expenditure.⁸⁰ Making such an expenditure means forgoing the development of new products, the employment of better workers, or the pursuit of other profitable ventures.⁸¹ Both funders and trolls provide alternatives to businesses making the lawsuit investment out of pocket.⁸² Companies can use what they obtain from funders for litigation expenses, such as hiring top-notch attorneys.⁸³ Businesses can also sell their patents to trolls, which then enforce them.⁸⁴ Often, small companies do not have the necessary financial assets to pose a credible litigation threat against potential infringers, whereas trolls have substantial resources to expend on patent assertions.⁸⁵

79. Joanna M. Shepherd & Judd E. Stone II, *Economic Conundrums in Search of a Solution: The Functions of Third-Party Litigation Finance*, 47 ARIZ. ST. L.J. 919, 927 (2015).

80. *See id.* (“Companies with outside investors are also hesitant to incur voluntary expenses with uncertain prospective payoffs because they must justify these expenses both directly to investors and through publicly available reports and metrics. Even a comparatively small additional expense may be received unfavorably in market reports, mandatory corporate disclosures, or in share prices.”).

81. *See* Shepherd & Stone, *supra* note 79, at 927 (“Most companies with sufficient business ventures to engender valuable business litigation have lucrative substitutes for the capital required to prosecute a complex commercial case, including developing new product lines, recruiting scarce or expensive talent, or expanding current manufacturing or distribution channels.”); *see also* FED. TRADE COMM’N, *supra* note 67, at 68 (“Both large and small companies are better able to find buyers for patent portfolios that they no longer need or wish to maintain. Selling those portfolios allows companies to recoup some return on the associated R&D investment and raise funds that can be used to support other innovative efforts.”).

82. *See* Mattathias Schwartz, *Should You Be Allowed to Invest in a Lawsuit?*, N.Y. TIMES (Oct. 22, 2015), http://www.nytimes.com/2015/10/25/magazine/should-you-be-allowed-to-invest-in-a-lawsuit.html?_r=0 (“Larger companies, even those with their own in-house counsel, are selling off pieces of lawsuits to smooth out cash flow and offload risk.”).

83. *See* Jonathan T. Molot, *The Feasibility of Litigation Markets*, 89 INDIANA L.J. 171, 179 (2014) (“[F]inancing can provide a business claimant with the resources it needs to retain topflight counsel”); Shepherd & Stone, *supra* note 79, at 946 (“Litigation financiers provide the initial or ongoing investment necessary to operate a lawsuit, obviating the need for the business firm to divert capital from business lines.”).

84. *See, e.g.*, Schwartz & Kesan, *supra* note 7, at 428 (“[Patent trolls] purchase patents from these patentees who cannot afford to enforce their own patents. [Trolls] accept the risks and uncertainty associated with attempting to enforce the patent rights.”).

85. *See* FED. TRADE COMM’N, *supra* note 67, at 68 (“[I]ndependent inventors have great difficulty negotiating royalty payments from large operating companies because they cannot credibly threaten expensive infringement suits.”); Schwartz & Kesan, *supra* note 7, at 428 (“[Patent trolls] purchase patents from these patentees who cannot afford to enforce their own patents.”); McDonough, *supra* note 6, at 210 (“Individual inventors and small entities rarely have the financial resources to commence and sustain a lawsuit.”); Shrestha, *supra* note 6, at 127 (“Even if the inventor were to try to license her patent on her own, she would be unlikely to obtain a licensing fee that [a patent troll] could obtain during negotiations because the latter brings a key ingredient to the bargaining table: a credible litigation threat.”); Stephen H. Haber & Seth H. Werfel, *Why Do Inventors Sell to Patent Trolls? Experimental Evidence for the*

Second, funders and trolls both bear lawsuit risk. Businesses, as plaintiffs, are typically risk averse when facing litigation.⁸⁶ This is problematic when defendants are risk neutral.⁸⁷ A difference in risk levels can lead to a settlement that deviates from the expected value of the case.⁸⁸ Risk aversion can cause plaintiffs to consent to lower settlements in order to evade the uncertainties associated with trials.⁸⁹ When skewed settlements systematically occur, the goals of the legal system, including optimal compensation and deterrence, are not met.⁹⁰ A plaintiff may seek funding in order to shift litigation risk from itself to the funder.⁹¹ The financier can better manage the risk because it maintains a portfolio of lawsuits and can spread the risk of one case over the others.⁹² After receiving funding, the plaintiff is closer to risk neutrality and can obtain a settlement with a smaller deviation from the expected lawsuit value.⁹³ Alternatively, unwillingness to

Asymmetry Hypothesis, ECON. LETTERS (forthcoming) (finding experimental evidence for the hypothesis that “an asymmetry in financial resources between individual patent holders and manufacturers prevents individuals from making a credible threat to litigate against infringement”).

86. See Shepherd & Stone, *supra* note 79, at 924 (“[Businesses] are *risk sensitive* to a lost investment in litigation.”); James Langenfeld & Sophie Yang, *FTC v. Actavis: Courts Bring Economics Back to Reverse Payment Cases*, ECON. MAGAZINE at 33, 35 (October 2014) (“[T]he patentee is likely to be risk averse to an unfavorable [litigation] outcome.”).

87. See Molot, *supra* note 20, at 69–70 (explaining how a plaintiff is willing to accept a settlement lower than the expected value of the case when facing a risk neutral, repeat player defendant).

88. *Id.*

89. *Id.*; see Kent S. Bernard & Willard K. Tom, *Antitrust Treatment of Pharmaceutical Patent Settlements: The Need for Context and Fidelity to First Principles*, 15 FED. CIR. B.J. 617, 630 (2006) (explaining how a pharmaceutical patentee is risk averse facing litigation and that the risk aversion will affect settlement demands); J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 NYU L. REV. 59, 73 (2016) (showing that the plaintiff’s settlement is the expected value of the case discounted by the plaintiff’s risk premium).

90. See Molot, *supra* note 20, at 67 (“Substantive law goals, such as deterrence, compensation, and retributive justice, cannot be achieved if defendants end up paying amounts different from what substantive law obligates them to pay, or if plaintiffs end up receiving amounts different from what substantive law entitles them to receive.”); Molot, *supra* note 83, at 172 (“If a principal goal of our procedural system is to ensure accurate resolution of disputes—so that defendants pay and plaintiffs receive precisely what they should when one applies substantive law to the facts of their case—then these bargaining imbalances represent a serious problem.”).

91. See Molot, *supra* note 20, at 96–97 (“[The funder] can offer the plaintiff cash for a portion of the recovery where the plaintiff . . . simply wants to reduce his exposure to litigation risk.”); Schwartz, *supra* note 82 (“Larger companies, even those with their own in-house counsel, are selling off pieces of lawsuits to smooth out cash flow and offload risk.”).

92. See John Beisner et al., *Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States*, U.S. CHAMBER INST. FOR LEGAL REFORM 6 (Oct. 2009), <http://www.instituteforlegalreform.com/uploads/sites/1/thirdparty litigation financing.pdf> (“[T]hird-party funding companies are able to mitigate their downside risk . . . they can spread the risk of any particular case over their entire portfolio of cases . . .”); Shepherd & Stone, *supra* note 79, at 943 (“Like any investor, litigation financiers first hedge against risk by buying stakes in large pools of litigation, purchasing portions of many cases rather than a few cases in entirety.”).

93. Molot, *supra* note 20, at 69–71.

bear litigation risk may compel a business to sell its patent.⁹⁴ The company may prefer upfront capital from a troll rather than uncertain payments from potential defendants.⁹⁵ The troll is less risk averse than the company because the former owns multiple patents and can spread the risk of one over its entire portfolio.⁹⁶ Thus, the troll can obtain a settlement closer to the expected value of the case.⁹⁷

Finally, funders and trolls are repeat players in the litigation game and bring beneficial experience to the table.⁹⁸ Financiers gain expertise on case valuation after investing in multiple lawsuits.⁹⁹ In the early stages of litigation, a funder can provide a helpful perspective on case value and possibly influence the caliber of the attorney that the plaintiff chooses.¹⁰⁰ Trolls also offer repeat-player lawsuit expertise. The primary business of these entities is vindicating patent rights.¹⁰¹ Unlike some product- or service-based companies, trolls are familiar with the litigation process and the repeat-

94. See David Yurkerwich, *Patent Sales and the IP Business Plan*, IAM-MAGAZINE (2008), <http://www.iam-media.com/Intelligence/Licensing-in-the-Boardroom/2008/Articles/Patent-sales-and-the-IP-business-plan> (“[In a patent sale,] a full risk transfer takes place in exchange for a fixed payment that has ‘priced in’ all past and future opportunities and risks to generate royalty income. . . . [I]ndividual licensors frequently engage in structured sales as they are usually cash constrained and risk averse . . .”).

95. See *id.* (“Boards need to evaluate the trade-off between the lower proceeds that can be realized from an immediate sale versus the time and uncertainty associated with litigation.”).

96. See, e.g., Lemley & Melamed, *supra* note 6, at 2126 (describing patent aggregator trolls); Myhrvold, *supra* note 17, at 8 (noting the multitude of patents that Intellectual Ventures, a patent troll, has).

97. See Prescott & Spier, *supra* note 89, at 73 (showing that the settlement amount varies from the expected value of the case due to litigants’ risk premiums).

98. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 98 (1974) (“[Repeat players in litigation] develop expertise and have ready access to specialists.”).

99. See Douglas R. Richmond, *Other People’s Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649, 651 (2005) (“The key to success for funding companies is to employ people with the claim and case evaluation expertise that traditional lenders typically lack or to develop systems or methodologies that are reasonable substitutes for such expertise.”); Jason Lyon, Comment, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 593 (2010) (“[T]he third-party funders’ very existence depends upon an accurate assessment of the value of claims, and the relative level of risk associated with each. Therefore, it is reasonable to expect that their expertise at claim valuation will surpass that of most attorneys.”).

100. See, e.g., Molot, *supra* note 83, at 180 (“Each litigant that Burford financed at the outset is one that would have found some lawyer to handle its dispute if it had been unable to finance it, although that lawyer would not have had the experience, ability, or resources possessed by the lawyer ultimately selected.”).

101. Colleen V. Chien, *Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*, 87 N.C. L. REV. 1571, 1579 (2009).

player defendants and judges.¹⁰² These non-practicing entities likely have learned from past mistakes and have crafted winning legal strategies.¹⁰³

B. Trolls Are Not Worse than Funders

While the FTC has deemed trolls similar enough to funders to be in the same market,¹⁰⁴ skeptics may argue that these two entities are fundamentally different because the former buy the right to bring the claim, whereas the latter only contract for a percentage of the lawsuit proceeds. Specifically, critics may argue that trolls are worse than funders for two reasons: (1) trolls have more incentives than funders to stir up frivolous litigation, and (2) they can shortchange patent sellers by buying claims outright. This Section addresses each contention.

1. Stirring Up Frivolous Litigation

Opponents may argue that trolls are worse than funders because the former have more incentives to stir up frivolous litigation. However, this is likely untrue. First, parties who can profit off of lawsuits—whether they own legal claims or not—will drive litigation.¹⁰⁵ Both trolls and funders want to realize the monetary gains from lawsuit assets.¹⁰⁶ The fact that a financier possesses the right to only part of the proceeds does not mean that it has any less of an incentive than a troll in seeking profitable cases in which to invest. The financier is comparable to the attorney of the plaintiffs in class actions and derivative lawsuits.¹⁰⁷ In these types of cases, the attorney has a large

102. See Galanter, *supra* note 98, at 99 (“[Repeat players in litigation] have opportunities to develop facilitative informal relations with institutional incumbents.”); Risch, *supra* note 8, at 486 (stating that in the author’s sample, companies that sold their patents often “had business models other than patent licensing” and “were attempting to build product or service-based businesses”); Yurkerwich, *supra* note 94 (citing different reasons that businesses sell patents including the fact that the patents are not related to the company’s core product- or service-based business).

103. See Galanter, *supra* note 98, at 103 (“[Repeat players in litigation] by virtue of experience and expertise, are more likely to be able to discern which rules are likely to ‘penetrate’ and which are likely to remain merely symbolic . . . [and] are more likely to be able to invest the matching resources necessary to secure the penetration of rules favorable to them.”).

104. FED. TRADE COMM’N, *supra* note 67, at 62–65.

105. See Wendel, *supra* note 28, at 748 (“All litigation is financed; the only question is how, and by whom.”).

106. See, e.g., Marianna Galstyan, *Who Are Patent Trolls and How Do They Work?*, INVESTOPEDIA (July 15, 2015), <http://www.investopedia.com/articles/investing/071515/who-are-patent-trolls-how-do-they-work.asp> (“Patent trolls . . . are companies that make money on patent infringement lawsuits.”); Roy Strom, *Numbers Never Lie—Or Do They?*, CHICAGO LAWYER (Feb. 2015), <http://www.chicagolawyer.com/Archives/2015/02/Litigation-Funding-Business.aspx> (“For litigation funders, [complex litigation is] a valuable asset.”).

107. See John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669,

financial stake in the outcome and is the driving force behind the claims; he finds meritorious lawsuits and secures the required plaintiffs in order to initiate the legal actions.¹⁰⁸ Similar to such an attorney, a funder views profitable cases as good investment opportunities and seeks them out.¹⁰⁹ In sum, funders have no less of an incentive than trolls to “stir up” litigation.

Second, trolls and financiers have reasons to make sound business decisions and not invest in frivolous cases. Trolls must be able to maintain credible litigation threats against future infringers in order to stay financially afloat.¹¹⁰ Thus, they buy patents they believe are valid and have a reasonable chance of eliciting royalties.¹¹¹ Similarly, funders must invest in a good portfolio of lawsuits in order to avoid operating losses in the long run.¹¹² They also want to cultivate a reputation for financing valid claims in order to attract profitable future investment opportunities.¹¹³

Finally, regardless of whether the plaintiff is a troll or not, all attorneys are bound by ethical duties, enforced by potential Rule 11 sanctions, to advise their clients against meritless lawsuits.¹¹⁴ Further, attorneys that operate on contingency fees will not want to waste their efforts on low

683 (1986) (“[O]ne better understands the behavior of the plaintiff’s attorney in class and derivative actions if one views him not as an agent [of the plaintiff], but more as an entrepreneur who regards a litigation as a risky asset that requires continuing investment decisions.”).

108. See *id.* at 678 (“Once the plaintiff’s attorney has decided to bring suit, identifying and securing a nominal client is often only a necessary procedural step that seldom poses a substantial barrier for the experienced professional.”).

109. See, e.g., *FAQS*, BURFORD, <http://www.burfordcapital.com/faqs/> (last visited Apr. 3, 2016) (explaining that Burford, a commercial litigation funder, provides financing for a wide variety of meritorious commercial litigation).

110. See Schwartz & Kesan, *supra* note 7, at 428 (“[Patent trolls] expect and are entitled to make money for assuming risks and uncertainty [associated with the purchased patents].”); Shrestha, *supra* note 6, at 127 (explaining that patent trolls bring “a credible litigation threat”).

111. See *supra* Section I.A.

112. See John P. Barylack & Jenna W. Hashway, *Litigation Financing: Preying on Plaintiffs*, 59 R.I.B.J., Mar.–Apr. 2011, at 5, 8 (“[Funders] carefully analyze applicants’ cases and accept only those they deem to have a high likelihood of recovery.”); Mariel Rodak, Comment, *It’s About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effects on Settlement*, 155 U. PA. L. REV. 503, 518–519 (2006) (“[I]t is in a litigation finance company’s best interest to advance only to those plaintiffs who, in its determination, have a reasonable chance of succeeding, since its investment will otherwise be for naught.”).

113. See, e.g., Lyon, *supra* note 99, at 595 (“[T]hird-party funders will likely be averse to the reputational costs of supporting frivolous litigation.”).

114. See MODEL RULES OF PROF’L CONDUCT R. 2.1, 3.1 (2013) (Rule 2.1 explains that lawyers must advise the client candidly, while Rule 3.1 explains that the lawyer has a duty to not bring frivolous litigation.); FED. R. CIV. P. 11 (allowing sanctions for frivolous litigation); see also Wesley A. Cann, Jr., *Frivolous Lawsuits—The Lawyer’s Duty to Say “No,”* 52 U. COLO. L. REV. 367, 372 (1981) (describing the lawyer’s ethical duty to not bring frivolous claims); Lyon, *supra* note 99, at 594–95 (“Attorneys have a duty to warn clients when their claims are without merit. . . . Any gains [the attorney] might make in fees could be offset by fines for prosecuting a frivolous suit.”).

probability cases.¹¹⁵ Until the 1990s, patent litigation was primarily handled on an hourly fee basis.¹¹⁶ However, in recent years, large wins by patent lawyers on contingency fees and an increase in demand for alternative fee structures that resulted from the Great Recession have spurred on contingency fee representation in patent cases.¹¹⁷

2. Shortchanging Patent Sellers

Opponents may also argue that trolls are worse than funders because the former can shortchange patent sellers by buying legal claims outright. However, this is also likely untrue. First, in the last few years, the number of trolls has increased.¹¹⁸ These entities are likely to compete against each other for valuable patents, bidding the price of the legal claims up, not down.¹¹⁹ Second, the seller likely knows more about the patent than the buyer because it filed the application and is familiar with the prior art, scope, and technical field.¹²⁰ Thus, the seller should have a better idea of the patent value than the buyer and is not likely to accept an unfair price.¹²¹

Further, the seller's information advantage can lead to an adverse selection problem in a market for legal claims.¹²² When buyers cannot see the true quality of legal claims, they believe that those sold are generally of

115. See Hosie, *supra* note 33, at 80 (“The cost of building and trying a patent case can easily exceed \$4 million. *No sane plaintiff’s lawyer would spend this kind of money on a frivolous case.*”); Lyon, *supra* note 99, at 593 (“[T]he attorney’s interest in recovery would prevent her from accepting frivolous claims on a contingency basis.”); Shrestha, *supra* note 6, at 120 (“[I]t is doubtful whether . . . a contingency fee attorney[] would sue a defendant if there was a low probability of a positive outcome.”).

116. David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 ALA. L. REV. 335, 354 (2012).

117. *Id.* at 355.

118. See Cotropia et al., *supra* note 7, at 676 fig.2 (2014) (the number of large aggregators and patent holding companies together increased by 44 from 2010 to 2012).

119. The smartphone patent war is an example of how bidding among patent buyers has worked; Rockstar, a company that ended up with some of the patents, operates under the patent troll model. See Joe Mullin, *Patent War Goes Nuclear: Microsoft, Apple-Owned “Rockstar” Sues Google*, ARS TECHNICA (Oct. 31, 2013), <http://arstechnica.com/tech-policy/2013/10/patent-war-goes-nuclear-microsoft-apple-owned-rockstar-sues-google/>.

120. See Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 743 (2005) (“Just as potential sellers of used cars have better information about the quality of their vehicles than can be assessed easily by other parties, so too do the original parties to a dispute have unique access to information about their claims.”); Elisa Ughetto & Cristina Odasso, *Patent Value: Seller and Bidder Perspectives* 7–8 (Druid Summer Conference, Working Paper, 2010) (stating that the patent seller has to provide information on “ownership status, validity, licensing activity, infringement, potential value [of patents] and so on” in a patent auction).

121. Ughetto & Odasso, *supra* note 120, at 7–8.

122. See Abramowicz, *supra* note 120, at 743 (explaining how asymmetric information between a buyer and seller of a legal claim can lead to an adverse selection problem).

lower quality.¹²³ This leads to heavy discounting of claims, which then leads to sellers pulling them out of the market.¹²⁴ Adverse selection can reduce the number of claims sold or can cause the market to completely fail.¹²⁵ In his article, Abramowicz used a simulation to show that the adverse selection problem may be overcome in circumstances where the buyer's litigation costs are substantially lower than those of the original plaintiff (i.e., the seller) and the potential defendant.¹²⁶ The reason that the patent market and its associated capital-injection and risk-shifting benefits are able to survive is because trolls can engage in lawsuits at a lower cost than others. Trolls' opportunity costs of litigation are lower than those of practicing-entity sellers because their primary business is bringing lawsuits, not distributing products or services.¹²⁷ Additionally, trolls, as plaintiffs, have lower discovery costs than defendants because plaintiffs only need to produce the patent document and prosecution history in response to discovery requests.¹²⁸

C. Conclusion

In sum, Part II demonstrated that trolls provide litigation-related benefits and that these benefits are legitimate since they are the same ones provided by commercial litigation funders, which operate in the same market as trolls. Section II.A showed that like funders, trolls make available capital for lawsuits, help mitigate risk differences, and offer repeat-player expertise. The only difference between trolls and funders is that the former buy the patents outright and the latter buy interests in the proceeds of patent cases. Section II.B rebutted allegations that the difference in claim ownership makes trolls fundamentally worse than funders. Both are incentivized as businesses to not invest in frivolous claims, and financiers do not have any less incentive than trolls to stir up litigation.¹²⁹ Further, patent sellers'

123. *See id.*

124. *See id.*

125. *See id.*

126. *See id.* at 745 ("Perhaps in [circumstances in which third-party buyers have substantial advantages in litigation costs,] the adverse selection problem can be overcome.").

127. *See* Chien, *supra* note 101, at 1579 ("[P]atent enforcement is [patent trolls'] core business."); Shepherd & Stone, *supra* note 79, at 927 ("Most companies with sufficient business ventures to engender valuable business litigation have lucrative substitutes for the capital required to prosecute a complex commercial case, including developing new product lines, recruiting scarce or expensive talent, or expanding current manufacturing or distribution channels.").

128. *See* John M. Golden, *Patent Trolls and Patent Remedies*, 85 TEX. L. REV. 2111, 2133 (2007) (The patent holders' "litigation costs might not be expected to be as great as those expected for the potential infringer."); Shepherd, *supra* note 21, at 602 ("[P]laintiffs often have few documents beyond the patent and prosecution history.").

129. *See supra* Section II.B.1.

information advantage makes it unlikely for trolls to shortchange sellers, and this advantage is the very reason that the troll business model must operate the way it does in order to provide the litigation-related benefits.¹³⁰

III. DO NOT TARGET THE TROLLS

Believing that trolls are responsible for patent litigation's ills, some policymakers have considered and even passed laws that disadvantage these entities in an effort to eliminate them and, in turn, cure the ills. In 2013, a federal bill called the Saving High-Tech Innovators from Egregious Legal Disputes ("SHIELD") Act was introduced.¹³¹ It required a court to award full litigation costs to the defendant if it won and the opposing party was not an original inventor, practicing entity, or university (i.e., if the plaintiff was a patent troll).¹³² Though this bill never made it out of committee,¹³³ it serves as a clear example of how policies may be crafted to target trolls. Additionally, out of the twenty states that have passed laws to sanction vague demand letters, seventeen of them exempt certain entities such as universities and technology transfer organizations, which sell or license patents to companies that have not yet chosen patented technologies.¹³⁴ Since trolls are neither universities nor ex ante patent dealers, they do not qualify for these exemptions.¹³⁵

As explained in Part I, trolls should not be blamed for patent litigation ills because they are not the sole contributor to the ills or are not responsible for them in the first place. Disadvantaging trolls in an effort to eradicate them—as seen in the SHIELD bill and the vague demand letter state laws—will not only fail to cure the problems but will also eliminate a source of the litigation-related benefits highlighted in Part II.

130. See *supra* Section II.B.2.

131. H.R. 845, 113th Cong. (2014).

132. *Id.*

133. See H.R. 845 – Saving High-Tech Innovators from Egregious Legal Disputes Act of 2013, CONGRESS.GOV (Apr. 8, 2013), <https://www.congress.gov/bill/113th-congress/house-bill/845> (showing that the last action taken on this bill was referral to the Subcommittee on Courts, Intellectual Property, and the Internet).

134. See BALUCH, *supra* note 2, at 42–49 (surveying state law activity regarding vague demand letters up to January 2015); see also Jonathan Griffin, 2015 Patent Trolling Legislation, NAT'L CONF. STATE LEG. (Nov. 12, 2015), <http://www.ncsl.org/research/financial-services-and-commerce/2015-patent-trolling-legislation.aspx> (listing state legislature activity concerning patent litigation reform related to regulating demand letters).

135. See FED. TRADE COMM'N, *supra* note 67, at 50–51, 69 (explaining that patent trolls are not part of the ex ante technology transfer market).

Targeting trolls in reforms will also lead to two adverse consequences. Section III.A discusses how eliminating these non-practicing entities will increase trolling behavior by practicing entities. This is undesirable because unlike trolls who generally do not discriminate against potential infringers, practicing entities seek to destroy their competitors and have a higher likelihood of reducing market producers than non-practicing entities, due to a greater ability to obtain injunctive relief.¹³⁶ Section III.B explains that upon the passage of policies that disadvantage trolls, investors will shift capital from these entities to funders. This consequence is also undesirable because unlike the troll business model, litigation financing implicates issues dealing with decision-maker conflicts of interest, waivers of attorney-client privilege and work-product doctrine protection, and the improper influence of funding on the attorney.¹³⁷

A. An Increase in Trolling Behavior by Practicing Entities

Eliminating trolls will likely result in an increase in trolling behavior by practicing entities.¹³⁸ In this Section, “trolling behavior” is defined as accumulating patents and asserting them against practicing entities—precisely the type of conduct that critics complain about.¹³⁹ The growing phenomena of defensive patenting and patent privateering suggest that trolls are currently not alone in engaging in trolling behavior and that the frequency of practicing entities asserting their patent portfolios will further increase once trolls are out of the picture.

First, practicing entities have started building portfolios of self-created and purchased patents in order to defend themselves in litigation by counterclaiming against practicing-entity plaintiffs (“defensive patenting”).¹⁴⁰ Defensive patenting occurs in the semiconductor, computer, electronics, and financial industries.¹⁴¹ As practicing entities grow their businesses, many start to assert patents against others, regardless of whether

136. *See infra* Section III.A.

137. *See infra* Section III.B.

138. *See* Lemley & Melamed, *supra* note 6, at 2152 (“There is little reason to believe that, as long as there is an abundance of patents that can be used to generate revenues, buy patent peace, or tax competitors, only trolls will try to profit from them.”).

139. *See supra* Section I.C (discussing the impenetrable patent portfolio problem).

140. *See* Chien, *supra* note 101, at 1582 (“By building portfolios of patents, companies can discourage or neutralize threats of suits brought by their competitors.”); Lemley & Melamed, *supra* note 6, at 2154–55 (discussing patent aggregation by trolls and non-trolls).

141. Chien, *supra* note 101, at 1582–83.

others sue them first.¹⁴² Examples of companies that have followed this path include Microsoft, Yahoo, Alcatel, Tessera, and Sun Microsystems.¹⁴³ If trolls go out of business as a result of adverse laws, practicing entities that do not wish to engage in patent enforcement will not be able to sell their patents to these non-practicing entities. They will have one less alternative to profit off of their inventions, making patent assertion more attractive.¹⁴⁴

Second, practicing entities have engaged in patent privateering, which occurs when a company sells its patents to a troll and then allies with that troll to assert them against the company's competitors.¹⁴⁵ Examples of these alliances include: Nokia with MOSAID, Micron with Round Rock Ventures, Ericsson with Unwired Planet, and British Telecom with IPValue.¹⁴⁶ If laws disincentivize trolls, practicing entities will no longer have a choice to partner with (and hide behind) trolls to destroy their competitors. Instead, they will likely take up the patent assertion activities that were previously delegated to trolls.

The shift of trolling behavior to practicing entities is undesirable because these entities target their competitors in patent infringement lawsuits. With the exception of those that are part of privateering agreements, trolls usually assert their patents against all potential infringers, without discrimination, in order to maximize profits.¹⁴⁷ In fact, they have an incentive to see companies stay in business so that they can continue to obtain royalties for infringing technologies.¹⁴⁸ In contrast, practicing entities go after their competitors so that they can dominate the market for their products and services.¹⁴⁹ They have an incentive to increase their rivals' costs and prices through high licensing fees and thereby increase consumer

142. Lemley & Melamed, *supra* note 6, at 2135; *see* Chien, *supra* note 101, at 1583 (“Despite the importance of defensive patenting strategies among high-tech companies, the share of suits involving hardware and software inventions has actually risen, not declined.”).

143. Lemley & Melamed, *supra* note 6, at 2136; *see* Chien, *supra* note 101, at 1582 (referencing Sun Microsystems when explaining defensive licensing).

144. *See* FED. TRADE COMM’N, *supra* note 67, at 68 (“Both large and small companies are better able [with patent trolls] to find buyers for patent portfolios that they no longer need or wish to maintain. Selling those portfolios allows companies to recoup some return on the associated R&D investment and raise funds that can be used to support other innovative efforts.”).

145. Lemley & Melamed, *supra* note 6, at 2137.

146. *Id.* at 2137–38.

147. *See id.* at 2145 (“A revenue-maximizing patent holder, whether a practicing entity or a troll, will not seek royalties above the level that will maximize its revenues.”).

148. *See id.* at 2146 (“Trolls have no similar incentive; they get paid more if the defendant stays in business and uses their patented technologies.”).

149. *See, e.g., id.* at 2145 (Practicing entities’ objective is “to impose royalty costs on competitors that will reduce demand for the competitors’ products and thereby increase demand for their own products.”).

demand for their own goods.¹⁵⁰ Large companies often see patent litigation as a way to exhaust the resources of their small competitors.¹⁵¹ Established businesses strategically use patent lawsuits to drive out new entrants.¹⁵² These companies can do this by obtaining injunctive relief in infringement actions and refusing to license their patents to their competitors.¹⁵³

Further, under the *eBay* four-factor test for a permanent injunction, it is more difficult for trolls than practicing entities to obtain injunctive relief, making the latter a greater threat in terms of reducing the number of players in the market for products and services.¹⁵⁴ Under *eBay*, a plaintiff must show “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.”¹⁵⁵ Courts have frequently found that plaintiffs fail to demonstrate irreparable injury and inadequacy of damages (i.e., elements one and two) when they do not practice the invention at issue and are willing to license their patent to other infringers.¹⁵⁶ Thus, trolls have a lower likelihood of obtaining injunctive

150. *Id.*

151. *Id.* at 2146; *see* Chien, *supra* note 101, at 1589–90, 1610 (finding that forty-one percent of high-tech litigation involves a large defendant and small plaintiff).

152. *See* Chien, *supra* note 101, at 1588 (“By suing less-established firms, critics say, predatory plaintiffs can use litigation to threaten their survival.”); Golden, *supra* note 128, at 2154 (“[P]atents that industry incumbents cross license in the spirit of détente may simultaneously be used to create barriers to new entrants.”); Magliocca, *supra* note 58, at 1818 (“Advocates for small inventors in garages argue that corporations see start-ups as easy fodder for a ‘scorched-earth’ strategy of stealing their patents and fighting an infringement suit in the hope of exhausting a plaintiff’s funds.”).

153. *See eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) (explaining the elements required for a patentee to obtain a permanent injunction).

154. *See* FED. TRADE COMM’N, *supra* note 67, at 27 (“Conventional wisdom assumes patentees that do not compete in a product market cannot obtain injunctions because money damages will adequately compensate any harm they may suffer from infringement. Conventional wisdom also assumes that a patent owner practicing the patent can and should be granted an injunction.”); Robert J. Garrey & John M. Jackson, *The Permanent Injunction Threat in Patent Cases: Has Ebay v. MercExchange Changed the Landscape for Patent Litigation in Texas District Courts?* 11 (Sept. 22, 2006), <http://images.jw.com/com/publications/626.pdf> (“Based on the cases discussed above, it appears that plaintiffs that use their patents to produce goods and services are far more likely to obtain injunctive relief against competitors adjudged to infringe their patents than are plaintiffs who merely license their patents.”); Benjamin H. Diessel, Note, *Trolling for Trolls: The Pitfalls of the Emerging Market Competition Requirement for Permanent Injunctions in Patent Cases Post-eBay*, 106 MICH. L. REV. 305, 309–10 (2007) (Post-*eBay*, “district courts have continued to make commercializing and competing in the market with a patented invention a necessary precondition to gaining an injunction.”).

155. *eBay*, 547 U.S. at 391.

156. *See* Diessel, *supra* note 154, at 324 (“In cases where courts denied injunctions and plaintiffs were willing licensors and did not commercialize their inventions, courts found neither irreparable injury nor inadequate remedy at law.”).

relief than practicing-entity plaintiffs and cannot use injunctions to force companies out of product- or service-based markets.¹⁵⁷

In sum, if laws disadvantage trolls and make their business model less profitable, trolling behavior by practicing entities will increase. This is undesirable because practicing entities often seek to eliminate their competitors using patent litigation and have a greater likelihood than trolls of forcing out market producers under the current *eBay* test for granting permanent injunctions.¹⁵⁸ These entities' legal actions will likely increase rivals' costs, reduce the number of market players, and, in turn, raise prices for consumers.¹⁵⁹ Unfortunately, antitrust laws are unlikely to mitigate this concern. The goal of the patent system is to promote innovation through a twenty-year statutory monopoly.¹⁶⁰ Patentees have no duty to license their patented inventions during the monopoly period and can unilaterally and unconditionally refuse to deal with a competitor.¹⁶¹ Antitrust laws only guard against two actions: (1) an extension of a patentee's statutory monopoly into another market of an unpatented product or service¹⁶² and (2) an interference with a competitor's business when the plaintiff knows that the patent is invalid or not infringed.¹⁶³

157. *See id.* at 310–22 (“Part I concludes that district judges have created and employed a ‘market competition requirement,’ or phrased more colloquially, district judges are essentially ‘trolling for trolls.’”).

158. *See Lemley & Melamed, supra* note 6, at 2145 (discussing how practicing entities have incentives to go after their competitors).

159. *See id.*

160. *See* FED. TRADE COMM'N, *supra* note 67, at 1 (“The goal of the patent system is to promote innovation in the face of that expense and risk. It does so by giving patent owners the right to exclude others from making, using or selling a patented invention for 20 years.”).

161. *See* *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 429 (1908) (“[E]xclusion may be said to have been of the very essence of the right conferred by the patent, as it is the privilege of any owner of property to use or not use it”); *In re Indep. Serv. Orgs. Antitrust Litig.*, CSU, L.L.C., 203 F.3d 1322, 1329 (Fed. Cir. 2000) (standing for the proposition that patentees can unilaterally and unconditionally refuse to deal with other entities); *United States v. Westinghouse Elec. Corp.*, 648 F.2d 642, 647 (1981) (“Westinghouse has done no more than to license some of its patents and refuse to license others. ‘[T]he right to invoke the State’s power to prevent others from utilizing his discovery without his consent’ is the essence of the patentee’s statutory monopoly.” (citations omitted)).

162. *See* *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488, 491 (1942) (standing for the proposition that a court will not protect the patent monopoly when the patentee is using the patent to try to restrain competition in the sale of a unpatented item).

163. *See* *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 174 (1965) (“[E]nforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act”); *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 994 (9th Cir. 1979) (allowing for a claim that enforcement of a patent that was asserted with knowledge of invalidity or non-infringement violates antitrust laws).

B. An Increase in Litigation Funding

Targeting trolls in patent litigation reform will likely divert capital to litigation financiers. Hedge funds, private equity firms, and other investors are always looking for different opportunities to make money.¹⁶⁴ When the Great Recession hit, they flocked to litigation funding because lawsuit returns are not correlated with economic fluctuations.¹⁶⁵ If laws make the troll business model less profitable, investors will funnel their capital into litigation finance. This is likely because funders and trolls both operate in the ex post patent transaction and litigation market and provide comparable services.¹⁶⁶ Both businesses are investing in patent lawsuits—either taking full or partial interest in the proceeds.¹⁶⁷

This diversion of capital is undesirable because three issues arise with funding that do not with the troll business structure: (1) conflicts of interest with judges and arbitrators, (2) waivers of attorney-client privilege and work-product doctrine protection, and (3) funding's undue influence on the attorney at the expense of the plaintiff. First, funding may give rise to conflicts of interest with judges and arbitrators because a case decision-maker may have a financial investment or tie with a financier.¹⁶⁸ Currently, parties do not have to disclose funding agreements to judges or arbitrators.¹⁶⁹ Thus, decision-maker conflicts of interest that involve lawsuit financing are not likely to be discovered, and proper recusal cannot occur.

Second, there is uncertainty as to whether the attorney-client privilege and/or work-product doctrine protection will be waived when lawsuit information is disclosed to a funder.¹⁷⁰ The plaintiff must disclose case details to the financier so that it can evaluate the expected profitability of the

164. See, e.g., Rob Copeland, *Hedge-Fund Manager's Next Frontier: Lawsuits*, WALL ST. J. (Mar. 9, 2015), <http://www.wsj.com/articles/hedge-fund-managers-next-frontier-lawsuits-1425940706> (explaining that a hedge-fund's next investment will be class-action lawsuits).

165. Maya Steinitz, *Whose Claim Is This Anyway? Third Party Litigation Funding*, 95 MINN. L. REV. 1268, 1283–84 (2011).

166. FED. TRADE COMM'N, *supra* note 67, at 62–65.

167. See, e.g., GARBER, *supra* note 20, at 13 (“[Commercial litigation funders] typically provide capital in exchange for a share of the eventual recovery by a corporate plaintiff.”); Schwartz & Kesan, *supra* note 7, at 428 (“[Patent trolls] purchase patents from these patentees who cannot afford to enforce their own patents.”).

168. See Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 903 (2015) (“[M]any funders are banks, hedge funds or other financial institutions in which a judge or arbitrator may have funds invested or may own shares.”).

169. See *id.* (“[T]here is no general rule that the parties or their legal counsel must disclose identities of funders.”).

170. See LISA BENCH NIEUWVELD & VICTORIA SHANNON, *THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION* 141–42 (2012) (discussing the attorney-client privilege and work-product doctrine in relation to disclosing information to a funder).

lawsuit and determine whether or not to provide funding.¹⁷¹ Further, once a financier decides to provide capital to the plaintiff, it will likely require updates as the litigation progresses in order to monitor its investment.¹⁷² The attorney-client privilege protects confidential communications between a lawyer and his client from being disclosed to the opposing party.¹⁷³ The purpose of the privilege is to encourage the client to converse honestly with his attorney; this allows the lawyer to give appropriate legal advice.¹⁷⁴ Voluntary revelation of confidential information in these communications to a third-party typically waives the privilege unless the disclosure falls under an exception.¹⁷⁵

There is currently no general rule that allows for the preservation of the privilege for information given to the funder.¹⁷⁶ Only three courts have addressed this issue. In *Leader Technologies, Inc. v. Facebook, Inc.*, in response to a motion to compel information that had been shared with potential financiers, the plaintiff argued that the attorney-client privilege was not waived because the common interest exception applied.¹⁷⁷ Under this exception, disclosures to an entity with a shared interest in the dispute do not waive the privilege.¹⁷⁸ The court held that the exception did not apply; the conclusion rested on the finding that no funding contract was finalized between the plaintiff and potential financiers.¹⁷⁹ Further, the court noted that the common interest must be “identical” and “legal” (i.e., “not solely commercial”).¹⁸⁰ Similarly, in *Miller UK Ltd. v. Caterpillar*, though a funding contract was consummated, the court refused to apply the common interest exception to communications between the plaintiff and financier, as

171. Grace M. Giesel, *Alternative Litigation Finance and the Attorney-Client Privilege*, 92 DENVER UNIV. L. REV. 95, 102 (2014).

172. *Id.* at 102–03.

173. NIEUWVELD & SHANNON, *supra* note 170, at 141; Giesel, *supra* note 171, at 104.

174. *Miller UK Ltd. v. Caterpillar*, 17 F. Supp. 3d 711, 731 (N.D. Ill. 2014); Giesel, *supra* note 171, at 105.

175. *Miller*, 17 F. Supp. 3d at 731; NIEUWVELD & SHANNON, *supra* note 170, at 141.

176. See NIEUWVELD & SHANNON, *supra* note 170, at 142 (“[T]here is no consensus among the states or under federal law as to whether a third-party funder has a sufficiently common interest to be covered by this exception.”); Shannon, *supra* note 168, at 900–01 (describing the variation in how jurisdictions treat funding disclosures in evaluating whether privilege has been waived); Maya Steinitz et al., *Are Litigation Finance Contracts Protected by Attorney-Client Privilege in New York?*, AMERICAN BAR ASS’N (Apr. 24–26, 2013), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac2013/sac_2013/15_panacea_plague.authcheckdam.pdf (concluding that litigation finance contracts are likely not protected by attorney-client privilege in New York but may be protected under work-product doctrine).

177. 719 F. Supp. 2d 373, 375–76 (D. Del. 2010).

178. *Id.* at 376; NIEUWVELD & SHANNON, *supra* note 170, at 142.

179. *Leader Techs.*, 719 F. Supp. 2d at 375–76.

180. *Id.* at 376.

well as other potential funders, because a mutual desire in seeing the “successful outcome of a case” did not satisfy the element of having a common “legal” interest.¹⁸¹ In contrast, in *Devon IT, Inc. v. IBM Corp.*, the court issued a protective order of confidential information shared with a funder and stated in a footnote that the financier’s and plaintiff’s desire to see the plaintiff win constituted a common interest.¹⁸²

The work-product doctrine, which shields the attorney’s written materials created for the case, may also be waived when information is disclosed to a funder.¹⁸³ The purpose of the doctrine is to protect an attorney’s “mental impressions, conclusions, opinions, or legal theories . . . concerning the litigation” and to prevent adversaries from freeriding on their opponent’s work.¹⁸⁴ The tangible materials must have been prepared for or obtained “because of” current or future litigation.¹⁸⁵ Work-product doctrine protection can only be waived when disclosure of materials to a third party occurs in a manner that “substantially increases the opportunities for potential adversaries to obtain the information.”¹⁸⁶

Just as the law surrounding funding and the attorney-client privilege is unsettled, there is currently no general rule concerning litigation finance and the work-product doctrine.¹⁸⁷ With the exception of the *Leader Technologies* court, the handful of courts that have faced this issue have concluded that the work-product doctrine applies to materials containing a lawyer’s case assessment and strategies that were prepared by the funder or by the plaintiff’s attorney for the funder.¹⁸⁸ In *Leader Technologies*, the court did not engage in a separate work-product doctrine analysis but instead determined that the documents were not protected by either the attorney-client privilege or work-product doctrine due to the lack of a common interest between the financier and plaintiff.¹⁸⁹ Under the “because of” test, *Miller and Carlyle Investment Management L.L.C. v. Moonmouth Co. S.A.*

181. 17 F. Supp. 3d 711, 730–32 (N.D. Ill. 2014).

182. No. 10-2899, 2012 WL 4748160, at *1 n.1 (E.D. Pa. Sept. 27, 2012).

183. FED. R. CIV. P. 26(b)(3).

184. FED. R. CIV. P. 26(b)(3)(B); *Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, C.A. No. 7841-VCP, 2015 WL 778846, at *9 (Del. Ch. Feb. 24, 2015).

185. *Miller*, 17 F. Supp. 3d at 735.

186. *Morley v. Square, Inc.*, No. 4:14CV172, 2015 WL 7273318, at *2 (E.D. Mo. Nov. 18, 2015).

187. See Grace M. Giesel, *Alternative Litigation Finance and the Work-Product Doctrine*, 47 WAKE FOREST L. REV. 1083, 1085 (2012) (“A body of law has not yet developed dealing with the application of the attorney-client privilege or work-product doctrine to the involvement of [alternative litigation finance] entities.”).

188. See, e.g., *Carlyle*, 2015 WL 778846, at *9.

189. *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 375–76 (D. Del. 2010).

found that the fact the funding documents served not only a litigation function but also a business purpose did not disqualify them from work-product doctrine protection.¹⁹⁰ However, the *Carlyle* court did note that a minority of jurisdictions applies the “primary purpose” test under which a funding document may not have work-product doctrine protection if it is created for a business purpose.¹⁹¹

With regard to the waiver inquiry, *Doe v. Society of Missionaries of Sacred Heart and Mondis Technologies, Ltd. v. LG Electronics, Inc.*, held that written nondisclosure agreements preserved work-product doctrine protection.¹⁹² *Miller* and *Morley v. Square, Inc.*, concluded that even without these agreements, revelations to financiers did not substantially increase the likelihood of defendants learning of the information and thus did not constitute waiver.¹⁹³ These courts noted that it would not be in the financiers’ business interests to notify potential clients’ opponents about funding inquiries and release lawsuit information.¹⁹⁴ In sum, there is uncertainty as to whether the attorney-client privilege and work-product doctrine cover funding-related information and documents. Current case law suggests that courts will find that attorney-client privilege is waived but work-product doctrine still applies.¹⁹⁵

Finally, along with litigation finance comes the risk that funding unduly influences the attorney in some way. A lawyer has a duty to give his honest, independent opinion to his funded client (i.e., the plaintiff).¹⁹⁶ Funding may create situations in which the attorney is tempted to act in a manner that is

190. *Carlyle*, 2015 WL 778846, at *9; *Miller*, 17 F. Supp. 3d at 734–35.

191. *Carlyle*, 2015 WL 778846, at *8–*9; see also Michele DeStefano, *Claim Funders and Commercial Claim Holders: A Common Interest or a Common Problem?*, 63 DEPAUL L. REV. 305, 355–58 (2014) (arguing that the primary purpose test gives courts a lot of discretion to deny work-product doctrine protection to funding documents); Giesel, *supra* note 187, at 1103 (“Some courts use the ordinary business concept as a disqualifier of work-product protection. . . . [E]ven if materials were created in part in the anticipation of litigation, those materials are not protected if they, in addition, were created in the ordinary course of business.”).

192. *Doe v. Society of the Missionaries of the Sacred Heart*, No. 11-CV-02518, 2014 WL 1715376, at *4 (N.D. Ill. May 1, 2014); *Mondis Tech., Ltd. v. LG Elecs., Inc.*, No. 2:07-CV-565-TJW-CE, 2:08-CV-478-TJW, 2011 WL 1714304, at *2–3 (E.D. Tex. May 4, 2011); see also *Devon IT, Inc. v. IBM Corp.*, No. 10-2899, 2012 WL 4748160, at *1 n.1 (E.D. Pa. Sept. 27, 2012) (noting that work-product doctrine protection applies in a case that involved nondisclosure agreements between the financier and plaintiff); Parloff, *supra* note 29 (“Litigation financiers ordinarily keep the identities of the cases they’re involved in strictly confidential. Nondisclosure agreements bar revealing any aspect of the negotiations process (including their existence), while confidentiality clauses protect any agreement reached.”).

193. *Miller*, 17 F. Supp. 3d at 738; *Morley v. Square, Inc.*, No. 4:14CV172, 2015 WL 7273318, at *2 (E.D. Mo. Nov. 18, 2015).

194. *Miller*, 17 F. Supp. 3d at 738; *Morley*, 2015 WL 7273318, at *2.

195. See *supra* notes 176–194 and accompanying text.

196. MODEL RULES OF PROF’L CONDUCT R. 2.1 (2013).

inconsistent with the plaintiff's best interests, particularly during the negotiation of the financing agreement or at the key junctures of the case like settlement. First, lawsuit financing may lead to conflict if the funder is a current or former client of the attorney.¹⁹⁷ The lawyer would have to evaluate his relationship with the client (i.e., the potential recipient of funding) and financier under conflict of interest rules and determine whether it is ethical for him to serve as both entities' attorney.¹⁹⁸

Second, funding may also affect the attorney's financial interests if the funding agreement affects his proceeds from the case or if the attorney has an investment in the funder.¹⁹⁹ For example, if a lawyer is responsible for negotiating the plaintiff's financing contract, he may be tempted to fashion the agreement in a way that serves his, not the client's, best interests.²⁰⁰ This situation may implicate Model Rule of Professional Conduct ("MRPC") 1.7, which requires informed consent if there is a "significant risk" that the representation of the funded client will be "materially limited" by the attorney's own interests.²⁰¹

Third, attorneys may have referral relationships with financiers.²⁰² Express referral agreements in which attorneys receive money in exchange for referrals likely violate MRPC 1.7(a)(2) and are prohibited by some state bar ethics committees.²⁰³ However, lawyers are generally allowed to inform

197. *Id.* at 16 ("If the lawyer also has a professional relationship with the [alternative litigation finance] supplier, then a conventional concurrent conflict of interest arises . . .").

198. See MODEL RULES OF PROF'L CONDUCT R. 1.7-1.11 (2013) (presenting rules for dealing with client, former client, and prospective client conflicts of interest).

199. See Shannon, *supra* note 168, at 905-06 (describing how attorneys may not be in the best position to negotiate the litigation funding contract due to their financial interests); see also AMERICAN BAR ASS'N COMM'N, *supra* note 19, at 17 (describing how a conflict of interest can arise during the negotiation of the funding contract if the "terms of the agreement may have an impact on the lawyer's own interests"); NIEUWVELD & SHANNON, *supra* note 170, at 136 (discussing the American Bar Association's model rules that may be relevant concerning conflicts of interest that may arise due to the attorney's financial interest in the funder).

200. AMERICAN BAR ASS'N COMM'N, *supra* note 19, at 17 ("[M]aterial limitation conflict could arise from the lawyer's involvement in negotiating a contract with an [alternative litigation finance] supplier.").

201. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2013); see also AMERICAN BAR ASS'N COMM'N, *supra* note 19, at 17 (explaining that "the client is entitled to know about the risks presented by the lawyer's financial and other incentives created by the contract" since it may create conflict under MRPC 1.7).

202. See AMERICAN BAR ASS'N COMM'N, *supra* note 19, at 24-26 (discussing attorney referral of clients to funders).

203. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2013); see, e.g., N.J. Supreme Court Advisory Comm. on Prof'l Ethics, Advisory Op. 691 (2001), http://njlaw.rutgers.edu/collections/ethics/acpe/acp691_1.html ("The attorney will not otherwise profit or benefit from [funding, with respect to referrals]"); Ohio Supreme Court Bd. of Comm'rs on Grievances and Discipline, Advisory Op. 2002-2 (2002), http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2002/default.asp ("It is improper under . . . the Ohio Code of Professional Responsibility for a lawyer to provide loan applications and

clients of litigation finance and refer them to funders.²⁰⁴ Though informal attorney referral to a financier is permitted, this practice still may be a cause for concern due to the repeat nature of lawyers and funders in the litigation market.²⁰⁵ The lawyer may fear that if he does not obey the financier's wishes (e.g., in giving settlement advice), then the funder will not invest in other cases that the attorney works on. This may be particularly worrisome in the initial stages of the lawsuit financing market when there is a small number of funders that operate in certain geographic areas or that are interested in specific case types.

All of the problems that arise with litigation finance are averted in the troll business structure. The primary difference between funders and trolls—owning the legal rights and possessing a portion of lawsuit proceeds—obviates the problems that implicate lawsuit financing. After a troll buys a patent, it acts as both plaintiff and financier, preserving the privileges traditionally associated with the attorney-client relationship and evading conflicts of interest and litigation control issues involving the funder. In a way, the troll is the most evolved form of lawsuit financier, and its business model is a demonstration of how a robust litigation market could work. The only circumstance in which the aforementioned problems with funding are not resolved is when the troll enters into a financing contract. However, this situation is no worse than when the financier enters into a relationship with a practicing-entity plaintiff. Further, trolls are less likely to go to funders than other plaintiffs because investors funnel money to these non-practicing entities for the purpose of patent assertion.²⁰⁶

In sum, disadvantaging trolls in patent litigation reform will likely deflect investment capital to lawsuit funders. This is undesirable because funding implicates a whole host of issues that the troll business model avoids

make referrals of clients to lenders recommended to the law firm by a consulting company that receives commissions or referral fees from the lender for each loan completed and also receives an annual consulting fee from the law firm, unless there is full disclosure and informed consent.”).

Some states have also explicitly banned referral payments between consumer litigation funders and attorneys. *See* OKLA. STAT. tit. 14A, § 3-814 (2016); TENN. CODE ANN. § 47-51-105 (2016); NEB. REV. STAT. §§ 25-3304 (2016).

204. AMERICAN BAR ASS'N COMM'N, *supra* note 19, at 24.

205. *See* AMERICAN BAR ASS'N COMM'N, *supra* note 19, at 24–25 (discussing how referring clients to funders may raise a risk of interference with the attorney's independent professional judgment); Shannon, *supra* note 168, at 905 (“[I]f the lawyer and the funder have an arrangement whereby they often refer business to each other, then the interests of the two of them may trump the interest of the underlying client as they are negotiating the funding arrangement.”); *see also* NIEUWVELD & SHANNON, *supra* note 170, at 136 (discussing the American Bar Association's model rules that may be relevant concerning conflicts of interest that may arise due to the attorney's relationship with the funder).

206. *See* Chien, *supra* note 101, at 1579 (“[P]atent enforcement is [patent trolls'] core business.”); McCurdy, *supra* note 10, at 82 (Patent trolls receive funding from “pension funds, hedge funds, endowments, and other sources of alternative investments, including even other businesses.”).

including potential conflicts of interest with judges or arbitrators, waivers of attorney-client privilege and work-product doctrine protection, and situations in which funding may negatively influence the attorney to act in a way that is inconsistent with the client's best interests.

CONCLUSION

Patent litigation is riddled with problems including weak and vague legal claims, high costs, impenetrable patent portfolios, and inconvenient timing of lawsuits. Some have targeted trolls as the cause of these problems, but this paper has shown that these entities are not responsible for these issues or that these problems are not unique to them. Moreover, trolls offer three litigation-related benefits: capital provision, risk-bearing, and repeat-player experience. These benefits are the same ones for which commercial litigation funders are praised. Eliminating trolls will not only close off a source of these benefits but also worsen problems by shifting trolling behavior to practicing entities and increasing investment in funders. Patent assertions by practicing entities are worse than those of trolls because the former seek to destroy their competitors and have a higher likelihood of doing so than the latter due to the current law for granting injunctive relief. Additionally, trolls are better than funders because the troll business model avoids issues related to decision-maker conflicts of interest, waivers of attorney-client privilege and work-product doctrine protection, and the improper influence of funding on the attorney. In conclusion, though patent litigation is plagued with problems, targeting troll plaintiffs is not the answer to solving them.