

STATES HOLD THE SWORD TO FORCE “PATENT TROLLS” BACK UNDER THEIR BRIDGES

TARA FELD*

Patent trolls are generally seen as drains on the economy, as they make no marketable product and survive only by drawing funds away from other legitimate businesses. While the federal government has taken steps toward combating patent trolls, much of the legwork is being done at the state level. This Note argues that the states are the proper platform through which to combat patent trolls, as states are in the position to best balance legal assertions of patent rights with the protection of businesses from patent trolls on a local level.

TABLE OF CONTENTS

I.	INTRODUCTION.....	1124
II.	BACKGROUND	1125
	A. <i>The United States Patent System</i>	1125
	B. <i>Patent Licensing</i>	1126
	C. <i>NPEs and Patent Trolls</i>	1127
	D. <i>The Federal Response</i>	1130
	1. <i>The Legislative Branch</i>	1131
	2. <i>The Executive Branch</i>	1132
	3. <i>The Judicial Branch</i>	1133
	E. <i>The States’ Responses</i>	1135
III.	ANALYSIS	1137
	A. <i>Shortcomings of the Federal Response</i>	1137
	1. <i>The Legislative Branch</i>	1138
	a. <i>Section 299 Joinder</i>	1138
	b. <i>Administrative Procedures</i>	1140
	c. <i>Future Congressional Action is Unlikely</i>	1142
	2. <i>The Executive Branch</i>	1143
	a. <i>The FTC</i>	1143
	b. <i>Executive Actions</i>	1144
	3. <i>The Judicial Branch</i>	1147
	B. <i>The States’ Responses Can Be More Effective</i>	1149

* J.D. Candidate, 2016, The University of Illinois College of Law. I would like to thank Professor Melissa F. Wasserman for her guidance in writing this Note. I dedicate this Note to my family for their overwhelming love and support.

1124	UNIVERSITY OF ILLINOIS LAW REVIEW	[Vol. 2016
	1. <i>States Can Tailor Their Laws to Specific Industries</i>	1149
	2. <i>States Can Get the Job Done</i>	1150
	3. <i>States Can Amend Existing Consumer Protection Laws</i>	1151
	4. <i>Other Federal Laws Have Been Successfully Supplemented by State Action</i>	1152
	5. <i>The Problem of Preemption</i>	1153
IV.	RECOMMENDATION	1154
	A. <i>Removing the Possibility of Preemption</i>	1154
	B. <i>Existing Preemption Exceptions</i>	1155
V.	CONCLUSION	1155

I. INTRODUCTION

Patent trolls have become the bullies of the patent market, shaking down small businesses and nonprofit organizations for money through coercive, deceptive practices. And the country is starting to notice. MPHJ Technology Investments, Inc., has become the “poster child” for patent trolls, representing the epitome of bad patent assertion behavior.¹ MPHJ sent a series of “allegedly unfair and deceptive letters” to small businesses and nonprofit organizations in which MPHJ claimed its patents covered print-to-email technology and that the target business infringed these patents.² In these letters, MPHJ threatened to file a patent infringement lawsuit against the target businesses unless they purchased a license for the technology.³ MPHJ specifically “target[ed] businesses too small to have the resources to fight such litigation,” effectively coercing the target businesses into paying for a likely unnecessary license.⁴

Patent trolls like MPHJ are generally seen as drains on the economy. They make no marketable product and survive only by drawing funds away from other legitimate businesses’ Research and Development (“R&D”) departments, stifling innovation.⁵ While the federal government has taken steps toward combating patent trolls, much of the legwork is being done at the state level.⁶

Recently, Vermont Attorney General William Sorrel turned the tables on MPHJ by filing suit against the company under the state’s Con-

1. Dennis Crouch, *State of Vermont’s Demand Letter Case Against MPHJ Continues*, PATENTLYO (Aug. 12, 2014), <http://patentlyo.com/patent/2014/08/vermonts-against-continues.html>.

2. Vermont v. MPHJ Tech. Invs., LLC, No. 2:13-CV-170, 2014 WL 1494009, at *2 (D. Vt. Apr. 15, 2014).

3. *Id.*

4. *See id.*

5. James Bessen et al., *The Private and Social Costs of Patent Trolls*, REG., Winter 2011–2012, at 26, 33.

6. *See infra* Part II.D–E.

sumer Protection Act.⁷ The Attorneys General of New York, Minnesota, and Nebraska also initiated their own suits against MPHJ.⁸ Additionally, over half the country has legislation aimed at battling patent trolls that is either in effect, pending, or under legislative debate.⁹

This Note argues that the states are the proper platform through which to combat patent trolls. States are in the position to best balance legal assertions of patent rights with the protection of businesses from patent trolls on a local level. Part II of this Note gives background information relevant to the U.S. patent system, patent troll practices, and the federal and state governmental responses to the patent troll problem. Part III analyzes the various ways in which the states are in a better position than the federal government to effectively protect businesses from patent trolls and touches upon the potential preemption issue associated with such state action. Part IV then recommends that Congress should amend the America Invents Act (“AIA”) or pass an independent act to explicitly allow states to pass legislation aimed at this goal, thereby removing any potential preemption issues.

II. BACKGROUND

This Section begins with the definition of a patent and a brief description of the U.S. patent system. It then discusses patent licensing, including the motivations behind licensing and the benefits licensing can provide to a patentee. With licensing in mind, this Section then discusses nonpracticing entities (“NPEs”) and patent trolls, both of which make use of licensing in different forms. It describes some beneficial licensing practices of NPEs and contrasts these with the negative, coercive nature of patent-troll licensing schemes. This Section then examines both the federal government’s and state governments’ responses to the patent-troll problem.

A. *The United States Patent System*

The U.S. patent system has its roots in the Constitution.¹⁰ The patent system in this country exists “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹¹ With this goal in mind, Congress has elected to afford patents “[t]he attributes of

7. See Consumer Protection Complaint, *State v. MPHJ Tech. Invs., LLC*, No. 2:13-CV-170 (Super. Ct. Vt. May 8, 2013) (No. 282-5-13Wncv) [hereinafter Vermont Complaint] (bringing suit under Vermont Consumer Protection Act 9 V.S.A §§ 2451 *et seq.*).

8. See *infra*, notes 108–13 and accompanying text.

9. For a list of these states as of June 2014, see Melanie Chernoff, *New State Laws Target Patent Trolls*, OPENSOURCE.COM (June 9, 2014), <http://opensource.com/law/14/6/new-state-laws-target-patent-trolls>.

10. U.S. CONST. art. I, § 8, cl. 8.

11. *Id.*

personal property.”¹² Patent law has developed to “reflect[] a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the ‘Progress of Science and useful Arts.’”¹³ The patent system incentivizes innovation through affording patentees “the right to exclude others from making, using, selling, offering for sale, or selling the [patentee’s] invention throughout the United States.”¹⁴ At the same time, it provides the public with protection from unwarranted monopolies obtained from patents through various bars to patentability.¹⁵ To best achieve these goals, patent law has developed around the “congressional intent to create a uniform system.”¹⁶

The exclusivity granted to a patentee would be meaningless if it were not enforceable. A patentee can enforce her right to exclude others from practicing her invention through a patent infringement action.¹⁷ Title 35 of the United States Code allows a patentee to bring a civil action for infringement against an entity that, “without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor.”¹⁸ While patent enforcement provides inventors with the security necessary for them to feel innovation is worth their efforts, it must not be excessive; improper uses of the patent system, “such as through abusive litigation or overly broad patent claims,” can stifle, rather than promote, innovation.¹⁹ Such actions upset the delicate balance of the patent system.

B. Patent Licensing

While a patentee may elect to enforce the exclusivity granted by her patent upon others, she may choose to give up that exclusivity by licensing her patent to other entities. Under Title 35, patents “shall be assignable in law by an instrument in writing.”²⁰ A license provides the licensee with freedom from the threat of suit for infringement by the patentee.²¹ It is essentially a “waiver of the right to sue” the licensee.²²

12. 35 U.S.C. § 261 (2012).

13. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989).

14. 35 U.S.C. § 154(a)(1) (2012).

15. See 35 U.S.C. § 101 (2012) (utility); 35 U.S.C. § 102 (2012) (novelty); 35 U.S.C. § 103 (2012) (nonobviousness).

16. *Bonito Boats, Inc.*, 489 U.S. at 142.

17. 35 U.S.C. § 281 (2012).

18. *Id.*; 35 U.S.C. § 271(a) (2012).

19. EXEC. OFFICE OF THE PRESIDENT, PATENT ASSERTION & U.S. INNOVATION 2 (2013) [hereinafter PATENT ASSERTION] (“Innovators who fear inadvertently infringing existing patents may reduce innovative activity or take costly steps to defend against lawsuits claiming infringement, leading to fewer resources available for wages, job creation, and innovation of new products and services.”).

20. 35 U.S.C. § 261 (2012).

21. Alice Haemmerli, *Why Doctrine Matters: Patent and Copyright Licensing and the Meaning of Ownership in Federal Context*, 30 COLUM. J.L. & ARTS 1, 22 (2006).

22. *Id.* at 21 (quoting *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 181 (1938)).

Patent licensing, in its uncorrupted form, is intended to be mutually beneficial to both the licensee and the patentee.²³ It can be the necessary step to take a patented idea to a marketable product because a license “can facilitate integration of the licensed property with complementary factors of production.”²⁴ Thus, by allowing for the production of a useful product, the patentee, licensee, and consumer all benefit.²⁵ Licensing also promotes innovation by providing inventors with viable economic benefits for their inventions, providing a reason for “greater investment in research and development” to create new, licensable products.²⁶

Because licensing is a waiver of the right to sue, it is reasonable to assume the existence of licenses results in less litigation. Interestingly, nonpracticing entities (an umbrella term covering “patent trolls” as well), whose sole sources of income stem from licensing fees and settlements from litigation threats associated with licensing,²⁷ accounted for sixty-two percent of all patent suits brought in the United States in 2012.²⁸

C. NPEs and Patent Trolls

Not all NPEs deserve to be associated with the negative connotation that comes with the term “patent troll.” For example, universities with patent portfolios are technically NPEs²⁹ because they obtain patents through research but do not make any tangible products; yet they do not typically engage in the coercive licensing practices associated with patent trolls.³⁰ Furthermore, noncoercive NPEs play a significant and important role in the patent market. They often act as intermediaries, matching patent owners with patent buyers so that the inventor’s technology can be used in the most effective way possible.³¹ Individual inventors may not have the proper skills or resources to turn their patent into a marketable product; NPEs can buy a patent and then sell or license it to a company which has the resources to implement the patented technology in an economically viable manner.³² This NPE-driven process spurs innovation by

23. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 2.3 (1995).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Jury Sides with Apple in WiLan Patent Infringement Case*, MACCN (Oct. 23, 2013, 6:58 PM), .

28. PATENT ASSERTION, *supra* note 19, at 5.

29. See Michael J. Mazzeo et al., *Do NPEs Matter? Non-Practicing Entities and Patent Litigation Outcomes*, 9 J. COMPETITION L. & ECON. 879, 887 (2013) (performing an empirical study in which NPEs are distinguished by whether “the NPE is a company, individual, or a university”).

30. See *id.* at 886; Gene Quinn, *Universities are NOT Patent Trolls*, IPWATCHDOG (June 6, 2014), <http://www.ipwatchdog.com/2014/06/06/universities-are-not-patent-trolls/id=49951> (“The role of the university is to push technologies into the marketplace and work with those who license university innovation, which is the antithesis of what a patent troll does.”).

31. PATENT ASSERTION, *supra* note 19, at 3; see also Colleen V. Chien, *Startups and Patent Trolls* 7 (Santa Clara Univ. Sch. of Law Legal Studies Research Paper Series, Working Paper No. 09-12, Sept. 2012).

32. PATENT ASSERTION, *supra* note 19, at 3.

taking a patent that might otherwise remain inactive and turning it into a new, useable commodity.

Additionally, NPEs benefit inventors through the legitimate enforcement of patent rights. Particularly for small inventors lacking resources to enforce their patent themselves, NPEs can be truly valuable.³³ For example, Conservant IP Management claims that it “skillfully identif[ies] the most valuable patents in IP portfolios, and [] clearly document[s] proof of infringement” before beginning licensing negotiations for its clients, the inventors.³⁴ The firm’s blog notes that unlike patent trolls, legitimate patent enforcement firms will only pursue litigation “after protracted good-faith negotiations with potential licensees have proven unsuccessful.”³⁵ NPEs allow small inventors to transfer the high cost of patent litigation³⁶ onto a well-funded company. At the same time, the economy receives the benefit of having legitimate patent rights enforced while still maintaining liquidity in the patent market.³⁷ These factors help to maintain the incentives for innovation set up by the patent system.

While legitimate NPEs provide important services that boost innovation, patent trolls have the opposite effect on the economy. Patent trolls technically fall within the umbrella of NPEs because, as is explained below, they do not actually make any marketable products.³⁸ They do, however, represent a perversion of the legitimate patent enforcement system. Patent trolls first acquire patents on very broad technologies, often of questionable validity.³⁹ In *Vermont v. MPHJ Technology Investments, LLC*,⁴⁰ for example, the patent troll asserted a patent it claimed covered any and all scan-to-email technologies.⁴¹ For example, MPHJ sued Coca-Cola Co. in 2014 alleging that the company’s 150,000 employees had been allowed to use company machines to send scanned versions of documents directly to email, a basic activity performed routinely by companies all over the world.⁴² Patent trolls then select a large

33. *Id.*

34. *Our Services*, CONSERVANT INTELL. PROP. MGMT., <http://www.conservantip.com/our-services> (last visited Nov. 8, 2015).

35. Jon Dudas, *Distinguishing Between Legitimate Non-Practicing Entities and Patent Trolls*, CONSERVANT INTELL. PROP. MGMT. (Oct. 10, 2013), <http://www.conservantip.com/blog/distinguishing-between-legitimate-npes-and-patent-trolls>.

36. *See AIPLA 2013 Report of the Economic Survey*, INTELL. PROP. INS. SERVS. CORP., <http://www.patentinsurance.com/custdocs/2013aipla%20survey.pdf> (last visited Nov. 8, 2015).

37. Mazzeo et al., *supra* note 29, at 882–83.

38. FED. TRADE COMM’N, *THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION* 8 (2011) (defining the business model of patent assertion entities—a term for NPEs that excludes entities like universities that seek to develop and transfer technologies—as “purchasing and asserting patents against manufacturers already using the technology, rather than developing and transferring technology”).

39. PATENT ASSERTION, *supra* note 19, at 4.

40. *Vermont v. MPHJ Tech. Invs., LLC*, No. 2:13–CV–170, 2014 WL 1494009 (D. Vt. Apr. 15, 2014); *see supra* Part I.

41. *MPHJ*, 2014 WL 1494009, at *1.

42. Michael Macagnone, *Xerox, Others Slam Scanner ‘Patent Troll’ IP In PTAB Review*, LAW360 (May 27, 2015, 2:45 PM), <http://www.law360.com/articles/651812/xerox-others-slam-scanner-patent-troll-ip-in-ptab-review>.

number of businesses (most often small businesses and even nonprofit organizations) heavily invested in this broad technology as their targets.⁴³ Then, these target businesses receive a letter or series of letters from the patent troll asserting that the business infringes a patent acquired by the patent troll and threatening litigation if the business does not license the broad technology from the patent troll.⁴⁴ Patent trolls tend to operate under many shell subsidiaries, which complicates litigation further as target businesses often have difficulty figuring out exactly which entity to defend against.⁴⁵

Often, patent trolls do not follow through on their threat of suit.⁴⁶ Instead, they hope that the exceptionally high cost of patent litigation and the fear of costly, potentially business-ending litigation will convince these small businesses and nonprofits to pay for a license.⁴⁷ In this sense, patent trolls use fear to essentially shake down their targets for money. Target businesses are forced into licensing very broad technologies from patent trolls at higher prices than the true market value of the license, but for a cost less than the expense of litigation.⁴⁸

Although threats of suit are not always accompanied by an actual court filing, those patent trolls that do make good on their threats end up costing target businesses a devastating amount. In 2012, small businesses reported that fighting a patent assertion battle in court cost, on average, \$857,000, or twenty-four percent of their annual revenue.⁴⁹ Settling the matter, while less than the cost of an in-court battle, still sets small businesses back, on average, \$340,000, or thirteen percent of their annual revenue in 2012.⁵⁰ Further, the cost of litigation incentivizes patent trolls to drag out litigation as much as possible to increase the settlement value of the case, thereby forcing defendants into often nonmeritorious settlements as the cost of fighting in court escalates.⁵¹ With such staggering

43. PATENT ASSERTION, *supra* note 19, at 6.

44. *Id.*; see, e.g., *MPHJ*, 2014 WL 1494009, at *1–2.

45. Press Release, Office of the Press Sec’y, FACT SHEET: White House Task Force on High-Tech Patent Issues (June 4, 2013) [hereinafter 2013 Fact Sheet], available at <http://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force-high-tech-patent-issues>; see also Colleen V. Chien, *From Arms Race to Marketplace: The Complex Patent Ecosystem and its Implications for the Patent System*, 62 HASTINGS L.J. 297, 319 (2010).

46. Ruth Simon & Angus Loten, *States Revise Laws to Curb “Patent Trolls”*, WALL ST. J. (May 21, 2014, 7:58 PM), <http://online.wsj.com/news/articles/SB10001424052702304422704579574293500331028>.

47. PATENT ASSERTION, *supra* note 19, at 6, 9.

48. *Demand Letters and Consumer Protection: Examining Deceptive Practices by Patent Assertion Entities: Hearing Before Subcomm. on Consumer Prot., Prod. Safety, & Ins. of the S. Comm. on Commerce, Sci., & Transp.*, 113th Cong. 8 (2013) (Prepared Statement of Hon. Jon Bruning, Attorney General, Nebraska) (“Instead, patent trolls generally seek to ‘price’ their license or settlement demands such that the sum obtained will be high enough to make the effort worthwhile but low enough that it can actually be afforded (using the term loosely) by the targeted entity. In other words, it is worth it to simply pay the troll to go away (for a price which reflects not any true market value for the patented technology, but its litigation-induced value) instead of engaging in protracted and costly litigation.”).

49. Chien, *supra* note 31, at 11 tbl.1.

50. *Id.* at 7.

51. PATENT ASSERTION, *supra* note 19, at 6–7.

numbers, it is no surprise that target businesses feel they must pay for an unnecessary license rather than risk the cost of litigation.⁵²

There are other disincentives for target businesses to follow through on litigation. For example, when a patent troll's patent is invalidated through litigation or an administrative proceeding, it becomes invalid for all subsequent assertions.⁵³ Therefore, a single defendant may be unwilling to shell out the exceptional amount of money necessary to invalidate a patent when other target businesses get to reap the benefits without contributing to the cost of litigation.

The activities of patent trolls cause not only economic loss by the target businesses but also a drop in innovation while these disputes are ongoing.⁵⁴ While entrenched in litigation, target company funds must be diverted away from research and other business-development practices in order to cover litigation and settlement costs.⁵⁵ Even before target companies receive a complaint from a patent troll, they bulk up their legal department out of sheer fear of patent troll suits.⁵⁶ This again takes funding away from the target company's other departments, decreasing its ability to innovate and grow business. While legitimate licensing schemes promote innovation,⁵⁷ patent trolls assert rights over basic technologies the target businesses use on a daily basis.⁵⁸ These licenses do not lead to technology transfer and do not further the patent system's goal of innovation.⁵⁹

D. *The Federal Response*

Patent trolls have not gone unnoticed by the United States Government. Every branch of the federal government has, at the very least, discussed taking steps to curb the coercive activities of patent trolls, with some of these discussions leading to actual change.

52. *Id.* at 6.

53. The principle of *res judicata* prevents a party from asserting a patent in a subsequent suit that was held invalid in a prior suit. *See Foster v. Hallco Mfg. Co.*, 947 F.2d 469, 476 (Fed. Cir. 1991).

54. For an empirical study exemplifying loss in innovation during disputes with patent trolls, see Catherine Tucker, *Patent Trolls and Technology Diffusion: The Case of Medical Imaging* (Mass. Inst. of Tech. Mgmt. Scis., TILEC Discussion Paper No. 2012-030, Mar. 23, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1976593.

55. Bessen et al., *supra* note 5, at 31.

56. Timothy B. Lee, *New Study Shows Exactly How Patent Trolls Destroy Innovation*, VOX (Aug. 19, 2014, 7:20 AM), <http://www.vox.com/2014/8/19/6036975/new-study-shows-exactly-how-patent-trolls-innovation>.

57. *See supra* Part II.B.

58. *See* Robin Feldman & Mark A. Lemley, *Do Patent Licensing Demands Mean Innovation?* 26 (Stanford Law and Econ. Olin Working Paper No. 473, Feb. 15, 2015) (“[L]icensees are simply paying for freedom to operate . . .”).

59. *Id.* at 27.

1. *The Legislative Branch*

The legislative branch's most robust response to patent trolls came in 2011 with the passage of the America Invents Act ("AIA").⁶⁰ Several provisions of the AIA were intended to impact patent trolls. The new joinder rule has a provision specifically stating joinder of parties is improper when it is "based solely on allegations that they each have infringed the patent or patents in suit."⁶¹ This rule combats patent trolls' commonly used strategic behavior of suing multiple parties at once to reduce litigation costs for themselves.⁶² Additionally, the AIA overhauled administrative procedures available to parties after a patent application has been granted. The new procedures include post-grant review ("PGR")⁶³ and *inter partes* review ("IPR").⁶⁴ The changes seek to improve the quality of granted patents⁶⁵ by allowing third parties to challenge a patent's validity and, if the challenger is successful, to ultimately render certain patent claims invalid.⁶⁶ Ideally, having higher-quality patents will prevent patent trolls from being able to assert patents on very broad technologies, as is their current practice.

Other legislative attempts at battling patent trolls have been introduced in Congress but have not yet been signed into law.⁶⁷ After the AIA passed, the Senate introduced the Patent Quality Improvement Act of 2013 "[t]o make improvements to the transitional program for covered business method patents;"⁶⁸ these improvements would be done through an amendment to the AIA, specifically to the post-grant review proceedings language.⁶⁹ The House of Representatives was more active, introducing several of its own bills on the issue. The House introduced the Saving High-Tech Innovators from Egregious Legal Disputes ("SHIELD") Act

60. See Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284-341 (2011).

61. 35 U.S.C. § 299(b) (2012).

62. KIMBERLY A. MOORE ET AL., PATENT LITIGATION AND STRATEGY 144-45 (4th ed. 2013) (citing 35 U.S.C. § 299).

63. 35 U.S.C. §§ 321-29 (2012).

64. 35 U.S.C. §§ 311-19 (2012).

65. Press Release, Office of the Press Sec'y, FACT SHEET-Executive Actions: Answering the President's Call to Strengthen Our Patent System and Foster Innovation (Feb. 20, 2014) [hereinafter 2014 Fact Sheet], available at <http://www.whitehouse.gov/the-press-office/2014/02/20/fact-sheet-executive-actions-answering-president-s-call-strengthen-our-p> ("The United States Patent and Trademark Office (USPTO) has now successfully implemented [the AIA], enabling many reforms that are leading to higher patent quality, including post-grant patent review proceedings at the USPTO . . .").

66. 35 U.S.C. § 311(b) (in an *inter partes* review, the challenger "may request to cancel as unpatentable 1 or more claims of a patent"); 35 U.S.C. § 321(b) (in a post-grant review, the challenger "may request to cancel as unpatentable 1 or more claims of a patent").

67. See Duane Carver, *Vermont Takes A Leap: First State To Pass Law To Combat Patent Trolling*, BERKELEY TECH. L. J. (Oct. 29, 2013), <http://btlj.org/?p=3082> (discussing legislation to combat patent trolls that has not yet been approved by Congress); *Patent Progress's Guide to Federal Patent Reform Legislation*, PAT. PROGRESS, <http://www.patentprogress.org/patent-progress-legislation-guides/patent-progress-guide-patent-reform-legislation> (last visited Nov. 8, 2015) (discussing proposed federal legislation to combat patent trolls through late 2013).

68. S. 866, 113th Cong. (2013).

69. See 35 U.S.C. § 321 (2012).

of 2013⁷⁰ with the aim of “forc[ing] patent trolls to take financial responsibility for their frivolous lawsuits”⁷¹; the House of Representatives also introduced the End Anonymous Patents Act to “require disclosure of ownership and transfers of ownership of patents,”⁷² which would allow target businesses to at least know which patent troll parent company was threatening suit.

The bill gaining most traction was The Innovation Act,⁷³ introduced in the House in October of 2013 and passed by a vote of 325-91 in December of that year.⁷⁴ The bill as passed in the House proposed, among other things, a heightened pleading standard for patent infringement actions,⁷⁵ changes to the scope of discovery early on in patent infringement actions,⁷⁶ and a requirement that defendants identify all interested parties to the suit to bring about greater transparency in patent ownership.⁷⁷ While these changes could have potentially helped to combat patent trolls, The Innovation Act fell flat in the Senate due to a lack of “agreement on how to combat the scourge of patent trolls on our economy without burdening the companies and universities who rely on the patent system every day to protect their inventions.”⁷⁸

2. *The Executive Branch*

Patent trolls have spurred action by the executive branch as well. The Federal Trade Commission (“FTC”) initiated an investigation into MPHJ’s actions to determine whether the patent troll had violated section 5 of the FTC Act “through deceptive representations made in letters sent to small businesses located across the country,”⁷⁹ and even drafted a complaint for the potential action.⁸⁰ The FTC’s use of section 5 against

70. H.R. 845, 113th Cong. (2013).

71. Press Release, Rep. Peter DeFazio, DeFazio Introduces SHIELD Act to Protect American Innovation, Jobs (Aug. 1, 2012), available at <http://defazio.house.gov/media-center/press-releases/defazio-introduces-shield-act-to-protect-american-innovation-jobs>.

72. H.R. 2024, 113th Cong. (2013).

73. H.R. 3309, 113th Cong. (2013).

74. *H.R. 3309 (113th): Innovation Act*, GOVTRACK, <https://www.govtrack.us/congress/votes/113-2013/h629> (last visited Nov. 8, 2015) (voting on passage of H.R. 3309).

75. H.R. 3309, 113th Cong. § 3 (2013) (adding 35 U.S.C. § 281(A)).

76. *Id.* (adding 35 U.S.C. § 299(A)).

77. *Id.* § 4 (amending 35 U.S.C. § 290).

78. Press Release, Sen. Patrick Leahy, Comment of Senator Patrick Leahy (D-Vt.), Chairman, Senate Judiciary Committee, On Patent Legislation (May 21, 2014) [hereinafter Leahy Press Release], available at http://www.leahy.senate.gov/press/comment-of-senator-patrick-leahy-d-vt_chairman-senate-judiciary-committee-on-patent-legislation.

79. Complaint for Permanent Injunction and Other Equitable Relief at 3, Fed. Trade Comm’n v. MPHJ Tech. Invs., LLC, No. W-14-CV-011, 2014 WL 10222410 (W.D. Tex. Jan. 13, 2014).

80. *Id.* In response, MPHJ filed preemptive a lawsuit against FTC, to enjoin the FTC investigation. Complaint, MPHJ Tech. Invs., LLC v. Fed. Trade Comm’n, No. 6:14-cv-11, 2014 WL 10222410 (W.D. Tex. Jan. 13, 2014). The court dismissed MPHJ’s complaint later that year. Memorandum Opinion and Order, MPHJ Tech. Invs., LLC v. Fed. Trade Comm’n, No. 6:14-cv-11, 2014 WL 4954007 (W.D. Tex. Sept. 6, 2014).

patent trolls, however, came under scrutiny as a potentially improper use of the FTC Act.⁸¹

Additionally, the White House released five executive actions “to help bring about greater transparency to the patent system and level the playing field for innovators.”⁸² These measures include requiring greater transparency in patent ownership, providing additional training and guidelines for examiners to avoid granting overly broad patents, publishing educational materials for target businesses to know their rights as technology consumers, increasing input from practitioners on the patent troll issue, and reevaluating the enforcement of international trade exclusion orders.⁸³

Along with executive actions, the White House set out a seven-point legislative recommendation targeting patent trolls.⁸⁴ The White House recommended requiring plaintiffs in infringement suits to disclose all interested parties (including other potential defendants), allowing judges to have more discretion in awarding fees to the prevailing party, expanding the PTO’s “covered business method patents transitional program” to include more computer-enabled patents, providing greater protection to consumers for off-the-shelf product uses, aligning the ITC standard for obtaining an injunction with the standard set forth in *eBay, Inc. v. MercExchange, L.L.C.*,⁸⁵ employing demand-letter transparency requirements, and giving the ITC sufficient hiring flexibility in order to employ qualified judges.⁸⁶ The above-described House and Senate bills incorporated many of these recommendations.⁸⁷

3. *The Judicial Branch*

The federal courts have been somewhat less active in combating patent trolls, with some federal courts taking a rather hands-off approach to such litigation. In *MPHJ*, for example, the Federal Circuit denied a patent troll’s appeal from the District of Vermont’s order remanding the action to state court based on lack of jurisdiction.⁸⁸ This decision may suggest the Federal Circuit recognizes state courts as the proper locale for handling patent troll litigation. The *MPHJ* decision implies that federal courts are not the proper venue for taking on these kinds of deceptive assertion practices.

81. See David Balto, *Dear Congress: Don’t Take Away the FTC’s Best Tool for Fighting Patent Trolls*, HUFFINGTON POST (Jan. 27, 2014, 5:59 AM), http://www.huffingtonpost.com/david-balto/dear-congress-dont-take-a_b_4350008.html.

82. 2013 Fact Sheet, *supra* note 45.

83. *Id.*

84. *Id.*

85. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); see *infra* text accompanying notes 97–99.

86. 2013 Fact Sheet, *supra* note 45.

87. See S. 866, 113th Cong. (2013); H.R. 845, 113th Cong. (2013); H.R. 2024, 113th Cong. (2013); H.R. 3309, 113th Cong. (2013).

88. *Vermont v. MPHJ Tech. Invs., LLC*, 763 F.3d 1350, 1352 (Fed. Cir. 2014).

The District of Vermont's and Federal Circuit's more removed approaches are not universal. In some courts, judges have certain rules that actually favor patent trolls, encouraging an increasing amount of forum shopping on the part of patent troll plaintiffs.⁸⁹ For example, in the Eastern District of Texas, Judge Rodney Gilstrap and Judge Roy S. Payne have a standing order requiring parties to request permission before filing a motion for summary judgment.⁹⁰ Denial of such a motion⁹¹ drags out litigation, increasing the overall cost and making it more difficult for target business defendants to avoid settlement with patent trolls.⁹² The Eastern District of Texas' "excessive damage awards, inflexible and expensive discovery schedule, and reluctance to transfer cases" all make it exceptionally favorable for patent trolls.⁹³ The large number of patent-troll plaintiffs filing in the district has proven highly profitable for Marshall, Texas, and surrounding cities where the district court is located.⁹⁴ The District of Delaware also has a disproportionately large number of patent suits.⁹⁵ It offers plaintiffs the greatest likelihood of reaching the trial stage through its general practice of not granting summary judgments,⁹⁶ which is a significant draw for patent trolls. The longer the litigation, the greater the cost to target businesses, making it more likely that the defendant will settle with the patent troll it faces.⁹⁷ In general, the federal judicial response has had little effect on limiting patent trolls filings, and in fact some judicial practices actually encourage them.

Other courts have issued decisions that actually do aim to take some tools out of the patent troll kit. The most prominent example of such a decision came in 2006 from the Supreme Court in *eBay, Inc. v. MercExchange, L.L.C.*⁹⁸ The Court in *eBay* held that successful patent plaintiffs are subject to the same four-factor balancing test for granting a permanent injunction as any other federal plaintiff.⁹⁹ The Court's decision did away with the Federal Circuit's prior practice of granting permanent injunctions to successful patent plaintiffs without going through the proper four-factor analysis, denying such equitable relief only in "unusu-

89. See J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 635 (2015) (citing Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q. J. 401, 407 (2010)).

90. HON. RODNEY GILSTRAP, STANDING ORDER REGARDING SUBMISSION OF LETTER BRIEFS FOR CASES ASSIGNED TO JUDGE RODNEY GILSTRAP AND JUDGE ROY S. PAYNE (2012) (containing an exemplary motion in which the movant "request[s] permission to file a motion for summary judgment").

91. See, e.g., Order on Letter Briefs, Pers. Audio, LLC v. Togi Entm't, Inc., No. 2:13-CV-13-JRG-RSP, 2014 WL 4403186 (E.D. Tex. June 23, 2014).

92. Daniel Nazer & Vera Ranieri, *Why Do Patent Trolls Go to Texas? It's Not for the BBQ*, ELEC. FRONTIER FOUND. (July 9, 2014), <https://www.eff.org/deeplinks/2014/07/why-do-patent-trolls-go-texas-its-not-bbq>.

93. Anderson, *supra* note 89, at 679.

94. *Id.* at 653.

95. *Id.* at 632-33.

96. *Id.* at 655-56.

97. See PATENT ASSERTION, *supra* note 19, at 6-7.

98. 547 U.S. 388 (2006).

99. *Id.* at 394.

al” or “exceptional” cases.¹⁰⁰ Requiring the court to go through the four-factor test makes it more difficult for a successful patent plaintiff to get a permanent injunction than if the court granted such relief almost by default. This is bad news for patent trolls, as they commonly hold the threat of a permanent injunction over their target business’s head to extort licensing fees.¹⁰¹ Without the very high likelihood of a permanent injunction, patent trolls lose out on one of their important coercive tools.¹⁰²

E. *The States’ Responses*

Several states have taken up the fight against patent trolls, looking to do more than the Federal Government has been able to do to protect their businesses from falling victim to coercive and harmful litigation. Vermont became the first state to get involved in the battle. Vermont Attorney General William H. Sorrell brought suit against MPHJ in May 2013 under Vermont’s Consumer Protection Act.¹⁰³ Subsequent to the initiation of the MPHJ suit, the Vermont legislature passed a law targeting “Bad Faith Assertions of Patent Infringement,” adding to the state’s trade regulation laws.¹⁰⁴ Aimed at targeting patent trolls, the Vermont law allows courts to consider, for example, a demand letter failing to provide “the patent number; the name and address of the patent owner or owners and assignee or assignees, if any; and factual allegations concerning the specific areas in which the target’s products, services, and technology infringe the patent or are covered by the claims in the patent,” as evidence of a bad-faith patent assertion.¹⁰⁵

Other states have followed closely behind Vermont’s actions.¹⁰⁶ For example, the Illinois General Assembly recently passed, and the Governor signed into law, a new section to be added to “The Consumer Fraud and Deceptive Business Practices Act.”¹⁰⁷ Similar to the Vermont law, Illinois’ new law makes it “an unlawful practice” to send a letter accusing the recipient of patent infringement if the letter does not contain the following information:

the identity of the person asserting a right to license . . . or enforce the patent . . . ; the patent issued by the United States Patent and Trademark Office alleged to have been infringed; and the factual

100. *Id.* at 393–94.

101. Gene Quinn, *Happy 5th Anniversary: The Impact of eBay v. MercExchange, IPWATCHDOG* (May 15, 2011), <http://www.ipwatchdog.com/2011/05/15/happy-5th-anniversary-ebay-v-mercexchange/id=16894>.

102. *Id.* (quoting Michael Marion of Birch, Stewart, Kolasch & Birch) (“[R]emoving the presumption of irreparable injury from the equitable balancing creates the near-impossibility that a company focused solely on monetizing its patents through licensing could not be made whole through money damages alone.”).

103. Vermont Complaint, *supra* note 7.

104. VT. STAT. ANN. tit. 9, §§ 4195–99 (2013).

105. VT. STAT. ANN. tit. 9, § 4197(b)(1) (2013).

106. See Chernoff, *supra* note 9 (citing twenty-five other states with passed, pending, or debated legislation similar to Vermont’s anti-patent law).

107. 815 ILL. COMP. STAT. 505/2SSS (2015).

allegations concerning the specific areas in which the intended recipient's or affiliated person's products, services, or technology infringed the patent or are covered by the claims in the patent.¹⁰⁸

Attorneys General in New York, Minnesota, and Nebraska have also taken steps to combat patent trolls. New York's Attorney General did not file suit against the patent troll, but did conduct an investigation into MPHJ's practices and reached a settlement agreement requiring MPHJ to conform to "Guidelines for Future Patent Assertion Conduct."¹⁰⁹ The agreement includes language requiring MPHJ to make "reasonable efforts to identify and evaluate a specific accused product, system, or method that the New York Person makes, uses, offers to sell, or sells that [MPHJ] believes in good faith actually infringes the Asserted patent."¹¹⁰ After its own investigation, Minnesota also reached a similar agreement with MPHJ, in which MPHJ agreed not to "seek[] the payment of licensing fees or other fees or payments in connection with the alleged or potential infringement of intellectual property" nor "initiate any action or lawsuit for alleged patent infringement against any Minnesota person or entity to which MPHJ . . . previously sent any patent notice or inquiry letter."¹¹¹ Nebraska's Attorney General similarly initiated an investigation into MPHJ's activities in the state and sent a cease-and-desist letter to the patent troll.¹¹² This action resulted in MPHJ adding the Attorney General as a defendant in a pending case against a target business in Nebraska.¹¹³ Additionally, the State was eventually enjoined from enforcing its cease-and-desist letter against MPHJ.¹¹⁴

Patent trolls unfortunately have discovered ways to abuse the United States' patent system by perverting the patent licensing game. Both the federal and state governments have begun taking steps to combat patent trolls. These steps include new legislation at both the federal and state levels, federal executive action plans, judicial intervention, and a number of civil suits against patent trolls initiated by state attorneys general. With so many changes in the works, many have questioned the efficacy of each of these steps. The next Section explores the impact these changes will have on the patent-troll problem.

108. 815 ILL. COMP. STAT. 505/2SSS(b)(4)(A) (2015).

109. Assurance of Discontinuance, *In re* Investigation by Eric T. Schneiderman, Attorney General of the State of New York, of MPHJ Tech. Invs., LLC, No. 14-015 (Jan. 13, 2014).

110. *Id.* at 12.

111. Assurance of Discontinuance at 3, *Minnesota v. MPHJ Tech. Invs., LLC*, No. 62-CV-13-6080, (D. Minn. Aug. 20, 2013) [hereinafter *Minnesota Assurance of Discontinuance*].

112. Letter from Jon Bruning, Attorney Gen. of Neb., to M. Brett Daniels, Farney Daniels LLP, Re: Possible Unfair/Deceptive Patent Enforcement Efforts Within the State of Neb. (July 18, 2013), available at <http://www.essentialpatentblog.com/wp-content/uploads/sites/234/2014/01/2013-07-18-AG-Cease-and-Desist-Order.pdf>.

113. Complaint in Intervention, *Activision TV, Inc. v. Pinnacle Bancorp, Inc.*, No. 8:13-cv-00215 (D. Neb. Oct. 8, 2013).

114. Order on Preliminary Injunction at 8, *Activision TV, Inc. v. Pinnacle Bancorp, Inc.*, No. 8:13cv215 (D. Neb. Jan. 14, 2014).

III. ANALYSIS

Patent trolls are an obvious imperfection within the country's patent system. Although the Federal Government has attempted to combat patent trolls, such efforts have not yet been, and are not likely to be, very effective going forward. The legislative branch's current solutions are not deterring patent trolls,¹¹⁵ and future progress seems unlikely from Congress.¹¹⁶ The executive branch has had equally limited success even with the President's commitment to finding solutions to the patent troll problem.¹¹⁷ In the judicial branch, federal courts simultaneously decline jurisdiction over aggressive assertion tactics¹¹⁸ and refuse to recognize state-based tort claims against patent trolls,¹¹⁹ preventing the federal courts from having any real impact on the issue.

The states, on the other hand, have had actual, tangible results in their fights against patent trolls.¹²⁰ States are not limited by the Federal Government's goal of uniformity within the national patent system.¹²¹ They can create laws specific to the needs of their unique citizenry.¹²² State laws aimed at combating patent trolls, however, may be subject to preemption by federal law.¹²³ Even so, the states are in a better position to tackle the patent troll problem than the federal government.

A. Shortcomings of the Federal Response

The Federal Government's overall limited success in battling patent trolls stems from a combination of cautious action, perhaps rightfully so, by all three branches. The Federal Government must maintain uniformity throughout the patent system¹²⁴ and take into account the diverse needs of the entire country.

115. Dongbiao Shen, Note, *Misjoinder or Mishap? The Consequences of the AIA Joinder Provision*, 29 BERKELEY TECH. L.J. 545, 559–71, 579–85 (2014). *But see* Tracie L. Bryant, *The America Invents Act: Slaying Trolls, Limiting Joinder*, 25 HARV. J.L. & TECH. 673, 688–95 (2012).

116. *See, e.g.*, Leahy Press Release, *supra* note 78.

117. 2013 Fact Sheet, *supra* note 45 (announcing several Congressional recommendations and Executive actions aimed at combating patent trolls).

118. *See* Vermont v. MPHJ Tech. Invs., LLC, No. 2:13–CV–170, 2014 WL 1494009, at *10 (D. Vt. Apr. 15, 2014), *dismissed for lack of jurisdiction*, Vermont v. MPHJ Tech. Invs., LLC, 763 F.3d 1350 (Fed. Cir. 2014) (granting motion to remand to state court); Chernoff, *supra* note 9 (“MPHJ immediately filed to have the Vermont case removed to federal court, arguing that the claims involve the infringement and enforcement of patents, which are in the purview of the federal courts. Federal District Judge William K. Sessions III disagreed and wrote, ‘the state is targeting bad faith conduct irrespective of whether the letter recipients were patent infringers or not, on the basis that MPHJ’s bad faith conduct would be unlawful even MPHJ’s patents were valid and the conduct was directed toward actual patent infringers.’”).

119. Paul R. Gugliuzza, *Patent Trolls and Preemption* 5 (Bos. Univ. Sch. of Law Pub. Law & Legal Theory Paper No. 15-03, 2015).

120. *See, e.g.*, Minnesota Assurance of Discontinuance, *supra* note 111.

121. *See* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 142 (1989).

122. Martin Diamond, *The Ends of Federalism*, 3 PUBLIUS 129, 152 (1973) (describing federalism for the American people as “the school of their citizenship, a preserver of their liberties, a vehicle for flexible response to their problems”).

123. *See generally* Gugliuzza, *supra* note 119.

124. *See* Bonito Boats, Inc., 489 U.S. at 142.

1. *The Legislative Branch*

Congress' key response to patent trolls came in 2011 through various provisions of the AIA.¹²⁵ The AIA's heightened joinder requirement¹²⁶ passed with the legislative intent to counter some of the coercive litigation tactics of patent trolls. Patent trolls often join multiple defendants in an action regarding the same patent to decrease costs for themselves;¹²⁷ in response, AIA section 299 "addresses problems occasioned by the joinder of defendants (sometimes numbering in the dozens) who have tenuous connections to the underlying disputes in patent infringement suits."¹²⁸ In addition, the AIA set up a number of administrative proceedings in an attempt to strengthen the overall quality of enforceable patents.¹²⁹

a. Section 299 Joinder

This new joinder rule has not been very effective at achieving its goal.¹³⁰ Instead of filing multidefendant suits, patent trolls are simply filing an increasing amount of single-defendant suits on the same patent.¹³¹ The absolute number of patent cases filed in 2012, after passage of the AIA, increased forty percent from 2011, just prior to the introduction of section 299 joinder.¹³² These changes have been attributed to the section 299, and some commentators have noted that despite this increase in litigation, the "number of unique patent holders, total number of accused infringers, and the distribution of their litigation, appear nearly unchanged from [prior to the AIA]."¹³³ The increased number of suits simply "burdens both courts and litigants."¹³⁴

Procedural mechanisms further frustrate the purpose behind section 299. Patent trolls can seek to consolidate pretrial activities under Federal Rule of Civil Procedure 42(a)¹³⁵ and achieve a similar reduced cost of litigation as before the AIA. While the legislative history suggests section

125. Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284-341 (2011); *see supra*, Part II.D.1.

126. 35 U.S.C. § 299 (2012).

127. MOORE ET AL., *supra* note 62, at 144-45.

128. H.R. REP. NO. 112-98, at 54 (2011); *see generally* Xun (Michael) Liu, Note, *Joinder Under the AIA: Shifting Non-Practicing Entity Patent Assertions Away from Small Businesses*, 19 MICH. TELECOMM. & TECH. L. REV. 489 (2013) (discussing section 299, its legislative history, and its effect on NPEs and small businesses).

129. 2014 Fact Sheet, *supra* note 65.

130. Shen, *supra* note 115, at 559-71, 579-85. *But see* Bryant, *supra* note 115, at 688-95.

131. Shen, *supra* note 115, at 559-60.

132. MAYA M. ECKSTEIN ET AL., THE (UNINTENDED) CONSEQUENCES OF THE AIA JOINDER PROVISION 7 (2012); RPX RATIONAL PATENT, 2012 NPE ACTIVITY REPORT 10 (2013) (chart 1); Shen, *supra* note 115, at 560.

133. Christopher A. Cotropia et al., *Unpacking Patent Assertion Entities (PAES)*, 99 MINN. L. REV. 649, 699 (2014).

134. Shen, *supra* note 115, at 560.

135. FED. R. CIV. P. 42(a) ("(a) If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.").

299 was intended to supersede Rule 42(a),¹³⁶ courts have actually been applying Rule 42(a), rather than section 299, to the question of pretrial consolidation, thus undermining the AIA's intended purpose.¹³⁷ Even with the given legislative history, section 299 does not on its face prohibit Rule 42(a) consolidation.¹³⁸ For example, in *Norman IP Holdings, LLC v. Lexmark International, Inc.*,¹³⁹ although the patent troll's action had been severed under section 299, it nonetheless successfully consolidated the actions under Rule 42(a) for all pretrial matters.¹⁴⁰

Patent trolls have yet another way around heightened joinder rules through multidistrict litigation ("MDL") consolidation.¹⁴¹ The MDL statute, 28 U.S.C. § 1407, allows "transfer[] to any district for coordinated or consolidated pretrial proceedings" when a multidistrict suit involves "common questions of fact."¹⁴² The Judicial Panel on Multidistrict Litigation ("JPML") has refused to consolidate matters under MDL when the defendants are not engaged in related businesses in the past.¹⁴³ This is potentially detrimental to patent trolls, as they often go after a number of defendants involved in vastly different businesses.

MDL consolidation, however, can still be an extremely useful tool for patent trolls. Plaintiff patent trolls benefit from the fact that (1) "[t]he standard for pretrial consolidations used in MDLs is lenient compared to the consolidation standard under § 299,"¹⁴⁴ and (2) "[t]he MDL panel has ruled that the AIA joinder provision does not apply to centralization under § 1407."¹⁴⁵ In fact, even with the JPML's hesitation to consolidate cases when defendants are in unrelated businesses, patent trolls have successfully used the MDL workaround after the passage of the AIA to consolidate cases, thus reducing their pretrial costs and defeating the purpose of section 299.¹⁴⁶ With these powerful, viable AIA-workaround tools, patent trolls can continue their coercive practices relatively unaffected by Congress's well-intended heightened joinder standard.

136. See 157 CONG. REC. S5429 (daily ed. Sept. 8, 2011) (statement of Sen. Kyl).

137. Stephen E. Kabakoff & R. Bruce Bower, *Reconciling Joinder and Consolidation Under the Federal Rules of Civil Procedure and Under the America Invents Act*, BNA'S PAT. TRADEMARK & COPYRIGHT J., Dec. 7, 2012, at 5.

138. Shen, *supra* note 115, at 561; see also Quinn Emanuel Urquhart & Sullivan, LLP, *Multi-Defendant Joinder Under the America Invents Act: Much Ado About Nothing?*, JDSUPRA BUS. ADVISOR (Dec. 20, 2012), <http://www.jdsupra.com/legalnews/multi-defendant-joinder-under-the-america-97136>.

139. Nos. 6:12cv508, 6:11-CV-495, 2012 WL 3307942 (E.D. Tex. Aug. 10, 2012).

140. *Id.* at *4.

141. ECKSTEIN ET AL., *supra* note 132; Shen, *supra* note 115, at 560, 564-70.

142. 28 U.S.C. § 1407 (2012).

143. ECKSTEIN ET AL., *supra* note 132.

144. Shen, *supra* note 115, at 565.

145. *Id.* at 567 (citing *In re Bear Creek Techs., Inc.*, ('722) Patent Litig., 858 F. Supp. 2d 1375, 1378-79 (J.P.M.L. 2012)); see 28 U.S.C. § 1407 (2012) (standard for initiating multidistrict litigation).

146. See, e.g., Scott W. Doyle et al., *The Impact of the America Invents Act on Litigation by Non-Practicing Entities*, SHEARMAN & STERLING LLP, at 5 (May 9, 2013), available at http://www.shearman.com/~media/Files/NewsInsights/Publications/2013/05/The-Impact-of-the-America-Invents-Act-on-Litigat_/Files/View-full-memo-The-Impact-of-the-America-Invents_/FileAttachment/The-ImpactoftheAmericaInventsActonLitigationbyNon_.pdf.

b. Administrative Procedures

The AIA aimed to increase patent quality through a number of administrative procedures.¹⁴⁷ Postgrant proceedings certainly have the potential to invalidate improperly granted patents, including the overly broad ones on which patent trolls heavily rely. In postgrant proceedings before the Patent Trial and Appeal Board (“PTAB”), “rules are stacked in favor of the challenger,” the challenger being the target business in an administrative action against a patent troll.¹⁴⁸ Further, patents “do[] not enjoy any presumption of validity” before the PTAB, whereas patent validity is presumed in district courts.¹⁴⁹ Finally, the claim construction standard before the PTAB is much broader than the standard before the district courts. In district courts, claims are given their “ordinary and customary meaning” with construction aimed at preserving validity when possible; in the PTAB, claims are given their “broadest reasonable interpretation,” with no attempt to maintain claim validity.¹⁵⁰ This difference means that it is likely easier to find a patent invalid as anticipated or obvious by prior art in a proceeding before the PTAB than before a district court judge since a broader construction means a greater number of prior art references could potentially fall within the scope of the challenged claims.¹⁵¹

Even with such potential, administrative proceedings may prove ineffective at combating patent trolls. The scope of review under an IPR is limited. Only a patent’s validity under 35 U.S.C. § 102 (novelty) or § 103 (obviousness) may be challenged, and “only on the basis of prior art consisting of patents or printed publications.”¹⁵² Section 101 (patentable subject matter) challenges and section 112 (disclosure requirements) cannot be brought in an IPR.¹⁵³ Further, a patent’s enforceability cannot be challenged in an IPR by raising an inequitable conduct defense.¹⁵⁴

Like IPRs, PGRs may turn out to be less effective than intended at battling patent trolls. A PGR must be filed within the first nine months after a patent’s issuance.¹⁵⁵ PGRs are only available for patents filed under the AIA’s new first-to-file system, which did not go into effect until

147. 2014 Fact Sheet, *supra* note 65 (“The United States Patent and Trademark Office (USPTO) has now successfully implemented [the AIA], enabling many reforms that are leading to higher patent quality, including post-grant patent review proceedings at the USPTO . . .”).

148. Gene Quinn, *How to Protect Your Patent From Post Grant Proceedings*, IPWATCHDOG (Sept. 21, 2014), <http://www.ipwatchdog.com/2014/09/21/how-to-protect-your-patent-from-post-grant-proceedings-2/id=51333>.

149. *Id.*

150. Ralph Loren & David Cotta, *Friction Between PTAB and the Federal Circuit?*, INTELL. PROP. MAG., July 15, 2014, (citing *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005) (en banc)).

151. *Id.*

152. 35 U.S.C. § 311 (2012).

153. *See id.*

154. *See id.*

155. 35 U.S.C. § 321(c) (2012).

March 16, 2013.¹⁵⁶ This leaves out many of the broad patents currently used by patent trolls that were filed before the AIA went into effect, including the scan-to-email patents at issue in the MPHJ case.¹⁵⁷ PGRs may be capable of invalidating some currently pending and future overly broad patents, but can do nothing to protect target businesses from patents filed before March 16, 2013. Further, for those patents eligible for PGR, the standard for initiating a PGR is rather high, requiring a showing that “it is more likely than not that at least 1 of the claims challenged in the petition is unpatentable.”¹⁵⁸ Fewer patents are capable of reaching this higher standard, giving PGRs a narrower reach than IPRs and potentially allowing improperly granted patents to escape review.

Both IPRs and PGRs may be prohibitively expensive for target businesses to initiate. It costs \$9,000 to file an IPR request¹⁵⁹ and an additional \$14,000 if the request for review is granted.¹⁶⁰ PGRs are even more expensive: \$12,000 for the initial request¹⁶¹ and an additional \$18,000 if the request is granted.¹⁶² These fees, of course, do not include the actual cost of the proceedings. The United States Patent and Trademark Office (“USPTO”) estimates that outside of the fees, preparing an IPR request will cost \$46,000 per request¹⁶³ and about \$631,000 inclusive of all costs.¹⁶⁴ Some firms have even quoted estimates as high as \$1,000,000 for an IPR, start to finish.¹⁶⁵ Estimates on the cost of a PGR are less developed due to their newness, but it is likely to be “well over \$250,000,” probably reaching “the range of three quarters of a million to one million dollars, including government fees,” from start to finish.¹⁶⁶ By comparison, the cost of defending against a patent troll suit for small businesses is, on average, \$857,000,¹⁶⁷ somewhere between the cost of an IPR and a PGR. With the cost of settling at \$340,000 on average;¹⁶⁸ however, small businesses can still be strong-armed out of pursuing even administrative proceedings against patent trolls due to their cost. Administrative proceedings also suffer from disincentives to pursue; the high cost of an

156. Changes to Implement Inter Partes Review Proceedings, Post-Grant Review Proceedings, and Transitional Program for Covered Business Method Patents, 77 Fed. Reg. 48,680, 48,687 (Aug. 14, 2012) (to be codified at 37 C.F.R. pt. 42) (“[P]ost-grant review provisions will apply to patents issued from applications that have an effective filing date on or after March 16, 2013 . . .”).

157. Vermont v. MPHJ Tech. Invs., LLC, No. 2:13-CV-170, 2014 WL 1494009, at *1 (D. Vt. Apr. 15, 2014) (the patents at issue in the case were “filed in 1998”).

158. 35 U.S.C. § 324(a) (2012).

159. 37 C.F.R. § 42.15(a)(1) (2015).

160. *Id.* § 42.15(a)(2).

161. *Id.* § 42.15(b)(1).

162. *Id.* § 42.15(b)(2).

163. Changes to Implement Inter Partes Review Proceedings, 77 Fed. Reg. 7041, 7057 (Aug. 14, 2012) (to be codified at 37 C.F.R. pt. 42).

164. *Id.*

165. Quinn, *supra* note 148.

166. Thomas G. Southard & Paul F. Prestia, *Economics and Logic of Patent Litigation Versus Post Grant/Inter Partes Patent Review*, RATNER PRESTIA (Oct. 3, 2012), <http://ratnerprestia.com/220?article=485>.

167. Chien, *supra* note 31, at 11.

168. *Id.*

administrative hearing is borne by one party while all other potential defendants enjoy the benefits of a favorable outcome without having to pay a dime. Parties are less willing to follow through on potentially meritorious proceedings when they are the only one paying for a benefit enjoyed by all.¹⁶⁹

In addition to administrative proceedings being prohibitively expensive for defendants, the cost can also be used by patent trolls as a tool to coerce defendants into settlement. The costs of both IPR and PGR increase with the number of claims requested for review.¹⁷⁰ This escalating cost schedule gives patent trolls a way to prevent pending and future patents from becoming subject to postgrant proceedings. “[T]rolls will invariably add countless claims to pending applications” so that the cost of initiating an IPR or PGR is greater than the cost of the license the patent troll offers to the target business, “effectively insulat[ing] themselves from post grant challenges from all but the biggest of targets.”¹⁷¹ Even with these postgrant proceedings, their high cost will still allow patent trolls to coerce settlement payments. Moreover, the cost of these proceedings, together with the very high risk of invalidation by the PTAB,¹⁷² can actually strengthen patent trolls’ abilities to coerce licensing fees. Smaller inventors without sufficient funds to pay for attorneys should their patent become the subject of an IPR or PGR may be forced to seek out NPEs, both legitimate ones and patent trolls alike, to adequately protect their patents, thereby *strengthening* some patent trolls’ assertion portfolios.¹⁷³

c. Future Congressional Action is Unlikely

Even with these concerns regarding legislative effectiveness against patent trolls, Congress is unlikely to resolve these issues in the near future. While some new bills have been proposed, none have made it through Congress.¹⁷⁴ Given the inability of Congress to agree on how to best combat patent trolls while still allowing legitimate businesses and

169. See *supra* text accompanying note 53.

170. 37 C.F.R. §§ 42.15(a)(3)–(4), (b)(3)–(4) (2015).

171. Scott A. McKeown, *Post Grant Fee Structure a Boon for Patent Trolls?*, PATS. POST-GRANT (Feb. 21, 2012), <http://www.patentspostgrant.com/proposed-uspto-post-grant-fee-structure-a-boon-for-patent-trolls>.

172. See Cyrus Morton & David Prange, *Patent Owners Beware, Your Patent Has a 15 Percent Chance (or Less) of Surviving the PTAB*, INSIDE COUNS. (Mar. 19, 2014), <http://www.insidecounsel.com/2014/03/19/patent-owners-beware-your-patent-has-a-15-percent> (“A year-and-a-half into IPR and CBM implementation, the PTAB’s first 20 final decisions have been brutal on patent owners. In the 20 final decisions, the Board has considered the patentability of 357 claims. Only 13 claims survived the process, yielding a survival rate of 3.6 percent.”).

173. Michael Gulliford, *If Patent Reform Is Meant to Starve Patent Trolls, Why Is It Feeding Them Instead?*, IPWATCHDOG (Sept. 8, 2014), <http://www.ipwatchdog.com/2014/09/08/if-patent-reform-is-meant-to-starve-patent-trolls-why-is-it-feeding-them-instead/id=51067>.

174. See *supra* Part II.D.1.

NPEs to prosper,¹⁷⁵ additional proposed legislation seems highly unlikely.¹⁷⁶

2. *The Executive Branch*

While the executive branch has not suffered from the same inability to agree on the proper course of action regarding patent trolls as Congress, its actions have been limited to a single FTC suit against a patent troll, recommendations to Congress, policy changes at the PTO, and educational task forces.¹⁷⁷ Nevertheless, these initiatives are commendable, as the FTC's case represents its first action against a patent troll,¹⁷⁸ and President Obama is the first President to truly take a stance against the growing patent troll problem.¹⁷⁹

a. The FTC

The FTC's strategy of going after patent trolls like MPHJ individually for violations of section 5 of the FTC Act,¹⁸⁰ while certainly a step in the right direction, cannot adequately tackle the patent troll problem. On a positive note, the FTC's case against MPHJ recently ended in settlement, barring MPHJ from "making deceptive representations when asserting patent rights."¹⁸¹ There are concerns, both within Congress and the FTC itself, about the use of section 5 to attack patent trolls;¹⁸² yet, criticism of the FTC's use of section 5 to go after patent trolls is not uniform.¹⁸³ Still, the details of any future use of section 5 against patent trolls will depend on the results of the FTC's study of patent trolls and their effect on "innovation and competition."¹⁸⁴ Therefore, whether the FTC can

175. See Leahy Press Release, *supra* note 78.

176. See *Patent Progress's Guide to Federal Patent Reform Legislation*, *supra* note 66 (noting it is "unlikely that comprehensive patent reform will pass this Congress").

177. 2013 Fact Sheet, *supra* note 45.

178. Ryan Davis, 'Patent Troll' to End Deceptive Tactics in Deal with FTC, LAW360 (Nov. 6, 2014, 9:01 PM), <http://www.law360.com/articles/594065/patent-troll-to-end-deceptive-tactics-in-deal-with-ftc>.

179. David Kravets, *History Will Remember Obama as the Great Slayer of Patent Trolls*, WIRED (Mar. 20, 2014, 6:30 AM), <http://www.wired.com/2014/03/obama-legacy-patent-trolls>.

180. See *supra* Part II.D.2.

181. *FTC Settlement Bars Patent Assertion Entity from Using Deceptive Tactics*, FED. TRADE COMM'N (Nov. 6, 2014), <http://www.ftc.gov/news-events/press-releases/2014/11/ftc-settlement-bars-patent-assertion-entity-using-deceptive>.

182. See Balto, *supra* note 81; Joshua D. Wright, Comm'r, Fed. Trade Comm'n, What Role Should Antitrust Play in Regulating the Activities of Patent Assertion Entities? at the Dechert Client Annual Antitrust Spring Seminar 23 (Apr. 17, 2013) ("Novel applications of Section 5 to condemn PAEs before this understanding is complete commit the cardinal antitrust sin: conforming the law (and economics) to condemn a disapproved-of practice, rather than condemning a practice because it fails to conform to the law.").

183. See, e.g., Balto, *supra* note 81 ("As noted by members of Congress, Section 5 is ideally suited to protect end users from abusive patent troll practices.").

184. *Patent Assertion Entities (PAE) Study*, FED. TRADE COMM'N, <http://www.ftc.gov/policy/studies/patent-assertion-entities-pae-study> (last visited Nov. 8, 2015). See also Carl W. Hittinger & Jeffrey W. Duffy, *FTC Section 5 in 2014: An Unexpected Attack, A New Frontier*, LAW360 (Dec. 22, 2014, 11:33 AM), <http://www.law360.com/articles/604845/ftc-section-5-in-2014-an-unexpected-attack-a-new-frontier>.

even initiate actions against patent trolls in the future remains uncertain at this time.

The FTC's recent success against MPHJ¹⁸⁵ certainly gives target businesses some hope that they can be saved from similar patent trolls. Unfortunately, the settlement may only have limited effectiveness both on MPHJ itself and as a deterrent to other patent trolls.¹⁸⁶ The settlement imposes no penalty for MPHJ's past deceptive practices,¹⁸⁷ does not require MPHJ to change the content of its allegedly deceptive letter,¹⁸⁸ nor does it show other patent trolls where the boundaries lay between illicit and acceptable conduct.¹⁸⁹

Further, there are limits to the effectiveness of using the FTC to combat patent trolls. The FTC cannot bring suit against a patent troll until it has actually *asserted* one of its patents.¹⁹⁰ FTC actions would be limited only to deceptive practices, such as sending threatening letters with no intent to actually bring an infringement suit, unable to get at the real crux of the patent troll problem: the coercive patent assertion itself.¹⁹¹ Additionally, the FTC suffers from limited resources.¹⁹² Such limitations force the FTC to "target[] its law enforcement . . . efforts to maximize its desired outcome," necessarily disallowing it from going after all patent trolls.¹⁹³

b. Executive Actions

Executive actions are less likely to succeed than even FTC litigation. Although "some points drew general praise," lawyers in the patent law community have expressed reservations as to the effectiveness of the President's legislative recommendations and executive actions.¹⁹⁴ One patent attorney nicely summed up the limitations of Obama's initiatives by

185. *FTC Settlement*, *supra* note 181.

186. See Richard Harris, *The Application Developers Alliance Calls Out FTC Ruling as Falling Short*, APP DEVELOPERS MAG. (Dec. 11, 2014, 8:00 AM), <http://appdeveloperomagazine.com/2191/2014/12/11/The-Application-Developers-Alliance-Calls-Out-FTC-Ruling-As-Falling-Short>.

187. The settlement does, however, impose up to a \$16,000 fine per deceptive letter in the future. *FTC Settlement*, *supra* note 181.

188. Davis, *supra* note 178.

189. Harris, *supra* note 186.

190. Collin A. Rose, Note, *A Match Made for Court: Patent Assertion Entities and the Federal Trade Commission*, 48 COLUM. J.L. & SOC. PROBS. 95 (2014).

191. *Id.* at 99.

192. *The FTC at 100: Where do We Go from Here?: Hearing Before the Subcomm. on Commerce, Mfg., & Trade of the H. Comm. on Energy & Commerce*, 113th Cong. 7 (2013) (statement of Lee Terry, Rep., Nebraska).

193. Memorandum from Kelly C. Tshibaka, Acting Inspector Gen., to Edith Ramirez, Chairwoman, Fed. Trade Comm'n 3 (Oct. 14, 2014), available at <http://www.ftc.gov/system/files/documents/reports/fy14-ftc-management-challenges/141014oig-mgmtchallenges.pdf>.

194. Bill Donahue, *Obama Plan to Squelch 'Patent Trolls' May Come up Short*, LAW360 (June 4, 2013, 7:51 PM), <http://www.law360.com/articles/447160/obama-plan-to-squelch-patent-trolls-may-come-up-short>. But see Kravets, *supra* note 179.

labeling some as “merely aspirational,” others as “ephemeral,” with “the most substantive” initiatives “requir[ing] congressional action.”¹⁹⁵

In Executive Action No. 1, the President stated that the PTO would institute a process to make the “[r]eal party-in-interest” (that is, the true owner of the patent being asserted) more easily ascertainable.¹⁹⁶ The goal is to increase transparency so that target businesses “know[] the full extent of the patents that their adversaries hold,” and can, in theory, better prepare for settlement negotiations or litigation.¹⁹⁷

Unfortunately, while the “real party-in-interest” recommendation may do its job to increase transparency, it does so at a cost.¹⁹⁸ This course of action can potentially burden the PTO with additional training and procedural costs which it lacks the resources to handle, thus taking resources away from patent applications and possibly leading to more improperly granted patents.¹⁹⁹ Further, it is unlikely to deter patent trolls from initiating litigation, a more poignant source of a patent troll’s coercive power than their ability to hide behind shell companies.²⁰⁰ Additionally, even if this executive action could be effective at combating patent trolls, the real teeth to the “real party-in-interest” recommendation would come from congressionally-approved sanctions for noncompliance.²⁰¹ Yet, “[i]t’s not clear that the White House has the political ammo to get Congress to pass such law in the near future.”²⁰² These factors limit the effectiveness of the executive branch’s “real party-in-interest” initiative.

The President’s other executive actions similarly suffer from a low likelihood of success at curbing patent trolls’ coercive behaviors. Executive Action No. 2, which provides examiners with additional training and guidelines in order to avoid granting overly broad patents,²⁰³ will likely take time away from the examination of applications and may not lead to better patents. The USPTO is currently undergoing the Glossary Pilot Program as a result of this executive action.²⁰⁴ The program is limited to certain types of software patents²⁰⁵ and requires applicants to include a

195. *Lawyers Weigh in on Obama ‘Patent Troll’ Initiatives*, LAW360 (Katherine Rautenberg ed., June 5, 2013), <http://www.law360.com/articles/447832/lawyers-weigh-in-on-obama-patent-troll-initiatives> (quoting Ilan Barzilay of Seyfarth Shaw LLP).

196. 2013 Fact Sheet, *supra* note 45.

197. *Id.*

198. Donahue, *supra* note 194.

199. *Id.*

200. *Id.* (“Forcing NPEs to disclose the real party in interest will not necessarily reduce patent suits or tilt the playing field back to even for targeted companies.” (quoting David Donoghue of Holland & Knight)).

201. See Carl Franzen, *The White House v. Patent Trolls: Can Obama Finally End Harmful Tech Lawsuits?*, THE VERGE (June 5, 2013, 2:33 PM), <http://www.theverge.com/2013/6/5/4399130/the-white-house-vs-patent-trolls-lawsuits>.

202. *Id.*

203. 2013 Fact Sheet, *supra* note 45.

204. Press Release 14-08, U. S. Patent and Trademark Office, USPTO Launches New Glossary Pilot Program to Promote Patent Claim Clarity (Mar. 26, 2014), *available at* <http://www.uspto.gov/news/pr/2014/14-08.jsp>.

205. 2013 Fact Sheet, *supra* note 45.

glossary of terms at the beginning of the detailed description section of their patents.²⁰⁶ As of November 5, 2015, all but one petition out of one hundred sixty-seven filed under the Glossary Pilot Program had been granted.²⁰⁷ The program has since ended.²⁰⁸ It remains to be seen whether the program will actually inhibit the actions of patent trolls. Given the small number of petitions applied for under the program, however, it seems the initiative will have only a limited impact on the patent troll problem, if at all.

Executive Actions Nos. 3 and 4 deal with consumer education and input from patent attorneys practicing in the field.²⁰⁹ Of the fifty-three attorneys quoted in Law360's article regarding the effectiveness of President Obama's executive actions, not a single one mentioned either the consumer-education or attorney-input actions.²¹⁰ This suggests attorneys practicing in the field do not believe these measures will have an impact, positive or negative, on the patent-troll problem.

Executive Action No. 5, aimed at standardizing the enforcement of exclusion orders granted by the International Trade Commission ("ITC"), does have some potential to do good for the fight against patent trolls.²¹¹ Ensuring a uniform methodology for determining the scope of ITC enforcement orders strengthens the overall effectiveness of ITC proceedings.²¹² While this is a positive outcome for the ITC in general, it will have almost no impact on the willingness of patent trolls to initiate lawsuits in the ITC, or in other U.S. courts for that matter, as "[t]here is no evidence that [patent trolls] are bringing lawsuits at increased numbers because of lax enforcement of ITC exclusion orders."²¹³

Overall, President Obama's executive actions are unlikely to deter patent trolls from filing coercive lawsuits.²¹⁴ Further, a general theme throughout all of the attorneys' responses in the Law360 article was the need for legislative, rather than executive action.²¹⁵ Unfortunately, legis-

206. U.S. PATENT & TRADEMARK OFFICE, GLOSSARY PILOT PROGRAM: FREQUENTLY ASKED QUESTIONS 4 (last visited Nov. 8, 2015), available at http://www.uspto.gov/patents/init_events/faq_glossaryapplicant_07012014.pdf.

207. *Glossary Initiative*, U. S. PAT. AND TRADEMARK OFF. (Feb. 20, 2015), <http://www.uspto.gov/sites/default/files/documents/Glossary%20Statistics%20November%205%2C%202015.pdf>.

208. *Glossary Initiative*, U. S. PAT. AND TRADEMARK OFF. (Feb. 20, 2015), <http://www.uspto.gov/patent/initiatives/glossary-initiative#heading-1>.

209. 2013 Fact Sheet, *supra* note 45.

210. *Lawyers Weigh in on Obama 'Patent Troll' Initiatives*, *supra* note 196.

211. 2013 Fact Sheet, *supra* note 45.

212. *White House Issues Executive Actions and Legislative Recommendations Aimed at Patent Assertion Entities*, WILSON SONSINI GOODRICH & ROSATI (June 5, 2013), <https://www.wsgsr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgsralert-patent-assertion-entities.htm>.

213. Angie M. Hankins, *White House Announces Executive Actions and Legislative Recommendations to Curb Patent Troll Lawsuits*, STROOCK SPECIAL BULL. (June 10, 2013), <http://www.stroock.com/SiteFiles/Pub1355.pdf>.

214. *Id.*

215. *Lawyers Weigh in on Obama 'Patent Troll' Initiatives*, *supra* note 195 ("The real potential teeth . . . by the White House to limit 'patent troll' litigation is in its legislative recommendations. The action taken by executive order is very limited and will have little effect." (quoting John Cooper of Farella Braun & Martel LLP)).

lative action on this issue seems highly unlikely to occur any time in the near future.²¹⁶

3. *The Judicial Branch*

Some federal courts have begun to take an indirect stand against patent trolls through decisions like *eBay*.²¹⁷ Specifically, the *eBay* decision makes it more difficult for successful patent plaintiffs to be granted a permanent injunction, taking one tool out of the patent trolls' belts. The decision has been successful at eliminating the "automatic injunction" mentality that ran through the courts prior to *eBay*. After *eBay* through May 26, 2013, thirty-two percent of patent cases were denied a permanent injunction by district courts.²¹⁸ This statistic shows an increase in injunction denials, up from an estimated five percent pre-*eBay*.²¹⁹

While this change at the district court level certainly represents a positive step, the *eBay* decision has had other side effects that somewhat diminish its success at combating patent trolls. Patent trolls have shifted from using district courts to filing with the ITC.²²⁰ Through 2011, patent troll suits before the ITC shot up from seven percent to twenty-five percent after the *eBay* decision.²²¹ The reason for this shift was that the ITC has a different standard for granting injunctions than the district courts.²²² The ITC grants injunctions in the form of exclusion orders.²²³ In order to receive an exclusion order, a party must show "a widespread pattern of unauthorized use of its patented invention and certain business conditions from which one might reasonably infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles."²²⁴ Because of the ITC's underlying statutory authority,²²⁵ "[c]ertain legislative and judicial changes to patent law procedures and remedies don't apply."²²⁶ The ITC, therefore, is not bound by the *eBay* decision; successful patent trolls are still almost guaranteed a permanent injunction in the jurisdiction.²²⁷ Essentially, "the

216. See *supra* Part II.D.1.

217. *eBay, Inc. v. Mercexchange, L.L.C.*, 547 U.S. 388 (2006); see *supra* Part II.D.3.

218. Karthica Perumal, *Post-eBay Permanent Injunction Rulings By District Courts--to 5/26/2013*, PATSTATS.ORG, http://www.patstats.org/Injunction_rulings_post-eBay_to_5-26-2013.xls (last visited Nov. 8, 2015).

219. Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 CORNELL L. REV. 1, 9–10 (2012).

220. *Id.* at 2; Quinn, *Happy 5th Anniversary*, *supra* note 101.

221. Rose, *supra* note 190, at 116; Quinn, *Happy 5th Anniversary*, *supra* note 101.

222. Chien & Lemley, *supra* note 219, at 14.

223. 19 U.S.C. § 1337 (2012).

224. *In re Certain Airless Paint Spray Pumps and Components Thereof*, Inv. No. 337-TA-90, USITC Pub. 1199 (Nov. 24, 1981) (Final). For a more in-depth explanation, see Gary M. Hnath, *General Exclusion Orders Under Section 337*, 25 NW. J. INT'L L. & BUS. 349 (2005).

225. 19 U.S.C. § 1337.

226. Chien & Lemley, *supra* note 219, at 15.

227. *Id.* at 16.

ITC's practices have undone many of the desirable consequences of eBay.²²⁸

Aside from having minimal impact on patent trolls, the *eBay* decision has negatively affected other sectors of the U.S. economy, namely the pharmaceutical industry.²²⁹ Such companies argued in amicus briefs before the Court in *eBay* “that limiting injunctions and weakening patent laws would drive up the cost of innovation.”²³⁰ Because of the highly technical nature of pharmaceuticals, courts are unlikely to arrive at the proper estimate of the reasonable royalty to award a successful pharmaceutical patent plaintiff.²³¹ Specifically for biotechnological tools and diagnostic products, courts are likely to find that the public interest weighs in favor of denying a permanent injunction to the plaintiff; the importance of these products to public health and safety make it unlikely that a court would limit their production through granting a permanent injunction.²³² Even if these fears have not necessarily panned out quite as the biotechnology industry feared,²³³ the fact that a permanent injunction is less of a sure thing than in the pre-*eBay* world means that smaller biotech companies will lose out on a significant bargaining chip and will be less likely to secure favorable settlements.²³⁴ To hedge this potential loss, companies will have to cut back on research spending, leading to a decrease in innovation.²³⁵

Courts additionally have institutional limitations that affect their ability to make effective strides against patent trolls. Although court decisions, especially Supreme Court decisions, impact both existing and future patents,²³⁶ they are limited only to the cases brought before them. Further, patent trolls do not even need to institute a trial in order to be successful.²³⁷ The court system moves too slowly for the target businesses that do get all the way to trial, as such defendants “cannot wait for the appeal process to rectify the wrong decision.”²³⁸

228. *Id.* at 4.

229. Severin de Wit, *The Case eBay Inc. vs. MercExchange LLC, its Impact on NPEs and Patent Enforcement* (Oct. 2010), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=severin_dewit.

230. *Id.*

231. Jeremiah S. Helm, Comment, *Why Pharmaceutical Firms Support Patent Trolls: The Disparate Impact of eBay v. MercExchange on Innovation*, 13 MICH. TELECOMM. & TECH. L. REV. 331, 342 (2006).

232. Bryan C. Diner & Anthony C. Tridico, *The Effect of the U.S. Supreme Court's Decision in eBay v. MercExchange on the Biopharmaceutical Industry*, FINNEGAN (May 1, 2006), <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=db03e683-c202-41fd-8b7d-57418d133746>.

233. See, e.g., *Hospira, Inc. v. Sandoz Inc.*, No. 09-4591(MLC), 2012 WL 1587688 (D.N.J. May 4, 2012) (granting a permanent injunction in a pharmaceuticals case); *Sanofi-Aventis Deutschland GmbH v. Glenmark Pharms. Inc., USA*, 821 F. Supp. 2d 681, 685–86 (D.N.J. 2011) (same).

234. Diner & Tridico, *supra* note 232.

235. See Helm, *supra* note 231, at 342.

236. Colleen V. Chien, *Reforming Software Patents*, 50 HOUS. L. REV. 325, 352 (2012).

237. *Patent Quality Improvement: Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. 20–23 (2003) (statement of David M. Simon, Chief Patent Counsel, Intel Corporation).

238. *Id.* at 21.

Judge Rader, former Chief Judge of the Court of Appeals for the Federal Circuit, expressed concern that the Supreme Court's recent interest in patent cases has resulted in binding precedent inconsistent with the goals of the U.S. patent system.²³⁹ Rader noted that litigating parties often want courts to do more than their job of applying the patent statutes, arguing for judges to consider consumer protection and fair competition in their application of laws not intended to tackle such issues.²⁴⁰ The former Chief Judge also noted that the outcome of a trial should not be dependent upon the identities of the parties involved, meaning that courts should not be in the business of deciding against a patent troll simply because of the nature of its business model.²⁴¹ With these criticisms of the judicial branch's role in the patent troll battle, it is not a strong candidate for a swift, effective solution.

B. The States' Responses Can Be More Effective

The Federal Government's responses to the patent troll problem are commendable, but ultimately fall short of truly handling the impediment to innovation. The state legislatures are in a much better position to take on patent trolls. State legislation avoids many of the drawbacks and inefficiencies that plague the Federal Government's responses to the patent troll problem.

Still, one serious concern unique to relying exclusively upon state action is the "collective action" problem. Because of each state's own independent legislative body, some states will inevitably have strong anti-patent troll legislation, while others will have weak or no such legislation.²⁴² This could lead to a sort of "forum shopping" by patent trolls in which they strategically choose which states to send their coercive letters, frustrating the overall goal of consumer protection, especially in those targeted states.²⁴³ Even with this drawback, states are still capable of solving the patent troll problem more effectively than the Federal Government.

1. States Can Tailor Their Laws to Specific Industries

One of the core principles of the U.S. federalist system of government is the notion that the states exist to meet the needs of their specific, diverse, and unique citizenry.²⁴⁴ As Justice Black once noted, "[t]he National Government will fare best if the States and their institutions are

239. Ryan Davis, *Rader Calls Out High Court's "Activism" in IP Law*, LAW360 (Jan. 22, 2013, 8:11 PM), <http://www.law360.com/articles/408846/rader-calls-out-high-court-s-activism-in-ip-law>.

240. *Id.*

241. *Id.*

242. Rose, *supra* note 190, at 132.

243. *Id.* at 132 n.223.

244. See *Younger v. Harris*, 401 U.S. 37, 44 (1971); Paul Chen, *Federalism and Rights: A Neglected Relationship*, 40 S. TEX. L. REV. 845, 852 (1999).

left free to perform their separate functions in their separate ways.”²⁴⁵ The existence of state governments allows each state to be more reactive and responsive to the specific needs of its citizenry when such needs are not homogenous from state to state.²⁴⁶

Because of the states’ responsive nature, they can cater their anti-patent-troll laws to the specific needs of the industries present within their respective jurisdictions. For example, patent trolls are not a significant problem for the pharmaceutical industry, and in fact the Big Pharma lobby pushed against anti-patent-troll reforms in Congress.²⁴⁷ Yet, for the software and technology industries, patent trolls represent a substantial and growing threat.²⁴⁸ Therefore, in states with a large technology industry but a smaller pharmaceutical industry (e.g. Washington),²⁴⁹ the anti-patent-troll laws could be more stringent than in a state with large pharmaceutical companies (e.g. Illinois).²⁵⁰ This sort of tailoring is not feasible at the federal level and represents one of the main reasons Congress has been unable to pass any further anti-patent-troll legislation in recent years.²⁵¹

2. *States Can Get the Job Done*

While states have the unique ability to tailor laws to their citizens’ needs, such an advantage would be useless if states fell victim to the same impasses that have plagued Congress. States simply can get (and have gotten) more done to combat patent trolls than the federal government.²⁵² Aside from the questionable effectiveness of the AIA in combating patent trolls, the main frustration with Congress is its inability to come to a consensus on how to deal with patent trolls.²⁵³ State legislatures have already proven far more amenable to agreement on this issue than

245. *Younger*, 401 U.S. at 44.

246. See Chen, *supra* note 244, at 865.

247. Timothy B. Lee, *Patent Trolls Have a Surprising Ally: Universities*, WASH. POST (Nov. 30, 2013), <http://www.washingtonpost.com/blogs/the-switch/wp/2013/11/30/patent-trolls-have-a-surprising-ally-universities>; Amy Schatz, *Patent Troll Bill Shelved Over Industry Fighting*, RE/CODE (May 21, 2014, 10:57 AM), <http://recode.net/2014/05/21/patent-troll-bill-shelved-over-industry-fighting>. But see Robin Feldman & W. Nicholson Price II, *Patent Trolling—Why Bio & Pharmaceuticals are at Risk*, 17 STAN. TECH. L. REV. 773, 776–77 (2014); José P. Sierra, *The Patent Troll Threat to Pharmaceutical Companies*, PHARMARISC.COM (Mar. 11, 2014), <http://www.pharmarisc.com/2014/03/patent-troll-threat-pharmaceutical-companies>.

248. PATENT ASSERTION, *supra* note 19, at 9–10.

249. Joel Kotkin, *The Best Cities for Technology Jobs*, FORBES (Nov. 11, 2011, 1:43 PM), <http://www.forbes.com/sites/joelkotkin/2011/11/18/the-best-cities-for-technology-jobs>.

250. Both AbbVie and Abbott Laboratories, two of the top pharmaceutical companies in the world, are headquartered in Illinois. *Contacts*, ABBOTT, <http://www.abbott.com/contact.html> (last visited Nov. 8, 2015); *Contact Us*, ABBVIE, <http://www.abbvie.com/country-contacts/us.html> (last visited Nov. 8, 2015); Eric Palmer, *The Top 10 Pharma Companies by 2013 Revenue*, FIERCEPHARMA (Mar. 4, 2014), <http://www.fiercepharma.com/special-reports/top-10-pharma-companies-2013-revenue>.

251. Schatz, *supra* note 247.

252. See *supra* Parts II.D.1, II.E, III.A.1.c.

253. See *supra* Parts II.D.1, III.A.1.c.

Congress has been; in October 2014, eighteen states passed anti-patent-troll legislation, with proposed bills in at least eleven more.²⁵⁴

The states do not seem to be gridlocked the same way Congress has unfortunately been on this issue. State legislatures have been far more active in passing new legislation than Congress in the last year.²⁵⁵ Federally generated patent laws and policies must be uniform across the entire nation, but the industries that rely on patents are not one-size-fits-all.²⁵⁶ Similar to the states' ability to tailor laws to the needs of their specific industries, the anti-patent-troll measures need not be uniform from state to state.²⁵⁷ In general, state legislatures cannot play the same political games as Congress,²⁵⁸ thereby avoiding, out of necessity, the industry lobbying stalemate currently going on at the federal level.²⁵⁹

3. *States Can Amend Existing Consumer Protection Laws*

Many of the anti-patent-troll measures taken by the states have come through the use of state consumer protection laws.²⁶⁰ Some state consumer protection laws are modeled after the FTC's section 5 language,²⁶¹ yet the usage of such state laws to target patent trolls has not been questioned as the FTC's similar usage has been.²⁶² Several courts have allowed such state consumer-protection-based claims against patent trolls, indicating that at least some courts (including federal courts) find this tactic acceptable.²⁶³ Further, and perhaps more importantly, MPHJ thought several state consumer-protection assertions were valid enough to settle in at least two states, Minnesota²⁶⁴ and New York.²⁶⁵

254. Jonathan Griffin, *2014 Patent Trolling Legislation*, NAT'L CONF. OF STATE LEGIS. (Sept. 21, 2015), <http://www.ncsl.org/research/financial-services-and-commerce/patent-trolling-legislation.aspx>.

255. Glen Justice, *States Six Times More Productive Than Congress*, CONNECTIVITY (Jan. 27, 2015), <http://connectivity.cqrollcall.com/states-six-times-more-productive-than-congress>.

256. See Schatz, *supra* note 247.

257. See KENNETH R. THOMAS, CONG. RESEARCH SERV., RL30315, FEDERALISM, STATE SOVEREIGNTY AND THE CONSTITUTION: BASIS AND LIMITS OF CONGRESSIONAL POWER 1 (2005) ("States may generally legislate on all matters within their territorial jurisdiction.").

258. Justice, *supra* note 255 ("States don't have the flexibility to kick the can down the road. They have balanced budget amendments and things they actually have to address.").

259. Schatz, *supra* note 247.

260. *Patent Trolls: Can You Sue Them for Suing or Threatening to Sue You?*, NAT'L L. REV. (Oct. 28, 2014), [hereinafter *Patent Trolls: Can You Sue Them*] <http://www.natlawreview.com/article/patent-trolls-can-you-sue-them-suing-or-threatening-to-sue-you>.

261. *Id.* (comparing 15 U.S.C. § 45(a) (2012) with N.C. GEN. STAT. § 75-1.1(a) (2015) and VT. STAT. ANN. tit. 9, § 2453 (2012)).

262. *Patent Trolls: Can You Sue Them*, *supra* note 260; see *supra* Part III.A.2.i.

263. *Patent Trolls: Can You Sue Them*, *supra* note 260.

264. Minnesota Assurance of Discontinuance, *supra* note 111.

265. Press Release, N.Y. Att'y Gen., A.G. Schneiderman Announces Groundbreaking Settlement With Abusive "Patent Troll" (Jan. 14, 2014), available at <http://ag.ny.gov/press-release/ag-schneiderman-announces-groundbreaking-settlement-abusive-%E2%80%9Cpatent-troll%E2%80%9D>.

4. *Other Federal Laws Have Been Successfully Supplemented by State Action*

State involvement in a nationally established legal regime is not a new phenomenon in the United States. For example, states enforce the federal environmental laws promulgated by the Environmental Protection Agency (“EPA”).²⁶⁶ States can step in, on their own accord, and initiate civil administrative actions, civil judicial actions, or criminal judicial actions for federal EPA violations.²⁶⁷ Courts even impose state-based fines or penalties for EPA violations.²⁶⁸ Additionally, state-based tort law sometimes applies in admiralty cases.²⁶⁹ Admiralty law, like patent law, is reserved strictly to the federal judiciary, deriving its exclusive jurisdiction from both the Constitution²⁷⁰ and Congressional law.²⁷¹

There are also areas of intellectual property law over which the state and federal governments share control. Trade secret and trademark laws involve elements of both federal and state governments.²⁷² Similar to the goals of patent law, trade secret law is intended to encourage innovation and the development of “valuable information.”²⁷³ Similar to the goals of anti-patent troll legislation, trademark law is focused on consumer protection.²⁷⁴ For trade secret law, the state component deals with trade secret misappropriation in terms of contractual, quasi-contractual, or property law principles,²⁷⁵ while the federal component handles the threats to international and national trade.²⁷⁶ The states provide for private actions against misappropriation, while the federal government, though lacking private causes of action, investigates and prosecutes parties involved in trade secret theft.²⁷⁷ Interestingly, state trade secret law applies even when the stolen secret ends up in a patent.²⁷⁸ The successful

266. *Enforcement Basic Information*, ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/enforcement/enforcement-basic-information> (last visited Nov. 8, 2015).

267. *Id.*

268. *Id.*

269. *Application of State Law in Particular Instances*, USLEGAL, <http://admiralty.uslegal.com/law-governing-remedies-in-admiralty/application-of-state-law-in-particular-instances> (last visited Nov. 8, 2015) (“State laws can be applied when there is no settled admiralty rule in an issue. In government maritime tort liability cases also, state laws can be applied.”); *see, e.g.*, *Caldarola v. Eckert*, 332 U.S. 155, 157–58 (1947).

270. U.S. CONST. art. III, § 2, cl. 1.

271. 28 U.S.C. § 1333 (2012).

272. *See* BRIAN T. YEH, CONG. RESEARCH SERV., R43714, PROTECTION OF TRADE SECRETS: OVERVIEW OF CURRENT LAW AND LEGISLATION 4–5 (2014); *State and Federal Trademark Law*, SHELDON MAK ROSE & ANDERSON, http://www.usip.com/pdf/Article_Trademarks/statfed.pdf (last visited Nov. 8, 2015).

273. YEH, *supra* note 272, at 5.

274. *State and Federal Trademark Law*, *supra* note 272.

275. *United States Trade Secret Law*, BARNARD, LOOP & MCCORMACK LLP, <http://www.seattlepatentlaw.com/articles/USTradeSecretLaw.pdf> (last visited Nov. 8, 2015).

276. *See* YEH, *supra* note 272, at 6–7, 18–19.

277. *Id.* at 16–17.

278. *See* Joel Leeman, *Federal Preemption Has its Limits: State Law Governs Theft of Trade Secrets Even When a Patent is Involved*, SUNSTEIN KANN MURPHY & TIMBERS LLP (Feb. 2009), <http://sunsteinlaw.com/federal-preemption-has-its-limits-state-law-governs-theft-of-trade-secrets-even-when-a-patent-is-involved>.

interplay between state and federal trade secret law, even when involving patents, shows that such a split scheme in an intellectual property discipline can work, and affirmatively has worked, within the United States legal system.

Likewise, trademark law's state and federal components co-exist. State trademark law has its roots in the common law, and federal trademark registration affords state-registered marks with additional, supplemental benefits.²⁷⁹ Both federal and state courts hear trademark causes of action.²⁸⁰ Further, federal law rarely preempts state trademark law.²⁸¹ The two regimes work to offer protection to rights holders and to consumers at both the state and federal level.²⁸²

5. *The Problem of Preemption*

The looming cloud over state-based, anti-patent-troll measures is the federal preemption problem. The question of preemption in the patent law context is beyond the scope of this Note, but has been covered by several other scholars.²⁸³ There is some merit to the suggestion that federal law may not preempt state patent troll legislation. For example, in *Zenith Electronics Corp. v. Exzec, Inc.*, the Federal Circuit held that state unfair competition laws were not preempted by federal patent law because the state cause of action requires bad faith.²⁸⁴ Additionally, in *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, the Federal Circuit held state tort liability for allegations of patent infringement were not preempted by federal patent law so long as the cause of action required the allegations to be "objectively baseless."²⁸⁵ Even the current preemption law, however, once applied to state measures take against patent trolls, "will almost certainly prohibit the states from condemning any but the most frivolous assertions of patent infringement."²⁸⁶

Paul Gugliuzza recently tackled the issue of federal preemption of state anti-patent-troll laws.²⁸⁷ Gugliuzza suggests that the current federal preemption framework as applied to state anti-patent-troll laws is improper. He argues the Federal Circuit's patent preemption precedent has incorrectly focused on First Amendment petitioning immunity rather

279. Sidney A. Diamond, *Properly Used, Trademarks are Forever*, 68 A.B.A. J. 1575, 1575 (1982).

280. John T. Cross, *The Role of the States in United States Trademark Law*, 49 U. LOUISVILLE L. REV. 486, 487 (2011).

281. *Id.* at 499.

282. *But see id.* (arguing federal trademark law should preempt state trademark law in order to increase uniformity trademark law).

283. *See generally*, Gugliuzza, *supra* note 119; Joan E. Schaffner, *Patent Preemption Unlocked*, 1995 WIS. L. REV. 1081; Jack L. Lahr, *Federal Preemption Doctrine: The Protection of Industrial Property and its Relation to the Sherman Act*, 39 ANTITRUST L.J. 812 (1970).

284. 182 F.3d 1340, 1355 (Fed. Cir. 1999) (citing *Dow Chemical Co. v. Exxon Corp.*, 139 F.3d 1470, 1476-77 (Fed. Cir. 1998); *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1322, 1336-37 (Fed. Cir. 1998)).

285. 362 F.3d 1367, 1377 (Fed. Cir. 2004).

286. Gugliuzza, *supra* note 119, at 6.

287. *Id.*

than on the Supremacy Clause.²⁸⁸ As such, state laws must require a bad-faith patent assertion to be “objectively baseless” in order to avoid federal preemption.²⁸⁹ This standard gives patent trolls “nearly boundless immunity” in their patent assertion tactics.²⁹⁰ Gugliuzza notes that many state anti-patent-troll laws, including Illinois’ new statute,²⁹¹ are at risk of preemption under the Federal Circuit’s current preemption precedent.²⁹² Illinois’ statute in particular includes language prohibiting patent holders from “falsely threaten[ing]” litigation,²⁹³ clearly not meeting the “objectively baseless” standard set out by the Federal Circuit.²⁹⁴ Gugliuzza suggests that under a proper preemption analysis, state anti-patent-troll laws may be allowed to prosper and avoid the immunity that the current patent preemption doctrine affords to patent trolls.²⁹⁵

IV. RECOMMENDATION

Patent trolls are a national issue, not uniquely limited to just a few states. The Federal Government’s response, however, is unlikely to have any significant or lasting impact on patent trolls. States, on the other hand, are in prime positioning to be the first line of defense against patent trolls. Anti-patent troll initiatives should therefore be left to state legislatures. This Note recommends that Congress pass legislation to remove any possibility of federal law preempting state anti-patent-troll measures. Such action by Congress has been done before and will result in a tailored attack on the patent-trolls specific to each of the states’ businesses.

A. *Removing the Possibility of Preemption*

The first step toward ending the reign of patent trolls is to allow the states to step into the ring. One potential obstacle to this is preemption by federal patent law.²⁹⁶ This is a not necessarily a difficult obstacle to overcome, though. Gugliuzza suggests leaving it to the courts to reexamine and rework their current patent preemption doctrine.²⁹⁷ This Note, however, recommends a much more direct, sure-fire approach to the preemption problem. Congress can simply pass legislation stating that state anti-patent trolls laws are not preempted by federal patent law. This could be done by amending the AIA to contain such language or by pass-

288. *Id.* at 33.

289. *Id.* at 41 (quoting *Globetrotter Software, Inc. v. Elan Computer Grp., Inc.*, 362 F.3d 1367, 1375 (Fed. Cir. 2004)).

290. *See id.* at 43.

291. 815 ILL. COMP. STAT. 505/2SSS (2015).

292. Gugliuzza, *supra* note 119, at 46.

293. 815 ILL. COMP. STAT. 505/2SSS(b)(1).

294. Gugliuzza, *supra* note 119, at 45.

295. *Id.* at 52–53.

296. *See supra* Part III.B.5.

297. *See* Gugliuzza, *supra* note 119, at 52–53.

ing an entirely new statute excluding anti-patent-troll laws from preemption. Limiting federal patent law's preemption doctrine would give states the power and freedom to "regulate as they see fit."²⁹⁸ Of course, in order for this recommendation to be implemented, Congress would have to be willing to pass such legislation. Congress has recognized that patent trolls are a problem; it has also been unable to reach a consensus on the proper solution.²⁹⁹ Therefore, due to its deadlock on the issue, Congress may be willing to leave anti-patent troll legislation to the states.

B. Existing Preemption Exceptions

Congress has exempted state laws from preemption in a number of other subject areas in the past. For example, as part of the Thrift Institutions Restructuring Act and the Garn-St Germain Depository Institutions Act of 1982, Congress passed legislation exempting due-on-sale provisions in contracts from preemption by federal law.³⁰⁰ Additionally, the Employee Retirement Income Security Act contains an exception from preemption specifically for Hawaii's Prepaid Healthcare Act.³⁰¹ It would not be an extraordinary move for Congress to make a similar preemption exception for states passing legislation aimed at combating patent trolls. As discussed in Part III, without the issue of federal preemption, states will be free to take the steps best suited for their specific citizenry in the fight against patent trolls.³⁰²

V. CONCLUSION

Patent trolls are a growing threat to the innovative and economic development of the nation. Both the states and the Federal Government have taken a number of legislative, executive, and judicial steps aimed at combating these perverters of patent law. The Federal Government, although not completely ineffective, will likely be less impactful than necessary to truly tackle the patent-troll problem. The states, however, sit in perfect position to take action and target the patent trolls most detrimental to their citizenry.

Their only hurdle is the law of federal preemption. Congress, however, can easily excuse state anti-patent troll legislation from preemption. This exemption would allow those best suited to take effective action against patent trolls, while at the same time avoiding the indecisiveness that currently divides Congress on the patent-troll issue. It is clear that *something* must be done about patent trolls. The states are the best option the nation has to begin effectively taking the patent trolls down and restoring patent protection to its original purpose: to promote innovation.

298. Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption*, 33 PEPP. L. REV. 69, 70, 75 (2005).

299. See *supra* Part II.D.1.

300. 12 U.S.C. § 1701j-3 (2012).

301. 29 U.S.C. § 1144(b)(5)(A) (2012).

302. See *supra* Part III.B.5.

