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Anticompetitive until Proven Innocent: An Antitrust Proposal to Embargo Covert Patent Privateering Against Small Businesses

Kyle R. Kroll

Note

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*Kyle R. Kroll**

Imagine you are a corporate juggernaut, a titan of industry, a business behemoth, the figurative 800-pound gorilla—the prospective monopolist, perhaps. For the most part, you dominate your industry in terms of market share, sales, and reputation.[1] Your success in business has enabled you to spend sizeable amounts of money in research and development (R&D), and as a result you have an extensive portfolio of patents and other intellectual property.[2]

Business is good, but you are not without faults. New startups constantly force you to adapt and enhance your products and services, costing you enormous financial resources. And because you are larger, it usually takes you longer to respond and pivot to counter smaller competitors.[3] New rivals present a very real danger to your continued dominance. Your

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1. *See Microeconomics—Characteristics of Monopolies*, INVESTOPEDIA, http://www.investopedia.com/exam-guide/cfa-level-1/microeconomics/characteristics-monopolies.asp (last visited Apr. 4, 2015).

2. *See* Maximilian A. Grant et al., *Getting Your House in Order: Patent Ownership and the Corporate Structure*, BLOOMBERG BNA (Mar. 8, 2012), http://www.bna.com/patent-ownership-and-the-corporate-structure.

3. Anita Campbell, *Are Big Companies Better Innovators than Small Ones?*, OPEN FORUM (Mar. 6, 2012), https://www.americanexpress.com/us/small-business/openforum/articles/are-big-companies-better-innovators-than-small-ones ("Corporations move at a glacial pace. They may be faster now, but 'fast' is still a relative term when you're talking about multinational firms. . . . Small companies have the advantage when it comes to innovation.").

patents do not perfectly "cover" their inventions, but it may be plausible to convince a court that your rivals are infringing on at least some aspects.[4] Although patent litigation is expensive, you have a large war chest, and you know that small companies often crumble under the weight of a patent infringement suit.[5] But if you sue competitors, that might harm your pristine reputation with consumers, business partners, and regulators.[6] And it might result in counter-suit.

Your lawyers tell you that in recent decades, a new model of patent litigation has emerged. Instead of suing infringers in their own names, "practicing"[7] companies are now outsourcing patent litigation to non-practicing patent assertion entities (PAEs, a name used by the Federal Trade Commission).[8] Outsourcing patent litigation to PAEs is often cheaper, more lucrative, and very effective, but most importantly, PAEs allow practicing companies to secretly manipulate and hinder rivals via patent litigation.[9]

While outsourcing patent litigation to PAEs may be beneficial to a hypothetical large business, experts and policy-makers are concerned about the negative effects such arrangements may have on competition and consumers.[10] Commentators ar-

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4. *See, e.g.*, Todd Hixon, *For Most Small Companies Patents Are Just About Worthless*, FORBES (Oct. 4, 2013), http://www.forbes.com/sites/toddhixon/2013/10/04/for-most-small-companies-patents-are-just-about-worthless ("[F]requently two issued patents arguably describe the same thing."). The doctrine of equivalents may provide broader coverage, at least facially.

5. *See infra* Part II.A (describing the effects of patent litigation on small businesses).

6. *See infra* note 58; *see also* Michelle Cramer, *Being Sued by Big Business Competition*, GREATFX PRINTING (Oct. 27, 2015), http://buzz.greatfxprinting.com/being-sued-by-big-business-competition.htm (describing one small business entrepreneur's tactic of using online public relations to "get the public on his side and put the heat on [his larger competitor]").

7. Companies that "practice" their patents are those which actually create products and services based on their patented inventions. *See* Kailash Choudhary & Priyanka Rastogi, *Non Practicing Entities (NPEs) and Their Impacts*, LEXOLOGY (Sept. 29, 2012), http://www.lexology.com/library/detail.aspx?g=2bc351e0-c393-4637-9c38-306ff7713557.

8. *See, e.g.*, *Patent Assertion Entities (PAE) Study*, FED. TRADE COMM'N, https://www.ftc.gov/policy/studies/patent-assertion-entities-pae-study (last visited Apr. 4, 2016).

9. *See infra* Part I.B.4.

10. *See* Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2129–70 (2013) (examining the economics of patent assertion by trolls and practicing entities); *cf.* eBay Inc. v.

gue that PAE patent litigation stifles investment and innovation.[11] For this reason in particular, policy-makers are wary of PAEs,[12] especially now that PAEs bring over half of all patent lawsuits.[13] News stories and research also confirm that the hypothetical scenario explained above is increasingly a reality.[14]

"Privateering" is a very concerning and increasingly popular PAE arrangement. In privateering, PAEs are directed—or "privateered"—by "sponsor" companies and used to harass those companies' rivals and raise rivals' costs.[15] In its most primitive form, privateering entails patent litigation brought by a PAE against tens to hundreds of targeted companies—usually rivals of the sponsor. When successful, privateering directly benefits the PAE through settlement or damages awards. But this reward is insignificant in comparison to the indirect benefits that inure to the sponsor as a result of reduced competition.

In recent decades, scholars have criticized PAEs.[16] They have focused on addressing "patent trolls"—an older and more-

MercExchange, L.L.C., 547 U.S. 388, 398 (2006) (Kennedy, J., concurring) (recognizing and criticizing patent trolls).

11. Tom Ewing, *Indirect Exploitation of Intellectual Property Rights by Corporations and Investors*, 4 HASTINGS SCI. & TECH. L.J. 1, 5 (2012) (stating that privateering is a competitive tool); Lemley & Melamed, *supra* note 10, at 2124; *see also* Stephen Kiebzak et al., *The Effect of Patent Litigation and Patent Assertion Entities on Entrepreneurial Activity*, 45 RES. POL'Y 218, 229 (2016) (stating that over $21 billion in venture capital has been withheld due to PAE patent litigation).

12. *See, e.g.*, *FTC Seeks To Examine Patent Assertion Entities and Their Impact on Innovation, Competition*, FED. TRADE COMM'N (Sept. 27, 2013), https://www.ftc.gov/news-events/press-releases/2013/09/ftc-seeks-examine-patent-assertion-entities-their-impact.

13. Lemley & Melamed, *supra* note 10, at 2123.

14. *See* Ian D. McClure, *From a Patent Market for Lemons to a Marketplace for Patents: Benchmarking IP in Its Evolution to Asset Class Status*, 18 CHAP. L. REV. 759, 778 (2015) (listing numerous examples of "creative patent transactions and privateering deals structured by companies since 2008"); *see also* Florian Mueller, *Privateering: Let's Name and Shame Companies That Feed Patent Trolls—Please Help Complete the List*, FOSS PATENTS (May 12, 2015), http://www.fosspatents.com/2015/05/privateering-lets-name-and-shame.html (listing transfers from Apple, BlackBerry, British Telecom, Ericsson, Huawei, Nokia, Sony, and Panasonic to patent privateers).

15. *See* Tom Ewing, *Practical Considerations in the Indirect Deployment of Intellectual Property Rights by Corporations and Investors*, 4 HASTINGS SCI. & TECH. L.J. 109, 111–14 (2012); Mark S. Popofsky & Michael D. Laufert, *Patent Assertion Entities and Antitrust: Operating Company Patent Transfers*, ANTITRUST SOURCE, Apr. 2013, at 1.

16. *See, e.g.*, *Economists' Roundtable on Hot Patent-Related Antitrust Issues*, ANTITRUST, Summer 2013, at 10; *see also* Thomas H. Chia, Note,

publicized type of PAE—but have not addressed patent privateering. And those who have addressed patent privateering have thus far focused only on the legal implications of the acquisition and aggregation of patents by a PAE, but not sponsored litigation against targeted rivals.[17] Some scholars assert that the best way to address PAE patent litigation is to reform patent law instead of reforming or employing other areas of law, such as antitrust law.[18] However, Congress has been slow to act in addressing defects in patent law,[19] so the development of other solutions may be necessary to address patent privateering.

Commentators are optimistic that antitrust law can provide answers.[20] Among the existing commentary, though, scholars have primarily focused on the effects of patent privateering on business at-large; they have not focused on how small businesses—those most likely to be targets of patent privateering[21]—are affected. Thus, the existing commentary overlooks the most pressing patent privateering concerns.

This Note analyzes how current U.S. antitrust law could be applied to address patent privateering against small businesses. Part I explores the history, logistics, and effects of PAE privateering and reviews relevant patent and antitrust laws. Part II analyzes attempts to apply antitrust law to patent privateering against large companies and considers similar applications to patent privateering against small businesses. Part III recommends Congress, regulators, or the courts adopt a rebuttable

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Fighting the Smartphone Patent War with RAND-Encumbered Patents, 27 BERKELEY TECH L.J. 209, 213 (2012) (discussing the debate).

17. *See* Mark S. Popofsky & Michael D. Laufert, *Antitrust Attacks on Patent Assertion Entities*, 79 ANTITRUST L.J. 445 (2014); Justin R. Orr, Note, *Patent Aggregation: Models, Harms, and the Limited Role of Antitrust*, 28 BERKELEY TECH. L.J. 525, 555–68 (2013).

18. *See* Lemley & Melamed, *supra* note 10, at 2171–72; Robert A. Matthews, Jr., *Antitrust Claims Against Patent Assertion Entities*, 5 ANNOTATED PATENT DIGEST § 34:54.50 (2016); Orr, *supra* note 17.

19. For example, a bill directed specifically at patent trolls failed to make it out of committee in 2014. Joe Mullin, *How the Patent Trolls Won in Congress*, ARS TECHNICA (May 23, 2014), http://arstechnica.com/tech-policy/2014/05/how-the-patent-trolls-won-in-congress.

20. *See* Susan E. Foster, *Intellectual Property Antitrust: The Pendulum Swings*, *in* RECENT DEVELOPMENTS IN ANTITRUST LAW 93 (2013); Matthew J. Reilly, *Trending Issues in Antitrust Law and Practice Tips on Avoiding and Responding to Antitrust Investigations*, *in* RECENT DEVELOPMENTS IN ANTITRUST LAW, *supra*, at 79; Orr, *supra* note 17.

21. *See* Colleen V. Chien, *Startups and Patent Trolls*, 17 STAN. TECH. L. REV. 461, 464–66 (2014).

presumption of antitrust liability and explains why other proposals would inadequately address patent privateering. This solution will counteract the practical difficulties faced by small businesses when sued by patent privateers and the related anticompetitive market effects.

I. PRIVATEERING, PATENTS, AND ANTITRUST LAW

This Part surveys patent privateering: its history, structure, strategy, effects, and the applicable law. It begins by reviewing relevant U.S. patent law in Section A. Section B then offers an explanation of how patent privateering is conducted, along with a discussion of why it is popular and its effects. Lastly, Section C briefly explains relevant antitrust law.

A. UNITED STATES PATENT LAW

Patent holders have the right to exclude all others from "making, using, or selling in the United States the invention claimed by the patent for twenty years."[22] Most scholars agree that patent rights benefit society at large by incentivizing R&D and invention.[23] Patents do this by enabling patent-holding inventors to recoup costs and profit from invention, encouraging the sharing of inventions and licensing to others, and reducing wasteful, duplicative R&D.[24] In this way, patent grants are crucial elements in a competitive system because they encourage competition between inventors to create and innovate.[25] In essence, patents form an essential part of the competitive economic landscape in the United States.

Patent rights are enforced through litigation,[26] and in the past decade, patent infringement suits have increased dramati-

22. FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY 2 (2003) [hereinafter FTC REPORT].

23. *See, e.g.*, JEFFREY H. MATSUURA, JEFFERSON VS. THE PATENT TROLLS: A POPULIST VISION OF INTELLECTUAL PROPERTY RIGHTS 1–2 (2008).

24. *Id.*

25. *E.g.*, William Wynne, *Patent Wars, Trolls, and Privateers: Killing Innovation, Death by 1,000 Lawsuits*, 47 NEW ENG. L. REV. 1009, 1014 (2013).

26. *See* 35 U.S.C. § 154(a)(1)–(2) (2012) ("Every patent shall contain . . . the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States . . . . for a term beginning on the date on which the patent issues and ending 20 years from the date on which the application for the patent was filed . . . ."); *id.* § 271 (defining infringement and creating a cause of action for infringement).

cally.[27] There are a variety of reasons for this increase, one of which is product complexity. Advanced tech products rely on thousands of patents at once; for example, a typical smartphone may involve as many as 250,000 different patents.[28] It is therefore easy for a smartphone manufacturer to infringe on at least one patent, perhaps inadvertently. Additionally, companies are constantly developing new patents based on past patented inventions, leading to overlapping patent rights and increasing the likelihood of infringement.[29] This may also be a byproduct of over-issuance of patents.[30]

Some competitors intend to use patent rights competitively and patent litigation as a competitive tactic.[31] This form of predatory patent litigation is most common in industries built primarily on intellectual property capital (e.g., high-tech industries), where the innovation is incremental and patents overlap and are interchangeable.[32] Firms engaging in predatory litiga-

27. *See* Amy G. O'Toole, *Recent Governmental Initiatives and Findings Addressing NPE Litigation—Are There Any Judicial Solutions?*, *in* NON-PRACTING ENTITY PATENT LITIGATION 2013: PLAINTIFF AND DEFENSE PERSPECTIVES 67 (R. David Donoghue ed., 2013). In recent years, patent litigation has abated, however. Richard Lloyd, *The Number of Litigants in US Patent Suits Drops to Lowest Level Since 2009*, IAM (Feb. 15, 2015), http://www.iam-media.com/blog/detail.aspx?g=7eed4cea-1687-4769-87e3-caee8fcb8c74; *see also* Wynne, *supra* note 25, at 1016.

28. Wynne, *supra* note 25, at 1017–18. Of note, commentators estimate that patent royalties paid by smartphone manufacturers may exceed $120 for every device. *See* Thibault Schrepel, *Patent Privateering—Patents as Weapons*, CTR. FOR POL'Y STUDIES (Oct. 28, 2014), http://www.cps.org.uk/blog/q/date/2014/10/28/patent-privateering-patents-as-weapons.

29. The Doctrine of Equivalents is intended to address this problem. *Relationship to the Doctrine of Equivalents*, U.S. PATENT & TRADEMARK OFFICE, http://www.uspto.gov/web/offices/pac/mpep/s2186.html (last visited Apr. 4, 2016).

30. *See generally* Michael D. Frakes & Melissa F. Wasserman, *Does the U.S. Patent and Trademark Office Grant Too Many Bad Patents?: Evidence from a Quasi-Experiment*, 67 STAN. L. REV. 613, 676 (2015) ("Our results suggest that the inability of the PTO to finally rid itself of an application biases it toward granting patents.").

31. *See* Colleen V. Chien, *Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*, 87 N.C. L. REV. 1571, 1587–88 (2009); Michael J. Meurer, *Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation*, 44 B.C. L. REV. 509, 512 (2003); Charles Duan, *Big Businesses Are Filing Frivolous Patent Lawsuits To Stifle Innovative Small Competitors*, FORBES (Feb. 24, 2014), http://www.forbes.com/sites/realspin/2014/02/24/big-businesses-are-filing-frivolous-patent-lawsuits-to-stifle-innovative-small-competitors.

32. *See* Chien, *supra* note 31, at 1589; *see also* Ewing, *supra* note 11, at 30 (stating that privateering is more prevalent in industries where patents are

tion tactics tend to target "less financially-established defendants" (usually small or new competitors), a combination that epitomizes a David vs. Goliath scenario.[33]

B. PATENT PRIVATEERING: THE WHO, WHAT, WHEN, WHERE, HOW, AND WHY

Recall that patent privateering involves concerted activity between a PAE and a sponsor company.[34] This Section explores the history of patent privateering, PAE activities, the privateering relationship, why privateering is popular, and the general effects of PAE activities.

1. Use of PAEs in Patent Privateering

Regulators first recognized PAEs as early as 2003.[35] By 2006, PAEs gained the attention of the Supreme Court, raising their national profile and spurring debate.[36] Since then, the number of PAEs and suits brought by them has increased dramatically.[37] Each branch of the federal government and many state governments are investigating PAE business models.[38] Nevertheless, most information about PAE ownership and activities remains unknown.[39] And the state and federal governments have only attempted to address small parts of the problem.[40]

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interchangeable because this makes it easier for the privateer to assert infringement with some apparent validity).

33. *See* Chien, *supra* note 31, at 1592.

34. *See supra* p. 2168.

35. *See* FTC REPORT, *supra* note 22, at 38–39. Scholars suggest that PAEs first popped up much earlier, though with less prominence. *See* Tom Ewing & Robin Feldman, *The Giants Among Us*, 2012 STAN. TECH. L. REV. 1, 15–16.

36. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 396 (2006) (Kennedy, J., dissenting).

37. Lemley & Melamed, *supra* note 10, at 2123; Jon Leibowitz, Chairman, Fed. Trade Comm'n, Opening Remarks at the Patent Assertion Entity Workshop 3 (Dec. 10, 2012), https://www.ftc.gov/sites/default/files/documents/public_events/patent-assertion-entity-activities-workshop/121210paeworkshop.pdf.

38. *See* O'Toole, *supra* note 27, at 66.

39. *See* Ewing & Feldman, *supra* note 35, at 3–4.

40. Efforts so far have mostly addressed patent trolls threatening litigation against thousands of small businesses at once. *See FTC Settlement Bars Patent Assertion Entity from Using Deceptive Tactics*, FED. TRADE COMM'N (Nov. 6, 2014), https://www.ftc.gov/news-events/press-releases/2014/11/ftc-settlement-bars-patent-assertion-entity-using-deceptive (stating that the number of letters sent by the PAE was over 9,000); Pamela M. Prah, *State AGs Target Patent Trolls To Protect Business*, USA TODAY (Nov. 25, 2013), http://

Many PAEs are sponsored and operate for the benefit of others.[41] Universities, individual inventors, and technology development companies that do not practice their patents may engage in PAE sponsorship to protect their patent rights.[42] But major Fortune 500 companies and even sovereign nations use PAEs not only to protect patents and generate royalties from infringers, but also for competitive purposes.[43] For them, the competitive interests involved in harassing a rival or perceived corporate threat overshadows any economic interests.[44] Their PAEs litigate hundreds of patent infringement lawsuits against rivals and threats to their own economies.[45] It is thus perhaps unsurprising that PAEs bring more than 60% of U.S. patent litigation.[46]

The rise in patent privateering, which involves PAEs, has been controversial because it carries the potential of anticompetitive abuse.[47] In particular, regulators worry about PAE in-

www.usatoday.com/story/news/nation/2013/11/25/state-ag-patent-trolls/3696889.

41. *See* Ewing, *supra* note 11.

42. *See id.* at 6; *see also* Christopher A. Cotropia et al., *Unpacking Patent Assertion Entities (PAEs)*, 99 MINN. L. REV. 649, 666–70 (2014) (discussing the different kinds of patent holding companies); Ewing, *supra* note 11, at 25 (discussing the same); David Segal, *Has Patent, Will Sue: An Alert to Corporate America*, N.Y. TIMES (July 13, 2013), http://www.nytimes.com/2013/07/14/business/has-patent-will-sue-an-alert-to-corporate-america.html.

43. Ewing, *supra* note 11, at 3, 30–31; Ewing & Feldman, *supra* note 35, at 6; Brenda Sandburg, *You May Not Have a Choice. Trolling for Dollars*, RECORDER, July 30, 2001, at 3–6, https://perma-archives.org/ware/XPX8-JU9T/id_/file:/XPX8-JU9T/cap.pdf; Hosuk Lee-Makiyama, *What the U.S. Can Learn from the EU's Patent Mistakes*, FORBES (June 8, 2015), http://www.forbes.com/sites/realspin/2015/06/08/what-the-u-s-can-learn-from-the-eus-patent-mistakes; Jeff J. Roberts, *Google and Microsoft's Patent Peace: 3 Unresolved Questions*, FORTUNE (Oct. 1, 2015), http://fortune.com/2015/10/01/google-microsoft-patent-analysis.

44. Ewing & Feldman, *supra* note 35, at 6.

45. *See* EXEC. OFFICE OF THE PRESIDENT, PATENT ASSERTION AND U.S. INNOVATION 1 (2013), http://permanent.access.gpo.gov/gpo37258/patent-report.pdf (reporting that PAEs threatened over 100,000 companies in 2012 and that the number is rising); Colleen Chien, Presentation in the Patent Entity Activities Workshop (Dec. 10, 2012), http://www.ftc.gov/opp/workshops/pae.

46. Leslie A. Gordon, *"Patent Privateers" Do Legal Legwork for Big-Time Tech Companies*, A.B.A. J. (July 1, 2013), http://www.abajournal.com/mobile/mag_article/small_companies_pick_up_the_cost_of_patent_privateering_litigation. This number continues to rise. *See* Stefani E. Shanberg & Joshua A. Baskin, *NPEs in the ITC*, *in* NON-PRACTICING ENTITY PATENT LITIGATION 2013, *supra* note 27, at 51; Chien, *supra* note 45; Stephanie Mlot, *Google Program Fights Patent Trolls, Aids Start-ups*, PCMAG (July 24, 2015), http://www.pcmag.com/article2/0,2817,2488392,00.asp (reporting 68%).

47. *See* Gordon, *supra* note 46.

volvement in the healthcare and technology industries because these sectors are economically substantial, implicate many patent rights, and have historically "been subject to a great deal of antitrust enforcement activity due to . . . alleged use of patents to exclude or limit competition."[48] Yet, no federal agency has taken any steps to break the swell.

2. Privateering's Core Activities: Aggregation and Litigation

Privateering comprises two core activities: the aggregation and litigation of patents. Aggregation is the amassing of "vast treasuries of patents" and forming a patent arsenal.[49] The aggregation of thousands of patents shifts the focus from the value of one patent to the size and diversity of a portfolio, which can be wielded like a club and pose a substantial threat to litigation targets facing hundreds of infringement allegations at once from a single PAE.[50] But this is not to say that the patents held by mass aggregators are always weak;[51] some are strong, making the threat of the club more intimidating and the seriousness of the suit hard to predict.[52] This club can be "life threatening" when brandished against startups and small companies.[53]

The relative threat of a patent infringement lawsuit depends on the size of the PAE's patent arsenal.[54] A larger patent arsenal enables a PAE to assert more infringement claims against a single target or against multiple targets and do so more credibly.[55] Either approach often results in nudging rivals into less favorable competitive positions[56] because the high cost

48. Reilly, *supra* note 20, at 85.

49. Ewing & Feldman, *supra* note 35, at 1.

50. *See* Lemley & Melamed, *supra* note 10, at 2153; Orr, *supra* note 17, at 538.

51. *See* John R. Allison et al., *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO. L.J. 677, 681 (2011).

52. *See* David L. Schwartz, *On Mass Patent Aggregators*, 114 COLUM. L. REV. SIDEBAR 51, 58 (2014).

53. *See id.* (stating that "mass patent aggregators may be vehicles that favor established players over upstarts").

54. *See, e.g.*, Ewing, *supra* note 11, at 34–35; Wynne, *supra* note 25, at 1024–25.

55. *Economists' Roundtable on Hot Patent-Related Antitrust Issues*, *supra* note 16, at 18.

56. Ewing, *supra* note 11. A less favorable position may mean market exclusion or increased costs through payment of settlement royalties, making the targets less competitive. *Id.*

of defending a suit incentivizes settlement or exit from the industry.[57]

Both litigation and aggregation have been wildly successful strategies for sponsor companies, padding the bottom line with additional revenue, while eliminating other patent litigation risks such as infringement counter-suits (since the PAE does not practice any patents) and reputation costs (with customers, shareholders, partners, or standard-setting entities).[58] Secrecy also eliminates the risk of responses by regulators.[59] Since there are very few consequences, more and more large companies have seen patent privateering as a way to generate new and additional revenue or gain competitive benefits in the wake of the 2008 Great Recession.[60] As a result, these activities are increasing in volume, frequency, and aggressiveness.[61]

3. How Sponsor Companies Structure a Privateering Relationship

There are at least three common types of patent privateering relationships. Public disclosure is a sponsor's greatest potential liability, so any privateering arrangement must be stealthy.[62] Secrecy limits a rival's ability to retaliate against the

57. *See* Brief of Public Knowledge & the Electronic Frontier Foundation as Amici Curiae Supporting Neither Party at 17, Altera Corp. v. Papst Licensing GmbH & Co. KG, Nos. 15-1914, 15-1919 (Fed. Cir. 2015), https://www.eff.org/files/2015/12/21/brief-altera-v-papst.pdf ("[Small companies] are . . . the ones most likely to succumb to undue settlement pressure . . . ."). Note also that the average cost of patent litigation involving a PAE is about $980,000 through the end of discovery and $1.75 million or more through trial. R. David Donoghue et al., *Fighting Smarter Against NPEs*, *in* NON-PRACTICING ENTITIES PATENT LITIGATION 2013, *supra* note 27, at 202; *see also* Wynne, *supra* note 25, at 1022.

58. *See, e.g.*, *Anti-Competitive Effects: Litigation & Extortion*, PATENT PROGRESS, http://www.patentprogress.org/systemic-problems/anticompetitive-effects-litigation-extortion (last visited Apr. 4, 2016); Jason Rantanen, *Guest Post on Using the Antitrust Laws To Police Patent Privateering*, PATENTLY-O (June 3, 2013), http://patentlyo.com/patent/2013/06/guest-post-on-using-the-antitrust-laws-to-police-patent-privateering.html; *see also* Popofsky & Laufert, *supra* note 15, at 4.

59. For example, the Department of Justice would not be able to discern a pattern of predatory litigation by a market leader and bring criminal charges under the Sherman or Clayton Acts.

60. *See* McClure, *supra* note 14.

61. *See* Schwartz, *supra* note 52, at 53; *The Patent Troll Problem*, LOT NETWORK, http://lotnet.com/the-patent-troll-problem (last visited Apr. 4, 2016).

62. *Cf.* Ewing, *supra* note 11, at 6 (explaining that "a sponsor's goals for a privateering operation are often defeated by public exposure" and that

sponsor with counterclaims for patent infringement or antitrust violations, harm the sponsor's reputation, complain to regulators about a larger competitor's predatory conduct, or respond to lawsuits in a more calculated way.[63]

First, a sponsor company may license one of its patents to a PAE.[64] Through the licensing agreement, the PAE is granted the exclusive right to assert the patent against infringers and litigate the patent in court. The licensing agreement may also provide the sponsor with some control over the PAE's patent infringement lawsuits.[65] But unlike other relationships, here sponsor secrecy can be disclosed via discovery.[66] In some cases, licensing may also limit a PAE's standing to bring suit.[67]

Second, a sponsor company may contract with a PAE in the hopes of compelling the PAE to use its own patents to sue the sponsor's rivals.[68] A sponsor could also invest in the PAE.[69] In such cases, the sponsor may be able to obtain greater secrecy since no patent assertion contract would exist, and the sponsor would exercise control over the PAE as a private part-owner.[70]

Third, and the most likely, the sponsor company could assign its patents to a PAE, but retain a license for practicing the patent.[71] The assignor-sponsor could also contract for the ability to direct assertions against rivals[72] or hold ownership in the PAE.[73] Because patent assignments are not required to be recorded, the secrecy of a privateering arrangement can be main-

"[c]onsequently, the sponsor typically makes every effort to hide its involvement in a privateering option").

63. *Id.* at 9.

64. *See* Lemley & Melamed, *supra* note 10, at 2139 ("[C]ompanies rarely sell their 'crown jewels'—patents that they need to prevent copying of technologies they consider critical . . . .").

65. *See, e.g.*, Wynne, *supra* note 25, at 1026. The license may instead simply provide guiding principles for how to choose a litigation target. *See* Lemley & Melamed, *supra* note 10, at 2138.

66. *See* Alan Devlin, *Antitrust Limits on Targeted Patent Aggregation*, 67 FLA. L. REV. 775, 835 (2015); Popofsky & Laufert, *supra* note 17, at 460.

67. *See* Max Grant & Kieran Dickinson, *Cases on Standing Hold Lessons for Patent Privateers and Defendants*, MANAGING IP, Oct. 2013, at 22, https://www.lw.com/thoughtLeadership/standing-lessons-for-privateers-and-defendants.

68. *See* Ewing, *supra* note 11, at 5–6, 33.

69. *Id.* at 73.

70. *See id.*; Lemley & Melamed, *supra* note 10, at 2138.

71. *See* Orr, *supra* note 17, at 541.

72. *Economists' Roundtable on Hot Patent-Related Antitrust Issues*, *supra* note 16, at 20.

73. *See* Ewing, *supra* note 11, at 5–6.

tained.[74] While this arrangement may provide the sponsor with significant control, secrecy could be compromised if the corporate veil is pierced.[75] Evidence suggests this arrangement is most common.[76]

Due to the desire for secrecy, either the second or third type of relationship is both popular and effective in securing the anticompetitive effects of patent privateering.

4. Privateering's Advantages for Sponsors and Negative Effects for Everyone Else

The significant incentives for sponsors to engage in privateering have undoubtedly propelled privateering's growth in recent years. Privateering offers litigation cost savings to sponsors,[77] may result in the receipt of larger settlements and judgment awards,[78] and enables the sponsor company to focus on its actual business.[79] Beyond financial benefits, patent privateering also reduces reputational losses and other consequences from suing competitors,[80] allows sponsors to secretly bombard

74. *See, e.g.*, Susan G.L. Glovsky, *Guest Post: It's Time for a Reliable System To Determine Who Owns a U.S. Patent*, PATENTLY-O (Mar. 6, 2012), http://patentlyo.com/patent/2012/03/patent-recordation.html (remarking that "defendants in a lawsuit may have to take it on faith that the seller, licensor, borrower, or plaintiff truly owns" the patent-in-suit). When patent assignments are recorded, they can be viewed online. *See Assignment Search*, U.S. PATENT & TRADEMARK OFFICE, http://assignment.uspto.gov (last visited Apr. 4, 2016).

75. *See* Gordon, *supra* note 46. However, PAEs can create shell companies to create further layers of secrecy to slim the risks of piercing. *See* Wynne, *supra* note 25, at 1032–33; *see also* David Balto & Matthew Lane, Abstract for The Patent Privateering Iceberg (Feb. 7–8, 2014) (unpublished manuscript), http://law.scu.edu/hightech/wipip2014 ("NPEs often employ a complicated ownership structure consistent of many shell companies to hide patent ownership.").

76. "Sales to PAEs and other non-practicing entities represent 75 per cent of all patent transactions." Popofsky & Laufert, *supra* note 15, at 2.

77. *See id.* at 4; *cf.* PATENT LITIGATION: LITIGATING AGAINST A NON-PRACTICING ENTITY, PRACTICAL LAW PRACTICE NOTE 5-553-7946 (2016) [hereinafter PATENT LITIGATION PRACTICE NOTE] (stating that PAEs often sue using largely the same counsel, experts, and evidence); *Economists' Roundtable on Hot Patent-Related Antitrust Issues*, *supra* note 16, at 19; Chien, *supra* note 45 (stating that most PAEs litigate on contingency and have attorneys well-versed in patent litigation).

78. *See* PATENT LITIGATION PRACTICE NOTE, *supra* note 77.

79. Orr, *supra* note 17, at 541; *see* Gordon, *supra* note 46 (stating that few companies can successfully manage commercializing patents and running their core business operations).

80. *Economists' Roundtable on Hot Patent-Related Antitrust Issues*, *supra* note 16, at 19; *see* Ewing, *supra* note 11, at 6–7; Schwartz, *supra* note 52, at

rivals,[81] helps achieve competitive results,[82] and reduces the risk of antitrust violations (due to the secrecy of the sponsor's identity).[83] It also allows large competitors to "control the location the case will be heard" as well as to gain various jurisdictional advantages.[84]

Privateering has also thrived in the current patent environment, which entails the under-utilization and under-capitalization of patents,[85] a proliferation of weak and overly-broad patents,[86] increased outsourcing of functions by corporate America,[87] high patent litigation costs,[88] the ability to easily engage in opportunistic litigation and secure favorable settlements,[89] a large patent marketplace for purchasing patent rights,[90] legal uncertainty regarding the merit of infringement accusations,[91] and prohibitive costs in amassing large, defensive patent arsenals.[92]

53; Wynne, *supra* note 25, at 1021.

81. *See generally* Ewing, *supra* note 11 (discussing how sponsors use PAEs to stifle competitors).

82. *Id.* at 31, 46 (stating that PAEs can more credibly threaten to sue for patent infringement); *see* Lemley & Melamed, *supra* note 10, at 2139–46.

83. Wynne, *supra* note 25, at 1032–33.

84. *See* Brief of Public Knowledge & the Electronic Frontier Foundation as Amici Curiae Supporting Neither Party, *supra* note 57, at 15–18.

85. *Economists' Roundtable on Hot Patent-Related Antitrust Issues*, *supra* note 16, at 11; Steven Seidenberg, *Should Your Company Enlist Patent Privateers?*, INSIDE COUNSEL (Feb. 26, 2013), http://www.insidecounsel.com/2013/02/26/should-your-company-enlist-patent-privateers.

86. MATSUURA, *supra* note 23, at 23; *see Economists' Roundtable on Hot Patent-Related Antitrust Issues*, *supra* note 16.

87. *See* Ewing, *supra* note 11, at 14; *see also* Lemley & Melamed, *supra* note 10, at 2165–66 (stating that there is an "everyone does it" attitude with privateering); Seidenberg, *supra* note 85.

88. *See, e.g.*, Chien, *supra* note 31, at 1584; Seidenberg, *supra* note 85.

89. *See* John M. Golden, *Patent Privateers: Private Enforcement's Historical Survivors*, 26 HARV. J.L. & TECH. 545, 590–91 (2013).

90. Meurer, *supra* note 31, at 519–20.

91. *See, e.g.*, Florian Mueller, *Nokia and Ericsson Seek To Justify Their Privateering Ways, Defend Patent Transfers to NPEs*, FOSS PATENTS (May 21, 2005), http://fosspatents.com/2015/05/nokia-and-ericsson-seek-to-justify.html ("Smartphone patent assertions are so vastly unsuccessful that I've arrived at the conclusion that the term 'intellectual property' is a propagandistic misnomer . . . . [W]hen the vast majority of assertions turn out meritless . . . transaction costs are totally out of proportion . . . .").

92. *See, e.g.*, Schrepel, *supra* note 28 (discussing briefly the mutually assured destruction theory of patent ownership); *see also* Chien, *supra* note 31, at 1584–85 (discussing the complications, risks, and expenses of patent litigation between large companies).

Nevertheless, privateering may face some disadvantages. For example, judges and juries tend to view PAE claims unsympathetically.[93] Further, the possibility of obtaining an injunction against a target is smaller since PAEs do not practice the patents-in-suit.[94] A PAE also cannot obtain damages for lost profits that the sponsoring company might otherwise collect.[95] However, since privateering is not primarily purposed on collecting royalties or enjoining alleged infringement, experts predict privateering will become even more widespread in the future.[96] And it is not so much the likelihood of success on the merits, but instead the high likelihood of forcing a defendant to settle out of court that enables this litigation model.[97]

Most criticisms of patent privateering relate to the effect patent privateering has on other actors in the patent system. For example, patent privateering interferes with innovation by increasing litigation costs to inventors,[98] forcing competitors to withdraw from the market,[99] facilitating bully-like behavior among actors in the patent system,[100] taxing "business, investment, growth and opportunity,"[101] and encouraging settlement

93. PATENT LITIGATION PRACTICE NOTE, *supra* note 77.

94. *Id.*

95. *Id.*

96. Seidenberg, *supra* note 85 ("It lowers companies' risk and puts the burden of enforcement on others. I don't see why this [trend] would stop." (internal quotation marks omitted) (quoting Matthew Rappaport, managing director of patent analytics company IP Checkups)).

97. *See infra* Part II.A.

98. *See* EXEC. OFFICE OF THE PRESIDENT, *supra* note 45, at 10; Lemley & Melamed, *supra* note 10, at 2118; Wynne, *supra* note 25, at 1009.

99. Wynne, *supra* note 25, at 1032. Startups may be forced to quit quickly after they begin. David Goldman, *Patent Troll: "I'm Ethical and Moral,"* CNN MONEY (July 2, 2013), http://money.cnn.com/2013/07/02/technology/enterprise/patent-troll; Gordon, *supra* note 46.

100. Schwartz, *supra* note 52, at 64.

101. *Demand Letters and Consumer Protection: Examining Deceptive Practices by Patent Assertion Entities: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety, & Ins. of the S. Comm. on Commerce, Sci., & Transp.*, 113th Cong. 11 (2013) (statement of Jon Potter, President, Application Developers Alliance), https://www.gpo.gov/fdsys/pkg/CHRG-113shrg86955.pdf [hereinafter *Demand Letters—Senate*]; *see* EXEC. OFFICE OF THE PRESIDENT, *supra* note 45, at 9; Lemley & Melamed, *supra* note 10, at 2119; Meurer, *supra* note 31, at 519; *see also* JORGE LEMUS & EMIL TEMNYALOV, OUTSOURCING PATENT ENFORCEMENT: THE EFFECT OF "PATENT PRIVATEERS" ON LITIGATION AND R&D INVESTMENTS 37 (2014), https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=llOC2015&paper_id=134 (discussing how PAE activity disincentivizes investment in research and development).

of meritless patent claims.[102] On the competitive and economic end, patent privateering unfairly harms rivals by scaring off customers and suppliers with threats of litigation,[103] removing high transaction costs that discourage nuisance litigation,[104] engendering a norm of businesses suing each other indirectly and the formation of invest-to-sue entities,[105] enabling a competitor to indirectly affect a rival's valuation,[106] reducing incentives for competitors to engage in cross-licensing truces (which are socially efficient),[107] raising rivals' costs,[108] and providing a method for companies involved in standard-setting to potentially evade fair, reasonable, and non-discriminatory (FRAND) licensing commitments.[109] Patent privateering reportedly costs the U.S. economy around $29 billion each year, the costs of which often "falls squarely on the shoulders of the consumer."[110]

5. Proposals To Address Privateering

Given the general effects of patent privateering noted above, policy-makers have called for legal reforms.[111] Most have proposed rules designed to lift the veil concealing the identity of

102. Donoghue et al., *supra* note 57, at 201; Wynne, *supra* note 25, at 1022 (citations omitted); *see also The Patent Troll Problem*, *supra* note 61 (stating that fewer than 1% of suits are found to have infringed a valid patent).

103. Wynne, *supra* note 25, at 1032. Demand letters are even being sent to frighten consumers. *See Demand Letters—Senate*, *supra* note 101, at 2–3 (statement of Sen. Claire McCaskill, Chairman).

104. *See* Ewing & Feldman, *supra* note 35, at 23.

105. Gordon, *supra* note 46.

106. *Id.*

107. IAIN M. COCKBURN, PRESENTATION ON PATENT ASSERTION ENTITIES POTENTIAL COSTS AT THE FTC/DOJ WORKSHOP 6 (Dec. 10, 2012), http://www.ftc.gov/sites/default/files/documents/public_events/patent-assertion-entity-activities-workshop/icockburn.pdf; LEMUS & TEMNYALOV, *supra* note 101.

108. *See* Popofsky & Laufert, *supra* note 17, at 456–57.

109. *See id.*; Schrepel, *supra* note 28 ("[Evading FRAND commitments] is one of the most harmful side effects of patent privateering.").

110. Keith Farrell, *The Harmful Practice of Patent Privateering*, TOWNHALL (Oct. 20, 2014), http://townhall.com/columnists/keithfarrell/2014/10/20/the-harmful-practice-of-patent-privateering-n1906666/page/full. Other sources corroborate costs in the $20–30 billion range. Some, however, put the number around $15 billion. *See* LAUREN COHEN ET AL., EMPIRICAL EVIDENCE ON THE BEHAVIOR AND IMPACT OF PATENT TROLLS: A SURVEY 20–21 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2708224. Regardless, the costs are substantial and increasing over time.

111. *See* O'Toole, *supra* note 27, at 68. *See generally* Golden, *supra* note 89, at 600–17 (discussing a variety of suggestions for how to reduce the harmful effects of patent privateering).

the sponsor company. For example, one proposal argues for a rule requiring all parties to a lawsuit to list all persons with an interest in the outcome of a case.[112] Other ideas increase sanctions or provide fee-shifting for unjustified, vexatious, or bad faith litigation.[113] Some proposals suggest amending patent laws to require notice to the United States Patent and Trademark Office (USPTO) of any assignment or sale of patents[114] and increase the plaintiff's burden to show infringement.[115] Lastly, some argue for outlawing patent privateering altogether—a perhaps unrealistic goal.[116]

Most recently, the private sector has attempted to address patent privateering by providing startups with patent rights free of charge in an effort to bring them within Google's realm of litigation protection.[117] Google has also engaged in several large cross-licensing deals with other major technology companies as a preemptive measure to protect itself from patent privateering at the hands of its peers.[118] However, Google's program is unlikely to solve the patent privateering problem generally.[119] Finally, some commentators have expressed optimism that antitrust law counterclaims or defenses are availa-

112. *See* Ewing, *supra* note 15, at 120–21; O'Toole, *supra* note 27, at 70–72 (citing H.R. 2639, 113th Cong. and S. 1013, 113th Cong.) (discussing the America Invents Act).

113. *See* Ewing, *supra* note 15, at 123; *see also* O'Toole, *supra* note 27, at 68–71 (citing, inter alia, H.R. 845, 113th Cong.) (discussing the America Invents Act and SHIELD Act).

114. O'Toole, *supra* note 27, at 70 (citing H.R. 2024, 113th Cong.).

115. *See Economists' Roundtable on Hot Patent-Related Antitrust Issues*, *supra* note 16, at 18.

116. *See* Golden, *supra* note 89, at 602. Banning privateering might be effective: an international ban on privateering was a major reason why the practice eventually died out on the high seas. *See* JANE MARTIN LEMNITZER, POWER, LAW AND THE END OF PRIVATEERING 174–75 (2014) (discussing the abolition of maritime privateering via the Declaration of Paris). *But see Star Trek: Deep Space Nine: To the Death* (Paramount television broadcast May 13, 1996) (predicting the use of privateering on the final frontier: space).

117. Mlot, *supra* note 46.

118. *Id.*; *see also* Rubin Sfadj, *How Patent Privateering Is Hurting the Patent System and the Innovation Economy*, CAPX (July 10, 2015), http://www.capx.co/how-patent-privateering-is-hurting-the-patent-system-and-the-innovation-economy. However, Google has also been the target of a patent privateer called "Rockstar Consortium" sponsored by Apple, Microsoft, RIM, Sony, Ericsson, and EMC. James M. Rice, *The Defensive Patent Playbook*, 30 BERKELEY TECH. L.J. 725, 756 (2015).

119. *See generally* Rice, *supra* note 118, at 773–74 (exploring defensive tactics that may be used in the future, but stating that "[n]o single private action will cure the current patent system").

ble to prevent and deter patent privateering.[120] Scholars have considered whether antitrust law is applicable, with varying opinions.[121]

C. UNITED STATES ANTITRUST LAWS

United States antitrust law exhibits the fundamental belief that free enterprise, open markets, and competition achieve an optimal economic system.[122] The Sherman Act buttresses this belief not only by imposing criminal liability on violators, but also providing for treble damages.[123] It also seeks to promote and protect competition by ensuring the process of competition remains fair.[124]

Antitrust law does not protect competitors from other competitors. Rather, it prohibits competitor conduct that unjustifiably forecloses competition and harms consumers.[125] Because patent rights allow patent holders to exclude others from creating products based on a patented invention, the antitrust laws arguably conflict with the grants of power created by patent laws.[126] Thus, policy-makers must determine the best balance between spurring innovation and protecting competition, though both can sometimes be achieved independently.[127] With the onset of patent privateering, scholars have turned their attention to evaluating whether or not competitors may legally use patent litigation to exclude rivals from participation in the market.[128]

120. Foster, *supra* note 20; Reilly, *supra* note 20; Orr, *supra* note 17.

121. *E.g.*, Popofsky & Laufert, *supra* note 17; *infra* notes 215–16.

122. FTC REPORT, *supra* note 22, at 1; *see* Daryl Lim, *Patent Misuse and Antitrust: Rebirth or False Dawn?*, 20 MICH. TELECOMM. & TECH. L. REV. 299, 310 (2014).

123. *See, e.g.*, 15 U.S.C. § 1 (2012) (stating that any person violating the section is guilty of a felony, punishable by a fine not exceeding $100,000,000, if a corporation).

124. *See* HERBERT HOVENKAMP ET AL., IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW § 12.2 (2d ed. 2012).

125. *See id.*

126. *See* Lim, *supra* note 122. *But see* David A. Balto & Andrew M. Wolman, *Intellectual Property and Antitrust: General Principles*, 43 IDEA 395, 396 (2003) (stating that patent and antitrust laws are complementary).

127. *See* Balto & Wolman, *supra* note 126, at 412; *Economists' Roundtable on Hot Patent-Related Antitrust Issues*, *supra* note 16, at 19; *see also In re* Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1325 (Fed. Cir. 2000) ("Intellectual property rights do not confer a privilege to violate the antitrust laws.").

128. *See, e.g.*, Meurer, *supra* note 31, at 521.

There are several antitrust counterclaims and defenses that a targeted small business could assert in response to a suit by a patent privateer.[129] The following subsections review possible relevant antitrust claims and defenses.

1. Section 1 of the Sherman Antitrust Act

Section 1 of the Sherman Antitrust Act makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."[130] Section 1 exclusively concerns collective, concerted conduct and addresses both horizontal (between competitors) and vertical (supply chain) arrangements.[131] Section 1 only applies to agreements between independent entities, so parent companies are not liable under the act for arrangements with wholly-owned subsidiaries or those partially-owned, over which they have control.[132]

Courts apply either a per se or rule of reason test for Section 1 liability.[133] Per se tests are only used when the agreements in question are obviously anticompetitive, such as price-fixing agreements.[134] Conduct that is not per se illegal is evaluated using the rule of reason test, which essentially requires the court to determine whether the conduct is more anticompetitive than pro-competitive.[135] Courts primarily consider whether the conduct forecloses on competition or harms consumers—an interrelated analysis.[136]

2. Section 2 of the Sherman Antitrust Act

The second Section of the Sherman Antitrust Act states that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce" is guilty

129. *See* Carl W. Schwarz et al., *The Intellectual Property/Antitrust Interface*, 7 ANDREWS INTELL. PROP. LITIG. REP. 15 (2000).

130. 15 U.S.C. § 1 (2012).

131. Balto & Wolman, *supra* note 126, at 399; Josh Baskin, *Competitive Regulation of Mobile Software Systems: Promoting Innovation Through Reform of Antitrust and Patent Laws*, 64 HASTINGS L.J. 1727, 1733 (2013).

132. *See* CHRISTOPHER J. MACAVOY, US ANTITRUST LAWS: OVERVIEW, PRACTICAL LAW PRACTICE NOTE 9-204-0472 (2014).

133. *See* Balto & Wolman, *supra* note 126, at 399.

134. *Id.*

135. *Id.*; *see also* Thomas F. Cotter, FTC v. Actavis, Inc.*: When Is the Rule of Reason Not the Rule of Reason?*, 15 MINN. J.L. SCI. & TECH. 41, 43–44 (2013) (discussing the intricacy of the test).

136. *See* Balto & Wolman, *supra* note 126, at 437.

of anticompetitive behavior.[137] A company violates Section 2 if it attempts to acquire monopoly power in its market or willfully maintains its power in anticompetitive ways.[138] Monopoly power is the ability "to foreclose competition, to gain a competitive advantage, or to destroy a competitor."[139] It can be shown when a company has the ability to directly affect rivals or has a market share of at least 50%.[140] Section 2 applies to both collective conduct and unilateral conduct.[141]

Section 2 claims are somewhat unpredictable, as the law is "more than a little confused."[142] Generally speaking, there are two elements to a monopolization claim: (1) possession or attempted possession of monopoly power in the relevant market; and (2) willful acquisition or maintenance of monopoly power through anticompetitive conduct, distinguishable from mere "growth or development as a consequence of a superior product, business acumen, or historic accident."[143] Courts look to whether there exists a dangerous probability of achieving monopoly power in attempted monopolization cases.[144]

The Supreme Court has stated that predatory litigation and associated conduct "may be sufficient to prove the necessary intent" for Section 2 claims.[145] Exclusionary and predatory conduct in general can satisfy intent as well.[146] This includes abuse of process, espionage or sabotage, patent abuses, and

137. 15 U.S.C. § 2 (2012). *See generally* U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), http://www.justice.gov/atr/public/reports/236681.htm (reflecting the DOJ's enforcement policy under Section 2 and synthesizing the views expressed at the DOJ and FTC hearings, in extensive scholarly commentary, and in the jurisprudence relating to unilateral conduct under Section 2).

138. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966); Baskin, *supra* note 131.

139. Balto & Wolman, *supra* note 126, at 401.

140. *See* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 45–46 (2006).

141. *See, e.g.*, United States v. Dunham Concrete Prods., Inc., 501 F2d 80, 82 (5th Cir. 1974); Balto & Wolman, *supra* note 126, at 401.

142. Daniel E. Feld, Annotation, *What Constitutes "Attempt To Monopolize," Within Meaning of § 2 of Sherman Act (15 U.S.C.A. § 2)*, 27 A.L.R. FED. 762 (2015).

143. *See, e.g.*, *Grinnell Corp.*, 384 U.S. at 570–71.

144. *See, e.g.*, Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993); *accord* Abbott Labs. v. Brennan, 952 F.2d 1346, 1354 (Fed. Cir. 1991).

145. *Spectrum Sports*, 506 U.S. at 459.

146. *See* Chia, *supra* note 16, at 228.

vexatious or repetitive litigation.[147] Meritless patent litigation exhibits the requisite conduct and intent to unlawfully attempt to monopolize.[148] Outsourcing patent litigation in an effort to maintain or obtain monopoly power may even be sufficient.[149]

In attempts to monopolize, establishing a dangerous probability of success often requires an analysis of the party's likelihood of achieving monopoly power in a relevant market, in view of the party's current market share and the barriers to achieving monopoly power.[150] Merely holding a patent does not usually convey a dangerous probability of achieving monopoly power.[151] Additionally, highly competitive markets with low market shares and low barriers to entry "do not attract much antitrust concern."[152] Less competitive, highly centralized markets with high barriers to entry have more antitrust risk.[153]

3. *Handgards* Sham Litigation

Patent holders are generally immune from antitrust liability unless they engage in meritless sham litigation or use a patent in some way to extend market power beyond the power granted by the patent.[154] This exception is called *Handgards* sham litigation and is one of a handful of specific applications of Section 2 of the Sherman Antitrust Act.[155]

Under *Noerr-Pennington* immunity, all persons have a right to petition the government for grievances under the First Amendment, and this has been interpreted to apply to law-

147. MACAVOY, *supra* note 132; Mark E. Roszkowski & Ralph Brubaker, *Attempted Monopolization: Reuniting a Doctrine Divorced from Its Criminal Law Roots and the Policy of the Sherman Act*, 73 MARQ. L. REV. 355, 360–61 (1990); Schwarz et al., *supra* note 129; Chia, *supra* note 16.

148. Ewing, *supra* note 15, at 139; *see infra* Part I.C.3.

149. *See* Ram Menon & Kevin Spivak, *Trends in Mobile and Consumer Electronics*, 48 LES NOUVELLES 238, 239 (2013).

150. *See* David R. Steinman & Danielle S. Fitzpatrick, *Antitrust Counterclaims in Patent Infringement Cases: A Guide to* Walker Process *and Sham-Litigation Claims*, 10 TEX. INTELL. PROP. L.J. 95, 102 (2001).

151. *See id.*

152. Balto & Wolman, *supra* note 126, at 403–04.

153. *See id.*

154. Steinman & Fitzpatrick, *supra* note 150, at 105.

155. *See* Baskin, *supra* note 131, at 1743. There are also other specific types of Section 2 claims, such as *Walker Process* claims. *See generally* Steinman & Fitzpatrick, *supra* note 150 (outlining the elements of *Walker Process*, *Handgards* or sham-litigation claims and explaining the grounds on which these claims may be attacked in motions to dismiss and/or at the summary judgment stage). However, these claims are not applicable unless the patents involved are invalid due to fraud. *Id.*

suits.[156] However, no person may petition the government in meritless ways as a strategy to harm competitors and consumers.[157] *Handgards* claims reflect the understanding that patent holders may not use litigation as an illegitimate weapon in a concealed attempt to interfere with a competitor.[158] This doctrine also establishes, however, that in order for a lawsuit to violate the antitrust laws, it must be a complete sham, focused not on the outcome of the case, but instead on the anticompetitive results of the judicial process.

4. Section 7 of the Clayton Act

Section 7 of the Clayton Act outlaws acquisitions of assets (such as patents) where the effect of such transactions "may be substantially to lessen competition or to tend to create a monopoly in a relevant market."[159] This can be shown when acquisition of patents allows the acquirer to exert monopoly power (similar to that defined in Section 2 claims) and substantially lessens competition within a relevant market.[160]

5. The Affirmative Defense of Patent Misuse

Patent misuse is an affirmative defense to a patent infringement suit.[161] The doctrine states that patent rights are *privileges*, not unconditional rights,[162] which are abused when used to extend the patent's exclusionary power beyond the scope of protection that is reasonably granted by the patent.[163] A defendant must prove that conduct not only extended the privilege beyond the scope of the patent, but also caused anticompetitive injury.[164] This injury can be shown by proving the patent was used in a way that violates antitrust laws or that the patent holder has engaged in some element of anticompeti-

156. E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138–40 (1961); Ewing, *supra* note 15, at 139; Roszkowski & Brubaker, *supra* note 147, at 416.

157. *See* City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 380 (1991); Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 993 (9th Cir. 1979).

158. Schwarz et al., *supra* note 129.

159. 15 U.S.C. § 18 (2014).

160. *See* John "Jay" Jurata, Jr. & Amisha R. Patel, *Taming the Trolls: Why Antitrust Is Not a Viable Solution for Stopping Patent Assertion Entities*, 21 GEO. MASON L. REV. 1251, 1259 (2014).

161. Lim, *supra* note 122, at 308; O'Toole, *supra* note 27, at 79–80.

162. *See* Lim, *supra* note 122, at 318–19.

163. *See* Schwarz et al., *supra* note 129.

164. *See id.*

tive behavior, using its market power to force parties to act in ways they would not otherwise act in a competitive market.[165]

Since it is a defense, patent misuse does not necessarily confer on the defendant a right to recover attorney's fees.[166] It does not even invalidate the offending patents—the misused patents are only unenforceable until the patent holder cures the misuse.[167] Some have argued for a broader and "more robust" patent misuse doctrine that could invalidate patents fully in cases of clear antitrust wrongs.[168] However, other scholars have argued that patent misuse duplicates antitrust laws and has a weak foundational justification.[169]

II. APPLICATION OF ANTITRUST LAW TO PATENT PRIVATEERING

This Part adds depth to the discussions of other commentators, who have previously addressed the general, broad effects of patent privateering, by specifically focusing on patent privateering against small businesses. Section A analyzes how patent privateering affects small businesses, as opposed to large companies. Section B compares arguments put forth by other commentators on how to apply antitrust law to patent privateering, exposing analytical holes and adding discussion for patent privateering against small businesses.

A. THE EXACERBATED EFFECTS OF PATENT PRIVATEERING ON SMALL BUSINESSES

Many of the anticompetitive effects associated with patent privateering[170] apply with greater force to small businesses and small business rivals—the most common PAE target.[171] This is primarily because small (and often new) businesses are the

165. *See* Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318, 1351–52 (Fed. Cir. 2010); U.S. Philips Corp. v. Int'l Trade Comm'n, 424 F.3d 1179, 1184–86 (Fed. Cir. 2005); Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 375 F.3d 1341, 1364 (Fed. Cir. 2004), *rev'd*, 546 U.S. 394 (2006); O'Toole, *supra* note 27, at 80–81.

166. *See* O'Toole, *supra* note 27, at 79–80.

167. Lim, *supra* note 122, at 309.

168. *See, e.g.*, Golden, *supra* note 89, at 611.

169. *See* Thomas F. Cotter, *Four Questionable Rationales for the Patent Misuse Doctrine*, 12 MINN. J.L. SCI. & TECH. 457, 488 (2011).

170. *See supra* Part I.B.5.

171. EXEC. OFFICE OF THE PRESIDENT, *supra* note 45, at 10. *But see* Chien, *supra* note 31, at 1601 (showing that PAEs target the largest companies 40%, and new startups about 25%, of the time).

least likely to challenge patent infringement lawsuits brought by PAEs.[172] Since entrepreneurs lack the time, resources, and sometimes even mental fortitude to address such lawsuits, they often are forced to settle before truly preparing a defense.[173] Patent litigation can be "lethal" to small companies both logistically and financially.[174] Defending a patent often requires hundreds to thousands of hours of additional work and may cost more than $5 million.[175] Therefore, when aimed at small businesses, privateering can be highly anticompetitive by (1) raising small rivals' costs; (2) impeding small rivals' ability to operate in or enter a market; and (3) foreclosing on competition in innovation. These effects on small businesses significantly risk their exclusion from the market—a result that is unlikely when patent privateering is targeted at large competitors.[176]

1. Raising Small Rivals' Costs

First, when settlement terms are prohibitively expensive, small businesses may be forced to increase prices, withdraw from the market, or expend extremely limited resources on a legal fight.[177] Unlike larger companies with considerable reserves and/or cash flow, small companies are ill-equipped to pay settlements or pursue expensive and lengthy litigation.[178]

172. *E.g.*, Duan, *supra* note 31; *see* Brief of Public Knowledge & the Electronic Frontier Foundation as Amici Curiae Supporting Neither Party, *supra* note 57, at 17–18.

173. *See Demand Letters—Senate*, *supra* note 101, at 15 (statement of Mark Chandler, Senior Vice President, General Counsel, and Chief Compliance Officer, Cisco Systems, Inc.); Sean Patrick Butler, *Dealing with NPEs: Views from a Startup GC*, *in* NON-PRACTICING ENTITY PATENT LITIGATION 2013, *supra* note 27, at 35–36; Mike Masnick, *Patent Trolls Causing Serious Problems for Startups*, TECHDIRT (Sept. 17, 2012), https://www.techdirt.com/articles/20120915/01425620391/patent-trolls-causing-serious-problems-startups.shtml (describing the emotional impact of PAE patent litigation).

174. *The Patent Troll Problem*, *supra* note 61.

175. Meaghan Hemmings Kent et al., *10 Reasons Every Defendant in Patent Litigation Should Consider Inter Partes Review*, MONDAQ (Apr. 26, 2014), http://www.mondaq.com/unitedstates/x/309504/Patent/10+Reasons+Every+Defendant+in+Patent+Litigation+Should+Consider+Inter+Partes+Review.

176. *See* EXEC. OFFICE OF THE PRESIDENT, *supra* note 45, at 10.

177. Indeed, one of the most common reasons a small business fails is insufficient capital, which may be siphoned away by legal fees. *See* Patricia Schaeger, *The Seven Pitfalls of Business Failure and How To Avoid Them*, BUSINESSKNOWHOW, http://www.businessknowhow.com/startup/business-failure.htm (last visited Apr. 4, 2016).

178. Duan, *supra* note 31 ("Big companies like Cisco have $13 million to battle these tactics and obtain justice. Little startups, small businesses, and solo entrepreneurs do not.").

In addition to the disproportionate *ability* of small businesses to defend themselves, the legal *costs* to defend a suit can be disproportionately greater for small businesses than for larger companies as well.[179] Even if the lawsuit shows only slight or even no merit, it is usually cheaper for small businesses to settle.[180] Thus, it is no wonder that some commentators have called patent litigation "the true sport of kings,"[181] and PAE patent litigation against small companies "silent extortion."[182]

Since small businesses are more likely to settle patent infringement lawsuits,[183] they usually must pass on the cost of any settlements to consumers.[184] The increased costs of prod-

179. *See* Lloyd Dixon et al., *The Impact of Regulation and Litigation on Small Business and Entrepreneurship: An Overview* 20 (Kauffman-RAND Ctr. for the Study of Small Bus. and Reg., Working Paper No. 317-ICJ, 2006), http://www.rand.org/content/dam/rand/pubs/working_papers/2006/RAND_WR317.pdf; *see also* Brief of Public Knowledge & the Electronic Frontier Foundation as Amici Curiae Supporting Neither Party, *supra* note 57, at 17 ("[Small companies] are the ones least able to secure distant counsel, travel to a distant forum, and learn the procedures of a new jurisdiction."); Xun Liu, Note, *Joinder Under the AIA: Shifting Non-Practicing Entity Patent Assertions Away from Small Businesses*, 19 MICH. TELECOMM. & TECH. L. REV. 489, 494 (2013) ("[S]mall businesses suffer greater direct impact from patent lawsuits because they pay more litigation costs relative to their size.").

180. *See* Dixon et al., *supra* note 179, at 42; Chien, *supra* note 21, at 467–68; Joff Wild, *It Is Time To Talk About the Patent Ogres*, IAM (Dec. 16, 2014), http://www.iam-media.com/blog/detail.aspx?g=dba41734-acfa-4759-93fc-26fcb2c0b98a.

181. Hixon, *supra* note 4. Some have also described the situation faced by privateer's targets as "giv[ing] up their gold and treasure, walk[ing] the plank or be[ing] put to the sword." Tim Sparapani, *Attack of the Patent Privateers*, FORBES (Sept. 2, 2015), http://www.forbes.com/sites/timsparapani/2015/09/02/attack-of-the-patent-privateers/#2f574bfe2184.

182. Paul Muschick, *Feds Crack Down on Patent Trolling*, MORNING CALL (Dec. 27, 2014), http://www.mcall.com/news/local/mc-patent-trolls-mphj-watchdog-20141227-column.html (quoting Pennsylvania Attorney General Kathleen Kane).

183. Again, this is primarily because small businesses are unwilling to "walk . . . the plank and tak[e] their chances while their business is under attack." Sparapani, *supra* note 181.

184. Indeed, most businesses find this is necessary unless they hold substantial reserves. *See generally* Raphael Auer & Thomas Chaney, *Exchange Rate Pass-Through in a Competitive Model of Pricing-to-Market*, 41 J. MONEY CREDIT & BANKING 151 (2009) (developing a model of pricing-to-market pass-through under perfect competition and flexible prices); Michael B. Devereaux & James Yetman, *Price Adjustment and Exchange Rate Pass-Through*, 29 J. INT'L MONEY & FIN. 181 (2010) (describing a theoretical model that would account for the determinants of exchange rate pass-through to consumer price); Aaron Huff, *Reality-Based Pricing*, 166 COMM. CARRIER J. 26 (2009) (discussing how commercial carriers are using mapping software and GPS technology to more efficiently track their mileage so as to keep down the cost pass-

ucts and services offered by small rivals subsequently render them less competitive than large sponsor companies.[185] Further, because small companies often settle in the face of threats of PAE litigation, there is greater possibility that royalties in excess of the value of the patents allegedly infringed upon will be gathered.[186] This does not happen as often when larger companies are sued due to their willingness and ability to defend.[187] In fact, most large companies are not the targets of patent privateering in the first place.[188]

Finally, some PAEs target whole swathes of small business rivals at once.[189] Sometimes small businesses ignore demand letters, but many settle.[190] Thus, as a group, hundreds to thousands of small businesses operating in an industry and competing with a more-dominant firm can suffer increased costs and the host of other detrimental effects. Thus, patent privateering can enable a large company to raise tens to hundreds of rivals' costs very efficiently.

through); John B. Taylor, *Low Inflation, Pass-Through, and the Pricing Power of Firms*, 44 EURO. ECON. REV. 1389 (2000) (arguing that the decline of pass-through is due to the low inflation environment that has recently been achieved in many countries).

185. *Cf.* Jagmohan Raju & Z. John Zhang, *Introduction to Smart Pricing: How Google, Priceline, and Leading Businesses Use Pricing Innovation for Profitability*, FT PRESS (Mar. 11, 2010), http://www.ftpress.com/articles/article.aspx?p=1569334&seqNum=2 (explaining competition-based pricing).

186. *See* Symposium, *Strategic Patent Acquisitions*, 79 ANTITRUST L.J. 395 (2014). Some have attributed this to the nuisance or "holdup" value of a patent. *See* Chien, *supra* note 21, at 472–74; Popofsky & Laufert, *supra* note 15, at 2; *see also* Ewing, *supra* note 11, at 3 (stating that litigation tools such as PAEs can extract greater value from patent rights).

187. *See* Richard Lloyd, *Unwired Planet CEO Praises Judge's Technical Knowledge After Major UK Court Win Against Samsung and Huawei*, IAM (Nov. 24, 2015), http://www.iam-media.com/blog/Detail.aspx?g=232cb69d-0343-4646-822c-c8b2a59066fc (reporting that Samsung and Huawei fought a patent privateer sponsored by Ericsson).

188. *E.g.*, *supra* note 171 and accompanying text.

189. *E.g.*, *In re* Innovatio IP Ventures, LLC Patent Litig., 921 F. Supp. 2d 903, 907 (N.D. Ill. 2013) (stating that 8,000 demand letters were sent to small businesses and end-users alleging patent infringement, but only twenty-six were actually litigated, in this case); *FTC Settlement Bars Patent Assertion Entity from Using Deceptive Tactics*, *supra* note 40 (stating that a PAE sent out 4,800 demand letters, but none went to trial).

190. Chien, *supra* note 21, at 472 (stating that 22% of all companies do nothing in response to a demand letter, 35% fought the demand in some way, 9% changed their products or business, 17% chose other actions, and 18% automatically settled).

2. Impeding Small Rivals' Ability To Operate in or Enter a Market

Threats of litigation can also substantially impede a startup's ability to attract and keep customers and raise funds.[191] In 2012, 40% of PAE-targeted small companies reported a significant operational impact (such as a change in business, exit from the market, delay in milestone, change in product, etc.) as a result of a demand letter or an actual lawsuit brought by a PAE.[192] About 13% of these small and startup companies exited their business or had to pivot their business strategy, and about 4% suffered fundraising impact.[193] When small businesses are forced to change their offerings, raise prices, or exit the markets, this affects consumers by reducing choice and availability.

Patent litigation can also exacerbate barriers to entry for small companies, reducing competition and raising the cost of production.[194] For example, a new entrant in an industry will face greater startup costs if sued by multiple incumbents as soon as entering. If an industry is known for such tactics, it is usually less attractive to entrepreneurs and investors.[195] In fact, patent privateering is inversely related to venture capital investment.[196] Large companies often do not need to worry about fundraising activities with investors.[197]

191. *See Demand Letters—Senate*, *supra* note 101, at 13 (statement of Mark Chandler, Senior Vice President, Gen. Counsel, and Chief Compliance Officer, Cisco Systems, Inc.); Sparapani, *supra* note 181 ("[Startups] may get stabbed to death and choose to terminate their business entirely to end impoverishing litigation and avoid bogus infringement claims."). For example, a four-employee startup that held a highly-ranked app on iTunes was forced to gut its app in response to a demand letter for royalties and removed features that customers liked. *Id.* at 11. The app is no longer successful, and the company is failing. *Id.*

192. EXEC. OFFICE OF THE PRESIDENT, *supra* note 45, at 10.

193. *Id.* at 11.

194. Reilly, *supra* note 20, at 79; Dixon et al., *supra* note 179, at 20.

195. *See* Chien, *supra* note 21, at 474–76.

196. Kiebzak et al., *supra* note 11 (stating that venture capital investment would have been at least $8.1 billion higher over the course of a five year period but for frequent PAE litigation).

197. *See* Don Duffy, *CEOs Need a "Healthy Paranoia" of Activist Investors*, CNBC (Aug. 12, 2015), http://www.cnbc.com/2015/08/12/ceos-need-a-healthy-paranoia-of-activist-investors-commentary.html ("The upsurge of shareholder activist campaigns in recent years has been a hot topic for corporate America."). Large companies are, however, subject to the opinions of investors in terms of management, governance, and direction. *See id.*

Threats of suit or actual litigation against small companies can have the effect of scaring away customers, suppliers, and other business partners, lowering stock prices and company valuations, disrupting mergers and acquisitions, distracting management, and prompting inefficient use of resources.[198] Business partners, when faced with the threat of litigation, may even decide a joint venture's costs outweigh the benefits.[199]

A patent infringement lawsuit may also be asserted at extremely inopportune times in an attempt to head off a small rival's momentum.[200] In a real life example affecting valuations, a startup eyewear company named Ditto laid off four employees to defend a patent lawsuit and was later valued $3–4 million less than its pre-lawsuit valuation, hindering is ability to raise funds and compete in the eyewear market.[201]

3. Foreclosing on Competition in Innovation

Small businesses are more important innovators in the U.S. economy than large companies, raising concerns about privateering's effects on competition in innovation.[202] Small businesses generate more patents per employee than large companies,[203] employ a greater percentage of all scientists and engineers (38% compared to 27% employed by large companies),[204] and "a small firm patent is more likely than a large

198. Ewing & Feldman, *supra* note 35, at 23–24; Robert G. Eccles et al., *Reputation and Its Risks*, HARV. BUS. REV. (Feb. 2007), https://hbr.org/2007/02/reputation-and-its-risks.

199. *E.g.*, Christopher R. Leslie, *The Anticompetitive Effects of Unenforced Invalid Patents*, 91 MINN. L. REV. 101, 117–18 (2006); Jim Milliot, *Startup Denies Competition Charges, But Will Close*, PUBLISHERS WKLY. (Jan. 3, 2005), http://www.publishersweekly.com/pw/print/20050103/37732-startup-denies-competition-charges-but-will-close.html.

200. A lawsuit could be asserted right before a small business makes an initial public offering or starts offering a superior product in the marketplace.

201. Tucker, *supra* note 11, at 3.

202. *See* Lee-Makiyama, *supra* note 43 (noting that competition in innovation is not just a domestic concern, but also an international one as nations begin to employ patent privateering).

203. *See* ANTHONY BREITZMAN & DIANA HICKS, AN ANALYSIS OF SMALL BUSINESS PATENTS BY INDUSTRY AND FIRM SIZE, at iii (Nov. 2008), http://archive.sba.gov/advo/research/rs335tot.pdf; U.S. SMALL BUS. ASS'N, FREQUENTLY ASKED QUESTIONS: ADVOCACY: THE VOICE OF SMALL BUSINESS IN GOVERNMENT 3 (2012), https://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf (stating that small businesses generate sixteen times more); Schmidt et al., *Why "Patent Reform" Harms Innovative Small Businesses*, IPWATCHDOG (Apr. 25, 2014), http://www.ipwatchdog.com/2014/04/25/why-patent-reform-harms-innovative-small-businesses/id= 4926 (five times more).

204. Schmidt et al., *supra* note 203.

firm patent to be among the top 1% of most frequently cited patents."[205] Indeed, some commentators have stated that small businesses "may well be most important to [the] economy as agents of change signaled by the fact that the small firm contribution to innovation is most intense in leading edge technologies."[206]

Patent privateering is usually targeted at companies that are involved in high-tech patents, affecting competition in areas of cutting-edge innovation.[207] In addition, high-tech patents tend to be more interchangeable and more likely to overlap, meaning that it is more difficult for small businesses to assess the validity of alleged infringement.[208] Therefore, patent privateering against small businesses can disproportionately foreclose competition in innovation.[209] This results in a prolongation of the technological status quo, which favors large incumbents but harms consumers through the stagnation of useful arts and sciences.

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205. CHI RESEARCH, SMALL SERIAL INNOVATORS: THE SMALL FIRM CONTRIBUTION TO CHANGE 3 (Feb. 27, 2003), http://archive.sba.gov/advo/research/rs225tot.pdf.

206. *Id.* at 25; *see also* BREITZMAN & HICKS, *supra* note 203 ("[T]he patents of small firms in general are likely to be more technologically important than those of large firms.").

207. *See* Chien, *supra* note 21, at 464 (stating that 60% of litigation demands involved software or high-tech patents). Because small businesses develop more high-tech patents, and high-tech patents tend to be used in lucrative industries, this may partially explain why PAEs target small businesses more often than large companies. *See* EXEC. OFFICE OF THE PRESIDENT, *supra* note 45, at 10.

208. Chien, *supra* note 31, at 1589; *see also Economists' Roundtable on Hot Patent-Related Antitrust Issues*, *supra* note 16, at 18–19 (discussing the difficulty in assessing whether one's products and services actually infringe on technological patents); Ewing, *supra* note 11, at 30 (stating that privateering is more prevalent in industries where patents are interchangeable because this makes it easier for the privateer to assert infringement with some apparent validity); Herbert Hovenkamp, *Anticompetitive Patent Settlements and the Supreme Court's* Actavis *Decision*, 15 MINN. J.L. SCI. & TECH. 3, 17 (2014) (stating that deference to settlements of patent infringement suits exists because they are "plagued with validity and boundary problems so severe that judges cannot have a great deal of confidence in the courts").

209. *See, e.g.*, COHEN ET AL., *supra* note 110, at 18–20; Chien, *supra* note 21, at 474; Kiebzak et al., *supra* note 11, at 220; Muschick, *supra* note 182. For example, health IT companies have been found to cease all innovation in a given technology while being sued for patent infringement by a PAE. EXEC. OFFICE OF THE PRESIDENT, *supra* note 45. Another example is X-Plane, a company sued by Google, which abandoned development of certain new products altogether as a result of the lawsuit. Mullin, *supra* note 19.

The above-mentioned effects can disproportionately foreclose competition by raising small rivals' costs, forcing them to exit the market, discouraging rivals from entering the market, providing large sponsor companies with superior litigating positions, and reducing or foreclosing competition in innovation. All of these effects are anticompetitive in its most basic concept and consequently harm consumers and societal progress.[210]

B. EXISTING COMMENTARY FAILS TO ADEQUATELY CONSIDER HOW PATENT PRIVATEERING AFFECTS SMALL BUSINESSES

Only a handful of commentators have addressed patent privateering and the application of antitrust law, and there are few cases even indirectly on point.[211] Some commentators are hopeful that antitrust law holds a solution to counter the worst cases of patent privateering,[212] but others disagree, concluding that outside limited scenarios, antitrust laws are inapplicable to patent privateering.[213] All past commentators appear to agree that antitrust law probably cannot provide refuge from privateering for *all businesses*, but none have considered how *small businesses* are uniquely and disproportionately affected by patent privateering.

This Section considers the viability of the antitrust counterclaims and defenses discussed in Part I.C, in the same order. It closes by discussing the practical problem of concealed sponsor identity, which limits the availability of antitrust theories to counter privateering.

210. *See* Morton & Shapiro, *supra* note 186, at 494–95.

211. There is, however, a current English case, which will be the first to consider "the phenomenon of patent privateering." *In Patent Portfolio Licenses, English Court Considers Patent Privateering and Gives Further Guidance on FRAND Terms*, 4-TRADERS (Dec. 10, 2015), http://www.4-traders.com/HUAWEI-TECHNOLOGY-CO-LTD-7785078/news/In-patent-portfolio-licences-English-Court-considers-patent-privateering-and-gives-further-guidance-21540123. The court appears to plan to address the privateering issues in summer 2016. *See id.*

212. *See* Popofsky & Laufert, *supra* note 15, at 12; Popofsky & Laufert, *supra* note 17, at 446–47.

213. *See* Jurata & Patel, *supra* note 160, at 1265; Joshua D. Wright & Douglas H. Ginsburg, *Patent Assertion Entities and Antitrust: A Competition Cure for a Litigation Disease?*, 79 ANTITRUST L.J. 501, 516 (2014); Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Address at the Dechert Client Annual Antitrust Spring Seminar 10 (Apr. 17, 2013), Westlaw 1728229.

1. Section 1 Claims

Section 1 claims involve contracts in restraint of trade between two or more competitors.[214] When *two competitors* contract to *jointly* sponsor and control a PAE, such would likely violate Section 1 because it would be obviously anticompetitive.[215] However, as explained earlier, such an arrangement would be extremely uncommon.

By contrast, a privateering arrangement might involve an agreement between one sponsor and a privateered PAE.[216] If the sponsor and PAE have a licensing or similar agreement, then a rule of reason analysis would be performed because agreements of this type are not currently per se violations. But because most privateering arrangements exist via transfers of ownership,[217] Section 1 claims probably fail because no contract is involved.

Even if a privateering arrangement is memorialized in the form of a license agreement, small business defendants may face another potential problem: the fact that the sponsor company maintains an ownership stake in the PAE, meaning the relationship could be a *close* one and not subject to Section 1 as a result. This is because parent companies are not liable for anticompetitive arrangements with wholly-owned or substantially-controlled subsidiaries.[218] Thus, this form of PAE sponsorship is insulated from Section 1 claims.

Assuming this issue does not arise, though, a privateering agreement's effects would most likely be more anticompetitive than pro-competitive when the privateering is directed against small businesses, for the reasons put forth in Part II.A. However, this scenario is more susceptible to arguments for pro-competitive benefits. For example, a PAE could be merely facilitating the assertion of patents in a more effective and efficient way than the sponsor company could on its own, freeing the sponsor to focus on other competitive activities such as R&D.[219] Given this benefit, commentators have argued that a court

214. *See supra* Part I.C.1.

215. *See* Popofsky & Laufert, *supra* note 15, at 12 (discussing how Nokia and Microsoft pooled their patents and used one PAE to sue competitors); Popofsky & Laufert, *supra* note 17, at 460–61 (discussing how competitors may conspire to sue other competitors in the terms of a settlement).

216. *See* Jurata & Patel, *supra* note 160, at 1267.

217. *See supra* Part I.B.3.

218. MACAVOY, *supra* note 132.

219. *See* Jurata & Patel, *supra* note 160, at 1268.

would likely not find that the *agreement* constitutes an unreasonable restraint of trade.[220] However, the same commentators did not consider the unique ways in which patent privateering disproportionately affects small businesses, and the unbalanced effects stated in Part II.A are far from reasonable.[221]

Except in the rare circumstance of co-sponsored patent privateering, Section 1 probably cannot readily provide a small business defendant relief under the antitrust laws because it is too easy for sponsors to create a privateering arrangement without drafting an agreement. In fact, the evidence suggests that this is already occurring.[222]

2. Section 2 Claims

Unlike Section 1 claims, which apply to agreements in restraint of trade, Section 2 claims prohibit monopolization, attempts to monopolize, and conspiracy to monopolize.[223] Because monopoly power is the ability "to foreclose competition, to gain a competitive advantage, or to destroy a competitor,"[224] the analysis in Part II.A suggests that most instances of patent privateering *against small businesses* have the effect of granting sponsors greater market power. Even when a sponsor targets hundreds to thousands of small competitors, it may be said to obtain market power because its efforts could drive up costs for all small rivals in the industry as well as increase prices for consumers and reduce the availability of important goods and services from alternative, smaller businesses.[225] Admittedly, courts may not be willing to adopt such a sweeping understanding from the outset.

In theory, most instances of patent privateering against small businesses are actionable under Section 2 if courts accept the above argument. Some commentators anticipate this understanding, pointing out, however, that the link between raising rivals' costs to maintenance or acquisition of monopoly power must be strong.[226] The analysis in Part II.A shows a siza-

220. *Id.*

221. *See* Renata Hesse, Deputy Assistant Attorney Gen., Dep't of Justice, Address at the Federal Trade Commission (Nov. 8, 2013), Westlaw 6037326.

222. *See* Popofsky & Laufert, *supra* note 15, at 2.

223. *See* 15 U.S.C. § 2 (2014); *supra* Part I.C.2.

224. Balto & Wolman, *supra* note 126, at 401.

225. *See* O'Toole, *supra* note 27, at 81.

226. *See* Popofsky & Laufert, *supra* note 15, at 10–11; Popofsky & Laufert, *supra* note 17, at 456.

ble causal link, especially in view of the exacerbated effects patent privateering has on small businesses. If monopoly power can be established, the traditional unilateral monopolization claim proceeds to whether the patent privateering constitutes a willful acquisition or maintenance of monopoly power.[227] Since patent privateering is purposed on hindering rivals' ability to compete with the sponsor, the mere existence of the arrangement should establish the requisite intent.[228]

However, since monopoly power is always viewed in relation to the market a potential monopolist occupies, Section 2 claims must always be directed at sponsor companies.[229] This is because PAEs do not *operate* in a given market, so they cannot be liable under Section 2 monopolization or attempts to monopolize. *Intellectual Ventures I v. Capital One* illustrates this limitation.[230] In that case, Capital One counterclaimed Intellectual Ventures I, the largest PAE in the world,[231] under Section 2 of the Sherman Act and Section 7 of the Clayton Act.[232] Capital One also asserted patent misuse as a defense.[233] Both counterclaims and the misuse defense were dismissed, mostly due to the PAE's lack of market power in the relevant market.[234] However, if Capital One would have been able to determine the sponsor, a Section 2 claim should have been viable against that sponsor, joined by counterclaim.

Given the detrimental impact patent privateering can have on small businesses, a small business defendant should also be able to successfully allege a sponsor's dangerous possibility of achieving monopoly power for attempted monopolization claims.[235] The extent of dangerousness may be debatable, depending on the size and market power of the sponsor company,

227. *See supra* Part I.C.2.

228. *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993) (suggesting that predatory litigation in this way could be sufficient to show intent in monopolization claims).

229. *See, e.g.*, PATENT LITIGATION PRACTICE NOTE, *supra* note 77 ("The alleged infringer would need to add the original patent holder as a counterclaim defendant and establish . . . monopoly in the relevant market.").

230. *See* Memorandum Opinion, Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 1:13-CV-00740-AJT-TCB (E.D. Va. Dec. 18, 2013).

231. *See Largest Patent Holdings*, PATENTFREEDOM, https://www.patentfreedom.com/about-npes/holdings (last visited Jan 3, 2015). Intellectual Ventures has an estimated 25,000 to 30,000 U.S. patents. *Id.*

232. Memorandum Opinion, *Intellectual Ventures I*, slip op. at 4–9.

233. *Id.* at 9–10.

234. *Id.* at 11.

235. *See* Popofsky & Laufert, *supra* note 17, at 456.

the characteristics of the market, and the strategy pursued; the greater the market share and breadth of targeting, the more dangerous the probability. Since it is unlikely that large sponsors would engage in patent privateering (as opposed to simply suing in its own name) for non-competitive purposes, attempted monopoly claims should be successful if asserted against the sponsor. In instances of small companies using patent privateering against similarly-sized rivals, an attempted monopolization claim is more questionable, but still very possible.

Conspiracies to monopolize depend on similar factors as Section 1 and Section 2 claims, and authority suggests that such a claim may be asserted against any member of a conspiracy or all of them.[236] This may be the best Section 2 claim if evidence suggests that the PAE is engaged in privateering, but the sponsor is unknown and suspected to be a large market player. Still, ascertaining the sponsor company's identity will be necessary to prove the conspiracy. This practical difficulty seriously limits the ability to assert a successful Section 2 counterclaim.[237]

3. *Handgards* Claims

Following the analysis above relating to Section 2 claims, a small business defendant could also assert a *Handgards* counterclaim by arguing that the patents being asserted are invalid or that the suit is objectively baseless.[238] This strategy would probably be most successful when the patent privateer asserts infringement of many different patents, using its large patent arsenal to artificially increase the size of the litigation threat, when no legitimate infringement exists at all or is highly questionable. This kind of claim could be expensive to prove, however, because it requires the small business defendant to make extensive legal arguments about the invalidity of the patents.[239]

Sham litigation is also difficult to prove, and in high-tech industries, it may be impossible. This is because patents tend to be interchangeable and likely to overlap, making it difficult

236. *See, e.g.*, United States v. Dunham Concrete Products, Inc., 501 F.2d 80 (5th Cir. 1974); Feld, *supra* note 142.

237. *See supra* Part I.C.3.

238. *See supra* Part I.D.3.

239. For example, the cost of simply engaging in *inter partes* review (an alternative way of challenging a patent's validity once sued, which stays court action when initiated) costs around $200,000 to $750,000. Kent et al., *supra* note 175. Comparatively, defending a patent lawsuit costs millions. *Id.*

to establish that litigation is being pursued without an objective basis or in bad faith.[240] Combined with the fact that patents enjoy a statutory presumption of validity,[241] this makes a successful *Handgards* claim unlikely for most general cases of patent privateering.

Moreover, infringement actions of *uncertain* or dubious validity are protected conduct, even if the conduct has anticompetitive effects.[242] Current *Noerr-Pennington* immunity protects patent holders from antitrust liability so long as their patents and lawsuits are not invalid or clearly meritless.[243] This limitation applies to any antitrust theory. In *In re Innovatio IP Ventures, LLC Patent Litigation*, the court held that a PAE's mass threat of assertion against thousands of small businesses, and eventual twenty-three lawsuits, was not objectively baseless and could be asserted despite the possibility that the PAE's conduct had anticompetitive effects.[244] Thus, so long as a privateered PAE asserts patents against small business defendants with at least *some* validity, any Section 2 claim will probably fail under this case's precedent.[245]

Some have argued that it should matter "little whether the privateer's case against the target is frivolous or has exceptional merit."[246] Because the *Noerr-Pennington* doctrine was created in a time before PAEs and patent privateering were commonplace, this argument has some persuasive weight. After all, when developing the *Noerr-Pennington* doctrine, the courts did not foresee or expect that the majority of patent litigation would turn into a game of indirect, secretive petitioning activity. And while the policy arguments favor protecting the right

240. Indeed, in the *Handgards* case itself, the patents involved were used in the manufacturing of plastic gloves and cannot fairly be described as high-tech. *See* Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1285 (9th Cir. 1984). However, sham litigation has been successfully shown in high-tech industries such as pharmaceuticals. *See, e.g.*, Rochester Drug Co-op. v. Braintree Labs., 712 F. Supp. 2d 308, 311–12 (D. Del. 2010).

241. *See* 35 U.S.C § 282 (2014).

242. *E.g.*, Jurata & Patel, *supra* note 160, at 1276; Popofsky & Laufert, *supra* note 17, at 447.

243. *Id.*

244. 921 F. Supp. 2d 903, 922 (N.D. Ill. 2013).

245. *See* Ewing & Feldman, *supra* note 35, at 28 ("[I]t is extremely difficult to establish that assertion of a patent against a product is a sham, particularly given the high burden of proof that some courts have required in sham litigation cases. In sum, it is tremendously difficult to succeed in a private antitrust claim.").

246. *See* Ewing, *supra* note 11, at 80.

for persons (whether natural or incorporeal) to petition the government, the antitrust implications seem to weigh heavily against applying the same protections to covert operatives suing on sponsors' behalf.

If indeed a PAE is engaging in patent privateering, there should be no hesitation by a court to reject a *Noerr-Pennington* immunity argument. Although this immunity has been tied to whether a suit is meritless, the *Handgards* doctrine more broadly concerns whether a claim was brought for the relief sought, instead of primarily for the outcomes that result from the judicial process (such as a rival's exiting the market under suit). Therefore, where patent privateering is employed against a small competitor, the likely motivations and outcomes that will result from such an action ought to in most cases overwhelmingly demand the conclusion that *Noerr-Pennington* immunity does not apply. This reasoning comports with what *Handgards* claims are designed to address: the use of litigation as a weapon in a concealed attempt to interfere with a competitor.[247] Further, it ensures that courts, which are supposed to be a "defense against organized bullying," do not "become the tools of organized bullying."[248]

In summary, a Section 2 claim, whether *Handgards* or not, should be successful in theory if a sponsor's identity is known and the privateering relationship can be sufficiently pleaded.

4. Section 7 Claims

Some commentators suggest that the most "natural mechanism" to challenge patent privateering is Section 7 of the Clayton Act, which prohibits acquisitions that may substantially lessen competition or create a monopoly.[249] They argue that acquisitions of patents by privateered PAEs can harm competition by enhancing sponsors' ability to "hinder or exclude rivals and thereby gain incremental market power" in much the same way as discussed in Parts II.A and II.B.1–3.[250] Therefore, patent acquisitions by privateered PAEs could substantially lessen competition and may even create or maintain monopoly power for the sponsor.

Other commentators dispute the anticompetitive effects of patent transfers, arguing that patent litigation by privateered

247. *See* Schwarz et al., *supra* note 129.
248. Duan, *supra* note 31 (emphasis omitted).
249. Popofsky & Laufert, *supra* note 15, at 11.
250. *See id.*

PAEs is no different than the exercise of the sponsor's pre-existing market power.[251] However, as asserted in Parts I.B.4 and II.B.2, patent privateering offers sponsors considerable benefits and negatively affects both targeted companies and consumers. Privateering also forecloses competition from small rivals in the market and in innovation.[252] In addition, accumulation of patents by privateers and their covert nature incentivize infringement lawsuits implicating as many patents as possible. This approach to patent litigation renders a patent lawsuit by a privateer more formidable than what could have been brought by its sponsor—but also more likely to be considered sham.

Most commentators agree that acquisitions of patents by PAEs would probably violate Section 7 if the PAE aggregates all substitute patents for a certain kind of product or in a certain industry because this would enable a sponsor, through the PAE, to obtain and maintain monopoly power.[253] The court found this in *Kobe v. Dempsey Pump*, in which Dempsey purchased key patents for hydraulic oil pumps, and no competitor could make a product without infringing on at least one of the patents.[254] The court held that the underlying purpose of accumulating the patents was a violation of Section 7 and patent misuse.[255] Similar reasoning could equally apply to patent privateers, which acquire patents in this way, especially if small businesses are targeted by privateers with comprehensive patent holdings.

Despite the likelihood of success in bringing these, there are certain downfalls to them. For one, a patent privateering relationship may not entail patent transfers or acquisitions.[256] In addition, even if a sponsored PAE did acquire patents, it

251. *See* Wright, *supra* note 213, at 8.

252. As added support, "[c]onduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way may be deemed anticompetitive." Rochester Drug Co-op. v. Braintree Labs., 712 F. Supp. 2d 308, 316 (D. Del. 2010) (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 604–05 (1985)). Patent privateering appears to do this and more.

253. *See, e.g.*, Devlin, *supra* note 66, at 775; Jurata & Patel, *supra* note 160, at 1265; Popofsky & Laufert, *supra* note 17, at 452; *see also* Hesse, *supra* note 221, at *9 (stating that there have been competitive concerns in this area, and some experts have suggested challenges under Section 7).

254. *See* Ewing, *supra* note 15, at 140–41 (citing Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir. 1952)).

255. *Id.*; *see supra* Part I.B.2.

256. *See supra* Part I.B.3.

might only acquire a specific set of patents needed to target a rival, eliminating the possibility that the *Kobe* precedence might apply. And furthermore, this claim suffers from the same practical difficulties in asserting the claim successfully in court, both in knowing enough about the relationship to meet pleading requirements and a small target's likely inability to afford to defend itself.[257]

5. Patent Misuse Defenses

It is unclear whether patent misuse could successfully be used to render a privateered patent unenforceable.[258] This is primarily because patent misuse only applies to specific extensions of a patent's grant of monopoly power,[259] which is limited to the exclusive right to make certain inventions and forbids the use of the patent to "secure an exclusive right or limited monopoly . . . contrary to public policy."[260] Usually, unlawful extensions of a patent grant involve attempting to merely enforce the patent's power beyond its terms.

However, to enable this defense in patent privateering scenarios, courts would need to accept the theory that privateered patent litigation is itself somehow an unlawful extension of the patent grant's monopoly power. Arguably, patent privateering extends the utility of one or more patents beyond its limited scope by allowing sponsors to more effectively assert infringement of such patents than they could without the help of a PAE. Because small businesses are especially likely to respond to suits in ways that harm themselves and benefit large sponsors, patent privateers tend to be more effective at asserting patents against small businesses than large sponsors.[261] In this way, the combination of the threat and the way the small business defendant will likely respond to it extends a patent's power beyond its power to exclusively sell an invention. A patent owner's rights, by definition, include the right to threaten to exclude others from practicing a patent, but patent privateering makes the threat of infringement unusually powerful—and perhaps even more credible or seemingly more meritorious than it actually is. This effect then enables the patent owner to

257. *See infra* Part II.B.6.
258. *See* Ewing, *supra* note 15, at 136–37.
259. *Id.* (citing Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318, 1329 (Fed. Cir. 2010)).
260. Morton Salt Co. v. G.S. Suppinger Co., 314 U.S. 488, 492 (1942).
261. *See supra* Part II.A.

secure a broader monopoly than is granted by the patent by its terms; by excluding a rival, for example, a patent owner might be able to secure monopoly over an entire industry or product market, let alone the specific inventions claimed by the patent. Jessica Rich, Director of the FTC's Bureau of Consumer Protection, seems to endorse this understanding: "Patents can promote innovation, but a patent is not a license to engage in deception . . . . Small businesses . . . have the right to expect truthful communications . . . ."[262] Without transparency, patent privateering may well be considered an unlawful extension of a patent's limited monopoly power and a predatory litigation tactic.

Assuming that a court might also accept this argument, patent misuse will not protect a small business defendant from future suit because it is only a defense. It might, however, force the sponsor company to sue the small business in its own name to cure the misuse resulting from covert enforcement. Thus, the sponsor company would then be subject to the normal incentives and consequences of suing smaller rivals for patent infringement—a result that is overall better for society and more in line with the goals of patent and antitrust law.

6. The Problem of Concealed Sponsor Identity

Despite the analyses above, which argue that some antitrust theories could be successful depending on the circumstances, it is unlikely that a small business defendant can ever *bring* any of these theories. This is because the current patent system precludes, in most circumstances, a small business defendant from acquiring specific or circumstantial knowledge of a privateering arrangement.[263] Patent ownership, transfers, and licensing agreements are usually secret.[264] Since a small business defendant may never know who is sponsoring a PAE or if a PAE is sponsored at all, the small business defendant will be unable to plead an antitrust counterclaim or defense in the first place without being conclusory.[265] This was, arguably,

262. *FTC Settlement Bars Patent Assertion Entity from Using Deceptive Tactics*, *supra* note 40.

263. *See, e.g.*, Ewing & Feldman, *supra* note 35, at 12.

264. If the sponsor's identity is not secret, and the privateering arrangement is known, then there is less need to use antitrust law to address the covert effects of patent privateering.

265. This problem is not unique to patent privateering; for example, in *Bell Atlantic v. Twombly*, a landmark Supreme Court decision, the plaintiffs suc-

partially the problem in *Intellectual Ventures*.[266] Further, this inability may incentivize suits and make a market less attractive to potential new entrants, foreclosing future competition.

For Section 1 claims, this means that the small business defendant will not know if there is an agreement between competitors or a sponsor and PAE. For Section 2 claims, the concealed identity of the sponsor presents similar difficulties, in that a small business defendant will be unable to determine which competitor is primarily benefiting from the suspected patent privateering arrangement. Likewise, for Section 7 claims, a patent seller will be unknown, so that a claim against the indirectly benefiting sponsor-seller cannot be asserted. Similarly, patent misuse defenses will be seen as merely speculative unless the small business defendant can pinpoint the sponsor company. Lack of knowledge about the identity of a sponsor eliminates the ability for defendants to retaliate with not only patent infringement claims, but also other types of claims as well, including those grounded in antitrust law.

There are further practical difficulties in determining the identity of a sponsor. First, ownership is not required in order to establish a privateering arrangement.[267] Second, PAEs may be established in venues with inhospitable piercing law, making it harder to pierce a corporate veil and identify a sponsor.[268] Third, many PAEs create further shell companies to assert patents, which would complicate veil piercing.[269] These layers also increase the likelihood a PAE and its sponsor remain anonymous in future suits, even if one of their many shell companies' veils are pierced and disclosed at trial.

Even if a small business defendant does have knowledge of a privateering relationship and could successfully assert an antitrust counterclaim, small businesses must still choose to do so. The analysis in Part II.A shows that most small businesses cannot litigate in the first place, finding it both necessary and prudent to settle due to their limited operational and financial

cumbed to a similar limitation, resulting in the dismissal of their case. 550 U.S. 544, 564 (2007).

266. Memorandum Opinion, Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 1:13-CV-00740-AJT-TCB, slip op. at 4–9 (E.D. Va. Dec. 18, 2013).

267. *See supra* Part I.B.3.

268. PATENT LITIGATION PRACTICE NOTE, *supra* note 77.

269. *See* Morton & Shapiro, *supra* note 186, at 476. For example, Intellectual Ventures reportedly has more than 1,300 shell corporations with which to litigate patents, potentially in multiple layers. *Id.*

means. PAE defenders have argued that this effect of PAE patent litigation is a USPTO and litigation problem, not an antitrust one.[270] While the way that small businesses respond to privateered litigation threats may be a symptom of litigation, the purposes of the privateering arrangement are of the kind antitrust law is designed to prevent.[271]

In summary, commentators have considered antitrust law as a potential solution to address patent privateering against *all* businesses. As a result, most agree that current antitrust law might only stop patent privateering in rare circumstances—perhaps when small businesses are targets. In addition, the analysis above shows that there are several practical reasons for why, even if theoretically antitrust law is a solution, such claims and defenses would likely fail to make it past the pleading stage of litigation. Technicalities and *Noerr-Pennington* immunity may also restrict the ability for current antitrust law to bar patent privateering outright. And even if antitrust law may theoretically already provide a solution for small businesses sued by patent privateers, the realities of the situation make it either too difficult or too costly to pursue the solution. Part III provides a solution to all these problems.

III. REBUTTABLE PRESUMPTIONS PROVIDE A SOLUTION

In the past several years, little has been done to address patent privateering. This Part provides a comprehensive solution to the anticompetitive effects of patent privateering against small businesses—the only kind of businesses substantially affected by privateering's patent litigation activities. Section A showcases this solution in the form of rebuttable pre-

270. *See* Wright & Ginsburg, *supra* note 213, at 525.

271. *See supra* Part I.C, which notes that the goals of antitrust law are to promote and protect fair competition. As Senator Sherman, the namesake of the Sherman Act, once famously stated:

> If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the prices of any commodity.

BILLS AND DEBATES IN CONGRESS RELATING TO TRUSTS: FIFTIETH CONGRESS TO FIFTY-SEVENTH CONGRESS 95 (James A. Finch ed., 1902), https://play.google.com/store/books/details?id=OsssAAAAYAAJ&rdid=book-OsssAAAAYAAJ&rdot=1. Patent privateering, if left unchecked, would enable such a king or emperor within a specific industry, without requiring it to compete for its throne.

sumption to be applied by courts. Section B compares this solution to other proposals recommended by scholars and reasons that only the solution proposed in Section A can adequately address the patent privateering. Lastly, Section C addresses the policy implications of the solution proposed in Section A in the realms of antitrust law, patent law, and *Noerr-Pennington* immunity.

A. THE PROPOSAL FOR A SECTION 2 ANTITRUST VIOLATION PRESUMPTION

As the analysis of Section 2 antitrust liability in Parts II.B.2–3 shows, in most cases patent privateering against *small businesses* constitutes an antitrust violation. Other kinds of antitrust liability are less likely to be successful and more attenuated. Section 2 antitrust liability can address every patent privateering activity, however.[272] Therefore, a presumption of Section 2 liability would provide the most protection without establishing a potentially too-sweeping presumption (say, of any kind of Sherman or Clayton Act liability).

Because patent privateering has significantly anticompetitive effects when targeted against small businesses (but not when against large ones), a rebuttable presumption of antitrust liability must be carefully tailored to protect small businesses. In contexts involving patent privateering against a small business, proving circumstantial anticompetitive effects should not be a major difficulty since, on the whole, the analysis in Part II.A indicates that patent privateering as a nationwide practice harms competition and consumers. However, the ability to prove that a privateering relationship exists is a formidable hurdle.[273] What is needed is a presumption structured in such a way to remove this hurdle, while also allowing for the assertion of good faith patent litigation suits; the presumption should not

272. Section 1 claims are restricted because they only apply to agreements, trusts, and other combinations, which can easily be circumvented by transfers of patents. Applying the presumption to Section 7 claims could also presume too much; not every transfer of patents to a PAE leads to patent privateering. Patent misuse does not provide small business defendants with more than temporary relief—though the relief would entail elimination of the privateering arrangement. But since patent misuse is a defense, it has no teeth, unlike Section 1, 2, and 7 claims. Further, its doctrinal foundation is already questioned. Section 2 is therefore best because it has a statutory foundation and provides greater disincentives to sponsors to litigate against small businesses through PAEs; violators would be subject to treble damages.

273. *See supra* Part II.B.6.

be overly broad, nor should it be too narrow. Therefore, a solution must presume that any circumstances suggesting a strong likelihood of patent privateering against a small business is unlawful as a violation of Section 2.[274]

Courts, legislatures, and/or regulators should adopt a rebuttable presumption that a patent infringement lawsuit violates Section 2 as either monopolization, an attempt to monopolize or maintain monopoly power, or a conspiracy to monopolize or maintain monopoly power in circumstances that are all but certain to indicate a privateering relationship. This presumption would only apply when small businesses are being sued by a PAE, which does not practice the patents in suit. Small businesses could be defined according to the Small Business Association's size standards, per industry.[275] In cases against these so-defined small businesses, the likelihood of patent privateering and the risk of harm to competition is great enough to justify this presumption.

However, a PAE plaintiff should be allowed and entitled to show that it is not a patent privateer. By providing easy-to-obtain, basic factual evidence, good faith plaintiffs should be able to rebut this presumption with only a slight burden. Ideally, rebutting evidence should relate to indicia of non-privateering relationships. For example, a plaintiff could show one of two "outs": either that (1) the plaintiff is not a PAE, or (2) the plaintiff is a PAE, but has no material ties to a competitor with monopoly power or close to market power in the market for the patent(s) being asserted. A PAE would be defined as any person who is not an original inventor, a company that substantially practices the patent, a university, or a technology

274. A presumption of unlawfulness need not be exclusive to Section 2. Any number of business torts or consumer protection regimes may also be viable alternatives. This Note, however, considers only antitrust law due to the powerful anticompetitive effects in play and the danger of monopolization. Both of these negative effects are primarily addressed by antitrust law—though, other doctrines may also be applicable.

275. *See* U.S. SMALL BUS. ASS'N, TABLE OF SMALL BUSINESS SIZE STANDARDS MATCHED TO NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODES (2016), https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf. This per-industry classification takes into account the relative size of an industry and its market participants. A small business could also be defined as any business with less than $100M in revenue each year. Chien, *supra* note 21, at 464, 475, showed that companies making less than $100M per year constituted the majority of defendants in PAE patent infringement lawsuits. Firms making more than $100M per year were also less affected by such lawsuits. *Id.* Therefore, the small businesses affected most by patent privateering probably make less than $100M in revenue per year.

transfer organization solely purposed on commercializing technology developed by institutions of higher education.[276] In regard to the second out, most non-PAE operating companies could easily prove that they substantially practice their patents, so this presumption would have a *de minimis* effect on them. Additionally, a presumption structured with these outs would not prevent universities from protecting their patent rights or the patent rights of their researchers. Lastly, inventors would be protected due to their non-inclusion as PAEs or outsourcing to technology transfer organizations. These kinds of PAE sponsors would have no competitive reason for refusing to disclose their identity. It may even be to the PAE's advantage to make such disclosure, as the sponsor's identity may engender sympathy or respect from fact-finders.

If, however, the plaintiff is a PAE (the first out), it would have to prove that it has no ties to any competitors—especially large competitors—with market power or dangerously close to market power in the market for the patent(s) being asserted. Such evidence would be harder to provide, but not unduly burdensome. This would require the PAE plaintiff to prove by clear and convincing evidence[277] that (1) there is no dominant (or close to dominant) competitor[278] practicing the patent, whether licensed to or from, and (2) there is no formal or informal agreement or arrangement in which any third parties to the lawsuit have any form of economic or non-economic interest in the outcome of the infringement lawsuit or use of the patents being asserted, including subsidiary, intermediary, and ultimate owners, of any percentage, of the PAE, itself.[279] Framing the exclusion this broadly would ensure that no conceivable form of privateering relationship exists between the PAE and any dominant (or near dominant) competitors in the market. If

276. This list is borrowed from the SHIELD Act, H.R. 845, 113th Cong. § 2 (b), (d) (2013).

277. This standard was chosen due to the harmful effects of patent privateering against small businesses and the need to provide small business defendants with hope that the rebuttable presumption may save them from legal costs. Courts may find, however, that the preponderance of the evidence standard is more appropriate, given the potential First Amendment implications.

278. A large competitor would be whatever is not a small competitor (those companies making over $100M per year).

279. Essentially, this provision relates to the various ways in which a privateering relationship may be structured, in order to preclude any possible formal privateering arrangement from rebutting the presumption. See *supra* Part I.B.3 for an overview of these possible arrangements.

there is no such relationship, then antitrust concerns are alleviated, and the suit is likely one brought by a non-privateered PAE.

Lastly, the presumption should be rebutted in the event that Section 2 liability can be otherwise disclaimed or disproven by the PAE-plaintiff.

If enforced, this rebuttable presumption would prevent patent privateers from suing small businesses for patent infringement and force dominant or nearly dominant sponsors to sue in their own names instead. As a result, the incentives and consequences of traditional patent litigation would inure to both plaintiffs and defendants. The anticompetitive effects of patent privateering would be lifted or at least extremely limited. In addition, the frequency of patent litigation would likely decrease, as large sponsors would no longer be able to avoid the various costs to them that are otherwise avoided through patent privateering. This would likely have public benefits, such as reducing the burden and congestion on the public court system and increasing consumer and business faith in the justice system as a whole.

B. A PRESUMPTION IS MORE EFFECTIVE THAN OTHER PROPOSALS

The presumption sketched out in Section A is likely to be more effective than other solutions currently proposed. Recall that most commentators have proposed changes to the *patent system* in order to address patent privateering.[280] One set of proposals in this area requires parties to a patent infringement lawsuit to list all persons with an interest in the outcome of the case.[281] This, the proponents argue, would help alleviate the problem of concealed sponsors by providing defendants with at least some circumstantial evidence of a possible privateering relationship. However, these reforms would have to be worded to account for both ownership and licensing interests to capture the full range of formal patent privateering arrangements, ownership, license, or otherwise.[282] The presumption envisioned

280. *See supra* Part I.B.5.

281. *See* Ewing, *supra* note 15, at 120–21; O'Toole, *supra* note 27, at 70–72 (citing H.R. 2639, 113th Cong. (2014) and S. 1013, 113th Cong. (2014)) (discussing the America Invents Act).

282. The White House lists real party in interest disclosures as a top priority for future PAE legislation. *FACT SHEET: White House Task Force on High-Tech Patent Issues*, WHITE HOUSE (June 4, 2013), http://www.whitehouse.gov/

above does this; and while such language could be adopted to provide for this solution, a disclosure mechanism would still present likely difficulties that are not encountered with a presumption.

For one, the timing of such disclosures would have to be early, so that small business defendants could quickly assess whether to defend or not. Timing of other important early disclosures, such as claim construction in *Markman* hearings, continues to be subject to judicial discretion and great variability.[283] Further, the creation of a disclosure requirement, even if properly timed, would also require the courts to recognize the antitrust liability arguments proposed in Part II.A, which underlie the presumption formulated above in Section A. Therefore, a disclosure requirement would require more moving parts than a presumption.

Lastly, a disclosure requirement would likely not have the same preclusive and deterrent effect of a presumption. A patent privateer might still sue a small business target hoping the target will respond in a way desirable to the privateer's sponsor.[284] The privateer could take this chance and may never need to disclose its identity at all. With the proposed presumption, the privateer would bear the initial onus to prove its non-anticompetitive nature to the court before proceeding against the small business target.[285] Until proven, a small business would not have much risk and may even respond to see whether the good faith nature of the suit is proven. Due to the ways in which small businesses respond to threats of patent litigation,[286] this early burden-switch is desirable and necessary to prevent patent privateering and its effects. A disclosure requirement would not accomplish such a goal.

Other reforms, most notably the SHIELD Act, aim to counteract the incentives for PAEs to litigate by imposing fee-

the-press-office/2013/06/04/fact-sheet-white-house-task-force-high-tech-patent-issues.

283. *See* James P. Flynn, Markman*: Courts Continue To Differ over Timing of Claims Construction*, EPSTEIN BECKER GREEN (Apr. 1, 2008), http://www.ebglaw.com/news/markman-courts-continue-to-differ-over-timing-of-claims-construction.

284. *See supra* Part II.A.

285. It may even face sanctions under FED. R. CIV. P. 11 if it cannot prove this right away—an adequate deterrent.

286. They usually respond in ways that are anticompetitive and enable monopoly for large sponsors. *See supra* Part II.A.

shifting mechanisms.[287] However, these reforms cannot fully offset the competitive advantages of patent privateering when unleashed against small businesses because most small rivals will choose to settle before even defending themselves.[288] If the analysis in Part II is sound, small businesses should choose not to settle; antitrust law already provides for treble damages, fee-shifting, and criminal liability.[289] But the evidence shows the opposite. Therefore, a proposal like the SHIELD Act would likely have no practical effect on the incidence of patent privateering. Even if it provided another avenue of recovering costs, small businesses are unlikely to be willing to front the bill for potentially several years of litigation.

Lastly, a blanket prohibition against the use of PAEs in patent litigation would probably not curb patent privateering.[290] First, it would be difficult for courts to determine if a company truly is a PAE or not, given the secretiveness of privateering arrangements. A court could employ the same criteria as listed in the proposed presumption in Section A, but if it did so, it might as well simply employ the presumption anyway. Second, benign uses of PAEs for litigation by inventors, universities, and small firms would be unjustifiably enjoined.[291] A blanket prohibition on privateering would thus be overly broad. Third, prohibition would still not solve the evidentiary difficulty of discovering the existence of a privateering arrangement or the identity of a sponsor.[292] Fourth, such a prohibition may violate *Noerr-Pennington* immunity, established by the First Amendment. A presumption, on the other hand, succumbs to none of these difficulties.[293]

287. *See* H.R. 845, 113th Cong. (2014), https://www.congress.gov/bill/113th-congress/house-bill/845/text (providing fees for a defendant who prevails in a patent infringement lawsuit).

288. *See* Chien, *supra* note 21, at 485 ("[O]ne problem with a number of these reforms is that they don't directly or necessarily help those against whom litigation is threatened, but not brought.").

289. *See* 15 U.S.C. § 1 (2012).

290. *Cf.* Wright & Ginsburg, *supra* note 213, at 505–06 (noting Professor Tim Wu's proposal to exterminate all PAEs).

291. *See, e.g.*, Tim Wu, Address at the Hearing on Digital Economy Oversight of Innovation Catalysts of the Organisation for Economic Co-operation and Development 4 (Feb. 15, 2012), http://www.oecd.org/regreform/sectors/49623337.pdf.

292. *See* Ewing, *supra* note 11, at 80.

293. See *infra* Part III.C.2 for a discussion of the First Amendment issue.

A rebuttable presumption is not an uncommon mechanism in antitrust law.[294] Therefore, it is more likely that courts or legislative bodies would be comfortable in employing such a tool. Federal courts have adopted a rebuttable presumption in at least one instance involving patent litigation already.[295] Given the precedents already set by the federal courts and the fact that this solution would likely be most effective at deterring patent privateering, it should be adopted.

C. Policy and Constitutional Considerations

In addition to comparing the presumption laid out in Section A to other proposals, there are several policy considerations that must be made. This Subsection explores two primary policy considerations: (1) the policies underlying both antitrust and patent law, and (2) First Amendment, *Noerr-Pennington* protections.

1. Antitrust and Patent Law

Recall that antitrust law is purposed on prohibiting competitor conduct that unjustifiably forecloses and harms consumers.[296] One way in which antitrust accomplishes this is by prohibiting monopolies. Recall also that patent law is purposed on promoting innovation by enticing inventors with the ability to hold a limited monopoly over the use of their inventions.[297] Patent law, too, encourages healthy competition by incentivizing competitors to constantly invent new innovations that are useful to society.

A presumption in favor of antitrust liability when a patent monopoly is used to attain monopolies outside of the patent grant and injure rivals is supported by both antitrust and patent law policy. It is easy enough to see why antitrust law would favor this presumption given the harmful effects that flow from patent privateering.[298] Indeed, foreign regulators al-

294. *See, e.g.*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 14–17; *see also* Thomas F. Cotter, *Antitrust Implications of Patent Settlements Involving Reverse Payments: Defending a Rebuttable Presumption of Illegality in Light of Some Recent Scholarship*, 71 ANTITRUST L.J. 1069 (2004) (calling for a rebuttable presumption of illegality for patent settlements involving reverse payments).

295. *See* Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1218 (9th Cir. 1997).

296. *See supra* Part I.C; *see also supra* note 271.

297. *See supra* Part I.A.

298. *See supra* Part II.A.2.

ready recognize this fact; the Korea Fair Trade Commission (KFTC), for example, recently established that patent privateering is "abusive or unreasonable."[299] The presumption envisioned in Section A would comport with this policy and with the public policy of the antitrust laws: to ensure fair competition between all businesses—not competition based on intimidation and availability of financial resources for litigation.

Antitrust and patent policy further favors stopping destructive patent privateering against small businesses because small businesses serve extremely important roles in the U.S. economy and innovation.[300] Disincentivizing covert patent litigation against small businesses also comports with the public goal to "foster . . . small business growth and development."[301]

Although it would appear that a patent holder's rights to exclude others from using an invention through litigation could be inhibited by the presumption advanced in Section A, the opposite is true. Rather, the presumption set forth in Section A only prevents a large sponsor from using PAEs to litigate patent rights without a public connection to the sponsor.

Preventing patent privateering would also not detract from the incentive that a patent monopoly provides inventors, unless those inventors are incentivized to apply for patents in order to covertly wield a club over a rival's head in the hopes of excluding them from the market over the long-term. Certainly, such a "right" was not intended to be part of the incentive for an inventor. Given that patent law intends to promote progress through incentives and competition, the incentives cannot logically include such anti-competitive and regressive ends. The rebuttable presumption proposed in Section A would thus eliminate the incentive to use a patent in a way that expands beyond the rights of a patent's limited monopoly.

2. First Amendment

Recall that *Noerr-Pennington* immunity provides that persons may petition the government through litigation and that

299. Bart Eppenauer, *Emerging Antitrust Regulation of Intellectual Property Licensing in Asia*, IP WATCHDOG (Aug. 16, 2015), http://www.ipwatchdog.com/2015/08/16/emerging-antitrust-regulation-of-intellectual-property-licensing-in-asia/id=60693 (noting that both China and Korea have attempted to preempt patent privateering and similar activity already seen in the U.S., but not yet prevalent in Asia).

300. *See* Liu, *supra* note 179, at 499–500.

301. *Id.* at 500.

the First Amendment protects this activity.[302] However, as has been established in the *Handgards* cases, no person may petition the government in meritless ways as a strategy to harm competitors and consumers.[303] Usually, this is found when a lawsuit is focused not on the outcome of the case on the merits, but instead on the anticompetitive results of the judicial process (sham litigation).

The presumption in Section A may be said to stand as a bar—albeit an extremely small one—to petitioning the government. However, it should be thought of as barring secretive and vindictive petitioning conduct. The presumption's narrow tailoring only applies to manners of speech (patent privateering) that significantly bear on important societal and governmental interests. As the Supreme Court has consistently stated, the right to freedom of speech (and any constitutional right) is not absolute; for example, restrictions have been justified in commercial speech cases where, generally speaking, restrictions are content neutral, narrowly tailored, serve significant governmental interests, and leave room for alternative channels of communication.[304] The *Handgards* cases and *Noerr-Pennington* doctrine reflects this same understanding by prohibiting meritless litigation.

The proposed presumption would survive a First Amendment challenge because it is content neutral, narrowly tailored to patent privateering against small competitors (which has been shown to be very anti-competitive), imposes a minimal burden, serves the interests of promoting and protecting fair competition and consumers, and does not affect the ability of large sponsors to sue small rivals for patent infringement in their own name (an alternative). And since covert patent privateering can only have anticompetitive purposes underlying it, it is a sham and thus a recognized and appropriate exception to *Noerr-Pennington* immunity.

302. *See* E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138–40 (1961); Ewing, *supra* note 15, at 139; Roszkowski & Brubaker, *supra* note 147, at 416.

303. *See* Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 993 (9th Cir. 1979); *see also* City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 380 (1991).

304. *See* Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011); Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980); Grayned v. City of Rockford, 408 U.S. 104 (1972).

CONCLUSION

Policy-makers have become increasingly wary of PAE patent acquisition and assertion activities. Through licensing or transfers of patents, sponsor companies can direct—or privateer—PAEs to sue competitors for patent infringement in an effort to raise rivals' costs, hinder rivals' ability to compete, and forestall and foreclose competition from existing and potential rivals. These anticompetitive effects inflate sponsor companies' market power, at the expense of competition, regulation, innovation, and consumer welfare. When patent privateering is targeted against small businesses, these effects are exacerbated. Small rivals are uniquely and disproportionately affected by patent privateering and are more likely to succumb to its anticompetitive effects.

Most solutions proposed to address this problem involve increasing transparency, cost-shifting or sanctioning, and lifting or piercing the corporate veil concealing a sponsor company's identity. There are ways for sponsors to circumvent these reforms, however, and disclosure mechanisms do not adequately address mismatched incentives and privateering behavior. Cost-shifting and blanket prohibitions succumb to similar weaknesses. This Note proposes an alternative solution, in the form of a rebuttable presumption of Section 2 antitrust liability. This presumption would operate when small businesses are sued by PAEs for patent infringement and would deter patent privateering against small businesses. As a result, large competitors could no longer employ covert patent litigation as a way to foreclose competition among small rivals and new innovators in the marketplace, thus protecting and promoting a competitive American economy.