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ABSTRACT

Patent trolls are categorically demonized as threatening American innovation and industry. But whether they are a threat that antitrust law is equipped to deal with is a complex question that depends on the particular type of patent troll and activities they engage in. This Article looks specifically at privateer patent trolls: entities that acquire their patents from operating entities and assert them against other industry members. In the particular context of privateering, antitrust law is almost certainly not the proper legal solution. Privateering does raise significant issues: circumventing litigation constraints, evading licensing obligations, and raising the cost and frequency of patent assertions. Nevertheless, there are clear doctrinal and practical roadblocks to leveraging antitrust law to police privateering activity generally, and there exist readily available alternative regimes that are more naturally suited to the task. Antitrust law's role in governing privateering activity should instead be more narrowly guided by its unique strengths, such as limiting collusive behavior.

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Introduction: The Assumed Role for Antitrust

Antitrust law and patent law are in a well-documented, fundamental tension. On the one hand, antitrust law is explicitly charged with preventing and breaking up monopolies. On the other hand, patent law is explicitly charged with granting them, at least temporarily. This tension has long inspired influential writing from a number of academics in its own right.[1] Now, the emergence of a more recent problem has brought that tension to its zenith: patent trolls.

Patent trolls—or, less disparagingly, "patent assertion entities"—are entities that acquire and enforce patents without actually practicing them.[2] That is, they make no product or service using the patent. Rather, their entire business model is predicated on acquiring licensing fees from entities that actually provide goods and services (so-called "operating entities").[3] Critics see these trolls as a pure nuisance: like their namesake, they create nothing and extract tolls from those trying to productively conduct their business. They argue that trolls are responsible for "an explosion of abusive patent litigation designed not to reward innovation . . . but to threaten companies in order to extract settlements based on questionable claims."[4] Some surveys have suggested that patent troll litigation makes up more than 60% of all patent litigation in the United States.[5] Academics have estimated that patent trolls cost operating entities almost $30 billion in 2011 alone.[6] Patent trolls have also been vilified in popular media, ranging from NPR's *This American*

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1. *See* Laurence Wood, Patents and Antitrust Law (1942); John H. Barton, *Patents and Antitrust: A Rethinking in Light of Patent Breadth and Sequential Innovation*, 65 Antitrust L.J. 449 (1997); Herbert J. Hovenkamp, *The Rule of Reason and the Scope of the Patent*, 52 San Diego L. Rev. 515 (2015); S. Chesterfield Oppenheim, *Patents and Antitrust: Peaceful Coexistence?*, 54 Mich. L. Rev. 199 (1955); George L. Priest, *Cartels and Patent License Arrangements*, 20 J.L. & Econ. 309 (1977).

2. *See* Brian T. Yeh, Cong. Research Serv., R42668, An Overview of the "Patent Trolls" Debate (2013), http://www.fas.org/sgp/crs/misc/R42668.pdf.

3. *See id.*; Thomas A. Hemphill, *The Paradox of Patent Assertion Entities*, Am. Enter. Inst. (Aug. 12, 2013), http://www.aei.org/publication/the-paradox-of-patent-assertion-entities/
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4. Gene Sperling, *Taking on Patent Trolls to Protect American Innovation*, The White House Blog (June 4, 2013, 1:55 PM), https://www.whitehouse.gov/blog/2013/06/04/taking-patent-trolls-protect-american-innovation.

5. *Id.*

6. James E. Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 Cornell L. Rev. 387, 408 (2014).

Life[7] to HBO's *Last Week Tonight*.[8] These perceived costs of patent trolling have inspired a number of potential solutions, with antitrust law perhaps chief among them.

At first glance, the nexus between antitrust law and patent trolls seems clear: if litigious patent trolls are unfairly deteriorating the markets for various patented goods, antitrust law can step in and reassert the proper rules for efficient competition. Thus far, however, the popular and scholarly literature surrounding antitrust law's proposed role in policing patent trolls has suffered from two key failures.

First, antitrust scholars have largely failed to distinguish between different types of patent trolls and patent troll activities.[9] Whether antitrust law can provide a solution—if a problem indeed exists—may vary greatly depending on, among other things: the particular patent owner's conduct; its "relationships or connections to operating entities;" the nature of "downstream product" markets; and potential "upstream technology markets."[10] In this way, patent troll behavior varies too much to allow for a single conclusory answer:

> Along one continuum, unilateral [patent troll] conduct may vary from acquiring a single patent or unrelated patents to amassing a thicket of closely related patents covering multiple facets of a single product or industry. The [assertion] strategy may vary as well, from blanketing an industry with demands for royalty payments . . . to engaging in more targeted demands, accompanied by claim charts. . . . Along another continuum, [patent trolls] may cooperate with one or more operating entities when asserting patents, ranging from unspoken agreements to explicit royalty- or revenue-sharing provisions.[11]

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7. *This American Life: When Patents Attack!*, CHICAGO PUBLIC RADIO (July 22, 2011), http://www.thisamericanlife.org/radio-archives/episode/441/when-patents-attack.

8. *Last Week Tonight with John Oliver: Patent Trolls*, YOUTUBE (Apr. 19, 2015), https://www.youtube.com/watch?v=3bxcc3SM_KA.

9. Many pieces draw no distinctions or make no acknowledgement of the different potential types of patent trolls and their divergent activities at all. *See, e.g.*, Michael A. Carrier, *Patent Assertion Entities: Six Actions the Antitrust Agencies Can Take*, 2013 CPI ANTITRUST CHRON. 1 (2013); Collin A. Rose, *A Match Made for Court: Patent Assertion Entities and the Federal Trade Commission*, 48 COLUM. J.L. & SOC. PROBS. 95 (2014); NAT'L ECON. COUNCIL ET AL., PATENT ASSERTION AND U.S. INNOVATION (June 2013), https://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf; Bert Foer & Sandeep Vaheesan, *Patent Trolls in the Cross Hairs*, AM. ANTITRUST INST. (Jan. 16, 2014), http://www.antitrustinstitute.org/content/patent-trolls-cross-hairs.

10. Erica S. Mintzer & Suzanne Munck, *The Joint U.S. Department of Justice And Federal Trade Commission Workshop On Patent Assertion Entity Activities — "Follow The Money"*, 79 ANTITRUST L.J. 423, 437 (2014).

11. *Id.*

This latter kind of activity—using patent trolls as a roundabout means to enforce patents against competitors—is frequently referred to as patent "privateering," and is the specific focus of this Article.[12]

Second, where the literature has distinguished between different types of patent trolls, it has still failed to account for the costs of expanding or reshaping antitrust law to cover patent troll activity, as opposed to leveraging existing legal solutions. Nowhere is this failure more glaring than in the realm of privateering. Academics[13] and industry members[14] who propose antitrust intervention have offered little to no balancing against alternative legal frameworks for grappling with privateers.[15] Nor do they address the gaps in antitrust law—described later in this Article[16]—that would need to be covered to apply antitrust law to privateers in the first place. This Article seeks to improve both the specificity and cross-doctrinality of patent troll analysis in the existing antitrust literature by (1) analyzing the shortcomings of antitrust law in policing privateering activity specifically, and (2) considering alternative legal regimes that would require little or no alteration to provide a solution.

Where alternative legal regimes are available, there should be a great deal of skepticism towards applying antitrust law. False positives are particularly costly due to the nature of antitrust's treble damages. To counterbal-

12. See, e.g., Tom Ewing, *Indirect Exploitation of Intellectual Property Rights by Corporations and Investors: IP Privateering and Modern Letters of Marque and Reprisal*, 4 Hastings Sci. & Tech. L.J. 1, 3 (2012); Tom Ewing & Robin Feldman, *The Giants Among Us*, 2012 Stan. Tech. L. Rev. 1, 63 (2012); Susan Decker, *Google Seeks Probe of Patent Privateers Defended by Nokia*, BloombergBusiness (Apr. 5, 2013, 11:23 AM), http://www.bloomberg.com/news/articles/2013-04-05/google-seeks-probe-of-patent-privateers-defended-by-nokia; Leslie A. Gordon, *'Patent Privateers' Do Legal Legwork for Big-Time Tech Companies*, A.B.A. Journal (July 1, 2013, 08:30 AM), http://www.abajournal.com/mobile/mag_article/small_companies_pick_up_the_cost_of_patent_privateering_litigation.

13. *See generally, e.g.*, Carrier, *supra* note 9, at 1; Mark S. Popofsky & Michael D. Laufert, *Patent Assertion Entities and Antitrust: Operating Company Patent Transfers*, 12 Antitrust Source 1 (2013), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr13_full_source.authcheckdam.pdf; Phillip Malone, Clinical Professor of Law at Harvard Law School, Panelist at Patent Assertion Entities Workshop, How Does Antitrust Apply to the Potential Efficiencies and Harms Caused by Patent Assertion Entities Activity? 155-63 (Dec. 10, 2012), https://www.ftc.gov/sites/default/files/documents/public_events/Patent%20Assertion%20Entity%20Activities%20Workshop%20/pae_transcript.pdf; *Comments of the American Antitrust Institute on Patent Assertion Entities* (Feb. 21, 2013), http://www.justice.gov/atr/public/workshops/pae/comments/paew-0011.pdf.workshops/pae/comments/paew-0011.pdf.

14. *See, e.g.*, Comments of Google, Blackberry, Earthlink & Red Hat to the Federal Trade Commission and U.S. Department of Justice on Patent Assertion Entities (Apr. 5, 2013), http://www.justice.gov/atr/public/workshops/pae/comments/paew-0049.pdf; Public Comments of the Electronic Frontier Foundation Regarding Patent Assertion Entity Activities (Apr. 5, 2013), http://www.justice.gov/atr/public/workshops/pae/comments/paew-0064.pdf.

15. Alternative legal frameworks for curtailing privateer activity are discussed *infra* Subsections I.C & II.B.

16. *Infra* Subsections I.A, I.B, II.A, & III.A.

ance those costs, "socially optimal antitrust rules" would have to "underdeter" as a rule.[17] Where regimes conflict, the primary hazard is for one to warp the other; in particular, given the deep tensions between the goals of patent and antitrust laws, the potential for interference between regimes is likely high.[18]

In fact, the Supreme Court has already recognized limiting antitrust law where alternative solutions are available. For example, in *Credit Suisse LLC v. Billing*,[19] the Court dismissed antitrust claims brought against underwriting firms accused of conspiring to manipulate initial public offering prices. The Court held that the creation of the Securities and Exchange Commission implicitly preempted antitrust regulation of the securities industry, determining the need for antitrust enforcement to be "unusually small," the prospect for mistakes to be "unusually likely," and the potential "harm to the efficient functioning of the securities markets" to be serious.[20] This hesitation to leverage antitrust law when other solutions exist can be traced back at least as far as *NYNEX Corp. v. Discon, Inc.*, in which the Court declined to apply antitrust law to a particular type of regulatory fraud in part because "unfair competition laws, business tort laws, or regulatory laws" existed as less costly alternatives.[21]

The existing literature on patent privateering generally points to three key features that allegedly open the door to antitrust involvement: evasion of litigation constraints,[22] evasion of licensing obligations,[23] and increased cost and frequency of patent litigation.[24] This Article analyzes each feature in Parts I, II, and III, respectively, examining the shortcomings in applying antitrust law to each perceived problem, and offering an alternative solution or perspective that should command our attention instead. This Article does not claim that the existence of alternative legal regimes to potentially govern privateering activity literally preempts antitrust law in that sphere. Rather, it highlights those alternatives—as well as the roadblocks in applying antitrust law as it now exists to privateers—as convincing evidence that antitrust

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17. Bruce H. Kobayashi & Joshua D. Wright, *Federalism, Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup*, 5 J. COMP. LAW & ECON 469 (2009); *see also* Bruce H. Kobayashi, *The Law and Economics of Predatory Pricing*, *in* THE LAW AND ECONOMICS OF ANTITRUST (K. Hylton ed., 2014).

18. Louis Kaplow, *The Patent-Antitrust Intersection: A Reappraisal,* 97 HARV. L. REV. 1813, 1815-17 (1984) ("The intersection of antitrust law and patent policy has proved to be a source of perpetual confusion and controversy . . . manifest[ing] itself in the continual flux of patent-antitrust doctrine, the apparent inconsistency among many segments of the doctrine, and the difficulty courts have in articulating rules and standards."). *See* sources cited *supra* note 1.

19. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 267 (2007).

20. *Id.* at 277.

21. Nynex Corp. v. Discon, 525 U.S. 128, 137 (1998).

22. *See* sources cited *infra* notes 25-27.

23. *See infra* notes 74-76.

24. *See* sources cited *infra* notes 123-126.

should play a modest role in this context. Deepening this contrast, in Part IV, the Article concludes by examining collusion via privateers as an example of the type of activity properly and uniquely suited to antitrust regulation—an example that acts as a guidepost for the modest role of antitrust moving forward.

I. Evading Constraints on Litigation Activity

Operating entities typically face retributive and reputational constraints on their ability to litigate their patent rights. In terms of retribution, rival operating entities likely "each possess patents that implicate one another's products," so "they enter into cross licenses or (similarly) abstain from suing one another . . . [in] the patent equivalent of . . . mutual assured destruction."[25] In terms of reputation, operating entities face "customers exerting pressure to settle litigation or shareholders skeptical of patent enforcement."[26] Operating entities might also need to engage with "standards-setting organizations, where a reputation as a non-aggressor can increase the likelihood that a firm's technology is included in standards."[27]

One of the primary arguments for using antitrust law against patent privateering is that patent privateering enables operating entities to avoid these litigation constraints that they would otherwise face.[28] A privateer, it is argued, faces no threat of patent counter-suit or reputational damage since they produce nothing themselves. As a result, with sufficient opacity separating them from the privateer, an operating entity that exercises control over a privateer is able to leverage their patents to a much greater extent than their competitors, raising their competitors' costs in an anticompetitive fashion, and necessitating antitrust involvement.[29]

This argument for antitrust involvement, however, ignores the implicit costs of litigation constraints, the extent to which existing antitrust doctrine

25. Popofsky & Laufert, *supra* note 13; *see also* Edith Ramirez, Chairman, Fed. Trade Comm'n, Opening Remarks: Competition Law & Patent Assertion Entities: What Antitrust Enforcers Can Do 7 (June 20, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/competition-law-patent-assertion-entities-what-antitrust-enforcers-can-do/130620paespeech.pdf (stating that patent privateering through "a lack of transparency," enables assertion without "mutually assured destruction by proxy"); Eli Dourado, *How Patent Privateers Have Eroded Mutually Assured Destruction in the Computer Industry*, The Umlaut (Oct. 2, 2013), https://theumlaut.com/2013/10/02/patent-privateers/.

26. Carrier, *supra* note 9, at 7.

27. Popofsky & Laufert, *supra* note 13, at 4.

28. *See* sources cited *supra* notes 25-27.

29. *See, e.g.*, sources cited *supra* notes 25-27; Julie Brill, Commissioner, Introductory Remarks at 2014 International CES CEA Innovation Policy Summit: Patent Litigation Reform: Who Are You Calling a Troll? (Jan. 8, 2014), http://www.aipla.org/committees/committee_pages/antitrust-law/Committee%20Documents/Subcommittee%20on%20IP%20Acquisitions%20and%20Licensing/Brill%20-%20PAEs%20and%20Legislation.pdf; Dourado, *supra* note 25; Thibault Schrepel, *Patent Privateering: Patents as Weapons*, U. Cin. L. Rev. Blog (Feb. 19, 2015), http://uclawreview.org/2015/02/19/patent-privateering-patents-as-weapons/#_ftn10.

forecloses intervention, and the potential for more efficient transparency-based solutions. These shortcomings are each examined in detail below.

A. *The Costs of Litigation Constraints*

A fundamental error that most antitrust arguments against patent privateering make is assuming that the status quo disrupted by privateering is inherently efficient or desirable.[30] But the efficiency valence of the status quo—in which operating entities acquire and maintain patent portfolios defensively as bargaining chips, afraid and unwilling to litigate infringement—is questionable. Retributional and reputational constraints on patent assertion are not without their own costs, and the increased litigation and enforcement normally associated with patent privateers may actually work as a pro-competitive market force.

Both operating entities and consumers bear significant costs associated with the litigation-constrained status quo. First, acquiring and maintaining patents for barter and defensive purposes has explicit costs. Second, patents are likely to be systemically undervalued when they are never fully monetized, raising the price of innovation. Finally, a lack of opportunities to litigate and test the validity of patents allows weak patents to remain in circulation as sham leverage. These costs are borne directly by operating entities and are likely partially passed through to consumers of downstream products.

In terms of explicit costs, operating entities must spend money to acquire and maintain patents for use in maintaining mutually assured destruction. As Professor Mark Lemley and Intel's General Counsel A. Douglas Melamed note, "smartphone companies alone spent over $14 billion acquiring patents in the last three years to deter or offset assertions by other operating entities."[31] In most cases, we should expect that the cost of defensive stockpiling would be equal to the expected liability in litigation without mutually assured destruction. If the cost were more, the defending company would generally choose litigation. If the cost were less, then the defensive patents would be undervalued; the price of those patents would eventually be bid up by other competitors seeking defense, arbitrageurs, or perhaps even the asserting company to strengthen its position. In this sense, privateers would not be increasing costs relative to the status quo, despite disrupting it.

Such disruption may in fact be procompetitive. To the extent that one competitor may be able to wield a destructive power beyond its actual patent portfolio value—say, by refusing to do business with any company that sues

30. For examples of the failure to consider status quo costs, see Popofsky & Laufert, *supra* note 13, at 4-5; Comments of Google et al., *supra* note 14, at 11-13; Ewing, *supra* note 12; Carrier, *supra* note 9, at 11.

31. Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 Colum. L. Rev. 2117, 2130 (2014).

it for patent infringement[32]—evading reputational constraints would be procompetitive. Privateers are also more likely to prefer lump-sum payments rather than running royalties,[33] so that their particular form of enforcement is less likely to "increase prices charged to buyers, reduce product sales, [or] result in deadweight loss."[34]

In terms of under-monetization, operating entities may be failing to account for the opportunity costs of using their patents in a purely defensive manner. By reaching only one potential use of their patents and foregoing the royalties and settlements gained through actual assertion, they are essentially "leaving money on the table."[35] In the long run, systemic under-monetization of patents would tend to depress the prices companies are willing to pay to acquire or maintain them.[36] This would in turn decrease the willingness to spend to *develop* patents, since the potential to eventually sell off rights is lower.[37] By allowing operating entities to reap the full monetary value of their patents, the ex ante value of developing a patent in the first place is increased, as well as the incentive to innovate.[38]

Finally, in terms of junk patents, the practice of avoiding litigation at all costs allows bogus patents to remain in play. While patent trolls typically hope for settlement rather than actual litigation,[39] they at least present the

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32. Intel was accused of participating in precisely this type of behavior, and forced to settle antitrust charges as a result. *See* Press Release, Fed. Trade Comm'n, FTC Accepts Settlement of Charges Against Intel (Mar. 17, 1999), https://www.ftc.gov/news-events/press-releases/1999/03/ftc-accepts-settlement-charges-against-intel.

33. *See, e.g.*, Lemley & Melamed, *supra* note 31, at 2134 ("Because their interest is in generating cash and their business models often depend critically on cash flow from patent assertions, they have no incentive to prefer running royalties and, if anything, are likely to prefer lump-sum payments."). *Cf. Patent Assertion and U.S. Innovation*, *supra* note 9, at 9 ("Future payment streams [for patent trolls] are unlikely to be large given that settlements tend to be paid in lump sums.").

34. Lemley & Melamed, *supra* note 31, at 2134 & nn.71-72.

35. *Id.* at 2137.

36. *See, e.g.*, David S. Abrams, *Did Trips Spur Innovation? An Analysis of Patent Duration and Incentives to Innovate*, 157 U. Pa. L. Rev. 1613, 1615, 1623 (2009) (examining the general elasticity between patent monetization potential—vis-à-vis patent duration—and incentives to innovate).

37. *Id*.

38. Jorge Lemus and Emil Temnyalov have developed a theoretical model for privateering and its effect on R&D spending supporting this argument. *Cf.* Jorge Lemus & Emil Temnyalov, *Outsourcing Patent Enforcement: The Effect of "Patent Privateers" on Litigation and R&D Investments* 37-38 (Dec. 30, 2014) (Northwestern Univ. working paper) (on file with Northwestern University Department of Economics). They find that by reducing the transaction costs of patent monetization, privateers "can increase R&D incentives even when: they do not invest in R&D, do not use the patents to produce products, do not have any cost advantage in litigation . . . , [and] lower total industry profits extracting a positive amount of rents." *Id.* at 38. Their conclusion holds even assuming that privateers simultaneously "reduc[e] the value of defensive portfolios," which would partially undercut "ex-ante incentives to innovate." *Id.*

39. Colleen V. Chien, *Startups and Patent Trolls*, 17 Stan. Tech. L. Rev. 461, 467 (2014).

defending company with an opportunity to challenge the underlying patent if the defending company believes it is invalid. In the world of mutually assured destruction, a company who challenges one possibly invalid patent of another company could provoke the wrath of the entire defending company's portfolio—a small skirmish leading to total nuclear war.[40] Challenging the patent of a privateer with a more limited portfolio, on the other hand, allows the conflict to remain a small skirmish. Companies selling off bits and pieces of their portfolios to privateers thus breaks the litigation stalemate and ensures the patents involved stand up to scrutiny.

In short, the costs of maintaining defensive portfolios, foregoing offensive revenue, and allowing junk patents to remain in circulation may themselves be acting as anticompetitive and inefficient forces. Patent privateering, which disrupts these forces, should therefore not be compared to a perfectly competitive market for intellectual property or downstream products. The antitrust valence of patent privateering cannot be calculated in such a vacuum—it must consider the existing alternative of patent détente, which itself proves costly and distortionary.

B. *Third-Party Intervention and Noerr-Pennington Immunity*

Using third parties as privateers to avoid retributive or reputational litigation constraints may also already be immunized from antitrust scrutiny under existing doctrine. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the Supreme Court established that the right to petition—protected under the First Amendment—grants presumptive immunity from liability under the antitrust laws for "attempts to influence the passage or enforcement of laws."[41] In that case, a group of railroads had engaged with a public relations firm "to conduct a publicity campaign against . . . truckers designed to foster the adoption and retention of laws . . . destructive of the trucking business."[42] A group of truckers, in turn, sought relief from those actions under the antitrust laws. Despite the clear detrimental effects on competition, and even assuming a subjective intent "to destroy [the truckers] as competitors," the Court nevertheless concluded that the defendant railroads were immune from antitrust liability. This doctrinal thread was reinforced and expanded just a few years later in *United Mine Workers v.*

40. The litigation between Motorola and Apple over smartphone patents provides an example of how quickly the conflict between two large, overlapping portfolio holders may escalate—and how long and costly the resulting war may be. *See, e.g.*, Motorola Mobility, Inc. v. Apple Inc., In the Matter of Certain Wireless Communication Devices, ITC Inv. No. 337-TA-745 (2010); Motorola Mobility, Inc. v. Apple Inc. (D. Del. Oct. 8, 2010); Apple Inc. v. Motorola, Inc. (W.D. Wis. Oct. 29, 2010); In the Matter of Certain Mobile Devices and Related Software, ITC Inv. No. 337-TA-750 (2010); Apple, Inc. v. Motorola Mobility, Inc. (S.D. Cal. Feb. 10, 2012).

41. E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135 (1961).

42. *Id.* at 129.

Pennington, highlighting the irrelevance of "anticompetitive purpose" in granting immunity to petition, and establishing the so-called *Noerr-Pennington* doctrine of antitrust immunity:

> Joint efforts to influence public officials do not violate the antitrust laws *even though intended to eliminate competition*. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. The jury should have been so instructed and, given the obviously telling nature of this evidence, we cannot hold this lapse to be mere harmless error.[43]

Noerr-Pennington doctrine thus appears to immunize privateering activity, if not outright, then at least with respect to the evasion of retributive or reputational litigation constraints to raise competitors' costs. The activity in *Noerr* and *Pennington* was lobbying, but the doctrine has explicitly been expanded to reach adversarial litigation.[44] And the Court in *Noerr* directly addressed the question of whether using intermediaries to *conceal* activity invalidates the antitrust immunity afforded by the First Amendment:

> Nor was the railroads' campaign made violative of the Sherman Act by their use of the so-called third-party technique, whereby propaganda actually circulated by a party in interest is given the appearance of being the spontaneously expressed views of independent persons and civic groups.[45]

With only one exception, federal courts have sensibly combined these strands of logic to conclude that sponsors of litigation—transparent or otherwise—have the same claim to *Noerr-Pennington* immunity as direct litigants.[46] And this immunity is not a mere doctrinal quirk or loophole:

> There is a clear public interest in ensuring that meritorious claims are brought before the courts, irrespective of the subjective motiva-

43. United Mine Workers v. Pennington, 381 U.S. 657, 657 (1965).

44. *See, e.g.*, Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) ("[T]he right of access to the courts is indeed but one aspect of the right of petition.").

45. *Noerr*, 365 U.S. at 140.

46. *See, e.g.*, Sosa v. DIRECTV, 437 F.3d 923, 937 (9th Cir. 2006); A.D. Bedell Wholesale v. Philip Morris, 263 F.3d 239 (3d Cir. 2001); Balt. Scrap v. David J. Joseph Co., 237 F.3d 394, 397 (4th Cir. 2001); Liberty Lake Invs. v. Magnuson, 12 F.3d 155 (9th Cir. 1993). *Cf. In re* Burlington Northern, Inc., 822 F.2d 518, 531 (5th Cir. 1987) ("[I]t would be an unwarranted extension of *Noerr-Pennington*'s protection to hold that a party without an interest in a case sufficient to allow it to directly petition the courts may nonetheless . . . encourag[e] and assist[ ] the lawsuits of others."). *See also* M. Sean Royall & Seth M.M. Stodder, *From Burlington Northern to Baltimore Scrap*, 15 ANTITRUST 47 (2001) ("Of the various reported decisions that have addressed this issue, virtually all have held that parties who sponsor litigation are entitled to *Noerr* immunity to the same extent as the direct parties to the litigation.").

> tions of the claimants or their supporters . . . many important cases concerning vital public interests—such as the environment, civil rights, or other issues—might [otherwise] never be brought into court and resolved.[47]

The *Noerr-Pennington* doctrine takes aim at balancing the need for fair competition, the freedom to petition, and the public benefit that litigation provides in a common law system.

It would be inconsistent, to say the least, if a company could secretly pay a third party's legal fees purely to increase the nuisance faced by its competitor, but could not use third parties like privateers to assert its own legal claims more effectively. At least in the latter case, the company actually has some plausible competitive reason to be involved: either its patent or its shared revenue stream is being asserted. Their stake in the outcome beyond just raising their competitor's costs legitimates their involvement. Privateering may nevertheless raise issues of destabilizing mutually assured destruction or reputational restraint, but *Noerr-Pennington* and its progeny suggest that antitrust law does not have a role to play.[48]

The *Noerr-Pennington* doctrine is not without its limits. But the core issue is one of underlying merit, not transparency or reciprocity. Specifically, the Court has established a "sham" exception to *Noerr-Pennington*, predicated upon a two-part test.[49] First, "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."[50] Second, if the lawsuit is objectively baseless, the court "examine[s] the litigant's subjective motivation," to determine whether it is an attempt to interfere with a competitor through "governmental *process*—as opposed to the *outcome* of that process."[51]

Privateering activity could fall within this sham exception, but that seems unlikely. Starting with the first "objectively baseless" prong, pri-

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47. Royall & Stodder, *supra* note 46, at 51.

48. Courts examining patent privateering have not yet specifically addressed this argument. In practice, *Noerr-Pennington* immunity has been raised as a defense by at least one high-profile accused independent patent troll, but the case ultimately reached settlement, leaving the argument open to privateers moving forward. *See* Steven Seidenberg, *Patent Trolls are Getting First Amendment Protection for their Demand Letters*, A.B.A. Journal (May 1, 2014, 09:00 AM), http://www.abajournal.com/magazine/article/patent_trolls_are_getting_first_amendment_protection_for_demand_letters; Press Release, Fed. Trade Comm'n, FTC Settlement Bars Patent Assertion Entity from Using Deceptive Tactics (Nov. 6, 2014), https://www.ftc.gov/news-events/press-releases/2014/11/ftc-settlement-bars-patent-assertion-entity-using-deceptive. Additionally, one district court has determined that independent patent troll demand letters are protected from RICO penalties by *Noerr-Pennington*. *In re* Innovatio IP Ventures, LLC Patent Litigation, 921 F. Supp. 2d 903 (N.D. Ill. 2013). Hence, while case law is sparse, these instances at least support an optimistic view towards privateers raising *Noerr-Pennington* arguments moving forward.

49. Prof'l Real Estate Inv'rs v. Columbia Pictures Indus., 508 U.S. 49, 60-61 (1993).

50. *Id.* at 60.

51. *Id.* at 61 (quotation marks omitted).

vateers acquire their patents (or enforcement rights thereof) from operating entities, so logically the patents were originally acquired or developed as part of that business. The patents must have covered something either necessary to the business, or sufficiently cost saving to outweigh the investment. Empirical analyses of this concept are hard to conduct, but the limited data available support this hypothesis; the patent quality of many privateer portfolios is at least as high as those of operating entities.[52] Similarly, the patents of privateers fare at least as well in reexamination proceedings as the patents of operating entities.[53] Moreover, the enforcement efforts are clearly targeted towards practicing competitors, not blanketing users or multiple industries with vague, copied threats. Hence, unlike so-called "bottom-feeder" patent trolls that rely on pure volume—a huge arsenal of low-quality junk patents or a large number of demand letters[54]—the *privateer* model would be expected to rely on high-quality patents and underlying claims that are not objectively baseless.[55]

The sham exception's second prong—subjective intent—is not likely to be met, either. A company asserting its patent against its competitors through a privateer would not be focused on 'process' as opposed to 'outcome'; it would genuinely hope to succeed on the merits and receive damages through a finding of infringement. The costs of litigation are simply a bonus. This is particularly true in the case of a privateer controlled by an operating entity. Professor Marina Lao explains:

> By definition, a patent or copyright infringement suit is a suit for the exclusion of a competitor; if the intellectual property plaintiff wins, the infringer is excluded from competition. It is by winning an infringement suit that patent or copyright owners can most effectively exclude a competitor. Therefore, it is unlikely that these plaintiffs merely hope to interfere with a competitor's business through the process of bringing an infringement suit, rather than through a successful outcome. . . . [T]he second-prong would mean that few infringement suits (even after being shown to be objectively baseless) would be considered 'shams' because the intellectual property

52. *See* Michael Risch, *Patent Troll Myths*, 42 Seton Hall L. Rev. 457 (2012); *see also* Timo Fischer & Joachim Henkel, Patent Trolls on Markets for Technology - an Empirical Analysis of Trolls' Patent Acquisitions (Apr. 2011) (unpublished manuscript) (on file with Ctr. for Econ. Policy Research), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1523102.

53. *See* Steve Moore, *A Fractured Fairytale Part 3: More Patent Troll Myths*, IPWatchdog.com (July 31, 2013), http://www.ipwatchdog.com/2013/07/31/a-factured-fairytale-part-3-more-patent-troll-myths/id=43755/.

54. *See* Lemley & Melamed, *supra* note 31, at 2126.

55. The tendency for privateers to assert disproportionately meritorious claims is explored *infra* Section III.C.

> plaintiff usually hopes to prevail, in order to completely exclude the competitor.[56]

Of course, this does not necessarily mean that privateers file all their infringement suits with legitimate intent. The incentive for nuisance litigation remains. But at a minimum, the practical burden of demonstrating sham intent would be disproportionately high when it comes to privateers relative to other forms of patent trolls, precisely because of their interplay with operating entities.

In short, with most privateer suits likely to have substantial merit and without a demonstration of the requisite subjective sham intent, *Noerr-Pennington* almost certainly immunizes privateering activity.

C. *Transparency-Based Solutions*

The costs of privateering activity are likely no higher than the costs of reputational and retributive constraints on patent assertion, in part because of the procompetitive destabilizing benefits. Furthermore, existing antitrust doctrine likely immunizes privateering activity through *Noerr-Pennington*. Rather than distort antitrust law to proscribe privateering activity, transparency-based solutions would likely address any remaining concerns more easily. Specifically, greater transparency in patent transfers and ownership would remove any potential for companies to evade constraints such as mutually assured destruction or reputational damage through privateering. To the extent that evasion is seen as a problem at all, full transparency offers a clear solution: a competitor that is sued for infringement by a privateer can retributively sue the company that sold its patent to that privateer, if the competitor is able to determine the identity of said company.[57] As long as the suit can be effectively traced back to its operating entity progenitor, the operating entity risks triggering mutually assured destruction or developing a bad reputation in the eyes of standard-setting organizations.

Currently, there is neither "an effective way of confirming who owns a particular patent" nor an effective way of determining "what patents a particular person of company owns."[58] Patent transferors and transferees frequently fail to record changes in ownership with the U.S. Patent and Trademark Office ("PTO") at all, and subsequent internal assignments to shell or subsidiary companies (with potentially inconsistent self-identifica-

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56. Marina Lao, *Reforming the* Noerr-Pennington *Antitrust Immunity Doctrine*, 55 Rutgers L. Rev. 965, 987 (2003).

57. Ewing, *supra* note 12, at 6.

58. Adi Kamdar, *Whose Patent Is It Anyway? A New Bill to End Patent Anonymity*, Elec. Frontier Found. (May 20, 2013), https://www.eff.org/deeplinks/2013/05/whose-patent-it-anyway-new-bill-end-patent-anonymity.

tion) creates further opacity as to the true owner or parties in interest.[59] Sometimes patent owners will deliberately obfuscate ownership for explicitly strategic reasons, as in some high-profile cases.[60] But in many cases, the opacity is the purely incidental result of a broken system.[61] Recordation costs, poor record-keeping practices, bankruptcy, and legitimate complexities of corporate identity and ownership all contribute towards ownership opacity.[62]

With this in mind, greater transparency could take the form of incentivizing more consistent and complete disclosures on the part of patent owners. One bill that has been proposed in the Senate, for example, requires anyone filing a patent infringement lawsuit to disclose all parties with a financial interest in the outcome or "any other kind of interest that could be substantially affected by the outcome of the proceeding."[63] This language would certainly include privateers engaged in contractual revenue-sharing with operating entities, although it is admittedly overbroad.[64] More practically, the bill would also treat "an assignment of all substantial rights" as a change in the "ultimate parent entity," and require that the patent office be notified within three months.[65] Other organizations like the Electronic Frontier Foundation have simply proposed higher penalties for failures to disclose:

> All patent owners should be required to keep their disclosures up to date throughout the life of the patent, or else the patent will be unenforceable. For example, patent owners should be required to update ownership and litigation records in a timely fashion. And, with

59. Colleen Chien, *The Who Owns What Problem in Patent Law* 3 (Santa Clara Univ. Legal Studies Research Paper No. 03-12, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1995664.

60. *See generally* Ewing & Feldman, *supra* note 12 (examining the patent holdings of Intellectual Ventures, noting assignments to thousands of shell companies and subsidiaries).

61. *See* Chien, *supra* note 59.

62. *Id.*

63. Patent Transparency and Improvements Act of 2013, S. 1720, 113 Cong. 1, § 3 (2013).

64. The rippling economic effects of a patent suit can arguably extend quite far. For example, in a suit over a semiconductor patent, if the patent were held to be invalid, every business that sold a product using those semiconductors—phones, laptops, GPS devices—would receive a financial upside through eliminated royalty payments somewhere along the line. If those businesses then reduced the price of their products, products using competing semiconductor technology might become comparatively less attractive to purchasers. Businesses selling complements to the semiconductors—say, software companies—may be positively affected in turn. And so on.

65. *Id.*

> the exception of relevant trade secrets, licenses to a patent should be reported within six months of their effective date.[66]

Any of these proposals would directly solve the underlying problem associated with privateers—evasion of litigation constraints through opacity.

Greater transparency in patent ownership could also be achieved by simply using existing information better. For example, it is currently possible to search the patent records by initial assignee but not by current assignee, even though the PTO has information on both.[67] Making the records searchable by maintenance fee payor[68] might also shed some light on the operating entity behind the privateer. Other existing data that the PTO "could track and make publicly available/searchable include . . . whether it has been reexamined, who requested the reexamination, [and] whether or not the current owner is a large or small entity."[69] Any of these could point the recipient of a privateer's demand letter in the direction of the operating entity that equipped it. And it requires no new data, only efforts to make existing data more accessible to users.

Focusing on transparency offers a solution that is more tailored to preventing companies from evading constraints on litigation through privateering. To the extent that evasion is seen as a problem, transparency targets the actual source of that problem and offers a solution that does not require rewriting key antitrust doctrine.

II. Evading Licensing Commitments

Another of the primary arguments for using antitrust law to diminish patent privateering is that privateering allows operating entities to circumvent licensing commitments they have made. To induce a standard-setting organization ("SSO") to adopt their particular patented technology as part of an industry standard, operating entities will frequently commit to license their relevant patents along certain terms.[70] Typically, these are so-called "FRAND" commitments: a commitment to offer fair, reasonable, and nondiscriminatory licensing terms.[71] In practice, FRAND terms tend to have two requirements: that a licensing rate would not destroy product viability if all other patent holders involved in the standard charged the same amount[72] and

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66. Elec. Frontier Found., *Proposal to Improve the Notice Function*, Defend Innovation, https://defendinnovation.org/proposal/improve-notice-function (last visited Jan. 31, 2016).

67. Chien, *supra* note 59, at 6.

68. *Id.* at 7.

69. *Id.* at 6-7.

70. Anne Layne-Farrar et al., *Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments*, 74 Antitrust L.J. 671, 672 (2007).

71. *Id.* at 671.

72. This is designed to prevent detrimental "'royalty stacking,' in which the cumulative demands of patent holders across the relevant technology or the device threaten to make it

that patent holders license to any entity able to pay the going rate.[73] The alleged antitrust issue arises when operating entities sell their patents to privateers who do not themselves abide by the licensing commitments, either refusing to license to certain businesses or demanding a higher royalty.[74]

Scholars generally suggest that Section 2 of the Sherman Act or Section 5 of the Federal Trade Commission Act ("FTC Act") would apply to companies avoiding licensing obligations through privateers.[75] This argument for antitrust involvement, however, is pre-empted by existing antitrust doctrine, and much simpler solutions can be found in existing contract law or estoppel. While antitrust involvement in this sort of privateering activity would thus require overriding existing case law on the Sherman Act or significantly expanding the scope of the FTC Act, solutions in contract law and estoppel are already available.

A. *Roadblocks in Applying Antitrust Law*

Even if using privateers to circumvent licensing obligations is not immunized from antitrust law under the *Noerr-Pennington* arguments used in Subsection I.B, applying Section 2 of the Sherman Act or Section 5 of the FTC Act to this sort of privateering activity nevertheless faces significant doctrinal and conceptual roadblocks.

Section 2 of the Sherman Act makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."[76] In practice, two factors are required to find a Section 2 violation: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distin-

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economically unviable to offer the product." Ann Armstrong et al., *The Smartphone Royalty Stack: Surveying Royalty Demands for the Components Within Modern Smartphones* 2 (May 29, 2014), WilmerHale, https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/The-Smartphone-Royalty-Stack-Armstrong-Mueller-Syrett.pdf; *see also* Koren W. Wong-Ervin, Counsel for Intellectual Prop. & Int'l Antitrust, Fed. Trade Comm'n, Methodologies for Calculating FRAND Royalty Rates and Damages (Oct. 22, 2014), https://www.ftc.gov/system/files/attachments/key-speeches-presentations/wong-ervin_aba_program_frand_royalty_rates_10-22-14.pdf.

73. *See* Layne-Farrar et al., *supra* note 70.

74. George S. Cary et al., *The Case for Antitrust Law to Police the Patent Holdup Problem in Standard Setting*, 77 Antitrust L.J. 913, 921 (2011) ("[O]pportunism in the standard-setting process is an antitrust problem.") (quoting Bruce H. Kobayashi & Joshua D. Wright, *Federalism, Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup*, 5 J. Competition L. & Econ. 469, 471 (2009)); Popofsky & Laufert, *supra* note 13, at 5; Comments of Google et al., *supra* note 14, at 16; David Balto, *As Congress and Enforcers Contemplate Patent Trolls, Don't Forget About Privateering*, Huffington Post: HuffPost Business Blog (Apr. 12, 2013, 4:15 PM), http://www.huffingtonpost.com/david-balto/as-congress-contemplates-_b_3000110.html.

75. *See* Popofsky & Laufert, *supra* note 13, at 10-12; Comments of Google et al., *supra* note 14, at 3-4; Schrepel, *supra* note 29.

76. 15 U.S.C. § 2 (2012).

guished from growth or development as a consequence of a superior product, business acumen, or historic accident."[77]

Regarding the first factor, the Supreme Court has rejected the notion that a patent alone confers monopoly power.[78] But possession of a standards-essential patent may tip the balance in certain cases.[79] As "the level of resources committed to the standard rises and the costs of switching to a new technology mount, industry members may find themselves locked into using" the standards-essential patent.[80] Depending on the availability of competing standards or substitute goods, this could convey significant market power to the patent owner.

The second factor, however, demands "an element of anticompetitive conduct" for there to be a violation, and this is where the Section 2 analysis begins to break down for privateering.[81] First, deception may specifically need to be shown to demonstrate anticompetitive conduct in this context. Stemming from older antitrust case law prohibiting collusion or other manipulation of the standard-setting process,[82] the major cases addressing violations of SSO licensing obligations have thus far held that a showing of deception is required to state a claim under the Sherman Act.[83] As one FTC Commissioner expressed, "there does not appear to be a single case that finds breach of an SSO agreement—without proof that *deception* resulted in acquisition of market power—a violation of the Sherman Act."[84]

But whether licensing obligations generally follow a patent after its transfer and attach to the new owner remains an "open question."[85] A partic-

77. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

78. Illinois Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. 28, 31 (2006).

79. *See* Joseph Farrell et al., *Standard Setting, Patents, and Hold-Up*, 74 ANTITRUST L.J. 603, 605-10 (2007).

80. Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Remarks at Conference on Standardization and the Law Developing the Golden Mean for Global Trade: Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting 3 (Sept. 23, 2005), http://www.ftc.gov/speeches/majoras/050923stanford.pdf.

81. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004).

82. *See, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); American Soc. of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982).

83. *See* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 311 (3d Cir. 2007); Rambus, Inc. v. FTC, 522 F.3d 456, 466-67 (D.C. Cir. 2008).

84. Joshua D. Wright, Commissioner, Fed. Trade Comm'n, Remarks at the Center for the Protection of Intellectual Property Inaugural Academic Conference: The Commercial Function of Patents in Today's Innovation Economy 23 (Sept. 12, 2013) (emphasis added), https://www.ftc.gov/sites/default/files/documents/public_statements/ssos-frand-and-antitrust-lessons-economics-incomplete-contracts/130912cpip.pdf.

85. Jay P. Kesan & Carol M. Hayes, *FRAND's Forever: Standards, Patent Transfers, and Licensing Commitments*, 89 IND. L.J. 231, 257 (2014). *See generally* U.S. DEP'T OF JUST. & USPTO, POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS 6 (Jan. 8, 2013) (noting the unresolved nature of the question, and comparing outcomes of alternative doctrinal paths), http://www.uspto.gov/about/offices/ogc/Final_DOJ-PTO_Policy_Statement_on_FRAND_SEPs_1-8-13.pdf; Renata Hesse,

ular patent's licensing obligations post-transfer may be even less clear, given the great deal of variability between SSOs and their specific terms.[86] It is not fraudulent or deceptive for privateers receiving patents from operating entities to legitimately dispute the metes and bounds of the original licensing obligations—for example, whether those obligations transferred with the patent.[87]

Second, even when a plaintiff is able to prove deception, they must also show "anticompetitive effect" for the deception to be considered anticompetitive conduct.[88] Because an increase in royalty prices alone is not sufficient to make out an anticompetitive effect, this would essentially mean demonstrating that the SSO would have chosen a different technology if they knew the patent holder would eventually try to circumvent its licensing obligations.[89] But this makes for a very costly fact- and expert-intensive inquiry, as one would need to compare not only the technical specifications and benefits of the alternative technologies presented to the SSO, but also their costs of production, implementation, and potential popularity. This high bar—both in terms of evidence needed as well as litigation costs—is likely prohibitive to many who would seek to challenge privateer circumvention of licensing obligations.

The problem of proving anticompetitive effect becomes even greater when considering patent privateering activity specifically. As stated earlier, privateers by definition do not actually practice the patents or participate in the downstream product market. Therefore, their incentive structure in terms of patent assertion is dictated entirely by maximizing royalties and settlements rather than increasing market share through injunctions or exclusion orders.[90] A standards-essential patent in the hands of a privateer would there-

Deputy Assistant Att'y Gen., DOJ Antitrust Division, Six 'Small' Proposals for SSOs Before Lunch 6 (Oct. 10, 2012) (recognizing the "inherent ambiguity" of FRAND and similar obligations in terms of scope), http://www.justice.gov/atr/public/speeches/287855.pdf.

86. *See, e.g.*, Kesan & Hayes, *supra* note 85, at 252-56.

87. *See, e.g.*, Lum v. Bank of America, 361 F.3d 217, 226 (3d Cir. 2004) (disagreement over term interpretation "does not rise to the level of fraud; at most, it alleges a contract dispute") (citing Blount Fin. Servs., Inc. v. Walter E. Heller & Co., 819 F.2d 151, 152-53 (6th Cir. 1987)); *see also* Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio, 900 F.2d 882 (6th Cir. 1990); O'Malley v. O'Neill, 887 F.2d 1557 (11th Cir. 1989).

88. Rambus, Inc. v. F.T.C., 522 F.3d 456, 463 (2008) (quoting United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001), cert. denied, 534 U.S. 952 (2001)); *see also* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135 (1998) (highlighting the need to demonstrate a change in competitive structure, not just an increase in prices).

89. *Rambus*, 522 F.3d at 466.

90. *See* Erik N. Hovenkamp & Thomas F. Cotter, *Anticompetitive Patent Injunctions*, 100 MINN. L. REV. (Univ. of Minn. Law Sch., Research Paper No. 15-01, forthcoming 2016) ("To be sure, privateers are among the class of patent owners who generally are not interested in ultimately obtaining injunctions, since . . . they sell no products themselves and therefore do not benefit from actually excluding competitors.").

fore be less likely to actually force out competitors in the market.[91] There may be price increases in terms of royalties paid by the competitors, but such price increases are still not enough to make out a unilateral antitrust violation under Section 2.[92]

Applying Section 5 of the FTC Act instead presents its own difficulties, primarily due to well-founded concerns against expanding the scope of that section beyond the rest of the antitrust laws. Section 5 prohibits "unfair or deceptive acts or practices in or affecting commerce."[93] This highly broad and potentially circular category certainly includes "any conduct that would violate the Sherman Antitrust Act,"[94] but its scope beyond that is exceedingly ill-defined. Federal courts have historically been reluctant to sustain Section 5 cases beyond the scope of the Sherman Act given the "apparent absence of limiting principles."[95] Nevertheless, "because settlement with the FTC will be preferable to litigation in a wide array of circumstances, what is considered illegal under Section 5 largely has become whatever at least three Commissioners can agree on."[96] This tension and the resulting broad discretion for the FTC have created significant uncertainty,[97] leading to inefficiencies through under- and over-compliance as well as needless rent-seeking aimed at FTC decision-makers.[98] Stretching Section 5 to encompass priva-

91. Even in situations where the operating entity has more direct control or influence over the privateer, the privateer still acts as an intermediary agent with its own profit-maximizing goals, goals that are at odds with securing injunctions or exclusion orders. In other words, the use of a privateer can still only reduce the anticompetitive effects of circumventing licensing obligations.

92. *Rambus*, 522 F.3d at 459.

93. 15 U.S.C. § 45(a) (2012).

94. *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority (last updated July 2008).

95. William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 942 (2010). For examples of this judicial pushback, *see e.g.*, FTC v. Abbott Labs, 853 F. Supp. 526 (D.D.C. 1992); E.I. DuPont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984); FTC v. Boise Cascade, 637 F.2d 573, 581 (9th Cir. 1980); Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980). The 1984 *DuPont* ruling was the last time an appeals court addressed the reach of Section 5.

96. James Cooper, *The Limits of Section 5's Scope Beyond the Sherman Act*, TRUTH ON THE MARKET (Aug. 1, 2013), http://truthonthemarket.com/tag/sherman-act/#ftn7.

97. This uncertainty persists even in the face of attempted clarification from the Commission itself. *See, e.g.*, *Dissenting Statement of Commissioner Maureen K. Ohlhausen: FTC Act Section 5 Policy Statement*, OFFICE OF THE FED. REGISTER (Sept. 21, 2015), https://www.federalregister.gov/articles/2015/09/21/2015-23498/statement-of-enforcement-principles-regarding-unfair-methods-of-competition-under-section-5-of-the ("I appreciate the effort to issue some form of guidance on the scope of Section 5 . . . . However, . . . what substance the statement does offer ultimately provides more questions than answers . . . .").

98. James C. Cooper, *The Perils of Excessive Discretion: The Elusive Meaning of Unfairness in Section 5 of the FTC Act*, 3 J. OF ANTITRUST ENFORCEMENT 87, 91 (2015); Joshua D. Wright, *Revisiting Antitrust Institutions: The Case for Guidelines to Recalibrate the Federal Trade Commission's Section 5*, CONCURRENCES: REVUE DES DROITS DE LA CONCURRENCE

teering activity—even if limited to the most brazen evasions of licensing obligations—exacerbates this tension, and these efficiency costs. A regulatory agency unmoored from textual limitations or external appellate review threatens to chill innovation as much as privateering.

In addition to these enforcement limitations, it is possible that the underlying licensing obligation itself violates the antitrust laws. For example, the Antitrust Division as well as the Federal Trade Commission have argued that SSO rules prohibiting members from owning intellectual property rights in a standard may constitute antitrust violations.[99] SSOs that demand royalty rates below a certain cap for all members could be liable for engaging in "horizontal price fixing,"[100] a *per se* violation.[101] At least one federal court has entertained this argument.[102] If the underlying licensing obligation violates the antitrust laws, then enforcement would be impossible. Due to the high costs of such a violation, SSOs may be chilled from using antitrust officials to enforce their licensing obligations even when they are legal.

B. *Solutions in Contract or Estoppel*

As mentioned above, disputes over the scope of licensing obligations—including whether those obligations follow a patent after a transfer to a privateer—are naturally seen as disputes over the terms of a contract. While the law does not enforce all promises,[103] where there has been offer, acceptance, and consideration there is generally an enforceable contract.[104] In the FRAND context, for example, a patent holder makes an explicit promise to

[Competition L.J.] (Nov. 2013) (Fr.), https://www.ftc.gov/sites/default/files/documents/public_statements/siting-antitrust-institutions-case-guidelines-recalibrate-federal-trade-commissions-section-5-unfair/concurrences-4-2013.pdf.

99. *See, e.g.*, Amy A. Marasco, Vice President, American National Standards Institute, Testimony before the Federal Trade Commission and U.S. Department of Justice: Standards-Setting Practices: Competition, Innovation and Consumer Welfare (April 18, 2002); *In re* Am. Soc'y of Sanitary Eng'g, 106 F.T.C. 324, 329 (1985); Mark A. Lemley, *Standardizing Government Standard-Setting Policy for Electronic Commerce*, 14 Berkeley Tech. L.J. 745, 753-54 (1999).

100. Patrick D. Curran, *Standard-Setting Organizations: Patents, Price Fixing, and Per Se Legality*, 70 U. Chi. L. Rev. 983, 1000 (2003); *see also* United States Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property § 5.1 at 24 (1995) ("[H]orizontal restraints [arising from joint patent ventures] often will be evaluated under the rule of reason. In some circumstances, however, that analysis may be truncated . . . some restraints may merit per se treatment, including price fixing . . . .").

101. *See* Arizona v. Maricopa County Medical Society, 457 U.S. 332, 332 (1982) (determining that maximum price-fixing agreements are illegal per se).

102. *See, e.g.*, Sony Elecs., Inc. v. Soundview Techs., Inc., 157 F. Supp. 2d 172, 179 (D. Conn. 2001) (rejecting plaintiff's motion to dismiss).

103. John P. Dawson et al., Contracts: Cases and Commentaries 1 (9th ed. 2008) ("Not all promises are legally enforceable."); Restatement of Contracts § 75 cmt. a (Am. Law Inst. 1932) ("No duty is generally imposed on one who makes . . . [a] promise . . . .").

104. *See, e.g.*, Restatement (Second) of Contracts § 17 (Am. Law Inst. 1981); Samuel Williston, The Law of Contracts § 23 (1920).

an SSO that it will grant licenses to anyone wishing to implement the new standard, and in exchange the SSO adopts the patented technology as part of the standard. These types of commitments have been increasingly described as "contractual" by litigants and courts, and for good reason.[105] The commitments are typically embodied in writing, perfectly suitable to the well-worn tools of contractual interpretation.[106] Moreover, the organizations and companies entering into these agreements are typically highly sophisticated commercial organizations, familiar and comfortable with contractual arrangements. Hence, given the uniquely high costs of antitrust law, as well as the Court's explicit hesitation to leverage antitrust law when alternative legal regimes exist,[107] the existence of this relatively tidy solution should be particularly compelling.

Admittedly, some minor conceptual roadblocks arise in terms of contract formation and enforcement, but the doctrine has largely already overcome them. In terms of contract formation, some licensing obligations are structured as bylaws associated with membership in an SSO and are thus governed by the law of business associations rather than contract law.[108] Nevertheless, courts have recognized an implicit contractual relationship in those circumstances: the SSO has "offered" the patent holder an opportunity to participate in standards development, and the patent holder "accepted" by agreeing to abide by the SSO's policies.[109] In terms of enforcement, it is typically not the SSO attempting to enforce the licensing obligations, but rather third-party operating entities seeking licenses.[110] If these third-party operating entities were found to be only incidental beneficiaries of the licensing obligations (as opposed to intended beneficiaries), they would not have standing to sue.[111] But thus far courts have generally adopted the theory

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105. *See, e.g.,* Microsoft Corp. v. Motorola, Inc., Order on Plaintiff's Motion for Partial Summary Judgment, 854 F. Supp. 2d 993, 999 (W.D. Wash. Feb. 27, 2012) ("[T]he court agrees with Microsoft that . . . Motorola has entered into binding contractual commitments to license its essential patents on RAND terms."); Research In Motion Ltd. v. Motorola, Inc., 644 F. Supp. 2d 788, 797 (N.D. Tex. 2008) (declining to dismiss plaintiff's breach of contract claim); Ericsson Inc. v. Samsung Electronics, 2:06-CV-63, 2007 WL 1202728, at *2 (E.D. Tex. Apr. 20, 2007) (noting that the licensing obligations were contractually binding).

106. Some states require under a Statute of Frauds that certain contracts—such as those covering more than $500 in goods or covering more than one year in duration—must be in writing to be enforceable. *See, e.g.*, Cal. Civ. Code. § 1624 (West 2015); U.C.C. § 2-201 (Am. Law Inst. & Unif. Law Comm'n 1977).

107. *See* Kobayashi and Wright, *supra* note 17, at 5; Kobayashi, *supra* note 17, at 3-4; Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 285, 277 (2007); Nynex Corp. v. Discon, 525 U.S. 128, 137 (1998).

108. Jorge L. Contreras, *A Market Reliance Theory for FRAND Commitments and Other Patent Pledges*, 2 Utah L. Rev. 479, 495 (2015).

109. *See* Apple, Inc., v. Motorola Mobility, Inc., 886 F. Supp. 2d 1061, 1077 (W.D. Wis. 2012).

110. Contreras, *supra* note 108, at 498.

111. Restatement (Second) of Contracts §§ 302(1), 315 (Am. Law Inst. 1981); *see generally* Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev. 1358 (1992).

that these potential licensees—those implementing the standard—were clearly beneficiaries that the SSO had in mind at the time of formation.[112] As a result, even these potential licensees could seek enforcement of the SSO licensing obligations against the promisor, the original patent owner.

Issues of contractual interpretation are sure to arise. Most importantly, the original patent owner that entered into the contract with the SSO is likely to argue that selling their patents off to a privateer did not constitute a breach. After all, the original owner has not technically refused to license the patent on FRAND terms; they simply no longer own the patent. Regardless of whether that argument holds water,[113] SSOs can simply redraft their licensing obligation agreements moving forward to foreclose such a strategy. In short, once contract law becomes the standard regime for addressing these disputes, future parties will simply negotiate for provisions specifically addressing the obligations of transferees if the courts fail to fill in the gaps.[114]

But even if contract law is seen as insufficient or inapplicable, another clean solution lies in promissory estoppel. Generally speaking, "an informal promise"—that is, one otherwise failing to satisfy the conditions of a contract—"may be enforceable by reason of action in reliance upon it."[115] The basic elements of promissory estoppel are as follows:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee of a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.[116]

In the context of licensing obligations, the existence of detrimental reliance seems quite clear. Once the SSO has incorporated the patent into its new standard, implementers will "invest substantial sums in the development, manufacturing, marketing, and sale of products incorporating" those stan-

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The third-party beneficiary doctrine is currently recognized throughout the United States. RESTATEMENT (SECOND) OF CONTRACTS ch. 14, intro. note (AM. LAW INST. 1981).

112. Microsoft Corp. v. Motorola, Inc.,, Order on Plaintiff's Motion for Partial Summary Judgment, Case No. C10-1823JLR at 10 (D. Wash. Feb. 27, 2012); Apple v. Motorola, No. 11-cv-178-bbc, Opinion and Order, slip op. at 42 (W.D. Wis., Aug. 10, 2012); ESS Tech v. PC-Tel, No. C-99-20292, 1999 WL 33520483 (N.D. Cal. 1999). *See also* Kesan & Hayes, *supra* note 85. Note generally that the failure to identify a specific beneficiary or group of beneficiaries is not fatal to raising a claim. RESTATEMENT (SECOND) OF CONTRACTS § 308 (AM. LAW INST. 1981) ("It is not essential to the creation of a right in an intended beneficiary that he be identified when a contract containing the promise is made.").

113. At least one federal court has already rejected that argument explicitly, holding that the original patent owner can be liable for a subsequent owner's repudiation of FRAND obligations. *See* Vizio v. Funai Elec. Co., No 09-0174 AHM (RCx) (C.D. Cal. Feb. 3, 2010).

114. *See generally* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

115. 3-8 CORBIN ON CONTRACTS § 8.3 (2015).

116. RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981).

dards, typically alongside the process of acquiring licenses.[117] By reneging on licensing commitments, the patent holder preys upon that reliance to obtain greater surplus than they would have been able to beforehand.[118] Nor do the issues of third-party enforcement arise that might come up in contract law.[119] In fact, some SSOs have already seized upon the potential of estoppel doctrine, including provisions in their licensing agreements designed to establish that the patent holder is aware that others will be relying on its commitment:

> By signing this Letter of Assurance, you represent that you have the authority to bind the Submitted and all Affiliates . . . to the representations and commitments provided in this LOA and acknowledge that users and implementers of the [Proposed] IEEE Standard identified in part C above are relying or will rely . . . on the terms of this LOA.[120]

Overall, application of equitable relief through promissory estoppel provides another natural fit where contract law comes up short.

Moreover, the remedies associated with contract law or promissory estoppel provide more than sufficient relief. An operating entity found to be liable to the relevant SSO for failing to license along FRAND terms (by selling its standards-essential patent to a noncompliant third-party) would face significant damages,[121] in addition to an injunction mandating that the patents be made available on FRAND terms moving forward.[122] The combination of damages plus an obligation to license should dissuade owners of FRAND-encumbered patents from intentionally evading their obligations through privateers. Even more so since, as mentioned before, these contracts

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117. Contreras, *supra* note 108, at 518.

118. *See* Farrell et al., *supra* note 79.

119. *See, e.g.*, Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CALIF. L. REV. 1889, 1915-16 (2002) ("While the law of contracts traditionally did not enforce a promisee's unsolicited reliance on a gratuitous promise, more modern cases . . . permit both members and nonmembers to benefit from enforcement of the license.").

120. INST. OF ELEC. AND ELECTRONICS ENG'RS, *Letter of Assurance for Essential Patent Claims* (Jan. 17, 2008), http://grouper.ieee.org/groups/1788/Patents/letter-of-assurance-form.pdf.

121. *See, e.g.*, *Microsoft Corp. v. Motorola, Inc.*, 864 F. Supp. 2d 1023 (W.D. Wash. 2012), in which the court held Motorola liable for $14.5 million in contract damages for failing to license its patents on FRAND terms. Dennis Crouch, *RAND Agreement Proving Powerful Limit on Patentee Action: Microsoft v. Motorola*, PATENTLYO (Aug. 3, 2015), http://patentlyo.com/patent/2015/08/agreement-microsoft-motorola.html.

122. Specific performance is not always available as a contract remedy. *See* RESTATEMENT (SECOND) OF CONTRACTS § 371(1) (AM. LAW INST. 1981); U.C.C. § 2-716(1) (AM. LAW INST. & UNIF. LAW COMM'N 1977). However, courts have generally determined that, almost by definition, a plaintiff without access to *standards-essential* patent licenses cannot be adequately made whole by damages alone. *See, e.g.*, Microsoft, 864 F. Supp. 2d 1023; Realtek Semiconductor Corp. v. LSI Corp., 946 F. Supp. 2d 998 (2013); GPNE Corp. v. Apple, Inc., No. 12-CV-2885, 2014 WL 1494247 (N.D. Cal. Apr. 16, 2012).

will become increasingly clear and these promises are becoming increasingly enforceable.

III. Increased Cost and Frequency of Litigation

Another primary argument for using antitrust law to curtail patent privateering is that privateering increases the frequency of patent infringement or exclusion litigation, as well as the cost per suit relative to suits brought by operating entities.[123] It is argued that the costs of these suits and licenses are distortionary[124] and act as a "startup tax across the tech sector"[125]—essentially an anticompetitive barrier to market entry. Scholars have suggested a variety of doctrinal footholds for antitrust law in this context, including Section 2 of the Sherman Act, Section 7 of the Clayton Act, and Section 5 of the FTC Act.[126]

Regardless of the *cost* and *frequency* of litigation, however, as long as the underlying claims are meritorious, the *Noerr-Pennington* exception analyzed in Section I.B would still immunize the activity.[127] The skepticism and roadblocks in expanding Section 5 of the FTC Act would also still apply.[128] But perhaps most significantly, this Article explores how the underlying assumptions as to the effects of patent trolls on cost and frequency of litigation are themselves largely incorrect with respect to privateers. As explained below, since privateers favor fast settlement over prolonged litigation, privateers are not likely responsible for the increased amount of patent assertions overall. Moreover, even if privateers have caused an increase in the overall number of assertions, the suits brought by privateers should be disproportionately meritorious.

A. *Privateers Encourage Settlement, Not Litigation*

The economic model for privateers is simple. Privateers do not practice their patents or otherwise participate in the downstream product market. In-

123. *See, e.g.*, Letter from Ken Wasch, President, Software & Info. Indus. Ass'n, to Legal Policy Section, Antitrust Div., U.S. Dep't of Justice 4 (Apr. 5, 2013), http://www.justice.gov/atr/public/workshops/pae/comments/paew-0058.pdf ("The [patent troll] business model is to make the litigation as expensive and disruptive as possible . . . ."); Comments of Google et al., *supra* note 14, at 8-9 (claiming an "explosion" of "excessive litigation" caused by patent trolls as well as an increase in total "costs confronting innovative industries" as a result); Chien, *supra* note 38, at 477 ("[T]rolls make demands of many companies at once in order to get nuisance settlements.").

124. Fed. Trade Comm'n, The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition, 71 (Mar. 2011), http://www.ftc.gov/os/2011/03/110307patentreport.pdf.

125. Jeff John Roberts, *Obama Says Patent Trolls 'Hijack' and 'Extort,' So Do Something Mr. President*, GigaOM (Feb. 16, 2013, 7:30 AM), http://gigaom.com/2013/02/16/obama-says-patent-trolls-hijack-and-extort-so-do-something-mr-president.

126. *See, e.g.*, Popofsky & Laufert, *supra* note 13, at 10-12.

127. *See supra* notes 41-56 and accompanying text.

128. *See supra* notes 93-98 and accompanying text.

stead, their sole source of revenue is licensing fees.[129] Privateers thus avoid litigation not only due to its inherent costs, but also because of the comparably reduced upside potential. For example, money damages are wholly unavailable in an infringement suit with the International Trade Commission under 19 U.S.C. § 1337. And an injunction is significantly less valuable in the hands of a privateer than an operating entity. Without any interest in actual downstream product competition, an injunction is worth nothing on its own, forcing the privateer to use it as a bargaining chip without the plausible threat of walking away from the table and profiting off the increased market share itself. The downside risk of litigation remains high: a determination of non-infringement immunizes the defendant, and a determination of invalidity would destroy the privateer's only monetizable asset.

Patent privateers should also receive lower settlements than operating entities, because of two key limitations as to the damages they could seek in court.[130] First, patent damages are generally awarded by juries,[131] and patent privateers—known tellingly as *trolls* in the public parlance—have no sympathetic story to tell of invention or improvement to the world. This reduces the amount that juries tend to award privateers.[132] Second, because privateers do not practice the patents they own, they cannot claim lost profits.[133] These lost profits, which operating entities *can* seek, "should generally exceed the statutory floor of reasonable royalties" ordinarily awarded as damages.[134] These two factors help reduce the amount of damages that would be awarded if a privateer actually took an operating entity to court. Hence, by bargaining in the shadow of the law, those factors should also act to lower settlement amounts compared to assertions made by operating entities.

Additionally, allowing operating entities to effectively "outsource" patent assertion promotes specialization. Not only does this specialization reduce the costs of litigation for the firm utilizing the privateer,[135] but it also

129. *See, e.g.*, Tom Ewing, *Introducing the Patent Privateers*, 45 Intellectual Asset Mgmt. Mag. 31, 35-36 (2011).

130. For perhaps the most famous analysis of potential courtroom results shaping ex ante negotiations, see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979); *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463 (2004).

131. *See, e.g.*, Mark A. Lemley et al., *Rush to Judgment? Trial Length and Outcomes in Patent Cases*, 41 AIPLA Q.J. 169, 173 tbl.1 (2013).

132. *See* Lemley & Melamed, *supra* note 31, at 2139 & n.99.

133. 35 U.S.C. § 284 (2012).

134. *See* Lemley & Melamed, *supra* note 31, at 2140.

135. The idea of task specialization as cost-reducing is at least as old as Adam Smith's discussions of labor economics, but has been most clearly articulated in this service context by Professors Anders Akerman and Loriane Py. *See* Anders Akerman & Loriane Py, *Service Outsourcing and Specialization: A Theory Based on Endogeneous Task Scope* (July 29, 2010) (Stockholm University working paper) (on file with European Trade Study Group), http://www.etsg.org/ETSG2010/papers/PY.pdf. *See also* Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations *passim* (1776).

provides two mutually beneficial gains. First, it provides clearer information for negotiation purposes. The privateer only has a handful of related patents and is almost certainly a repeat player in terms of patent assertion. Hence, it has likely acquired some degree of expertise on the market value of its licenses. Armed with this knowledge, the privateer and the operating entity are less likely to end up in litigation.[136] Second, by acting as a patent assertion specialist, a privateer reduces the negotiation costs for both parties relative to an operating entity. Their small, focused portfolios and few employees shorten time spent on discovery or investigation.[137] Their lack of participation in the downstream market and potential for countersuit simplifies and brackets negotiations even further.

Finally, it should be pointed out that this tendency to quickly settle is ultimately procompetitive. While injunctions and exclusion orders ultimately force operating entities out of the market, settlements extracted by privateers do not. Driven purely by a desire to maximize licensing revenue, and able to engage in price discrimination, they have no incentive to "price out" any competitor.[138] The marketplace remains as robust as possible in terms of number of participants, while still allowing for efficient monetization of intellectual property, thereby continuing to encourage innovation.

B. *Privateers Do Not Increase the Rate of Patent Assertions*

While the popular media has labeled patent trolls collectively as responsible for an increasing "onslaught of litigation,"[139] the data suggest another story. The rise in overall patent assertions can be easily explained by the surge in issued patents, mandatory case disaggregation, and the increasingly low quality of patents issued by the PTO—particularly for software patents.

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136. Any public information about a privateer's negotiation, settlement, or litigation with other operating entities serves to reduce informational asymmetry and minimize the likelihood of divergent expectations, two major proposed determinants of when settlement will fail and lead to litigation. *See* Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. Legal Stud. 187 (1993) (proposing an asymmetric information model). *But cf.* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. Legal Stud. 1, 33 (1984) (proposing a divergent expectations model).

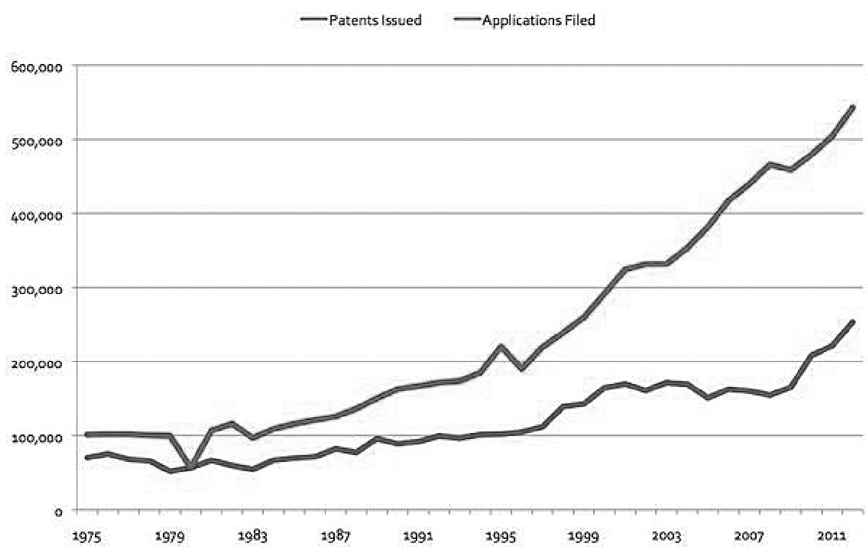
137. *See, e.g.*, Letter From Ken Wasch, *supra* note 123 (". . .PAEs have few, if any, documents to produce or witnesses to be deposed.").

138. Comments of C. Graham Gerst, *Patent Assertion Entities Activities Workshop*, *supra* note 13, at 124 (noting that patent trolls ask for money, settle, and allow the competitors to ultimately continue producing whereas operating entities seek injunctions, ultimately thinning the marketplace); *See supra* note 33.

139. Randall R. Rader et al., *Make Patent Trolls Pay in Court*, N.Y. Times (June 4, 2013), http://www.nytimes.com/2013/06/05/opinion/make-patent-trolls-pay-in-court.html; *see also* Timothy B. Lee, *Here's What it Feels Like to Be Sued by a Patent Troll*, Wash. Post (July 18, 2013); Diana Samuels, *Patent Trolls Responsible for Growing Number of Lawsuits, New Data Shows*, Silicon Valley Bus. J. (Oct. 10, 2012), http://www.bizjournals.com/sanjose/blog/2012/10/patent-trolls-responsible-for-growing.html.

Utility patents are "the most common type of patent,"[140] covering "any new and useful process, machine, manufacture, or composition of matter" (or improvement thereof).[141] In practice, these patents cover everything from mechanical devices and chemical compounds to computer software and processes.[142] In 1990, the PTO granted approximately 90,000 utility patents.[143] In 2014, it granted 300,000, more than a 300% increase in less than 25 years.[144] This increase in patent grants has tracked the increase in patent suits over the last 25 years very closely; in particular, both feature strident increases starting in 2009 compared to periods of measured growth in the 1990s.[145]

FIGURE 1. UTILITY PATENTS: FILLED vs. ISSUED, 1975 - 2012[146]



140. 3 JOHN GLADSTONE MILLS III ET AL., PAT. L. FUNDAMENTALS § 8:1 (2d ed.) (2015).

141. 35 U.S.C. § 101 (2012).

142. GREGORY E. UPCHURCH, INTELLECTUAL PROPERTY LITIGATION GUIDE: PATENTS AND TRADE SECRETS §§ 14:31-14:34 (2015); 1 R. CARL MOY, MOY'S WALKER ON PATENTS § 5:13 (4th ed.) (2003).

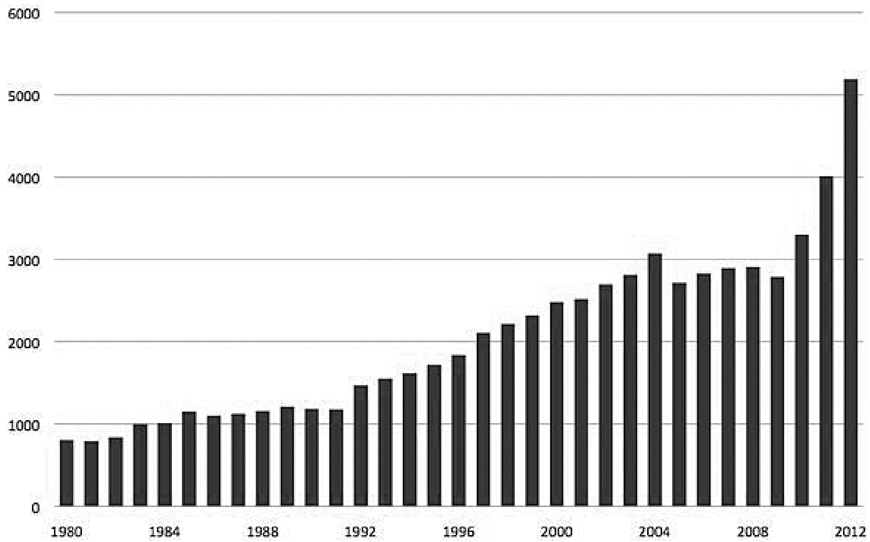
143. U.S. PATENT AND TRADEMARK OFFICE, U.S. PATENT STATISTICS CHART CALENDAR YEARS 1963-2014, http://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm (last accessed Jan. 31, 2016). *See also* Gene Quinn, *The Rise of Patent Litigation in America: 1980-2012* (Apr. 9, 2013), http://www.ipwatchdog.com/2013/04/09/the-rise-of-patent-litigation-in-america-1980-2012/id=38910/.

144. U.S. PATENT STATISTICS CHART, *supra* note 143.

145. PRICEWATERHOUSECOOPERS, 2014 PATENT LITIGATION STUDY 5 (July 2014), http://www.pwc.com/en_US/us/forensic-services/publications/assets/2014-patent-litigation-study.pdf.

146. Quinn, *supra* note 143.

FIGURE 2. PATENT CASES COMMENCED, 1980-2012[147]



In other words, patent assertions have increased, but at a rate roughly proportional to the rate of patents being issued.[148] Inventors are patenting more things, explaining at least some of the increase in patent suits and assertions.

Mandatory case disaggregation has also increased the number of apparent suits. The America Invents Act, passed in 2011, prohibits joining "multiple unrelated defendants to an action solely on the basis that they have each allegedly infringed the patent-in-suit."[149] This has directly led to the apparent surge in litigation since 2011 without actually changing the number of defendants or plaintiffs.[150] Therefore, it is likely that at least part of the overall increase in patent litigation is largely illusory.

Finally, the PTO has granted an increasing number of software patents, which tend to be disproportionately litigation-prone. In 1991, software patents composed approximately 25% of all patents granted by the PTO; since

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147. *Id.*

148. 2014 Patent Litigation Study, *supra* note 145.

149. George D. Medlock, Jr. & David Frist, *Joinder: Over a Year After the America Invents Act*, 5 Landslide 44 (Mar. 2013), http://www.americanbar.org/publications/landslide/march_apri_2013/joinder_over_a_year_after_the_america_invents_act.pdf. *See generally* America Invents Act, 35 U.S.C. § 299 (2012).

150. *See* Scott W. Doyle et al., *The Impact of the America Invents Act on Litigation by Non-Practicing Entities*, Shearman & Sterling LLP (May 9, 2013), http://www.shearman.com/~/media/Files/NewsInsights/Publications/2013/05/The-Impact-of-the-America-Invents-Act-on-Litigat__/Files/View-full-memo-The-Impact-of-the-America-Invents__/FileAttachment/TheImpactoftheAmericaInventsActonLitigationbyNon__.pdf; Robin Feldman et al., *The AIA 500 Expanded: The Effects of Patent Monetization Entities* (UC Hastings Research Paper No. 45, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2247195; Christopher A. Cotropia et al., *Unpacking Patent Assertion Entities (PAEs)*, 99 Minn. L. Rev. 649, 674-78 (2014).

2011, a majority of patents granted have been software-related, and that proportion is still increasing.[151] Lawsuits involving software-related patents accounted for 89% of the increase in defendants between 2007 and 2011 alone.[152] And little wonder as to why—the software patents granted by the PTO have been imprecise in scope, and many should not have been issued at all. As the Government Accountability Office explained:

> Language describing emerging technologies, such as software, may be inherently imprecise because these technologies are constantly evolving . . . claims in software patents sometimes define the scope of the invention by encompassing an entire function—like sending an email—rather than the specific means of performing that function . . . some patents, particularly software patents *should never have been issued* because they were obvious, not novel, or lacked definiteness.[153]

This failure has been so systemic as to necessitate some high-profile intervention from the Supreme Court,[154] but it has not solved the problem entirely or provided clear guidance moving forward.[155]

In short, "the focus on the identity of the litigant"—troll or not—"rather than the *type* of patent" has been myopic.[156] These low-quality, overbroad software patents—combined with the aforementioned surge in issued patents and mandatory case disaggregation—explains the increase in patent cases, not privateering activity.

C. *Privateers Facilitate Meritorious Patent Assertions*

Even if privateers have caused an increase in patent assertions, most of those claims are still ultimately meritorious. As explained in Section I.B,

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151. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-465, INTELLECTUAL PROPERTY: ASSESSING FACTORS THAT AFFECT PATENT INFRINGEMENT LITIGATION COULD HELP IMPROVE PATENT QUALITY 11-13 (2013), http://www.gao.gov/assets/660/657103.pdf.

152. *Id.* at 21-24.

153. *Id.* at 28-30.

154. *See* Alice Corp. v. CLS Bank Int'l, 134 S. Ct. 2347, 2359-60 (2014) (determining that a particular software patent had merely added "a generic computer . . . perform[ing] generic computer functions" to an otherwise unpatentable abstract idea).

155. *See, e.g.*, Brian Fung, *The Supreme Court's Decision on Software Patents Still Doesn't Settle the Bigger Question*, WASH. POST: THE SWITCH (June 20, 2014), http://www.washingtonpost.com/blogs/the-switch/wp/2014/06/20/the-supreme-courts-decision-on-software-patents-still-doesnt-settle-the-bigger-question ("[The Court] didn't do much to say what kinds of software should be patentable. In other words, the court decided the most basic conflict in the case, but more or less declined to offer guidance for other, future cases."); Robert Merges, *Go Ask Alice—What Can You Patent After Alice v. CLS Bank?*, SCOTUSBLOG (June 20, 2014, 12:04 PM), http://www.scotusblog.com/2014/06/symposium-go-ask-alice-what-can-you-patent-after-alice-v-cls-bank ("To say we did not get an answer is to miss the depth of the non-answer we did get.").

156. GOV'T ACCOUNTABILITY OFFICE, *supra* note 151, at 45.

privateers by their very nature will tend to have higher-quality patents than other kinds of patent trolls by virtue of acquiring them from operating entities.[157] Their enforcement efforts are also more likely to be narrowly targeted towards practicing competitors rather than broad, blanketing threats against end users or entire industries. Taken together, these indicate that the privateer model would be expected to assert claims that are generally meritorious as a rule.

Additionally, operating entities tend to use privateers to break up their patent portfolios into intelligible, coherent chunks that make more sense for assertion.[158] For example, a company may have a vast portfolio overall, but only a few patents relating to semiconductors. By splitting off a sub-portfolio of only the semiconductor patents, the privateer simplifies litigation for all parties involved, minimizing the patents that need to be examined in any dispute. Contrast this with what is sometimes called the IBM method of intimidation, wherein an entire massive portfolio is coupled with vague threats and used as a cudgel.[159] During negotiations between Sun Microsystems and IBM in the 1980s, IBM's chief negotiator was quoted as saying:

> OK, maybe you don't infringe these seven patents. But we have 10,000 U.S. patents. Do you really want us to go back to Armonk [IBM headquarters in New York] and find seven patents you do infringe? Or do you want to make this easy and just pay us $20 million?[160]

Perhaps ironically then, privateering actually contributes to meritorious claims through transparency in negotiations, threat letters, and complaints filed. The privateering model makes it less attractive for operating entities to bring their whole portfolio to the table to cover for weak or unspecified claims of infringement with IBM-style intimidation.

Analogizing to the world of litigation finance offers further evidence that privateers ultimately assert disproportionately meritorious claims. The business model of privateers is in many ways modeled after litigation financiers: buying up patents—"claims"—from operating entities that don't have the resources or willingness to bear the risk of litigation, and then asserting them. Intellectual Ventures is perhaps the most well-publicized of these privateers, and they state their business model as such:

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157. *See supra* notes 52-55 and accompanying text.

158. *See, e.g.*, Lemley & Melamed, *supra* note 31, at 2159-60 (discussing the strategy of portfolio disaggregation via privateers).

159. *See* Gary L. Reback, *Patently Absurd*, FORBES (June 24, 2002), http://www.forbes.com/asap/2002/0624/044.html.

160. Dan O'Connor, *Patent Bully: Steve Jobs' Unethical Use of Patents*, PATENT PROGRESS (Jan. 23, 2013), http://www.patentprogress.org/2013/01/23/patent-bully-steve-jobs-unethical-use-of-patents.

> [I]magine an inventor out there, someone with a brilliant idea, a breakthrough. This inventor has a patent, but still, companies are stealing his idea and he doesn't have the money or legal savvy to stop them. That's where Intellectual Ventures comes in. They buy this inventor's patent and make sure that companies who are using the idea pay for it.[161]

Privateers, like litigation financiers, take on a substantial amount of downside risk in the tradeoff. They risk findings of non-infringement that sink their costs of litigation, or worse, patent invalidation that destroys their only asset. Even where victorious, failure to reach a licensing agreement with the infringer (resulting solely in an injunction or exclusion order) brings them little or no financial benefit since they do not participate in the product market themselves. Moreover, where an operating entity maintains some kind of partial interest in royalties that the privateer collects or sets minimum revenue targets, the stakes are raised even further.[162] The result is that, like litigation financiers, privateers will assert "in cases where the risk is the lowest" and "the underlying law giving rise to the . . . claim" favors their position as plaintiff.[163] In other words, privateers will avoid frivolous or unfounded assertions.

Finally, it is worth pointing out that privateers, unlike pure litigation financiers, already face sanctions and fee-shifting rules to the extent they engage in frivolous litigation and other reprehensible tactics.[164] Enforcement and application of these rules is far from perfect, but the stakes for a privateer are proportionally much higher than for an operating entity. Most privateers—especially those created with singular purpose—do not have particularly deep pockets: most patent trolls operate on $10 million or less in revenue per year.[165] Given that the legal costs of a patent suit can easily

161. Statement of Alex Blumberg, *This American Life: When Patents Attack!*, Chicago Public Radio (July 22, 2011), http://www.thisamericanlife.org/radio-archives/episode/441/transcript.

162. *See, e.g.*, Popofsky & Laufert, *supra* note 13, at 7.

163. Joshua G. Richey, *Tilted Scales of Justice? The Consequences of Third-Party Financing of American Litigation*, 63 Emory L.J. 489, 489 (2013).

164. In particular, *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S. Ct. 49 (2014), facilitates fee-shifting in the patent assertion context for frivolous suits. *See generally* Fed. R. Civ. P. 11(b)-(c) (allowing a court to impose sanctions on an attorney, law firm, or party where "the claims, defenses, and other legal contentions are [not] warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law," or where "the factual contentions [do not] have evidentiary support"). For examples of state law regimes, see Ind. Code Ann. § 34-52-1-1 (2013) and Cal. Civ. Pro. Code § 128.5 (2013). Additionally, privateers risk losing the *Noerr-Pennington* immunity discussed earlier to the extent their lawsuits become objectively baseless. *See supra* notes 51-56 and accompanying text.

165. Colleen V. Chien, *Patent Trolls by the Numbers* (Santa Clara Univ. Legal Studies Research Paper No. 08-13, Mar. 13, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2233041.

exceed $5 million per litigant,[166] one successful fee-shifting would likely destroy most privateers. To pay the costs of litigation, the patent may even be sold off—and snapped up by the former plaintiff. Thus, privateers have strong incentives to assert their patents against operating entities that are actually infringing them, rather than roll the dice with every competitor in the industry.

In short, there is good reason to be skeptical of the extent to which patent trolls in general can be blamed for the current patent landscape. This skepticism should be at its highest when talking about privateers in particular, since they (1) encourage settlement rather than litigation, (2) have likely not contributed to the increase in patent assertions, and (3) raise generally meritorious claims. Combined with the *Noerr-Pennington* immunity and Section 5 limitations, the argument for antitrust intervention due to privateer-created anticompetitive barriers to entry or "startup taxes" does not withstand scrutiny.

IV. Colluding via Privateers and the Limited Role for Antitrust

Evasion of litigation constraints, evasion of licensing obligations, and effects on the cost and frequency of patent litigation do not open the door to antitrust involvement in privateering activity. That said, some forms of privateering activity would merit antitrust intervention. For example, where privateers are essentially used as instruments of collusion, antitrust has a natural role to play. Two or more operating entities could hypothetically use a privateer to pool their patents and wield them collectively against competitors not in the pool. This would be functionally identical to cross-licensing and then agreeing, implicitly or explicitly, to sue all other competitors out of the market—a practice that the Supreme Court has already confirmed violates Section 1 of the Sherman Act.[167]

Nor should the act of collusion be immunized simply because it occurs through a third party like a privateer. That conclusion would run counter to the very foundations of antitrust law. The Clayton Act, for example, was designed to proscribe "holding companies . . . compan[ies] whose primary purpose is to hold stocks of other companies" to form a collusive trust.[168] Case law dating back to the turn of the century has supported this notion;[169] unlawful collusion cannot be made lawful by laundering through a third

166. For patent suits with an underlying claim over $25 million, average legal costs are $5 million. *See* Am. Intellectual Property Law Ass'n, 2013 Report of the Economic Survey (Feb. 5, 2013), http://www.patentinsurance.com/custdocs/2013aipla%20survey.pdf. For suits where the underlying claim is between $1 million and $25 million, average legal costs are still $2.8 million. *Id.*

167. *See* United States v. Singer Mfg. Co., 374 U.S. 174 (1963).

168. David Dale Martin, Mergers and the Clayton Act 31 (1959).

169. *See* N. Sec. Co. v. United States, 193 U.S. 197 (1904).

party. Hence, antitrust has a clear role to play in policing privateers as agents of collusion.

But the arguments for the role of antitrust law in regulating collusion are not arguments for policing privateering activity in and of itself. This is simply a natural extension of the longstanding proscription against collusion between competitors or anticompetitive mergers—a proscription unique to the specialized laws of antitrust. The fundamental problem with most popular and academic arguments calling for antitrust intervention is that they fail to recognize this distinction, and in turn the limitations inherent to antitrust law. These limitations may be quasi-constitutional, such as the *Noerr-Pennington* doctrine,[170] or they may be practical, such as proving intent under Section 2.[171] Superimposed on these limitations is the notion—supported not only by academics but also the Supreme Court—that when an alternative regime to antitrust law is available, efficiency considerations dictate that antitrust's role should be minimized.[172]

This is to say nothing of the more generalist arguments in favor of a limited role for antitrust law. Antitrust violations are ultimately felonies, after all, so practices condemned by antitrust law "should not be . . . just over the line," but "so clearly beyond the pale . . . as to be subjects of strong condemnation."[173] Given the highly broad and open text of the actual antitrust statutes, this is a particularly salient concern for voluntary compliance and clarity.[174] The particularly high cost of false positives—not only the direct costs of treble damages but also the inducement of rent-seeking activities—coupled with judges' lack of economic or industry expertise suggests minimizing the role of antitrust law as mere business regulator.[175] In short, there is good reason to be skeptical "about courts' ability to separate good conduct from bad" and "modest[ ] about what [antitrust] laws can do well."[176] These arguments are convincing in their own right. But they mostly serve here to highlight the fact that conduct without a clear anticompetitive

170. *See supra* notes 41-56 and accompanying text.

171. *See supra* notes 76-87 and accompanying text.

172. *See supra* notes 17-21 and accompanying text.

173. Ronald A. Cass, *Competition in Antitrust Regulation: Law Beyond Limits*, 6 J. COMPETITION L. & ECON. 119, 129 (2010); *see* Ronald A. Cass & Keith N. Hylton, *Preserving Competition: Economic Analysis, Legal Standards, and Microsoft*, 8 GEO. MASON L. REV. 1 (1999).

174. For example, Section 1 of the Sherman Act forbids any "contract . . . in restraint of trade or commerce." 15 U.S.C. § 1 (2012). But any contract is in 'restraint of trade,' of course, since it binds two parties to each other in some fashion, thus preventing them from doing that business with anyone else without incurring the costs of breach. Where the text has failed to provide a sensible answer, it has been up to the courts to develop a significant body of rules and tests case-by-case.

175. *See generally* Frank H. Easterbrook, The Limits of Antitrust, 63 TEX. L. REV. 1 (1984).

176. Cass, *supra* note 173, at 131.

valence—such as unilateral usage of privateering—should not be curtailed by antitrust laws where alternatives are available.

Conclusion

Patent trolls may pose a problem for American innovation and industry. Whether they pose an *antitrust* problem is a closer call, though, depending on the particular type of patent troll and the activities they engage in. For privateer patent trolls, antitrust law is almost certainly not the solution. Privateering may permit operating entities to circumvent litigation constraints, but the litigation activity is almost certainly immunized from antitrust scrutiny. Transparency-based solutions offer a readily available alternative. Privateering may permit operating entities to evade licensing obligations, but significant roadblocks prevent actually prosecuting that behavior. Contract law or estoppel doctrine can provide relief instead. And in terms of the cost and frequency of patent assertions, the valence of privateering activity is uncertain at best. If anything, the increase in assertions is composed of disproportionately meritorious claims. Given the existence of alternative legal solutions, the role of antitrust law in regulating privateers should be limited and clearly grounded in uniquely antitrust concerns, such as collusion.