INTRODUCTION

The patent system is designed to incentivize innovation by striking a balance between rewarding the inventor and allowing society to make use of the invention. However, like everything else, the patent system is vulnerable to exploitation. Once again, the greedy have discovered a way to profit from the work of others. Traditionally, inventors or innovative companies would be granted a patent for worthwhile contributions to society thereby securing a monopoly as a reward for the investment of time and resources. This system incentivizes the inventor or innovative company to continue to innovate which ultimately benefits society as a whole. However, a new contender has emerged. The non-practicing entity ("NPE") now has a major presence in the patent landscape. NPEs account for about 62 percent of all new patent infringement litigation. \(^1\) The term “patent troll” was coined to describe a certain form of NPE that exploits the patent system by extorting companies into settling lawsuits and engage in abusive litigation techniques. They are companies that purchase patents for the sole purpose of asserting them in litigation. They assert these patents (usually very broad in nature) with the hope that an “infringing” company will opt to settle rather than go through with costly litigation. Overwhelmingly, trolls do not create or develop new inventions nor do they practice any of the patents they own. Accordingly, these entities are fundamentally at odds with the goal of the patent system discussed previously. This paper will provide an overview of patent trolls and the tactics they use. This paper then provides an analysis of several counter measures that have been

taken and advocates that the best solution to the problem of patent trolls is through federal legislation and that unless proposed legislation is passed soon, the problem will continue to grow and damage truly innovative companies and the patent system itself.

BACKGROUND

I. What Are Patent Trolls And Why Do We Care?

In recent years the number of suits filed by Trolls has dramatically increased. These suits were traditionally filed against high-tech companies. However, patent trolls have begun to target smaller companies and even end users of technology. This new low has, in a way, helped bring attention to the problem trolls are creating. In short, trolls are companies that buy patents in order to litigate. They do not create or produce products so they are immune to counterclaims of patent infringement. Among the most useful tactics used by trolls are (1) asserting overly broad patents, (2) targeting smaller companies, (3) waiting until a product is market-ready to assert litigation, (4) using shell companies to bring litigation to shield themselves from having to pay attorney’s fees later on, and (5) sending out thousands of threatening letters at a time to “alleged infringers” to maximize the amount of settlements they can receive without having to actually go thorough with litigation.

5 See EXEC. OFFICE OF THE PRESIDENT, supra note 1, at 4.
Many patent trolls acquired patents in bankruptcy proceedings after the dot-com boom. Among these were broad patents such as the online shopping cart and the process of scanning documents to email. These patents capitalized on the use of the internet, meaning that they have become exponentially vital to modern life. Because of this, the trolls that now own them have an infinite number of potential defendants. Additionally, some of these software patents are incredibly broad and can therefore be asserted against a broader range of “infringing” products. For example, the patent troll Personal Audio, LLC received a patent in 2009 for a “system for disseminating media content representing episodes in a serialized sequence.” The company now contends that the patent applied for in 1996 applies to nearly all digital episodic content, including podcasting and posting television episodes online.

One “infringer” targeted by Personal Audio was podcaster Adam Corolla. The former comedian had one of the most popular podcasts on iTunes when he was sent a letter threatening litigation. Unexpectedly, Corolla decided to fight back by crowdfunding to cover legal expenses. Because of the nature of podcasting and the support from the podcasting community, Corolla was able to bring more attention to the shakedown-like tactics used by Personal Audio and they eventually agreed to drop the suit. Some infer that Personal Audio decided to back down because podcasting was not the “cash cow” they had thought and instead

7 U.S. Patent No. 7,272,639 (issued Sept. 18 2007).
8 See, e.g., Joe Mullin, supra note 4.
10 Podcasting is a form of digital radio show made available episodically online or through such platforms as iTunes.
12 Crowdfunding is the practice of funding a project or venture by raising many small amounts of money from a large number of people, typically via the Internet.
decided to pursue litigation against more high value defendants Apple and CBS. 14 Although some consider this a victory, Corolla ended up spending over $200,000 in legal fees. 15 Had Personal Audio continued with discovery, the suit would have cost around $100,000 per month to defend. 16 Corolla was able to recover. However, other small businesses may have had to close up shop after such an ordeal. Personal Audio went on to win a $1.3 million judgment against CBS for the same patent. However, non-profit organization Electronic Frontier Foundation recently raised money to file an inter partes review and invalidated the patent. 17

ANALYSIS

II. What Can Be Done To Combat Patent Trolls?

Because Trolls have been gaining more notoriety recently, more effort is being put forth to combat them. There have been several important Supreme Court decisions that have severely crippled troll tactics, states have started to pass laws aimed specifically at stopping troll-like behavior, and legislation has been proposed in both The Senate and House of Representatives that would help to repair the patent system and guard against such abusive litigation. Although all of these measures address aspects of the patent troll problem, the only means that will address the specific problem as well as work practically is to pass federal legislation.

14 Adam Carolla FINALLY talks about the patent troll Personal Audio case! (Afterpod Oct. 1, 2014) https://www.youtube.com/watch?v=x9EVohYB_NE.
15 Id. at 17:50.
16 Id. at 14:10.
17 See Joe Mullin, supra note 11.
A. Landmark Cases

There have been several blows to patent trolls in the Supreme Court. In 2006 the Supreme Court implemented a case-by-case analysis, in deciding to grant injunctive relief. The Court held in *eBay Inc. v. MercExchange, L.L.C.* 18 that the traditional equitable test must also be applied to patent infringement cases. 19 Previously, courts would routinely grant injunctive relief pursuant to a patent holder’s right to exclude. Because of this, trolls could threaten companies with products that were market ready or already on the market with an injunction. Doing so would give trolls leverage to negotiate a more favorable settlement. 20 However, some critics suggest that The Court did not provide enough guidance in *eBay* to apply the test in patent cases. This leaves the test open to different interpretations by lower courts and allows trolls to continue to forum shop. 21

The Court struck another blow to patent trolls in 2014. In *Alice Corp. v. CLS Bank International,* 22 The Court narrowed the scope of patentability by holding that computer software designed to mitigate settlement risk was invalid for “fail[ing] to transform [an] abstract idea into a patent-eligible invention.” 23 This holding frustrates patent trolls’ method of asserting overly broad, weak patents in order to sue a wide variety of “alleged infringers.” It also

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19 *Id.* at 390 (referencing Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982); Amoco Production Co. v. Gambell, 480 U.S. 531, 452 (1987)).
23 *Alice Corp.*, *supra* note 22 at 2352
addressed the problem at the source by instructing the USPTO as to which software patents it may issue in the first place. 24

Finally, in Octane Fitness, LLC v. ICON Health & Fitness, Inc., 25 The Court created a more flexible, case-by-case standard for district courts to award attorney’s fees. 26 This fee shifting can act as a deterrent to patent trolls, discouraging them from bringing bad faith patent litigation. Although it is a step forward, the decision only addresses one of many patent system issues that patent trolls exploit. 27

The difficulty in relying on the Judicial Branch to address the problem is that it is limited to the Legislative Branch’s instructions and acts retroactively. It took The Supreme Court until recent years to give more discretion to lower courts in granting injunctive relief and allowing prevailing parties to receive attorney’s fees. This evolution comes more than a half-century after the relevant sections of the United States Code were enacted. 28 It is true that in this way The Court can adapt the law to current trends and ideals in the patent field. However, this ability still responds to the problems as they arise and has no preventative quality. Additionally, The Court’s opportunity to address these problems only arises after litigation has been going on for years. To get to this point, “alleged infringers” would have already spent millions of dollars. Also, patent trolls could likely avoid a trip to the Supreme Court by targeting companies without the resources to carry a case through that far. In sum, The Court can help address certain oversights of the Legislative Branch but it cannot directly address the underlying problems.

24 Heinecke, supra note 21 at 1168.
26 Id. at 1756.
27 Heinecke, supra note 21 at 1170.
B. State Law

“Alleged infringers” can now attempt to remedy the damage caused by abusive litigation from trolls by filing specific tort claims in state court. Previously, companies would have to depend on consumer protection laws that were more difficult to apply in the patent context. In response to this difficulty, some states have passed laws specifically aimed at creating a remedy for companies that have been victimized by patent trolls. One example is North Carolina’s Abusive Patent Assertions Act (“the Act”). This legislation seeks to help the battle against patent trolls by (1) covering specific targets of alleged patent infringement as well as those who merely receive threats of litigation, (2) allowing courts to require companies bringing patent litigation to post a bond of $500,000 to cover attorney’s fees should the court find it to be a bad faith assertion, (3) allowing joinder of parties with an interest in the patent in the event the company asserting litigation in bad faith cannot afford the amount awarded to the targeted “infringer” and (4) allowing the Attorney General to join in suit against parties asserting litigation in bad faith.

Although this act targets many of the prominent tactics used by patent trolls it may prove ineffective against preemption by federal law. Any litigation (on the merits) involving patent infringement necessarily requires a patent analysis which allows patent trolls to remove the case to federal court by way of Federal Question Jurisdiction. Once in federal court, any state tort action related to the case would be dismissed. In order to avoid removal to federal court,

31 Id.
victims of patent trolls must show that the assertion of a patent right is “objectively baseless,” an incredibly high burden to meet. The decision in *GlobeTrotter* heightened this burden by requiring that bad faith be shown in addition to “objectively baseless” claims, even if the state tort does not require a showing of bad faith. Ultimately, there have not been any notable victories in bringing state action in response to abusive patent litigation.

**C. Enacted and Proposed Legislation**

In response to the increasing incidents of patent troll litigation, legislation has been enacted and proposed in congress. Three notable examples are The America Invents Act (“AIA”), The PATENT Act, and The Innovation Act of 2015. Although The AIA was signed into law in September of 2011, both The PATENT Act and Innovation Act are still being considered by Congress.

The AIA targeted a limited number of patent troll tactics. Among other things, the act (1) made joining defendants more difficult to discourage forum shopping, (2) expanded post-grant review to encourage transparency in the USPTO and help clarify the parameters of existing patents, and (3) further restricted patents on abstract business methods that had led to so much litigation throughout the 1990’s. Although the AIA included a study on litigation by NPEs,
it failed to directly address several crucial issues such as damages, pleadings, discovery, and venue restrictions. 42

The pending legislation, PATENT Act and Innovation Act, aim to pick up where the AIA left off. Both Acts include provisions that would (1) heighten pleading requirements, (2) require plaintiffs to disclose other parties with interests in the asserted patents, (3) allow for fee shifting to make it easier for the prevailing party to receive attorney’s fees, and (4) impose limitations on discovery so that the validity of the asserted patent would be considered before parties were required to engage in the costly process of discovery. 43 Although they differ slightly on the issues mentioned, it is clear that the acts are aimed towards addressing the patent troll problem. 44 However, like any proposed legislation, these acts must navigate the politics of the system before they become effective. The main pushback on this specific legislation is that it goes too far and would end up hurting innovative companies. This criticism has urged some corporations such as Ford, Apple, and Pfizer to join together to create a lobbying group called The Partnership for American Innovation. 45 This may explain Congress’ hesitation to proceed further.

43 Heinecke, supra note 40 at 1162-1164.
CONCLUSION

Although it may face the most opposition, federal legislation would be the best option to combat the patent troll problem. Legislation would prevent abusive litigation before it begins, saving “alleged infringers” from spending copious amounts of money to defend themselves. Litigation is something that the Judicial Branch would simply not prevent. Legislation would also be unaffected by the procedural issues that state law is currently facing. In order to be enacted, larger companies that currently oppose the legislation may have to make a small sacrifice. In doing so they will be helping smaller companies that are most affected by patent trolls but have little resources to fight back or lobby for change. The patent system aims to encourage innovation whether it comes from a large company, small company or elsewhere. There may be innovations that society will never know if something is not done to better address the problems caused by patent trolls.