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ANOTHER ATTEMPT AT PATENT REFORM:

S.1013 THE PATENT ABUSE REDUCTION ACT OF 2013

I. INTRODUCTION

The idea of shoot-from-the-hip lawsuits brought by essentially faceless licensing entities, without any significant thought of whether the lawsuit or underlying patent has any merit, seems outrageous to society. But these suits do happen, and when they do, people pay for them to go away because the cost of settlement is often less than the cost of litigation. Congress has introduced a significant amount of new patent legislation in an attempt to curb these sometimes meritless patent suits where defendants will settle merely to avoid litigation costs. But the challenge with trying to regulate these suits is finding the balance of curtailing abuses while at the same time not unduly undermining the rights of patent owners who have legitimate suits, whether those patent owners are practicing or not. A non-practicing entity is not necessarily a bad actor that is harmful to society and banning non-practicing entities all together would undermine the rights of patent owners and the value of patents generally because there are instances where licensing is a legitimate exploitation of patent rights.

One of the most recent Congressional attempts to curb NPEs abusing the patent litigation process for profit is the Patent Abuse Reduction Act (“PARA” or “Bill”). Unlike previous attempts that only focused on changing one aspect of litigation procedure, this Bill is the most expansive by focusing on all the procedural areas that are most often abused. The Bill’s counter-measures include (1) expansive pleading requirements, (2) modified joinder, (3) limits on discovery, and (4) a “loser pays” system for patent litigation.

The PARA should not be enacted because a bill as comprehensive as the PARA will bar meritless suits at the expense of barring too many with merit. Increased pleading requirements will not allow good faith actors to take advantage of sometimes much needed discovery to learn how a potentially infringing product actually works. As technology advances, plaintiffs will become more reliant on discovery because more potentially
infringing devices rely on computer processes that are not easily reverse engineered.

Section II of this article will give background to set up the circumstances in which the PARA was introduced, beginning with Part A which provides a background on “Patent Trolls” and lays out both (1) a brief history of “Patent Trolls” and (2) how these entities operate today. Part B gives a very brief introduction to patent litigation, specifically the procedures that would be affected by the PARA including (1) pleading requirements, (2) claim construction, and (3) awarding of attorney’s fees and costs. Part C summarizes legislation that either has been passed or introduced recently to curtail abusive patent litigation by “Patent Trolls.” Section III will examine the PARA itself and provide a brief synopsis of the Bill’s provisions. Section IV analyzes each section of the PARA to determine what Congress is actually trying to regulate in the provisions and how the regulation would actually affect abusive patent litigation. Parts A through D examine each of the four major procedural changes proposed by the PARA. Section E describes a position that does not get very much attention: opponents of NPE regulation. The article concludes with Section V, which details why the Bill should not be enacted because it is far too sweeping regulation that would have a negative effect on patent owners who assert their patents in good faith.

II. BACKGROUND

Before discussing the Patent Abuse Reduction Act ("PARA" or "Bill"), it is useful to have a background on the current landscape in the patent monetization area. This section will introduce non-practicing entities, look to how they operate, outline current patent litigation procedures, and briefly discuss Congress’s attempts to curtail the rapid expansion of licensing and litigation campaigns brought by “patent trolls.”
The term “patent troll” was originally coined by Peter Detkin, a former assistant counsel at Intel.1 Mr. Detkin described a patent troll as “somebody who tries to make a lot of money off a patent that they are not practicing and have no intention of practicing and in most cases never practiced.”2 Nowadays, the term patent troll is often used to refer to a Non-Practicing Entity (“NPE”), which are firms that, as their name suggests, buy patents without any intention of “practicing” the invention.3 Rather than using a patent to produce and sell a product to the exclusion of others, NPEs prefer to go on aggressive licensing and litigation campaigns targeting any end user of the patented technology.4 Further, NPEs usually acquire older patents to use on new technology and often “spring” up to enforce their patents against unsuspecting companies, much like the troll from the tale of the Billy Goats Gruff “sprang” up onto unsuspecting children.5


3. Generally, NPE is the more polite term used to refer to a “patent troll.” However, some have argued that the term “Non-Practicing Entity” does not accurately depict the type of entity that, some say, abuse the patent system. Sara Jeruss, Robin Feldman, & Joshua Walker, The America Invents Act 500: Effects of Patent Monetization Entities on U.S. Litigation, 11 DUKE L. & TECH. REV. 357, 366-69 (2012) (arguing that there are several more apt terms, such as, “Patent Monetization Entity” that would be a more accurate description of a “patent troll”). For example, a university could fit into the broad “NPE” term because universities often prefer to license their patents instead of “practicing” them. Id. Most would not think that universities stifle innovation by abusing the patent system. However, for the purposes of this article, NPE will still be used as it is the current, most widely used term to refer to a “patent troll.”; McMahon, supra, note 1, at 159-166.

4. See McMahon, supra, note 1.

1. Early "Patent Trolls"

The type of behavior exhibited by "patent trolls" is not a new practice. Using patents to "rent seek" has been a practice of entities since the late 18th century. Choosing to license a patent, rather than use it to "practice" an invention, to generate revenue has been a strategy of many inventors since the start of the U.S. patent system. In fact, some believe that the one of the first "patent trolls" was Eli Whitney, the inventor of the cotton gin. Whitney's first attempts of manufacturing and selling the cotton gin proved to be commercially unsuccessful, forcing Whitney to sue plantation owners that used Whitney's patented gin in order profit from his invention.

One of the most notorious instances of early "patent trolling" was patent attorney George Selden's assertion of his patent on the automobile during the early 1900s. Selden first filed his patent in 1879 when the idea of an automobile was circulating, but nobody had the capability to make one. Selden took advantage of the patent laws at the time and did not actually choose to issue his patent until 1895. After the patent issued, with the help of some investors, Selden sued nearly every automobile manufacturer in
the United States for patent infringement, and was quite successful in obtaining licenses. This success ended, however, when he sued Henry Ford, who had no intention of licensing Selden’s patent and vigorously fought the suit. Ford eventually won on appeal, with the appellate judge ruling that “every element in the claim was old and the combination itself was not new” and that neither Ford nor any other car maker owed Selden anything.

2. Non-Practicing Entities Today

Today, NPEs acquire their patent assets by purchasing patents from universities, corporations, governments, research labs, and individual inventors. But NPEs have developed an organizational web so that often the acquiring company does not have any intention of keeping the patent. Larger NPEs will then typically assign their newly acquired patents or exclusive licenses to a number of shell companies. In fact, the largest NPEs may own over a thousand shell companies holding thousands of patents and patent applications. An advantage to using such a large amount of shell companies to enforce its patents is that the complex web of shell companies and subsidiaries is hard to make sense of, which consequently makes NPEs harder to litigate against. This is, in large part, because Federal Rules of Civil Procedure Rule 7.1 does not require litigants to disclose their parent corporation or any other equity holder unless that entity holds more than 10% of the shell company’s stock. Also, it is

13. Id.
14. Id.
15. Id.
17. Id. ¶ 21.
18. Id. ¶ 25. The NPE Intellectual Ventures is said to have 1276 shell companies holding 8000 U.S. patents and 3000 U.S. patent applications. Id.
19. Id. ¶ 195.
20. Id. ¶ 200.
hard to litigate against the larger parent NPE for a shell company’s actions because courts are hesitant to “pierce the corporate veil.”

As a further advantage, NPE entities are generally incorporated in a way that creates significant forum advantages in potential litigation through the limitation of the forum to a single favorable jurisdiction. Incorporating a shell in a favorable forum and establishing the principle place of business and registered agent for that entity in that same forum easily accomplish establishing one appropriate venue. This structure causes there to be personal jurisdiction in only one jurisdiction, making there be only one appropriate venue for litigation.

All of these factors combine to make it very difficult to litigate against the shell corporations and even more difficult to access the deep pockets of the parent NPE. This is especially true when the parent NPE or NPE backed investment fund are only shareholders, which creates a slight connection that “effectively render[s] almost no one [financially] responsible for [the shell’s] actions.”

NPEs are also in a better position than companies that operate their own patents. In an average operating company versus operating company patent infringement suit, the defendant operating company will usually assert their own patents against the plaintiff’s, which often leads to a cross-license settlement. However, in a NPE versus operating company patent infringement suit, instead of defensively asserting their own patents to induce a quick cross-licensing settlement, defendant operating companies are faced with the decision of paying extremely high patent

21. Id. ¶ 210. A plaintiff may “pierce the corporate veil,” or hold a parent company liable for its subsidiaries actions, when the parent company uses such a parent-subsidiary structure “to accomplish certain wrongful purposes, most notable fraud, on the shareholder’s behalf.” United States v. Best Foods, 524 U.S. 51, 62 (1998).
23. Id. For example, Searete LLC, a shell of the notorious troll Intellectual Ventures, is a Delaware LLC with a presence and manager in Nevada. Id.
24. Id.
25. Id.
26. McMahon, supra note 1, at 166.
litigation costs to defend their patent or quickly settle with the NPE to avoid such costs. 27

Under the current laws, the creation of NPEs and the filing of patent infringement lawsuits by NPEs have skyrocketed over the last couple of years. 28 A recent study shows that patent infringement cases filed by NPEs have risen from 22 percent of all patent infringement cases to 40 percent of all infringement cases from 2007 to 2011. 29 Additionally, it is estimated that defendants in NPE suits have lost over $83 billion in wealth per year over recent years. 30 These numbers have caused both Congress and President Obama to take notice and try to reform the patent system. 31

B. Patent Litigation Procedure

Patent litigation is an extremely complex form of civil litigation. In fact, most jurisdictions supply litigants with procedural local patent rules to supplement the district’s local rules and the Federal Rules of Civil Procedure (“FRCP”). This section will detail the aspects of patent litigation that are most relevant to the PARA: pleading requirements, claim construction hearings, and awarding of attorney’s fees in an “exceptional” case.

27. Id.
29. Id. The study also notes that out of the five top litigation filers for this period, four were NPEs. Id.
1. Pleading Requirements

The FRCP’s pleading requirements are simple: a pleader must provide a short and plain statement showing that the court has proper jurisdiction, he is entitled to relief, and the type of relief sought. Additionally, the FRCP provides Form 18 - a model complaint for patent infringement which requires the plaintiff “to 1) allege ownership of the patent; 2) name each defendant; 3) cite the patent that is allegedly infringed; 4) state the means by which the defendant allegedly infringes; and 5) point to the section of the patent law invoked.” However, Form 18 has only been approved for direct infringement; a plaintiff may need to plead more with respect to indirect infringement in order to overcome a motion to dismiss. Therefore, if inducement or contributory infringement is pleaded, the pleader must be mindful of the Twombly/Iqbal "plausibility" standard in order to survive a motion to dismiss.

2. Claim Construction

Patent claims are often written with broad and ambiguous language in order for the patentee to ensure that his claim cover the most embodiments of his invention as possible. For, if a claim contains narrow language, a competitor can easily design around the claim to avoid infringement. Claim construction is the task of

32. FED. R. CIV. P. 8(a). The only formal exception to these pleading requirements can be found in Rule 9(b), which provides for a heightened pleading requirement for fraud cases. FED. R. CIV. P. 9(b).

33. FED. R. CIV. P. Form 18.


35. See In re Bill of Landing Transmission & Processing Sys. Patent Litig., 681 F.3d 1323, 1341-47 (Fed. Cir. 2012) (performing a Twombly/Iqbal analysis on each of plaintiff’s claims for inducement). Further, infringement by inducement under 35 U.S.C. 217(b) occurs when the defendant “knowingly induced infringement and possessed specific intent to encourage another’s infringement.” Id. at 1339.

36. Brian J. Love, Interring the Pioneer Invention Doctrine, 90 N.C.L. REV. 379, 389 (2012). The article noted that “[w]hen courts have found that a patent
interpreting a claim in a patent to determine the scope of each contested term. In *Markman v. Westview Instruments*, a unanimous Supreme Court held that claim construction was strictly a question of law for the judge, not a question of fact for the jury. Since that decision, after discovery in a patent infringement suit, the parties participate in a *Markman* hearing, where a District Court judge will hear each party’s contesting definitions of terms in a patent claim and interpret those terms as a matter of law.

3. *Awarding of Attorney’s Fees and Sanctions*

In a patent infringement suit, awarding of attorney’s fees and costs is governed by 35 U.S.C. § 285, which reads that attorney’s fees and costs will be award if the case is “exceptional.” Currently, awarding attorney’s fees and costs to a prevailing party is a two-step process. A district court must (1) determine if the case is exceptional by clear and convincing evidence, and (2) determine whether awarding attorney’s fees is appropriate and how much that award should be. Further, sanctions under §285 may be awarded to the defendant if both (1) the plaintiff brought the litigation in bad faith and (2) the litigation was objectively baseless.

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38. 18 DONALD S. CHISUM, CHISUM ON PATENTS, § 18.06 (2013). A *Markman* hearing must be had before trial in a jury trial. *Id.* However, in a bench trial, the judge can make claim construction determinations during the actual trial. *Id.*
40. *Id.*
41. *Id.* at 1324.
C. Recent Legislative Efforts to Curtail Non-Practicing Entities

1. The Leahy-Smith America Invents Act

The most recently enacted bill in the patent area is the Leahy-Smith America Invents Act ("AIA"), which was signed into law by President Obama on September 16, 2011.42 The AIA is most known for expanding the definition of "prior art" and changing the U.S. patent system from a "first to invent" system to a "first to file" system.43 However, the section relevant to this discussion is a smaller section tucked away toward the end of the bill: new limitations of joinder.44

Generally, § 19(d) of the AIA seeks to limit joinder of defendants to a suit to parties that allegedly infringed the plaintiff's patent(s) in the same transaction as the original defendant.45 Additionally, there must be questions of fact common to all defendants being joined to the suit.46 These new limitations on joinder are designed to address the joinder of multiple defendants "who have tenuous connection to the underlying disputes."47 Joining multiple parties to a suit is a strategy mainly employed by NPEs in order to reduce litigation costs by litigating certain issues once rather than across multiple suits.48 Also, joining multiple defendants to an action helps secure a venue favorable to the plaintiff because a motion to transfer venue is less likely to be successful when a large number of defendants are involved.49 For example, many NPEs would file in or transfer their suits to the Eastern District of Texas, known as the "center of the

43. Id.
44. Id. § 19(d); 35 U.S.C. § 299 (West).
45. Id.
46. Id.
49. Id.
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The Eastern District of Texas has been favorable to plaintiffs for a number of reasons, some of which are the venues notorious "rocket docket," historically plaintiff friendly juries, and the Judges' tendency not to grant a motion to transfer venue. Therefore, NPEs favor this jurisdiction because it allows them to litigate more quickly, avoid being transferred to unfavorable jurisdictions, and the potential of a high jury award if the case ever went to trial.

While the joinder limitation of the AIA is a first step in curtailing the large amount of cases brought by NPEs, it only attempts to eliminate one of the many tactics that NPEs use in litigation. Also, NPEs can get around the new joinder limitation by filing multiple suits against different parties in the same District and filing a motion to consolidate.

50. Mark Liang, The Aftermath of TS Tech: The End of Forum Shopping in Patent Litigation and Implications for Non-Practicing Entities, 19 TEX. INTELL. PROP. L.J. 29, 39 (2010). There were 332 patent infringement suits filed in the Eastern District of Texas in 2007. Id. at 42. The Northern District of California was second with 156 cases filed. Id.

51. Id. at 43-49. A case in the Eastern District of Texas will only take about 12 months to go from filing to trial, whereas the national average for the same period of time is two years. Id. at 44. This quick turnaround saves NPEs money in litigation costs and attorney's fees. Id. Further, a defendant is left to quickly scramble to put a case together while the NPE has the advantage of putting a case together before the case is filed. Id. at 45. With respect to juries, the plaintiff win rate in the Eastern District of Texas in a patent infringement suit is around 90%, well above the national average of 68%. Id. at 46. Commentators speculate that this may be because the jury pool in the Eastern District of Texas is statistically elderly and uneducated, which may make them less likely to understand the technology or policy arguments involved in a particular suit. Id. Finally, the Eastern District only grants a third of the motions to transfer venue filed, while nationally, half the motions are granted. Id. at 46.

52. Holly Forsberg, Diminishing the Attractiveness of Trolling: The Impacts of Recent Judicial Activity on Non-Practicing Entities, 12 PGH. J. TECH. L. & POL'Y 4, ¶ 40 (2011).

53. See Jeruss, supra note 3, at 380; E.D. Tex. Pat. R. 2-6 (stating that "[s]eparately filed cases related to the same patent shall be assigned to the same judge, i.e., the judge assigned to the first case"); N.D. Ill. LR40.4 (stating that "[c]ases will be consolidated if, among other factors, "the handling of both cases by the same judge is likely to result in a substantial saving of judicial time and effort").
2. The Saving High-Tech Innovators from Egregious Legal Disputes Act

The Saving High Tech Innovators from Egregious Legal Disputes ("SHIELD") Act failed to be enacted during the 112th Congress, but an expanded version of the act was re-introduced by Rep. Peter DeFazio [D-OR] to the 113th Congress on Feb 27, 2013. The purpose of introducing the SHIELD Act is to "force patent trolls to take financial responsibility for frivolous lawsuits." The SHIELD Act of 2013 is in the House Judiciary Committee, but is not likely to advance from this Committee.

The SHIELD Act implicitly targets NPEs by forcing such an entity to pay all reasonable costs and attorney’s fees to the adverse party if there is a judgment against the NPE. Specifically, after a party has moved for a judgment on either invalidly or non-infringement, the adverse party must prove that it either (1) is the original inventor, (2) has made a substantial investment in the exploitation of the patent through production or sale, or (3) is a university or technology transfer organization. Essentially, the SHIELD Act attempts to take away the threat of high patent litigation costs when sued by a NPE, thus reducing the incentive for a defendant to settle on especially questionable infringement claims brought by NPEs.

58. SHIELD Act of 2012, supra note 56. A technology transfer organization is defined as an organization “whose primary purpose is to facilitate the commercialization of technology developed by one or more institutions of higher education.” Id.
3. The End Anonymous Patents Act

The End Anonymous Patents Act ("EAPA") was introduced to the House of Representatives on May 16, 2013 by Rep. Theodore Deutch [D-FL] and was referred to the House Committee on the Judiciary on the same day. 59 The EAPA was introduced with the purpose of "bringing much needed transparency to our current patents system." 60 The operative provisions of the EAPA attempt to reduce the common NPE secrecy tactics of using multiple shell companies to hide the true owner of a patent a secret. 61

The EAPA requires parties to disclose the owner of a patent and any party that has an interest in the patent to the USPTO upon the patent's issuance. 62 The same disclosure would also be required whenever the patent's maintenance fees are paid and whenever the patent transfers ownership in any way. 63 If a patent holder fails to comply with any of the above requirements, the EAPA would limit damages in a patent infringement suit to after the date the requirements were met. 64

4. The Stopping the Offensive Use of Patents Act

The Stopping the Offensive Use of Patents Act ("STOP Act") was introduced to the House of Representatives by Rep. Darrell Issa [R-CA] and Rep. Judy Chu [D-CA], after the PARA, on July 22, 2013. 65 The STOP Act was referred to the House Committee

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60. Id.
61. See Feldman, supra note 16, ¶27.
62. End Anonymous Patents Act, H.R. 2024, 113th Cong. (2013). For the purposes of this Act, an "interested party" is "(A) any entity that has the legal right to enforce the patent through an infringement action; (B) any ultimate parent entity of an entity described in (A); and (C) any entity that has a controlling interest in the enforcement of the patent, including any ultimate parent entity not included under (A) or (B)." Id.
63. Id.
64. Id.
on the Judiciary on the same day. The STOP Act was introduced to “deter abuse and arm smaller entities with the support they need to fight back” against NPEs. The STOP Act is an example of how Congress is also trying to combat NPEs through preempting a NPE suit through patent prosecution by creating means for a NPE’s patent to be invalidated.

The STOP Act’s purpose is to “make improvements to the transitional program for covered business method patents, and for other purposes.” Accordingly, the STOP Act amends 35 U.S.C. § 321 (§ 18 of the Leahy-Smith America Invents Act) to make the post grant review provision of that section permanent by eliminating subsection (a) paragraph (3) of the notes, thus making the “Business Method Transitional Program” permanent. The AIA’s “Business Method Transitional Program” allows anyone who is sued by a party with a “business method patent” to apply for a post-grant review of the patent at the United States Patent and Trademark Office within nine months. Removal of this provision would allow for post-grant review even if the time frame of nine months has expired.

The STOP Act also expands the definition of business method patents for the purposes of the transitional program. The notes in § 321 currently read that a business method patent is a patent that claims “a method or corresponding apparatus for performing data processing or other operations used in the practice, administration,
or management of a financial product or service.” The STOP Act amends the definition by “striking ‘a financial product’ and inserting ‘an enterprise, a product.’” Hence, the bill does not limit a reviewable business method patent to a “financial product,” which broadens the scope of what the provision covers.

The goal of the bill is to further eliminate some NPE’s use of questionable business method patents to go after big banks and large corporations. The one-two punch of broadening the scope what is considered a business method patent, along with making the transitional program permanent, would eliminate a lot of future NPE causes of action by making their patents more easily invalidated without a defendant accumulating large litigation costs.

III. THE PATENT ABUSE REDUCTION ACT

The Patent Abuse Reduction Act (“PARA” or “Bill”) was proposed as an attempt to “deter patent litigation abusers without prejudicing the rights of responsible intellectual property holders.” The PARA was introduced by Sen. John Cornyn [R-TX] in the Senate on May 22, 2013 as S.1013. The bill was cosponsored by Sen. Charles Grassley [R-IA] and referred to Committee on the Judiciary on the same day.

The purpose of the PARA is “to amend Title 35, United States Code, to add procedural requirements for patent infringement suits.” Specifically, the act: (a) sets new pleading requirements;
(b) expands joinder of "Interested Parties"; (c) sets new discovery limits; and (d) expands the awarding of costs and expenses in a patent infringement suit.\footnote{79}{Id.}

\section*{A. Pleading Requirements}

Section 2 of the Bill seeks to amend 29 U.S.C. § 281 by adding several new pleading requirements for patent infringement suits.\footnote{80}{Id. § 2.} Specifically, the Bill requires plaintiffs to include in the initial complaint, each patent that is being asserted and each specific patent claim that is being infringed.\footnote{81}{Id. § 2(a).} Further, the plaintiff is required to identify each accused product and state the specific name and model number associated with that product.\footnote{82}{Id.} The plaintiff must also have to explain, element by element, how the accused device infringes on each claim.\footnote{83}{Id.}

Additionally, the plaintiff is required to plead specific details about the parties alleging infringement.\footnote{84}{Id.} The initial pleadings must contain a description of the principal business of the party alleging infringement, a list of all complaints filed that assert the relevant patent(s), and whether the patent is subject to any licensing.\footnote{85}{Id.} Further, the party alleging infringement must disclose the identity of all owners and co-owners, assignees and licensees of the patent(s) being litigated.\footnote{86}{Id.} Finally, the party alleging infringement must also identify all persons who have the legal

\footnote{79}{Id.}
\footnote{80}{Id. § 2.}
\footnote{81}{Id. § 2(a).}
\footnote{82}{Id. The Act does not limit this disclosure to "products;" the plaintiff would have to plead the same amount of specificity for each accused "apparatus, product, feature, device, method, system, process, function, act, service, or other instrumentality." Id.}
\footnote{83}{Patent Abuse Reduction Act, S. 1013, 113th Cong., § 2(a) (2013). The plaintiff would have to explain whether the device infringes literally or under the doctrine of equivalents. See id. Further, the plaintiff must show how, with detailed specificity, each claim corresponds to the functionality of the accused device. Id.}
\footnote{84}{Id.}
\footnote{85}{Id.}
\footnote{86}{Id.}
right to enforce the patent and all persons who have a financial stake in the outcome of the litigation.\textsuperscript{87}

Notably, the PARA would also require the Supreme Court to amend Form 18 of the Federal Rules of Civil Procedure to conform to the Act.\textsuperscript{88}

\textbf{B. Joinder}

The PARA seeks to expand on the newly enacted joinder provisions found in the America Invents Act. Section 3 of the PARA adds another section to 35 U.S.C. § 299: Joinder of Interested Parties.\textsuperscript{89} However, the provisions in the PARA build upon the joinder provisions in the America Invents Act in that the PARA focuses on the defendant’s ability to join more plaintiffs to the litigation.\textsuperscript{90} Specifically, a defendant may join any “interested party” (as defined by section 2 of the PARA) to the suit if that party’s interest is limited to “asserting any such patent in litigation.”\textsuperscript{91} A law firm cannot be joined if their only interest is representing the party alleging infringement.\textsuperscript{92} The defendant’s motion to join an interested party would not be granted if a) the party is not subject to service of process; or b) joining the party would “deprive the court of subject matter jurisdiction or make venue improper.”\textsuperscript{93}

\textsuperscript{87.} Id. The party alleging infringement would also have to disclose all agreements with the parties with have a financial stake. Id.

\textsuperscript{88.} Patent Abuse Reduction Act, S. 1013, 113th Cong., § 2(c) (2013).

\textsuperscript{89.} Id. § 3.

\textsuperscript{90.} Id.

\textsuperscript{91.} Id. According to § 2, an “Interested Person” is “any person other than the party alleging infringement who A) owns or co-owns [the patent]; B) is the assignee of [the patent]; or C) is an exclusive licensee to [the patent].” Patent Abuse Reduction Act, S. 1013, 113th Cong., § 2 (2013). An “interested person” is can also be “any person with a direct financial interest in the outcome of the action, including a right to receive proceeds or any fixed or variable portion thereof.” Id.

\textsuperscript{92.} Id.

C. Discovery Limits

Section 4, “[d]iscovery in patent infringement suits,” is the Bill’s longest and most expansive section. This section seeks to add a new section (§300) to Chapter 29 of Title 35 of the United States Code.

The first section of the new discovery provision focuses on “Discovery Limitation[s] Prior to Claim Construction.” Specifically, if a court determines that a hearing on claim construction is required, discovery will be limited to “information necessary for the court to determine the meaning of the terms used in the patent claim.” The Bill makes an exception for discovery in cases where a resolution within a specified period of time is required and a party’s rights with respect to the patent would be in danger because of that period of time. The Bill also provides an exception for discovery that is necessary to resolve a motion made by a party prior to the ruling relating to claim construction.

The Bill then goes on to discuss “Sequence and Scope; Cost-Shifting,” making a distinction between “core documentary evidence” and “additional discovery.” A detailed list is set forth describing what can be core documentary evidence, while additional discovery is simply defined as anything that is not core documentary evidence. Core documentary evidence only includes documents that:

(I) relate to the conception, reduction to practice, and application for the asserted patent; (II) are sufficient to show the technical operation of the instrumentality identified in the complaint as

94. Id. § 4.
95. Id. § 4(a).
96. Id.
97. Id.
99. Id.
100. Id.
101. Id.
infringing the asserted patent; (III) relate to potentially invalidating prior art; (IV) relate to previous licensing or conveyances of the asserted patent; (V) are sufficient to show revenue attributable to any claimed invention; (VI) are sufficient to show the organizational ownership and structure of each party, including identification of any person that has a financial interest in the asserted patent; (VII) relate to awareness of the asserted patent or claim, or the infringement, before the action was filed; and (VIII) sufficient to show any marking, lack of marking, or notice of the asserted patent provided to the accused infringer.\textsuperscript{102}

The Bill specifically mentions that core documentary evidence does not include any sort of electronic communication or computer code unless that court finds good cause to allow the evidence.\textsuperscript{103} Additionally, during the pre-trial conference, parties in a patent suit are required to disclose (1) when discovery of core documentary evidence will be completed; (2) whether a party will seek additional discovery; and (3) any issues relating to infringement, invalidity, or damages that would “streamline the case.”\textsuperscript{104} The PARA dictates that a party seeking additional discovery would have to bear all costs associated with that discovery, including attorney’s fees.\textsuperscript{105} Further, the party seeking additional discovery would be required to either pay the anticipated costs associated with the discovery up front, or post a bond of the same amount.\textsuperscript{106}

The PARA’s section on discovery ends with a disclaimer stating that nothing in the discovery section should be construed to allow a party to obtain information that is not otherwise discoverable and

\textsuperscript{102} Id.
\textsuperscript{103} Id. § 4(a). Electronic communication includes e-mail, text messages, instant messaging, and other forms of electronic communication. Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
will not permit a party to obtain otherwise privileged information.\textsuperscript{107}

\textbf{D. Costs and Expenses}

The final section of the PARA amends Section 285 of Title 35 of the United States Code.\textsuperscript{108} As previously mentioned, § 285 currently reads: “The court in exceptional cases may award reasonable attorney fees to the prevailing party.”\textsuperscript{109} The PARA would amend this section to state that, in patent litigation there is a presumption that costs, expenses and attorney’s fees will be awarded (1) unless the conduct of the non-prevailing party was reasonable and substantially justified, or (2) if there are exceptional circumstances.\textsuperscript{110} Courts are directed not to look at any licenses taken to settle a claim when determining if the non-prevailing party was within one of the exceptions.\textsuperscript{111} The Bill ends by stating that if the non-prevailing party is unable to pay the costs, expenses, and attorney’s fees, the court may make that amount recoverable against a previously defined “interested party.”\textsuperscript{112}

\textbf{IV. ANALYSIS}

This section will detail the four main segments of the Patent Abuse Reduction Act (“PARA”): Pleading Requirements, Joinder, Discovery, and Attorney’s Fees and Costs. When applied, each of the proposed sections will have an effect on the patent system that is not readily apparent from a first read of the text of the bill. This section will detail these effects and the different arguments for and against legislation like the PARA that try to curtail the litigation efforts of a non-practicing entity (“NPE”).

\begin{itemize}
\item[107.] \textit{Id.}
\item[110.] Patent Abuse Reduction Act, S. 1013, § 5(a).
\item[111.] \textit{Id.}
\item[112.] \textit{Id.}
\end{itemize}
The filing of litigation can be a very powerful bargaining tool in licensing negotiations. NPEs will often file suit with no intention of actually serving the defendant or follow through with the case, but instead solely to use the now more imminent threat of litigation to gain leverage over a defendant in a licensing negotiation. Most companies cannot afford the liability of a pending lawsuit against them and often will have to quickly assess the cost of litigating the claim compared to the cost of a settlement or license. The PARA attempts to curtail this practice by changing the pleading requirement standard for patent infringement cases in order to make the filing of litigation more costly.

The PARA’s proposed pleading requirements drastically change the current procedure by forcing the pleader to include specific details about the alleged infringement(s) and the parties involved in the suit. These new pleading requirements would affect NPEs by (1) raising the cost of litigation by forcing NPEs to investigate potential infringement more thoroughly, and (2) making NPE shell companies more transparent by requiring the disclosure of its parent company.

1. The Pleading Requirement’s Effect on Litigation Cost

The PARA’s requirement of forcing the pleader to disclose, claim element by claim element, the scope of the defendant’s device’s infringement, can be interpreted as an attempt to increase initial litigation costs in order to decrease the amount of “nuisance cases” filed by NPEs. Currently, because of the current pleading standard discussed in Part II Section, it is not very expensive for a

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113. See Jonathan Moore, *Particularizing Patent Pleading: Pleading Patent Infringement in a Post-Twombly World*, 18 TEX. INTELL. PROP. L.J. 451, 463 (2010) (noting that “even if the alleged infringement pertains only to a component, if the overall product is a technology that requires significant investment, customers will be wary of making that investment because of the pending suit”).

NPE, or really any other patent plaintiff, to file a patent litigation suit. 115

While the initial costs of filing a suit are low for plaintiffs, the suit’s starting costs are inversely high for defendants. 116 When a plaintiff is not required to plead specific infringement contentions, a defendant is left to blindly access the merits of the claim without knowing what product is allegedly infringing and how it potentially infringes. 117 Consequently, this makes the defendant's initial investigation into whether the defendant should proceed with the litigation or enter into settlement negotiations a costly process because they must examine all of their property to determine the nature and scope of the alleged infringement. 118 Even if a defendant chooses to pay to investigate the merits, the decision of how to proceed with an effective defense (e.g., invalidity or non-infringement) is nearly impossible to evaluate in the short time frame available to answer a complaint, so the defendant often simply settles such vaguely pleaded "nuisance suits." 119

The PARA’s pleading disclosure provisions would shift the current cost burden at the initiation of a patent infringement suit by increasing the cost of filing an infringement suit for a plaintiff and decreasing the cost of defending such a suit at the initial pleading stage. The plaintiff would be required to detail the accused devices down to the specific “name or model number." 120 This one detail would allow for a defendant to more quickly assess the merits of the plaintiff’s claim, thus reducing attorney’s fees and other costs associated with initial litigation investigation. The heightened disclosure provisions from the PARA would likewise increase the cost of filing litigation for plaintiffs, specifically NPEs, because NPEs traditionally sue a large number of defendants with very vague infringement contentions in their

116. Id. at 486-87.
117. Id. at 187.
118. Id.
119. Id. 187-88.
complaint. Requiring disclosure of each claim element specifically infringed, or a “claim chart,” would increase a NPEs costs before filing suit since a more thorough investigation will have to take place before a lawsuit is filed. For example, a NPE may have to hire a scientist or engineer to dismantle and understand a product so that infringement contentions could be properly pleaded. This increased initial cost means that NPEs will have to either spend more money on attorney’s fees and experts to create claim charts or simply file less infringement suits in general.

But it is also important to note that the benefits mentioned above would only be realized during the initial pleading stages of litigation. This is due to the fact that most Districts’ local patent rules require a claim chart to be submitted to the defendant immediately after an answer is filed in the plaintiff’s initial infringement contentions.121 If a defendant can obtain enough information to answer the complaint and wait for the initial disclosures to seriously investigate a case, the defendant would be able to save time and money in the long run, because rather than investigating the infringement themselves, defendants could wait for the plaintiff’s claim charts/initial contentions. The PARA provides a limited technical change by simply moving the disclosure to an earlier point in the suit.

2. The Pleading Requirement’s Effect on Non-Practicing Entity’s Transparency

The other notable provision in the PARA’s pleading requirements section is the provision requiring the pleader to disclose the identity of anyone who has a stake in the investigation and the nature of their stake.122 This is solely aimed at larger NPEs

121. See, e.g., N.D. Ill. L.P.R 2.2(a)-(h) (requiring, among other things, “a chart identifying specifically where each element of each asserted claim is found within each Accused Instrumentality, including for each element that such party contends is governed by 35 U.S.C. § 112(6), a description of the claimed function of that element and the identity of the structure(s), act(s), or material(s) in the Accused Instrumentality that performs the claimed function” within 14 days after initial disclosures); E.D. Tex. P.R. 3-1 (containing a similar provision).

and their strategy to use large amounts of shell companies to pursue litigation. In effect, this provision, along with the other provisions of the PARA, would make that practice obsolete because once the parent NPE is disclosed, that company can be joined under the PARA’s joinder provisions (discussed infra Section IV, Part B). After the parent NPE is disclosed and subsequently joined, it could be held liable if a judgment for say, attorney’s fees, is entered, as it has the capital to pay the judgment that the subsidiary does not. Essentially, the PARA’s heightened pleading requirements would not be effective in reducing NPE lawsuits without the PARA’s joinder provisions.

B. Joinder Provisions

As discussed earlier, a typical NPE strategy is to use a shell company to buy and enforce a patent. The attorney that represents the NPE shell company will usually front the costs of litigation and work on a contingency fee basis. This means that, to operate, the shell company’s only asset would need to be the patent(s) being enforced, thus making the entity ‘judgment proof’ because they have no monetary assets.

This section, along with the “Pleading Requirements” (discussed supra Section IV, Part A) and “Attorney’s Fees and Costs” section (discussed infra Section IV, Part C), would eliminate the usefulness of the NPE shell company structure because the parent NPE will be easily enjoined to the litigation, making it vulnerable to a 35 U.S.C. § 285 ruling or a ruling associated with the “loser pays” portion of the PARA (discussed infra). Essentially, the PARA’s joinder provisions will no longer allow a NPE to hide behind the “corporate veil.” If the large, parent NPE is joined to the suit, it can be held responsible for attorney’s fees and costs, as well as sanctions if the court decides to award them. Currently, if

123. See supra Section II, Part B.2
125. Id.
these judgments are entered against the shell company, the entity simply declares bankruptcy and dissolves, giving a defendant no recourse to collect his court awarded attorney’s fees and costs or sanctions for a meritless case.

C. Discovery

Generally, parties in any litigation will serve each other with broad discovery requests in order to obtain as much information as possible to build the strongest case. Patent infringement suits are no exception.\textsuperscript{126} Discovery requests in patent infringement suits often involve a large number of highly technical documents that require a large staff or teams of attorneys to sort through.\textsuperscript{127} Further, because of the complex technical nature of patent cases, attorneys often have trouble sorting important documents from unimportant ones and cannot tell what is important until deep into the discovery process, creating inefficiencies of time and money.\textsuperscript{128}

NPEs have a particular advantage in discovery proceedings because of their use of shell companies and because, by their very nature, they do not practice the invention associated with the asserted patent. A NPE shell company, whose only asset is the patent-in-suit, is structured to only have a limited amount of information available to divulge in discovery.\textsuperscript{129} Whereas when a practicing entity is subject to very broad discovery requests, they have significantly more documents and information, ranging from technical specifications to company financials, for each device or product they manufacture.\textsuperscript{130} Therefore, NPEs can purposely impose large and expensive discovery requests against practicing


\textsuperscript{127} \textit{Id.} at 325-26.

\textsuperscript{128} \textit{Id.} at 327.


\textsuperscript{130} \textit{Id.}
entities without having to worry about the same thing being done to them.\textsuperscript{131} The PARA attempts to combat this strategy in several ways.

\textit{1. The Pre-Markman Hearing Discovery Limits}

The first section of the PARA’s discovery provisions limits pre-claim construction discovery to only articles that are relevant to claim construction. On its face, this provision would substantially limit abusive discovery because there is, in theory, a much narrower set of documents that are relevant to claim construction than documents relevant to all issues that arise in a patent infringement suit (infringement, invalidity, etc.). Moreover, a defendant would be better positioned to get the case to a claim construction \textit{Markman} hearing at a much lower cost because a NPE will not be able to make large, costly, and unrelated discovery requests before the hearing.\textsuperscript{132}

There are many advantages to getting a suit to a \textit{Markman} hearing. The first, in the NPE context, is narrowing down the scope of the claim, which is essential to winning a patent infringement suit. As stated earlier, NPEs generally acquire extremely broad patents so that they can assert them against a large amount of defendants. If a defendant takes a NPE to a \textit{Markman} hearing, there is a high probably that the NPE’s patent it claims to be infringed does not actually read as broadly as the NPE contends. Chances are the defendant will be able to escape the lawsuit after a \textit{Markman} hearing for a very low settlement, or, in some cases, can demonstrate that their device is outside the scope of the claim and prevail in a summary judgment motion.

The pre-\textit{Markman} hearing discovery limits will also have a positive effect on current and future defendants that are not participating in the specific infringement suit. If any particular

\textsuperscript{131} Id.

\textsuperscript{132} A party generally has 30 days to respond to a discovery request. See, \textit{e.g.}, \textsc{Fed. R. Civ. P.} 34(b)(2)(A) ("The party to whom the request is directed must respond in writing within 30 days after being served"). If a NPE were to file large discovery requests just after defendant's answer, the discovery would have to be complied with well before a \textit{Markman} hearing would be scheduled.
defendant decides to bring a case to a *Markman* hearing, all other defendants will benefit from the judge’s claim interpretation because of issue preclusion and preclusion of inconsistent positions.\footnote{133. See Jason Rantanen, *Slaying the Troll: Litigation as an Effective Strategy Against Patent Threats*, 23 SANTA CLARA COMPUTER & HIGH TECH, L.J. 159, 174 (2006); see also Parklane Hosiery v. Shore, 439 U.S. 322, 326 n.5 (1979) (stating that issue preclusion or collateral estoppel bars a suit if the issue or cause of action has already been “actually litigated”). Further, collateral estoppel has “the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.” Id. at 326. Additionally, preclusion of inconsistent positions occurs when a litigant, as the name suggests, take a position different from the one he took in an earlier trial. See, e.g., Jackson Jordan, Inc. v. Plasser American Corp., 747 F.2d 1567, 1578 (Fed. Cir. 1984). Generally, a court will see if the defendant was prejudiced in relying on the earlier position to bar a litigant’s suit. Id. at 1580.} Essentially, these two doctrines will set the narrower terms of a NPE’s patent claim into stone, which a future defendant may be able to use to preclude the litigation all together by showing non-infringement based off a claim’s previous *Markman* hearing interpretation.\footnote{134. See Jason Rantanen, *Slaying the Troll: Litigation as an Effective Strategy Against Patent Threats*, 23 SANTA CLARA COMPUTER & HIGH TECH, L.J. 159, 174 (2006).} However, this strategy will only work if the claim construction was “essential to the final judgment” of the case, as required by the doctrine of issue preclusion.\footnote{135. Id.} For example, if a defendant were to get a favorable ruling on claim construction and won the case on summary judgment, the doctrine would apply. However, if the defendant obtained a favorable claim construction ruling and the NEP simply dropped the suit or agreed to a very small settlement, the doctrine would not apply because while the ruling may have been essential to the outcome, a settlement is not a judgment for issue preclusion purposes.\footnote{136. See RF Delaware, Inc. v. Pac. Keystone Techs., Inc., 326 F.3d 1255, 1261 (Fed. Cir. 2003) (“Thus, if the parties to a suit enter into an extrajudicial settlement or compromise, there is no judgment, and future litigation is not barred by *res judicata* or collateral estoppel though, of course, a court may dismiss litigation thereafter filed on the same claim on the basis that the parties have by contract ended their controversy”).} Therefore, in order for the pre-*Markman* hearing discovery limits
to have maximum effect on abusive infringement suits, defendants will have to use summary judgment motions to dispose of suits, rather than less expensive settlement negotiations.

Also, a claim construction ruling on a patent will still give defendants a good idea of the best way to design a product around a NPE’s claim(s). While this would not shield the defendant from any damages from previously infringing products, it could mitigate the damages enough to where the NPE’s patent will not be as valuable as it once was, causing the entity not to assert it anymore.

While the pre-Markman hearing discovery limits would streamline a case and eventually curtail abusive patent litigation, it will also inevitably have a negative effect on plaintiffs that are smaller companies or sole inventors who do not quite know exactly how an accused product actually works, and, more importantly, if it actually infringes. Some products are especially hard to reverse engineer and a patentee of, for example, a software patent, may have an inclination that a product on the market is infringing but has no way of knowing for sure until he files suit. These non-NPE plaintiffs may rely on early stage discovery in order to quickly discern the merits of their case. The PARA would force these smaller entities with a tighter litigation budget to pay attorney’s fees through a Markman hearing in order to find out how the accused device actually works in post-Markman hearing discovery.

There is also the question of what “discovery related to claim construction” actually entails as the Act is silent on the issue. This silence, presumably, leaves this determination up the courts, which may create more issues and waste more time than if the provision was not in place at all. A NPE will do anything to elongate a suit so that defendant’s attorney’s fees will start to increase to the point where it does not make fiscal sense to continue with the suit anymore.137 Therefore, without Congressional guidance, a NPE would not mind still asking for vast amounts of discovery and having a hearing about each and every request to determine if the requested article fits within the scope of “discovery related to

137. Remember, NPEs generally use attorneys that work on a contingency fee basis, covering the costs of litigation up front in order to take a percentage of a settlement or verdict, discussed earlier in Part B of this article.
claim construction.” Over time, there would be case law that would make this process more efficient, but there will always be new things requested, further stalling the litigation process, which puts pressure on a defendant to settle due to mounting legal fees.

2. Post-Markman Hearing Limits and Cost Shifting

The PARA also dictates that discovery after claim construction will be limited to “core documentary evidence,” and if a party makes a discovery request that is outside the scope of “core documentary evidence,” that party will bear the cost of production. Here, the PARA is trying to specifically limit a common tactic of all patent litigators to request hundreds of thousands of pages of emails in order to find anything that could be useful for the litigation. In a typical practicing entity versus practicing entity suit, these types of requests would be issued regularly by both sides in order to “uncover every stone” for their client. However, in a NPE situation, a NPE shell can issue these types of requests and not have to worry about having to produce the same type of documents because the documents simply do not exist. The PARA would level the playing field by placing the cost burden on the NPE if it is inclined to continue to employ this tactic.

D. Attorney’s Fees and Costs

The PARA’s final section creates a more useful “loser pays” system for awarding attorney’s costs and fees upon completion of litigation. Currently, 35 U.S.C. § 285 states that attorney’s fees and costs are only to be awarded in patent litigation if the

presiding judge believes the case is “exceptional.”” 142 This section is not used often, if at all. 143 In fact, judges granted a § 285 motion to shift fees in only 20 out of 3,000 patent infringement cases filed in 2011. 144 This is because judges are inherently wary of finding an “exceptional case” and most “nuisance cases” brought by NPEs usually settle before a judge could even award fees.

While district court judges have extreme discretion in awarding attorney’s and costs under § 285 and Rule 11 145, most are still hesitant to without more precedent from higher courts. 146 There have been recent Federal Circuit decisions that have articulated the standard that judges should use in awarding fees and serve as a good example of “exceptional” conduct. 147 However, judges will still feel uncomfortable awarding fees under this standard because attorney’s fees and costs can be exceptionally high in patent litigation and place a substantial economic burden on an unsuccessful party. 148 While the PARA’s proposed guidelines of when to award costs may persuade some judges to award fees and

144. Id.
145. FED. R. CIV. P. 11 focuses on whether an attorney has conducted a sufficient factual investigation before making a representation to the court. If a judge determines that a reasonable investigation was not conducted, sanctions can be awarded. FED. R. CIV. P. 11(e).
146. Gene Quinn, Defending Chief Judge Rader: Judges Can Make Patent Trolls Pay, IPWATCHDOG (Sept. 2, 2013, 2:43 PM), http://www.ipwatchdog.com/2013/06/24/defending-chief-judge-rader-judges-can-make-patent-trolls-pay/id=42348 (quoting a district court judge who explains that the “exceptional case” standard is a “really high bar” and that there is not enough appellate authority in this area to cite).
147. See, e.g., Eon-Net LP v. Flagstar Bancorp, 653 F.3d 1314, 1323 (Fed. Cir. 2011) (awarding fees and costs under § 285 and Rule 11 because plaintiff “failed to engage in the claim construction process in good faith” and displayed a “cavalier attitude” toward the “patent litigation process as a whole”).
costs more liberally, it is not clear that it would actually increase the frequency of awarding costs to the non-prevailing party.

As discussed earlier, NPEs use shell companies with no assets other than the asserted patent to litigate.\(^\text{149}\) A defendant would never be able to collect from a NPE shell company if a court did apply Rule 11 sanctions or a grant a § 285 fee shifting order in any particular case. But the PARA allows for the costs to be shifted to an interested party affiliated with the non-prevailing party, which, in the case of if a NPE shell was the losing party, would typically be the parent company that has more financial assets than the shell used in the litigation. But the Bill provides no explanation of how and to which party the cost would shift, and the parent NPEs would vehemently object to bearing these costs. Therefore, while the provision sounds effective and opens the door for more opportunities, in practice the court’s willingness to award fees and costs in patent litigation would most likely remain as it currently is unless there is more controlling precedent that would authorize more liberal fee shifting.

\[E. \text{ A Different Perspective: Opponents of the Act}\]

The arguments presented by the most talked about perspective, proponents of the PARA and regulating NPE litigation, are discussed above. Generally, they argue that most NPEs hinder innovation and their use of patent litigation to “tax” businesses should be severely reduced or eliminated. The most active proponents of NPE regulation are interest groups like the Electronic Frontier Foundation (“EFF”) and the Computer and Communications Industry Association (“CCIA”). Both organizations believe that patent trolls are stifling innovation and push for regulation of them.\(^\text{150}\)

\(^{149}\) Discussed earlier in Part B of this article.

\(^{150}\) See Patent Trolls, ELECTRONIC FRONTIER FOUNDATION (Oct. 28, 2013, 10:08 AM), https://www.eff.org/issues/resources-patent-troll-victims (“we’ve watched as the [patent] system appears to fall apart, harming innovation, the very thing it was designed to foster”); Patents, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (Oct. 28, 2013, 10:17 AM), http://www.cccianet.org/issues/patents (“CCIA has advocated a wide range of reforms to the U.S. patent system”). Also, in an attempt to promote
There is another perspective; however, that does not get as much attention: NPEs can enormously benefit small companies and individual inventors and any attempt to regulate them "would tilt an already unbalanced playing field to further benefit large corporations in the information technology industries." Essentially, the PARA’s opponent’s argument is that the patent system was designed to encourage innovation, and a large portion of that innovation is done by individual inventors and small companies who do not have the resources to "practice" their patents and need monetary incentives to keep innovating and contributing to society. Proponents of this argument include the NPEs themselves and organizations like the Innovation Alliance, which is generally comprised of businesses and NPEs that regularly enforce their patents.

The premise of NPE’s supporter’s argument focuses helping an inventor, who is not particularly interested in litigation, monetize his patents. For example, a typical start-up company may only have a couple of employees and a few patent assets. That company would not be in the financial position to manufacture whatever device that their patent covers in a way that would

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transparency themselves, the EFF has created a website that allows “victims” of patent trolling to upload pre-suit demand letters received from NPEs. See *Trolling Effects* (Oct. 28, 2013, 10:24 AM), www.trollingeffects.org.


153. See *About*, Innovation Alliance (Oct. 28, 2013, 10:54 AM), http://innovationalliance.net/about/about-us (believing in the “critical importance of maintaining a strong patent system that supports innovative enterprises of all sizes”). The Innovation Alliance features members like QUALCOMM (an operating company) and InterDigital (a NPE). *Id.*

overcome market barriers to enter and compete with large scale corporations. Therefore, a life-giving strategy for the company would be to license their patent to make some revenue to keep the business alive and growing.\textsuperscript{155} This extra revenue could go into more research and development, thus promoting more innovation and generating additional revenue so that, one day, the company would have the financial means to compete with the big players in the market.\textsuperscript{156} The problem, however, is that these small companies lack bargaining power to effectively negotiate with larger companies because they do not have the capital to back up a licensing demand with litigation.\textsuperscript{157} This is where, it is argued, NPEs play a valuable role. A large NPE can buy a smaller company’s patent, giving that company instant capital to help it grow and innovate. This, in a sense, levels the playing field because a large NPE is usually backed by a myriad of investors and does not mind getting involved in large scale litigation.\textsuperscript{158} Therefore, as NPE supporters put it, the NPE can do the litigating and the inventor can get back to doing what he is best at and “truly loves”: inventing.\textsuperscript{159} Supporters argue that NPEs provide incentive for innovation by creating an accessible market for inventors and start-up companies to monetize their patents so that they can get quickly grow their business by reinvesting the profits obtained by a patent sale.\textsuperscript{160}

Another argument employed by the opposition to regulating NPEs is that the patent system is very fragile and sweeping regulation would always have untended consequences that would negatively affect the rights of patent owners.\textsuperscript{161} For example, if the cost of filing a suit is heightened (e.g., heightened pleading requirements), some patent owners would not be able to cover the cost of filing litigation to enforce their patents, essentially

\begin{footnotesize}
155. Id.
156. Id.
157. Id. (noting that smaller companies cannot justify spending $3-7 million dollars on a patent infringement suit).
158. Detkin, supra note 148, at 640.
159. Id.
160. Id.
\end{footnotesize}
rendering their patent useless through an inability to enforce. Further, Congress should wait to see how current provisions, like provisions in the AIA, will actually play out in practice before more action is taken.

V. CONCLUSION

The Patent Abuse Reduction Act ("PARA" or "Bill") should not be passed as currently proposed. It is far too sweeping of a measure and would, as the opponents of regulation claim, inevitably have far too many unintended consequences that would hinder the rights of patent holders. Heightened pleading requirements would bar good faith suits of patentees who simply do not know enough information about a potentially infringing product to plead sufficiently. Also, even if the plaintiff had enough information survive a motion to dismiss, the discovery procedures do not adequately define "discovery relating to claim construction," which would lead to longer, and therefore more costly, litigation for defendants. At the end of the day, the Bill’s fatal defect is that while it would make it costlier for a non-practicing entity ("NPE") to litigate, it also prohibits good faith patent owners from enforcing their patents through litigation.

However, there are some provisions in the Bill that would be very effective at curtailing NPE abuse. Specifically, the provisions that affect transparency would make a NPE think twice about bringing a meritless suit. If a bill with provisions that mirror the PARA’s transparency sections in the pleading requirements and joinder provisions were passed, parent NPEs would be on the hook for an attorney’s fee judgment or sanctions award, rather than simply bankrupting a shell company and hiding behind a "corporate veil." Also, a judge may be more inclined to award attorney’s fees or sanctions if he knows that such an award could actually be enforced against a party.

The PARA’s "loser pays" provision is another provision that could also have an immediate impact on whether a NPE would

162. This also ties in with the argument that, if a patent owner cannot afford litigation, he could still sell his patent to a NPE to enforce it for him.
163. Id.
bring a meritless case because attorney’s fees in a patent suit are particularly expensive and having to cover that cost for both parties would severely endanger a NPE’s business operations. However, for such a provision to matter, defendants would still have to either take the case to trial or some other form of official adjudication for the judge to give the award. Even with the new “loser pays” system, defendants would still be hesitant to take on the risk of litigating to this stage and not win fees and costs because of the excessive amount. Therefore, many defendants would stick to the status quo and simply settle NPE “nuisance cases” at the first available opportunity in order to minimize their losses. While a “loser pays” system sounds effective, as proposed the system would simply not work because the large cost of patent litigation would still make an accused infringer hesitant to take a case to trial.

The current § 285 and Rule 11 provisions could be enough to substantially curtail patent litigation abuse. If courts were more liberal in awarding fees or sanctions, NPEs would be incentivized to only bring claims with merit. Also, as previously mentioned in this article, NPEs usually employ lawyers who work on a contingency fee basis. This serves as an additional check on meritless cases, because an attorney would presumably not take on the risk of a case that he does not feel strongly about if there is a high possibility of not being paid.¹⁶⁵

Patent litigation abuse is a very complex problem. In fact, it may just be too complex to solve. The bottom line is that the United States has always favored a strong patent system.¹⁶⁶ While such a system produces strong innovation incentives, unfortunately, such a strong patent system also provides for forms of abuse. Thought the PARA includes a number of good changes,

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¹⁶⁴ See Section II Part B of this article.
¹⁶⁶ See U.S. CONST. art. I, § 8, cl. 8. The clause states that “[t]he Congress shall have power . . . to promote the progress of the science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” Id.
Congress must pass other bills with less sweeping regulations in order to one day create a more manageable situation.

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