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# Non-Practicing Entities & Patent Reform

By Nicholas Douglas

## *Abstract*

*The patent system is designed to promote innovation and supply a blueprint for innovative minds to improve upon, but the behavior of some patent owners is contrary to these principles. Non-practicing entities obtain patent rights, and rather than produce the product claimed in the patent, they assert their exclusionary rights broadly and aggressively against businesses producing similar products in order to induce settlement or licensing payments. These assertions account for a significant percentage of infringement claims and threaten a potentially innocent business with expensive litigation. The actions of these entities have a substantial effect on the patent system and have been the motivation behind reform and recent Supreme Court decisions. Each of the three branches of government has significant influence over the patent system, and each has the potential to promote change to reduce the impact of non-practicing entities on the United States patent system and on the United States economy.*

## I. Introduction to The Patent System and Non-Practicing Entities

It could not be argued otherwise that the purpose of the patent is to promote the progress of science and useful arts, for the words come from our highest legal authority, The United States Constitution.<sup>1</sup> To an inventor, a patent means security. Patents provide a safeguard for inventors, protecting their right to their own product and incentivizing continued innovation. Absent the safety of a patent, an inventor without capital has nothing more than an idea ready to be seized by a capable company. Who would continue in the advancement of science and technology if their life's work could be swept away by anyone

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1. U.S. CONST. art. I, § 8, cl. 8.

with their ear to the door? Patents work to remove inventions from the shadows of laboratories and promote disclosure so that one's ideas may be built upon by another's ideas. The spirit of the patent is embodied in the quote by Isaac Newton in a letter addressed to Robert Hooke: "If I have seen further, it is by standing on the shoulders of giants."<sup>2</sup>

An issued patent in compliance with statutory requirements provides the owner, and his heirs or assigns, with "the right to exclude others from making, using, offering for sale . . . or importing" the patented subject matter.<sup>3</sup> A patent owner may bring an action in district court against a party whose product is claimed to infringe against the rights of the owner. While a patent approved by the United States Patent and Trademark Office ("USPTO") is presumed to be valid, in court, a defendant in an infringement suit may defend or counter with a claim of invalidity.<sup>4</sup> A patent may be held invalid if the subject matter is found unpatentable, if the invention is obvious, or if the invention lacks novelty under the statute.<sup>5</sup> Since infringement suits require extensive time and money, the USPTO provides several proceedings that may be initiated following the grant of a patent that are designed to settle such disputes. These post-grant proceedings were expanded in the Leahy-Smith America Invents Act of 2011 ("AIA").<sup>6</sup>

The AIA brought substantial reform to United States patent law.<sup>7</sup> Some of the most significant changes were to the procedure for contesting the validity of a third party's patent. Prior to the implementation of the AIA, a third party could assert invalidity in three ways: as a defense to an infringement suit; petition for *inter partes* reexamination; or file for *ex parte*

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2. Letter from Isaac Newton to Robert Hooke (Feb. 5, 1675) (on file with author), <https://digitallibrary.hsp.org/index.php/Detail/objects/9792>.

3. 35 U.S.C. §§ 154(a)(1), 271(a) (2012).

4. 35 U.S.C. § 282 (2012). A patent may be held invalid if it is found that the subject matter is unpatentable, if the invention is obvious or lacks novelty, or if the invention fails to demonstrate utility under the statute. *See infra* note 5.

5. 35 U.S.C. § 101-03 (2012).

6. *See generally* Leahy-Smith America Invents Act of 2011, Pub. L. No. 112-29, 125 Stat. 284 (2011).

7. *Id.*

reexamination with the USPTO.<sup>8</sup> *Ex parte* reexamination proceedings involve only the patent owner and the USPTO, giving the petitioning party limited opportunity to assert his or her case.<sup>9</sup> *Inter partes* reexamination was instituted in the American Inventors Protection Act of 1999 and allowed for third party participation, but was overhauled by the AIA in 2011<sup>10</sup> The AIA created new alternatives for a party to contest the validity of another party's patent. These alternatives are known as *inter partes* review ("IPR") and post-grant review.<sup>11</sup>

IPR is an adversarial proceeding within the USPTO, which is brought by a third party who contests the validity of another party's patent.<sup>12</sup> IPR takes place before a panel of three Administrative Patent Judges of the Patent Trial and Appeal Board ("PTAB").<sup>13</sup> The petition is limited to contesting the patent under the statutory novelty or obviousness standards.<sup>14</sup> The petitioning party must identify existing patents or printed publications that raise a question of the patent's validity.<sup>15</sup>

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8. Jason Scott Tiedeman & Eric D. Gorman, *Declaratory Judgement Actions, Covenants Not to Sue, and Bad Patents: A Call to Allow the Judiciary to Weed Out Bad Patents while Adhering to the "Case or Controversy" Requirement*, 13 J. HIGH TECH. L. 1, 22-26, 41 (2012).

9. *Id.* at 29.

10. *Id.* at 26-27. One of the most significant changes brought by the AIA was the changing of the standard used to grant a review of a patent. The AIA lowered the review from "a substantial new question of patentability" to "a reasonable likelihood that" the challenger "would prevail." *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2137 (2016); compare 35 U.S.C. § 312(a) (2006) (repealed), with 35 U.S.C. § 314(a) (2012).

11. Tiedeman & Gorman, *supra* note 8, at 27. Post-grant review is an adversarial proceeding that became available after March 2013 with the implementation of the AIA. Post-grant review differs from IPR in the legal standard required for a showing of invalidity, in order for the USPTO to grant review. Post-grant review has the higher legal standard, as a petitioner must show that "it is more likely than not" that the proceeding will result in the cancellation of one or more of the patent claims. IPR requires the petitioner to show that there is a reasonable likelihood of success that one or more of the claims are anticipated by the prior art. Post-grant review, therefore, requires a showing of a 51% or greater chance of success while IPR encompasses 50% or greater. *Id.* at 40, 74.

12. See generally 35 U.S.C. § 311-19 (2012).

13. *PersonalWeb Techs., LLC v. Facebook, Inc.*, No. 5:13-CV-01356-EJD, 2014 U.S. Dist. LEXIS 4095, at \*9 (N.D. Cal. Jan. 13, 2014).

14. 35 U.S.C. § 311(b) (2012).

15. 35 U.S.C. § 312(a)(3)(A) (2012). This is yet another way in which post-grant review differs from *inter partes* review; patents being reviewed post-

Additionally, the petition must be brought at the conclusion of post-grant review within nine months of the grant of the patent or within one year of the commencement of an infringement suit.<sup>16</sup>

The purpose of IPR was to “establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs.”<sup>17</sup> It seeks to accomplish this goal by expeditiously resolving issues within one year of the granting of IPR, and providing estoppel on the issue of invalidity of patent claims during litigation in federal court.<sup>18</sup> Additionally, the process works to remove bad patents and promote valid patents through contests by third parties.<sup>19</sup> Because of this, courts will often stay proceedings pending the outcome of IPR.<sup>20</sup> Recent statistics in 2013 show that courts stay proceedings across the country at a rate of approximately sixty percent when an IPR decision is pending.<sup>21</sup> Some of the benefits of staying the proceeding include the examination of the patent by experienced patent judges, the potential reduction in arguable factors at trial, judicial efficiency, and possible dismissal if the patent is held invalid by the PTAB judges.<sup>22</sup> Avoiding costly litigation and having the benefit of experienced patent judges are not the only benefits of choosing IPR; there are several fundamental differences between IPR and district court procedures that influence the outcome for parties wishing to contest the validity of another’s

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grant may be argued invalid on much broader grounds. *Compare* 35 U.S.C. § 321 (2012), *with* 35 U.S.C. § 312(a)(3)(A) (2012).

16. 35 U.S.C. § 311(c)(1)-(2) (2012); 35 U.S.C. § 315(b) (2012).

17. Changes to Implement Inter Partes Review Proceedings, Post-Grant Review Proceedings, and Transitional Program for Covered Business Method Patents, 77 Fed. Reg. 48680-01 (Aug. 14, 2012) (codified at 37 C.F.R. § 42.100 (2017)).

18. *PersonalWeb Techs., LLC v. Facebook, Inc.*, No. 5:13-CV-01356-EJD, 2014 U.S. Dist. LEXIS 4095, at \*10-11 (N.D. Cal. Jan. 13, 2014).

19. *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016) (citing 157 CONG. REC. 9778 (2011) (statement of Rep. Goodlatte)).

20. See *id.* at 2146.

21. Robert Arcamona & David Cavanaugh, *Stays to Litigation Pending IPR and CBM Review: Statistics, Trends, and Key Issues*, INTELL. PROP. TODAY, Mar. 2014, at 9, [https://www.wilmerhale.com/uploadedFiles/Shared\\_Content/Editorial/Publications/Documents/IP-today-stays-to-litigation-pending.pdf](https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/IP-today-stays-to-litigation-pending.pdf).

22. Mathew R. Frontz, *Staying Litigation Pending Inter Partes Review and the Effects on Patent Litigation*, 24 FED. CIR. B.J. 469, 472-73 (2015).

patent.

The procedure of IPR and district court proceedings differ substantially. In IPR, the parties have the option, although rarely granted, of amending or modifying their claims.<sup>23</sup> Conversely, in district court, there is no such option.<sup>24</sup> Additionally, case schedules between the two approaches can differ drastically; district court procedures and patent trials may take several years, while IPR is statutorily mandated to be completed within one year of commencement.<sup>25</sup> The procedures also differ in the absence of summary judgment in IPR, absence of a jury at a PTAB hearing, limitation of issues to patentability in IPR,<sup>26</sup> restrictions on witness testimony in IPR, and settlement practices.<sup>27</sup> Furthermore, discovery procedures vary drastically; in district court, discovery is broadly available, while in IPR, discovery is limited to routine discovery and a significant showing of relevancy and appropriateness of the discovery requests must be presented to the Board for additional discovery.<sup>28</sup> Lastly, judgments from each may be appealed to the Federal Circuit, although the standards of review on appeal differ depending on which legal avenue was utilized.<sup>29</sup> District court decisions are reviewed for clear error while PTAB decisions are reviewed for substantial evidence.<sup>30</sup> These differences in procedure influence a party's decision to pursue a claim in district court and/or to pursue a determination of validity via IPR.

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23. Michael J. Flibbert & Maureen D. Queler, *5 Distinctions Between IPRs and District Court Patent Litigation*, FINNEGAN (Dec. 16, 2015), <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=64c22ef3-9abe-4637-a445-c75c56892eb1>.

24. *Id.*

25. 37 C.F.R. § 42.100(c) (2017).

26. Flibbert & Queler, *supra* note 23. A district court may hear a variety of issues including infringement, damages, misuse, etc., but IPR is limited to the patentability of the claims under novelty and obviousness standards. 37 C.F.R. § 42.104(2) (2017) (citing 35 U.S.C. §§ 102-03 (2012)).

27. Flibbert & Queler, *supra* note 23.

28. *Id.*; compare Fed. R. Civ. P. 26(b), with 37 C.F.R. § 42.51(b) (2017).

29. Flibbert & Queler, *supra* note 23.

30. *Id.*; Ryan Davis, *Fed. Circ.'s Embrace of PTAB to Fuel More AIA Reviews*, LAW360 (Mar. 8, 2016, 1:41 PM), <https://www.law360.com/articles/767549/fed-circ-s-embrace-of-ptab-to-fuel-more-aia-reviews> (board decision affirmance rates are quite high as a result of a more deferential standard of review for PTAB decisions).

There are several fundamental differences between IPR and district court review that also have had an influence on the rate of patents being held invalid in IPR proceedings. One difference is that, in IPR, the legal standard of review is the preponderance of the evidence test, while district courts use the clear and convincing test.<sup>31</sup> Clear and convincing evidence is “the highest burden of proof in U.S. civil litigation” and provides a presumption of validity of patents being contested in court.<sup>32</sup> In proceedings involving PTAB judges, no presumption of validity exists, and the patent may be invalidated under a finding of invalidity by preponderance of the evidence.<sup>33</sup> This fundamental difference is discussed later as a potential area for patent reform.<sup>34</sup> Another difference is the standard for claim construction. The PTAB judges utilize the “broadest reasonable construction standard” while the federal courts must view the claim’s explicit language and its meaning to a person having “ordinary skill in the art.”<sup>35</sup>

The two analytical procedures that are employed by the separate entities may result in a different claim meaning, depending on who is reviewing the patent. There are several instances where both the district court and PTAB have participated in claim construction for the same claims, but it is fairly rare under the AIA amendments, due to courts frequently staying proceedings during IPR review.<sup>36</sup> In cases where both entities have reviewed the patent, there are several instances in which the PTAB judges have reached the same claim construction as the district court,<sup>37</sup> and several cases in which

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31. U.S. PAT. & TRADEMARK OFF., Dep’t of Com., MANUAL OF PATENT EXAMINING PROCEDURE ch. 706 (9th ed. 2018). “In other words, an examiner should reject a claim if, in view of the prior art and evidence of record, it is more likely than not that the claim is unpatentable” *Id.*; *See also* *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016).

32. *Flibbert & Queler*, *supra* note 23.

33. *Id.*

34. *See infra* Section III.

35. Jacob Oyloe et al., *Claim Constructions in PTAB vs. District Court*, LAW360 (Oct. 6, 2014, 10:50 AM), <https://www.law360.com/articles/581715/claim-constructions-in-ptab-vs-district-court>. *See also* *Cuozzo Speed Techs., LLC v. Lee*, 136 S.Ct. 2131, 2134 (2016) (citing *Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005)).

36. Oyloe et al., *supra* note 35.

37. *Id.*; *see, e.g.*, *Google Inc. v. SimpleAir, Inc.*, No. CBM2014-00054, 2014

they have differed,<sup>38</sup> as a product of the differing analyses.<sup>39</sup> Because of the lower burden of proof required in IPR for a patent to be held invalid, PTAB judges have shown a pattern of invalidation of patents at a substantially high rate, giving PTAB judges the nickname “patent death squads.”<sup>40</sup> “The PTAB has invalidated at least ‘one claim’ –or part—in almost 80% of the patents it has ruled on,” after the implementation of the AIA.<sup>41</sup> This seemingly anti-patent bias sparked discussion of the potential effect of the PTAB invalidations stifling innovation and creating a barrier to obtaining and maintaining legitimate patents.<sup>42</sup> PTAB practice was further criticized after entities began to abuse the system for financial gain.<sup>43</sup>

The structure of IPR coupled with the relentless invalidation of patent claims by PTAB judges created a system that could be exploited by those with capital. Kyle Bass, a hedge-fund manager, is one of the well-known exploiters of the system.<sup>44</sup> Mr. Bass has challenged the validity of several pharmaceutical patents using his Coalition for Affordable Drugs, with the intention that they would be invalidated by the PTAB.<sup>45</sup> Entities like Mr. Bass’s Coalition then see a profit by betting against the pharmaceutical company’s stock value, and if they are successful in contesting the patent’s validity, the company can see a value decline of up to ten percent in its shares.<sup>46</sup> Mr. Bass claims that his actions help to reduce artificial inflation of drug prices by challenging the patents, but

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WL 1940194 (P.T.A.B. May 13, 2014); Kyocera Corp. Motorola Mobility LLC v. Softview LLC, No. IPR2013-00004, 2014 WL 1382058 (P.T.A.B. Mar. 27, 2014).

38. Oyløe et al., *supra* note 35; *see, e.g.*, Rackspace Hosting, Inc. v. Rotatable Techs., No. IPR2013-00248, 2013 WL 8595952 (P.T.A.B. Oct. 1, 2013); Vibrant Media, Inc. v. Gen. Elec. Co., No. IPR2013-00170 (JYC), 2013 WL 8595515 (P.T.A.B. July 29, 2013).

39. Oyløe et al., *supra* note 35.

40. Peter J. Pitts, *‘Patent Death Squads’ vs. Innovation*, WALL ST. J. (June 10, 2015, 7:23 PM), <https://www.wsj.com/articles/patent-death-squads-vs-innovation-1433978591>.

41. *Id.* (citing Brian J. Love & Shawn Ambwani, *Inter Partes Review: An Early Look at the Numbers*, 81 U. CHI. L. REV. DIALOGUE 93, 101 (2014)).

42. *See* Pitts, *supra* note 40.

43. *Id.*

44. *Id.*

45. Joseph Walker & Rob Copeland, *Kyle Bass Takes Aim at Drug Patents*, WALL ST. J., Apr. 8, 2015, at B1.

46. *Id.*; Pitts, *supra* note 40.



many believe his goal is a selfish one and that he is taking advantage of the patent system for his own financial gain.<sup>47</sup> Evidence supporting the latter is the fact that Mr. Bass had teamed up with a known non-practicing entity, Erich Spangenberg, who has a history of exploiting the patent system for financial gain.<sup>48</sup> Non-practicing entities are a thorn in the side of legitimate business, and have created issues that are driving the need for patent reform.

Non-practicing entities (“NPEs”) are individuals or companies who acquire patent rights from an inventor or owner of a patent.<sup>49</sup> NPEs are also referred to as patent assertion entities (“PAE”) and pejoratively as patent trolls.<sup>50</sup> NPEs do not produce the patented invention, rather, they make a profit by aggressively asserting their patent rights over others with newly obtained patents. Viewed in a positive light, NPEs allow small and medium sized patent holders to make a profit by relinquishing some or all of their rights to their patented invention in exchange for an opportunity to enforce their patents over potential infringers vicariously through the NPEs.<sup>51</sup> However, these functions may be secondary to their personal financial gain, for the money obtained in settlement of the suits by the NPEs is not returned to the inventors, rather, it is shared only with the NPE’s attorney as contingency fees.<sup>52</sup>

NPEs have been under much scrutiny for alleged abuses of the patent system and for acting contrary to the fundamental policies of patent rights. NPEs do not produce any products

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47. Walker, *supra* note 36.

48. *Id.*

49. David L. Schwartz & Jay P. Kesan, *Analyzing the Role of Non-Practicing Entities in the Patent System*, 99 CORNELL L. REV. 425, 425-26 (2014) (stating that non-practicing entities are often referred to as “patent trolls” or “patent assertion entities”).

50. BRIAN T. YEH & EMILY M. LANZA, CONGRESSIONAL RESEARCH SERVICE, PATENT LITIGATION REFORM LEGISLATION IN THE 114<sup>TH</sup> CONGRESS 5 (2015), <https://www.fas.org/sgp/crs/misc/R43979.pdf>. The name *patent troll* is derived from the villains of folklore which would sit surreptitiously under a bridge that they did not build and demand tolls from travelers attempting to cross. *Id.* The comparison is derived from the fact that NPEs did not invent or produce the patented product but still demand monetary compensation for others to use it. *Id.*

51. Schwartz & Kesan, *supra* note 49, at 428.

52. *Id.* at 429.

themselves, rather, they make their profits through aggressively asserting their patent rights.<sup>53</sup> This is frequently done in an unreasonably broad manner to coerce often innocent, alleged infringers to license under the NPE's patent or to force a court settlement in which the NPE's profit.<sup>54</sup> They take advantage of the broad claim construction of their patents to cast a wide net over an industry and pull into court anything they claim falls under their patent.<sup>55</sup> Federal lawsuits are enormously expensive, and by threatening suit against valid producers, they often force licensing or payment of fees that are substantially less than the cost of litigation.<sup>56</sup> As the Chairman and President of the Licensing Executives Society, Brian O'Shaughnessy stated, "[t]he whole point of the system is to encourage invention, but if it's impossible to enforce your rights without going bankrupt, that's not much encouragement[.]"<sup>57</sup> How can NPE practice be said to promote the progress of science and useful arts when they do not produce any scientific or useful product, yet they hoard the patents which claim the rights to those products and syphon money from entities which are promoting innovation?

## II. The Judicial Branch: NPEs in Court

In 2012, it was estimated that up to sixty-one percent of new patent lawsuits were brought by NPEs (also known as PAEs) and the potential cost of these suits was approximated at

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53. Shwartz & Kesan, *supra* note 49, at 429.

54. See BRIAN T. YEH, CONGRESSIONAL RESEARCH SERVICE, AN OVERVIEW OF THE "PATENT TROLLS" DEBATE 5 (2013), <https://fas.org/sgp/crs/misc/R42668.pdf>.

55. *Id.* at Summary.

56. YEH & LANZA, *supra* note 50, at 5. NPEs extort the producers by threatening litigation; additionally, they utilize the International Trade Commission to threaten to block importation to extort a greater value from the potential defendant. Kurt Orzech, *Reps. Reintroduce Bill to Keep Patent Trolls Out of ITC*, LAW360 (Mar. 23, 2016, 6:23 PM), <http://www.law360.com/articles/775112/rep-reintroduce-bill-to-keep-patent-trolls-out-of-itc>. A potential remedy is being sought through the proposed Trade Protection, Not Troll Protection Act. See H.R. 4829, 114th Cong. (2016).

57. Erin Coe, *Patent Owners Face Tougher Playing Field as Obama Exits*, LAW360 (Dec. 19, 2016), <https://www.law360.com/articles/873350/patent-owners-face-tougher-playing-field-as-obama-exits>.

twenty-nine billion dollars in 2011.<sup>58</sup> Of these lawsuits, it was shown through a random sample of patent cases, that 325 cases settled with the majority of NPE suits never reaching trial or summary judgment.<sup>59</sup> According to another study, NPEs engage in considerably more lawsuits than their product-producing counterparts, but also have a substantially lower chance of winning if the case proceeds to trial.<sup>60</sup> This accounts for the extraordinarily high settlement rate of NPEs at 89.6% of cases.<sup>61</sup> NPEs rely on these suits to profit, so they must be diligent in choosing which entities to pursue in court, for if the party asserted against has the means to see the case to the end, they have a higher chance of winning. With NPEs maintaining their presence in the years following the implementation of the America Invents Act,<sup>62</sup> the courts have produced a handful of influential decisions limiting the abuse of NPEs.

A significant limitation was placed on NPEs in the Supreme Court's 2006 decision in *eBay Inc. v. MercExchange*, which vastly limited the ability of patent trolls to receive injunctive relief.<sup>63</sup> The case involved a "business method patent" owned by MercExchange "designed to facilitate the sale of goods by establishing a central authority to promote trust among participants."<sup>64</sup> The court outlined a four-factor test for the appropriateness of injunctive relief, addressing (1) irreparable

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58. Colleen Chien, *Patent Assertion Entities*, SANTA CLARA U. slide 23 (Dec. 10, 2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2187314](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2187314); James Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 CORNELL L. REV. 387, 389 (2014).

59. Sara Jeruss et al., *The America Invents Act 500: Effects of Patent Monetization Entities on US Litigation*, 11 DUKE L. & TECH. REV. 357, 375-77, 385 (2012) (stating that the cases sampled were from 2007 to 2011 and showed an increase in NPE lawsuits from 22% to 40% over the time period).

60. John R. Allison et al., *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO. L.J. 677, 692-94 (2011) (stating NPEs win judgments on the merits in 9.2% of cases compared to 50% for product producing wins).

61. *Id.* at 694.

62. While there may have been a decrease in lawsuits brought by NPEs in 2011, in 2013, after the implementation of the America Invents Act, NPEs still accounted for an estimated 52% of all patent infringement suits. James Bessen, *Patent Trolling was Up 11 Percent Last Year*, WASH. POST (Jan. 31, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/01/31/patent-trolling-was-up-11-percent-last-year/>.

63. *See generally* 547 U.S. 388 (2006).

64. *Id.* at 390.

injury; (2) inadequacy of other remedies; (3) balancing of the hardships of both parties; and (4) the public interest.<sup>65</sup> While the Supreme Court stated that NPEs are not disqualified from injunctive relief *per se*, courts have since consistently weighed the factors against NPEs for injunctive relief.<sup>66</sup> Furthermore, following the decision in *eBay*, NPEs have had a rather difficult time demonstrating “irreparable” harm when they have no intentions of producing their patented subject matter.<sup>67</sup> By effectively removing the ability of NPEs to obtain injunctive relief, *eBay* has limited their awards to monetary damages, and has prevented NPEs from completely shutting down the operations of producers in court.

In a unanimous decision written by Justice Breyer in 2015, the Supreme Court in *Cuozzo* empowered the USPTO and validated its regulation of its agency proceedings.<sup>68</sup> The case involved a patent for a speedometer that showed the driver when they were driving in excess of the speed limit.<sup>69</sup> The plaintiffs were a group of NPEs who sought to alter the procedure of *inter partes* review by invalidating the broadest reasonable construction standard in favor of a standard more favorable to the patent holders.<sup>70</sup> This was an attempt to establish an appealable standard which would give a presumption of validity to a plaintiff's patent in IPR, hence creating an analogous standard to the one used in district court.<sup>71</sup> The NPEs argued

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65. *Id.* at 391.

66. Christopher B. Seaman, *Permanent Injunctions in Patent Litigation After eBay: An Empirical Study*, 101 IOWA L. REV. 1949, 1987-90 (2016) (demonstrating that NPEs were only 16% successful in obtaining an injunction following a finding of liability, while other patentees were 80% successful in obtaining injunctions); *see, e.g.*, *Finisar Corp. v. DirecTV Grp., Inc.*, 523 F.3d 1323 (Fed. Cir. 2008); *Paice LLC v. Toyota Motor Corp.*, 504 F.3d 1293 (Fed. Cir. 2007); *Lamina Packing Innovations, LLC v. Monsieur Touton Selection, Ltd.*, No. 12 Civ. 5039(CM), 2013 U.S. Dist. LEXIS 51020 (S.D.N.Y. Apr. 4, 2013); *Ricoh Co. v. Quanta Comput. Inc.*, No. 06-cv-462-bbc, 2010 U.S. Dist. LEXIS 38220 (W.D. Wis. Apr. 19, 2010).

67. *See* Seaman, *supra* note 66, at 1952-53.

68. *See* *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131 (2016).

69. *Id.* at 2138.

70. Joe Mullin, *Supreme Court sends off patent troll that challenged review rules with an 8-0 slapdown*, ARSTECHNICA (June 23, 2016), <https://arstechnica.com/tech-policy/2016/06/how-a-patent-troll-brought-its-color-shifting-speedometer-to-the-supreme-court/>.

71. *Cuozzo Speed Techs., LLC*, 136 S. Ct. at 2134-35.

that the agency lacked authority to use its own standard of review.<sup>72</sup> In his decision, Justice Breyer analogized IPR with a “specialized agency proceeding” rather than a judicial decision.<sup>73</sup> The Supreme Court unanimously held that the USPTO has the authority under case law (*Chevron* and *Mead*) to regulate its own proceedings and fill in any gaps or ambiguities in the Congressional statutes.<sup>74</sup> The upholding of the USPTO’s broadest reasonable interpretation standard has allowed the agency to be critical of overly broad patents, and has aided in the identification, management, and invalidation of such patents that NPEs collect and enforce.

A persistent judicial exploitation that NPEs often utilized was a method of forum shopping. Given the legal freedom to do so, an asserting party would often choose to bring its case in a district that is known for its patent-owner-friendly decisions.<sup>75</sup> Although there are specific statutes governing venue in patent cases, in 1990 the Federal Circuit expanded the scope of venue in *VE Holding Corp.* to “any district where there would be personal jurisdiction over the corporate defendant at the time the action is commenced.”<sup>76</sup> This decision led to valid determinations of jurisdiction in any state which the patented product or allegedly infringing product was sold. Because of this, historically, the Eastern District of Texas received “20-25% of all patent litigation.”<sup>77</sup> The Supreme Court recently decided a case which involved this very type of venue shopping.

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72. *Id.* at 2142.

73. *Id.* at 2135.

74. *Id.* at 2144 (citing *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

75. Gene Quinn, *Supreme Court Agrees to Hear Patent Venue Case Filled with Patent Reform Implications*, IPWATCHDOG (Dec. 14, 2016), <http://www.ipwatchdog.com/2016/12/14/supreme-court-patent-venue-case-patent-reform-implications/id=75751/>; see 28 U.S.C. §§ 1391(c)(2), 1400(b) (2012). The statutes regarding proper venue are 28 U.S.C. § 1400(b), which states that a “patent infringement [action] may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business[.]” and 28 U.S.C. § 1391(c)(2), which states that a corporation is a resident of a district “in which such defendant is subject to the court’s personal jurisdiction . . . .”

76. *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1583 (Fed. Cir. 1990). For the applicable statutes, see *supra* note 90.

77. Quinn, *supra* note 74.

The recent *TC Heartland v. Kraft* has the potential to reduce the instances of venue shopping in patent infringement cases.<sup>78</sup> The patent infringement suit was brought by Kraft over its Mio water enhancers, and Kraft advocated for the case to be heard in Delaware, a patent-friendly venue.<sup>79</sup> The fundamental question to be determined in the case was the meaning of the term “residence” as applied to corporate entities asserting patent rights in jurisdictions outside of their state of incorporation.<sup>80</sup> The Supreme Court held that “[a]s applied to domestic corporations, ‘reside[nce]’ in § 1400(b) refers only to the State of Incorporation.”<sup>81</sup> Going forward, in the context of NPEs that are not incorporated in the forum state, venue contests will now turn upon the satisfaction of a “regular and established place of business” under § 1400(b),<sup>82</sup> which is a more comprehensive test.<sup>83</sup>

One of the most significant patent cases to be tried before the Supreme Court since the implementation of the AIA was *Alice v. CLS Bank*.<sup>84</sup> In *Alice*, the Court addressed patentable subject matter restrictions under 35 U.S.C. § 101.<sup>85</sup> While abstract ideas, such as mathematical equations, remain outside of the realm of patentable subject matter, some entities were acquiring broad and vague patents on such ideas by claiming the idea through the use of a computer. The patents at issue in *Alice* claimed “(1) a method for exchanging financial obligations, (2) a computer system configured to carry out the method for exchanging obligations, and (3) a computer-readable medium containing program code for performing the method of

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78. *TC Heartland LLC v. Kraft Food Grp. Brands LLC*, 137 S. Ct. 1514 (2017).

79. *See id.* at 1517.

80. *Id.* at 1516-17.

81. *Id.* at 1521.

82. 28 U.S.C. § 1400(b) (2012).

83. *See In re Cray Inc.*, 871 F.3d 1355, 1362-63 (Fed. Cir. 2017). (the Federal Circuit has established a three-part test for an entity to satisfy a regular and established place of business within the forum under §1400(b): the entity must have (1) a physical presence in the forum (2) that is regular and established (not sporadic), and (3) is the place of the business and not solely the place of an employee).

84. *See generally* 134 S. Ct. 2347 (2014).

85. *Id.* at 2352; *see* 35 U.S.C. § 101 (2012).

exchanging obligations.”<sup>86</sup> In deciding the case, the Court relied heavily on *Mayo*, which provides the framework for the section 101 claims at issue.<sup>87</sup> The case resulted in the invalidation of the abstract subject matter patents, referred to as business method patents, and began a trend of invalidation of such patents in the USPTO.<sup>88</sup> Such patents were very valuable to NPEs because of their ability to enforce their patents against a wide range of potential infringers due to their broad reach and commonly utilized subject matter. Although *Alice* may have created just as much confusion as clarification over the boundaries of patentable subject matter in the software industry, it functioned to halt attempts of enforcement by NPEs holding business method patents and render them invalid in USPTO proceedings.

A recent decision by Judge Cote in the Southern District of New York ordered an unusual remedy in a patent infringement suit involving NPEs with business method patents.<sup>89</sup> The case involved AlphaCap Ventures, an NPE, suing ten companies over infringement of its business method patent over financing data collection.<sup>90</sup> The NPE, unsurprisingly, sued each entity in the Eastern District of Texas, and each party settled except Gust, who transferred the case to New York and raised its own claims of abuse of process and patent misuse against AlphaCap.<sup>91</sup> In her strongly-worded decision, Judge Cote stated that the NPEs were aware of the invalidation of their patents by the *Alice* decision, yet commenced the suits anyway.<sup>92</sup> She stated that the commencement of the suit, knowing the patents were

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86. *Id.* at 2349.

87. *Id.* at 2355 (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 78-80 (2012)). When addressing the patentability of claims that involve laws of nature, natural phenomena, or abstract ideas the court must: (1) determine whether the claims involve one of these concepts; (2) determine if there are additional elements that transform the claim into a patentable combination. *Id.*

88. Nam Kim, *Software and Business Method Inventions After Alice*, INTELL. PROP. L. BLOG (Sep. 23, 2016), <https://www.intellectualpropertylawblog.com/archives/software-and-business-method-inventions-after-alice>.

89. *See Gust, Inc. v. AlphaCap Ventures, LLC*, No. 15cv6192 (DLC), 2016 U.S. Dist. LEXIS 98869 (S.D.N.Y. July 28, 2016).

90. *Id.* at \*1-2.

91. *Id.* at \*3-5.

92. *Id.* at \*4.

invalidated, was frivolous and awarded over \$500,000 in attorney's fees against the NPE.<sup>93</sup> The decision became unusual when the Judge ordered the NPE as well as its counsel, Gutride Safier LLP to pay the fees for the frivolous suit.<sup>94</sup> The decision to make the attorneys for the NPE responsible for the payment of the fees sets up an interesting situation for future NPEs like AlphaCap. If attorneys can be personally held to pay the opposing counsel's fees for bringing a lawsuit asserting an overly-broad patent, they may very well be dissuaded from representing NPEs at all. This decision, if adhered to, may have the future effect of forcing NPEs to choose their lawsuits much more carefully in order to secure counsel for the matter. While federal courts have strategically limited the abuses of NPEs, the legislative branch has been developing reform that would constitute much more broad and immediate changes to the patent system.

### III. The Legislative Branch: Proposed Reform

A recent change to the Federal Rules of Civil Procedure ("FRCP") dealt a blow to the non-practicing entities' legal arsenal. In December of 2015, the FRCP was amended and Rule 84 was abrogated.<sup>95</sup> Rule 84 provided an abbreviated complaint template, Form 18, which exempted patent infringement complaints from the standards set in *Twombly* and *Iqbal*.<sup>96</sup> Prior to the amendment, patent infringement complaints only needed to provide basic factual allegations, while the standard outside of Rule 84 was plausibility.<sup>97</sup> This allowed NPEs to assert a valid claim without any substantial factual allegations, making their threats of suit even more likely. It is argued that

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93. Ryan Davis, *NPE, Gutride Safier Ordered to Pay Up in 'Frivolous' Suit*, LAW360 (Dec. 20, 2016, 10:06 PM), <https://www.law360.com/articles/874955/npe-gutride-safier-ordered-to-pay-up-in-frivolous-suit>.

94. *Id.*

95. FED. R. CIV. P. 84.

96. Dennis Crouch, *An Early Review of the Impact of Form 18's Elimination on Pleading Direct Infringement*, PATENTLYO (Apr. 6, 2016), <http://patentlyo.com/patent/2016/04/elimination-pleading-infringement.html>. See generally *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

97. *Id.*



the limited requirements encouraged NPEs to “initiate frivolous lawsuits” whose pleadings would not meet the general standard.<sup>98</sup> Additionally, the lack of information supplied in the initial pleadings would result in lengthier discovery and slow and costly lawsuits.<sup>99</sup> The amendments were too recent to provide any substantial evidence of their effect on NPEs, but courts have already begun to require stricter standards on patent infringement complaints.<sup>100</sup> In addition to requiring stricter standards for pleadings, there are several proposed bills in Congress that would have a substantial impact on the abuses of NPEs in the patent system.

One of the most expansive proposed patent reform bills was the Innovation Act. The Innovation Act was introduced by Representative Goodlatte in February, 2015.<sup>101</sup> The first ambition of the act was to clarify the level of detail required in the pleadings of an infringement suit, relating to the lower acceptable standard prior to the abrogation of the Form 18 pleadings.<sup>102</sup> The bill would require the complaint to allege in detail the patented invention allegedly infringed upon, the elements of the specific claims infringed, the specific acts of the infringer along with a detailed description of the infringing instrumentality, and the authority of the party to assert the action against Defendant.<sup>103</sup> Additionally, the complaint must identify all entities that have a financial interest and any parent company and licensee of the plaintiff, which ties into the second objective of the bill.<sup>104</sup>

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98. YEH & LANZA, *supra* note 50, at 8.

99. H.R. REP. NO. 113-279, at 22-23 (2013).

100. *See, e.g.*, InCom Corp. v. Walt Disney Co., No. CV15-3011, 2016 U.S. Dist. LEXIS 71319, at \*2-4 (C.D. Cal. Feb. 4, 2016); Raindance Techs., Inc. v. 10x Genomics, Inc., No. 15-152-RGA, 2016 U.S. Dist. LEXIS 33875, \*6-7 (D. Del. Mar. 4, 2016).

101. Innovation Act, H.R. 9, 114th Cong. (2015).

102. *Id.* § 3; Fed. R. Civ. P. 84 (abrogated, effective 3 Dec. 1, 2015).

103. *Id.* The Senate proposed Protecting American Talent and Entrepreneurship Act, (PATENT Act), which outlines very similar requirements for pleadings in infringement lawsuits. A clear difference between the bills is that the PATENT Act does not require the description of the authority to bring suit within the pleading, but requires specific information to be disclosed within fourteen days after service or filing. S.1137, 114th Cong. § 281B(b) (2015).

104. H.R. REP. NO. 114-235, at 5 (2015).

The second purpose of the Act was to allow for the joinder of parties with an interest in the suit.<sup>105</sup> The bill allowed for a party other than the party alleging infringement to be joined when that party:

- (A) is an assignee of the patent or patents at issue;
- (B) has a right, including a contingent right, to enforce or sublicense the patent or patents at issue; or
- (C) has a direct financial interest in the patent or patents at issue, including the right to any part of an award of damages or any part of licensing revenue . . . .<sup>106</sup>

The significance of this proposition is to create transparency as to which entities have a financial interest in the lawsuit, and which larger entities may be the controlling party over the ownership of the patent rights. NPEs have, in the past, set up elaborate chains of shell companies making it difficult to legally reach the ultimate entity in charge (the entity with the capital). If an NPE shell company loses a suit, they may just file for bankruptcy for they do not have the capital to pay the fees and the deep pocketed parent company is not a party within the suit. This provision works to require that parent company to be disclosed and mandates them to participate in the suit.

The third objective of the Act was to limit the cost of discovery and to allocate the costs of litigation effectively. This was accomplished by the Act postponing discovery during the resolution of pre-trial motions.<sup>107</sup> With several exceptions, the Act would generally stay discovery pending a motion to sever a claim or for misjoinder, a transfer of venue, or a motion to dismiss.<sup>108</sup> The exceptions include when the court believes discovery is necessary to decide a motion, issues involving preliminary injunctions, parties' consent to discovery, and

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105. *Id.* at 3-4.

106. *Id.* at 4.

107. YEH & LANZA, *supra* note 50, at 9.

108. *Id.* at 9-10. The PATENT Act allows for limited discovery to resolve pre-trial motions, but overall, calls for similar reform as the Innovation Act.

certain drug product disputes.<sup>109</sup> This provision of the Act was designed to limit the cost to the parties in litigation by eliminating the cost of discovery during the interim of motion decisions. This provision had the potential to work significantly against NPEs in lowering the cost of litigation to the *infringing* party and possibly work in favor of avoiding settlement with the entity. At the very least, NPEs would have to reevaluate their demands for settlement; when NPEs present an offer of settlement they must demand an amount significantly lower than the cost of litigation in order to be successful in pressuring the defendant to settle. If similar reform is successful in lowering the cost of litigation, it may have the secondary effect of lowering the demands of NPEs.

Section 3 of the Act also proposed shifting the costs of patent litigation.<sup>110</sup> The Act proposed that the non-prevailing party of the patent infringement suit would be liable for reasonable attorney's fees.<sup>111</sup> Since the vast majority of NPE suits that do not end in settlement are resolved in favor of the allegedly infringing party, this could provide substantial reform in opposition of NPEs. This provision increased the risk for NPEs to bring a lawsuit and would result in decisions similar to that of Judge Cote in *AlphaCap Ventures*, discussed above.<sup>112</sup> Additionally, in a provision titled "covenant not to sue," the Act called for attorney's fees for unilateral motions to dismiss.<sup>113</sup> Working in conjunction with the increased pleading requirements, a complaint alleging infringement by an NPE that is overreaching or unreasonably vague may be dismissed along with the requirement of payment of attorney's fees. This increased risk of dismissal could also dissuade NPEs from casting a wide net and aggressively asserting their patent rights with broad patent claims at the risk of being dismissed. Moreover, if the party cannot pay, a joined party may be

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109. Innovation Act, H.R. 9, 114th Cong. § 3 (2015).

110. *Id.*

111. *Id.* (the act outlines an exception to the fees if the non-prevailing party's position and conduct are reasonably justified in law and fact, or for special circumstances). The Senate's PATENT Act also calls for the payment of attorney's fees if the position or conduct of the asserting party is not objectively reasonable. S.1137, 114th Cong. § 7 (2015).

112. *See supra* Section II.

113. Innovation Act, H.R. 9, 114th Cong. § 3 (2015).

responsible for the remainder of the fees.<sup>114</sup> Building off of the necessary joinder provision of the Act, the organization that is ultimately leading these patent enforcers will be held liable for whatever damages that its cronies cannot pay.

The fourth purpose of the Act required the USPTO to provide small businesses with information regarding abusive patent litigation practices.<sup>115</sup> Section 7 of the Innovation Act addressed small business education and outreach.<sup>116</sup> The section would require the USPTO to pursue two initiatives. The first requirement was that the director of the USPTO “shall develop educational resources for small businesses to address concerns arising from patent infringement.”<sup>117</sup> The second provision would require “education and awareness [to small businesses] on abusive patent litigation practices” and would require a dedicated section of the official USPTO website to small business education.<sup>118</sup> These resources would spread awareness of patent troll practice and help prevent NPEs from preying on small uninformed businesses. Receiving an unanticipated demand letter from an unknown company threatening suit in the absence of a licenses agreement may send a small business into panic. Without capital to defend a suit against a seemingly wealthy, successful, patent-owning company, a small business may concede immediately to the demands without realizing it may have done nothing wrong. These programs may have the effect of significantly reducing easy targets from the pool of potential NPE victims.

The Innovation Act also addressed the issue of venue shopping discussed in *TC Heartland*. The proposed provision under the Act would permit jurisdiction in a judicial district “where the defendant has a principal place of business or is

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114. *Id.*

115. *Id.* § 7.

116. *Id.* Additionally, the proposed PATENT Act also contains a provision requiring educational resources to be made available to small businesses. *See* S. 1137, 114th Cong. § 13 (2015).

117. H.R. REP. NO. 114-235, § 7(a)(1), at 12 (2015).

118. *Id.* §§ 7(a)(2), 7(b)(1). Like the Innovation Act and PATENT Act, the STRONG Patents Act address the issue of abusive patent practice on small businesses. The STRONG Patents Act would “require the Small Business Administration to produce a report that analyzes the impact of patent ownership by small businesses . . . .” YEH & LANZA, *supra* note 50, at 36.

incorporated[.]” the defendant has infringed and “has a regular and established physical facility[.]” the defendant consents to jurisdiction, the inventor conducted research, or where a party has a physical facility for a purpose other than creating venue in that jurisdiction.<sup>119</sup> This provision was, of course, drafted prior to the Supreme Court’s decision in *TC Heartland*; however, the provision had the potential to significantly reduce the ability of plaintiffs to travel nationwide to bring an infringement suit in a district that is likely to give a favorable decision. Following the *TC Heartland* decision, venue may no longer be a focus of patent reform, but time will tell if further legislative action should be taken in reducing a patent plaintiff’s ability to forum shop. Likewise, there may be increased manufacturing and research and development coming to the Eastern District of Texas in order for businesses to take full advantage of the most patent-friendly forum.

The fifth objective of the Act was to end the practice of bad faith demand letters. Demand letters are sent by the patent holding party and typically contain a cease and desist demand or a demand that the allegedly infringing party establish a license with the patent holder for its product.<sup>120</sup> NPEs are often associated with the use of vague demand letters “for the sole purpose of extracting financial concessions.”<sup>121</sup> The act stated that “[i]t is the sense of Congress that it is an abuse of the patent system and against public policy for a party to send out purposefully evasive demand letters to end users alleging patent infringement.”<sup>122</sup> The bill further stated that demand letters must contain “basic information about the patent in question, what is being infringed, and how it is being infringed.”<sup>123</sup> This provides the accused party with adequate information as to the legitimacy of the claims and allows the entity to better prepare a litigation strategy if they were to choose to defend themselves over succumbing to the demands of the NPE.

There were three additional proposed patent reform bills which addressed the issue of abusive demand letters by NPEs.

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119. *Id.*; Innovation Act, H.R. 9, 114th Cong. § 3 (2015).

120. YEH & LANZA, *supra* note 50 at 23.

121. *Id.* at 27.

122. H.R. REP. NO. 114-235, § 281B(e), at 6 (2015).

123. *Id.*

First, the Demand Letter Transparency Act of 2015 addressed necessary change to the content of demand letters.<sup>124</sup> The bill would require significant disclosure from the asserting entity of patent rights and ownership as well as information on the recipients and the history of patent assertion for entities sending more than twenty demand letters within a one-year period.<sup>125</sup> Additionally, the bill contained eighteen informational requirements that each demand letter must contain. These requirements included, but were not limited to, disclosure of information on the infringed patent, identification of claims infringed, detailed explanation of how the product infringes the patent, and information regarding the right of the asserting party to bring the patent infringement claim.<sup>126</sup> The objective of this bill was to eliminate the practice of abusive demand letters and to seize one of the legal weapons in the NPE arsenal, which is used to coerce allegedly infringing parties into submitting to the NPE's demands.

The remaining two proposed bills on demand letter reform were the Targeting Rogue and Opaque Letters ("TROL") Act<sup>127</sup> and the Support Technology and Research for Our Nation's Growth ("STRONG") Patents Act.<sup>128</sup> These two bills were identical in that they identified abusive demand letter practice as a violation of the Federal Trade Commission ("FTC") Act and authorized the FTC to enforce regulation against unfair or deceptive demand letters.<sup>129</sup> The separate bills outlined several instances in which demand letters may be classified as unfair or deceptive acts or practices: (1) if a sender of a demand letter acts in bad faith regarding the identity of parties or presence of current civil action;<sup>130</sup> (2) seeks compensation, in bad faith,

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124. See Demand Letter Transparency Act of 2015, H.R. 1896, 114th Cong. (2015).

125. *Id.* § 2.

126. *Id.* § 3.

127. H.R. 2045, 114th Cong. (2015) (TROL is a clever name that plays off of a name commonly given to NPEs, *patent trolls*, and stands for Targeting Rogue and Opaque Letters).

128. S. 632, 114th Cong. (2015) (STRONG stands for Support Technology and Research for Our Nation's Growth).

129. See H.R. 2045, § 2(a), at 3-6; S. 632, § 202(a).

130. H.R. 2045, § 2(a)(1); S. 632, §202(a)(1).

under an invalid patent,<sup>131</sup> or; (3) in bad faith, fails to include any of the following information; the identification of asserting entities and patent(s) infringed, identification of the infringed product, a description of how the product infringes, or the contact information for patent holder.<sup>132</sup> While the individual bills may have differed, they both addressed the need for the disclosure of information within the letters of the identity of asserting parties, identity of any patents infringed, and, specifically, how the patent has been infringed. These fundamental pieces of information allow the alleged infringer to seek legal counsel and begin discussing the merits of the accusations. Without such information, and in the current state of patent demand letters, the party may be left with insufficient information to prepare for litigation and may be confronted by a threat which has been made in bad faith to extort a license agreement from the party.

As discussed earlier, a fundamental difference between district court patent proceedings and USPTO patent contests is the burden of proof required for a showing of invalidity.<sup>133</sup> The USPTO currently requires the preponderance of the evidence standard while the district court requires clear and convincing evidence.<sup>134</sup> The issue that this creates, aside from general inconsistency, is a presumption of patent validity in district court and an emergence of anti-patent “death squads” in the USPTO.<sup>135</sup> While the Innovation Act was silent on the issue, the Senate’s PATENT Act sought to establish a presumption of claim validity for IPR and post grant review proceedings, while maintaining the current standard of preponderance of the evidence.<sup>136</sup> The STRONG Patents Act, however, sought to amend the standard in the USPTO proceedings to mirror that of the district court’s standard of proof of clear and convincing

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131. H.R. 2045, § 2(a)(2); S. 632, §202(a)(2).

132. H.R. 2045, § 2(a)(3); S. 632, § 202(a)(3).

133. *See supra* Introduction to The Patent System and Non-Practicing Entities.

134. *Id.*

135. *Id.*; *see* Pitts, *supra* note 40.

136. PATENT Act, S.1137, 114th Cong. § 11(b)(3), (1)(J)(2)(E) (2015) (this objective to create a universal standard of review between federal court and the USPTO is analogous to the argument that the NPEs asserted in *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2137 (2016)).

evidence.<sup>137</sup> This had the potential to create uniformity in the analyses used by the judicial and administrative entities, but more significantly, has the potential to return the PTAB to a pro-patent institution. Conversely, as discussed in *Cuozzo* above, the importation of the clear and convincing standard to the USPTO post-grant proceedings could potentially make it more difficult to invalidate unreasonably broad patents being asserted by NPEs.

Congress has been considering the next round of patent reform since the effects of the AIA have become apparent. The AIA did not sufficiently address the abuses of the patent system by NPEs, and the results are patently clear. Potential remedies to some of the largest issues are addressed in the proposed bills discussed above, but as of the 2016 presidential election, the bills have failed to make it out of Congress. With the transition of administrations comes other opportunities for patent reform from the executive branch of the United States Government.

#### IV. The Executive Branch: The Future of Reform

The proposed bills discussed above currently remain in the House and Senate with their destinies uncertain. The Obama Administration made significant progress in patent reform with the AIA, but President Obama himself admitted that it “only went about halfway to where we need to go.”<sup>138</sup> With his term coming to an end, President Obama was referred to as “the most hands-on policy-savvy president in the IP field that we’ve ever had[.]”<sup>139</sup> With his departure, President Obama has passed on the responsibility to see the remaining issues resolved.

The 2016 election has created a sweeping change in favor of the Republican Party, and the proposed patent reform bills have historically received mixed support by the Republican Party.<sup>140</sup>

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137. S. 632, §§ 102(c), 103(c).

138. The Obama White House, *President Obama Participates in a Fireside Hangout on Google+*, YouTube (Feb. 14, 2013), [https://www.youtube.com/watch?v=kp\\_zigxMS-Y](https://www.youtube.com/watch?v=kp_zigxMS-Y).

139. Coe, *supra* note 57.

140. See Republican/Conservative, MAPLIGHT, <http://maplight.org/us-congress/interest/J1100/bills> (last visited Feb. 12, 2018) (demonstrating Republican representatives both supporting and opposing past patent reform bills).



A revived Innovation Act is not likely to make progress in the 115<sup>th</sup> Congress, but it is likely that Senator Chris Coons will resubmit the STRONG Act in the coming Congress.<sup>141</sup> President Trump has remained relatively quiet on the issues of patent reform, with the exception of his desire to increase intellectual property law enforcement against countries such as China.<sup>142</sup> The Trump Administration calls for the implementation of changes on high-priority controversial issues, such as immigration bans, wall and pipeline construction, the defeat of ISIS, and the refocusing of the Environmental Protection Agency.<sup>143</sup> With the Administration's necessary focus on these crucial issues, it is likely that patent reform will be, initially, a low priority for the Trump Administration. However, the patent landscape is influenced by more than reform bills alone.

The most significant influence that President Trump will have on the patent system, in the absence of priority of reform, is his appointments. The prior Director of the USPTO, Michelle Lee was replaced by President Trump during the introduction of his Administration with Andrei Iancu.<sup>144</sup> The director "sets the tone for hiring and promoting administrative judges, examiners, and supervisors" which influences the agency's position and enforcement of patent rights.<sup>145</sup> Many had speculated as to who President Trump's nomination would be for the position. Predictions included Michelle Lee staying as the current director, Phil Johnson of Johnson & Johnson, or an individual from the pharmaceutical industry, but President Trump had not expressed an interest in any particular candidate until August

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141. Russell Binns, *Patents Under the Trump Administration*, LAW360 (Jan. 27, 2017, 3:29 PM), <https://www.law360.com/articles/885572/patents-under-the-trump-administration>.

142. *Id.*

143. Miriam Valverde, *What Trump has done in his first 100 days in office*, POLITIFACT (April 16, 2017), <http://www.politifact.com/truth-o-meter/article/2017/apr/26/what-trump-has-done-his-first-100-days-office/>.

144. Press Release, United States Patent and Trademark Office, Andrei Iancu Begins Role as New Director of United States Patent and Trademark Office (Feb. 8, 2018), <https://www.uspto.gov/about-us/news-updates/andrei-iancu-begins-role-new-director-united-states-patent-and-trademark>.

145. Steve Hall & Kate Van Namen, *The Impact of President Trump's IP-Related Appointments*, FINDING IP VALUE (Jan. 26, 2017), <https://findingipvalue.com/2017/01/26/the-impact-of-president-trumps-ip-related-appointments/>.

of 2017.<sup>146</sup>

Arguably, the most influential appointment comes from President Trump's Supreme Court appointment. President Trump's nominee, and newest Supreme Court Justice, Neil Gorsuch, filled the vacant position left by the late Antonin Scalia.<sup>147</sup> Gorsuch has not had a decision that enlightens us on his stance of the state of the patent system, but he has expressed his desire to do-away with *Chevron* deference.<sup>148</sup> *Chevron* was a Supreme Court decision that established a blueprint for reviewing courts to give administrative agencies deference on particular matters of agency expertise.<sup>149</sup> In the absence of *Chevron*, a reviewing court would review a claim *de novo*, and would strip away some of the USPTO's authority given to it in the *Cuozzo* decision.<sup>150</sup>

Removal of *Chevron* deference would put parties being subjected to lawsuits by NPEs at an even greater disadvantage. A company defending against an infringement claim by an NPE would bring an IPR proceeding to try and reduce the costs of litigation, and it would have the benefit of the preponderance of the evidence test favoring invalidation of a weak patents. Then, when the NPE's weak patent is invalidated, it could simply appeal to Federal Court, which would no longer have to give any deference to the USPTO, nor would it apply the same legal standard; rather, the court would apply the clear and convincing evidence test, which would favor the validation of the patent, and would essentially undo the expert decision of the PTAB.

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146. Binns, *supra* note 125; Gene Quinn, *Trump Nominates Andrei Iancu to be USPTO Director*, IPWATCHDOG (Aug. 26, 2017), <http://www.ipwatchdog.com/2017/08/26/trump-nominates-andrei-iancu-uspto-director/id=87362/>.

147. Julie Hirschfeld Davis, *Neil Gorsuch is Sworn In as Supreme Court Justice*, N.Y. TIMES (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/us/politics/neil-gorsuch-supreme-court.html>.

148. Scott Graham, *What to Expect From Neil Gorsuch on IP, Patents and Trade Secrets*, NAT'L L.J. (Feb. 13, 2017, 10:00 AM), <http://www.nationallawjournal.com/id=1202779049527/What-to-Expect-From-Neil-Gorsuch-on-IP-Patents-and-Trade-Secrets?slreturn=20170123154805>.

149. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984).

150. Lawrence Ashery, *The State of Judicial Deference to the USPTO*, LAW360 (Nov. 15, 2016, 12:45 PM), <https://www.law360.com/articles/859781/the-state-of-judicial-deference-to-the-uspto>.

With Supreme Court patent cases being so influential over the past several years, Neil Gorsuch may have a significant impact on the future of patent law. The impact is amplified by the possibility of additional Supreme Court appointments during Trump's presidency. While the outcome of future Supreme Court patent decisions are uncertain, what is certain is the need for reform in the patent system, the need for the promotion of fairness, the need to adhere to the principles of the Constitution, and the need for a shield against legitimate businesses of all sizes against the predators of the patent field.

## V. Conclusion

The patent system was implemented to promote scientific and technological advancements and provide inventors with a form of protection over their work. The protections were so fundamental that they appear in Article I of the Constitution. The accumulation of patent rights by non-practicing entities is contrary to these principals. NPEs abuse the legal system by exercising blatant forum shopping, sending abusive and vague demand letters, enforcing patents with subject matter that is on the fringe of patentability, forcing licensing agreements and settlement payments from companies that produce products in good faith, hiding behind shell corporations to avoid liability, and costing innocent companies millions of dollars in legal fees to succeed in litigation. There is potential to eliminate these practices through upcoming Supreme Court decisions, proposed legislation in Congress, and new presidential appointments that will influence the future of patent reform. Regardless of the governmental avenue, reform is justified for the sake of innovation and for the sake of upholding the principles found within the United States Constitution.