

WHY PATENTEES LITIGATE

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Several aspects of patent litigation call into question patent holders' motivation for enforcing their exclusionary rights. Indeed, the expense alone can be enough to deter a firm from engaging in litigation, especially if it is likely that the parties will be unable to reach a settlement agreement and will go to trial. Notwithstanding, the number of patent infringement filings in district courts grows each year, thus providing a forum for asking what patent holders really desire to gain from litigating. Although injunctive relief and damages awards confer benefits to patent holders that can make litigating worthwhile, this Article posits that plaintiffs have no intention of ever obtaining these statutory remedies. Rather, handsome settlement arrangements provide the incentive for patentees to litigate. This Article contends that such settlement agreements are becoming a way of life for patent holders, and that rather than viewing litigation as an end result of parties' failure to resolve a dispute, it is instead becoming the ordinary course of business and a routine consequence of owning a patent.

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I. INTRODUCTION

“I have heard trial judges claim that they dislike patent litigation, partly because it is hard. Patent litigation is like the neurosurgery of litigation: it is hard scientifically and it is hard legally.”

—U.S. District Court Judge Patti Saris²

Patent litigation is complex.³ Infringement suits charge judges and juries with the task of analyzing arguably the most intricate factual issues presented in federal courts today.⁴ Moreover, courts must grapple with patent law’s highly esoteric legal doctrines and apply those principles to the underlying technologies at issue.⁵ These complexities have generated debate among scholars as to whether the district courts should even hear patent cases,⁶ and if so, whether juries are competent to render fair and rational verdicts.⁷ Indeed, despite the efforts to unify patent law with the creation of the Federal Circuit,

² Symposium, *A Panel Discussion: Claim Construction from the Perspective of the District Judge*, 54 Case W. Res. L. Rev. 671, 682 (2004).

³ *E.g.*, *Rohm & Haas Co. v. Brotech Corp.*, 127 F.3d 1089, 1092 (Fed. Cir. 1997) (Rader, J.) (“Patent litigation frequently is complex, long, and difficult.”).

⁴ *See* Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. Rev. 889, 933 (2001) (“[Patent suits] are among the most complex cases on [district courts’] dockets.”).

⁵ Jonathan L. Moore, *Particularizing Patent Pleading: Pleading Patent Infringement in a Post-Twombly World*, 18 Tex. Intell. Prop. L.J. 451, 460–61 (2010); *see* *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1479 (Fed. Cir. 1998) (Newman, J., offering additional views) (“When the issues in litigation involve complex questions of science and technology, a special effort is required of the judicial process.”).

⁶ *See generally* Kimberly A. Moore, *Are District Court Judges Equipped to Resolve Patent Cases?*, 15 Harv. J.L. & Tech. 1, 3 (2001) (calling into question district court judges’ ability to, *inter alia*, properly construe patent claims).

⁷ Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peak Inside the Black Box*, 99 Mich. L. Rev. 365, 365 & n.2 (2000) (“[T]here is a popular perception that the increasing complexity of technology being patented . . . has made patent trials extremely difficult for lay juries to understand.”); *see also* Michael A. Fisher, *Going for the Blue Ribbon: The Legality of Expert Juries in Patent Litigation*, 2 Colum. Sci. & Tech. L. Rev. 1, 1 (2001) (“As patented technologies have become increasingly complex, there has been growing concern that ordinary jurors lack the ability to understand the scientific and technical issues in patent litigation. Although a court may call upon expert witnesses, special masters, and other means of facilitating comprehension, there are likely to be many patent-related cases in which the issues are so far beyond the training and intelligence of the jury that no rational fact-finding is possible.”).

unpredictable results and inconsistent damages awards still plague patentees at the trial-court level.⁸ Additionally, the pedantic issues that pervade patent cases often result in lengthy trials that can endure for weeks.⁹ This protracted timetable for adjudication is further exacerbated by the fact that patent cases are often delayed due to heavy criminal dockets in the district courts.¹⁰

These features of infringement lawsuits yield the undeniable conclusion that patent litigation is expensive.¹¹ For example, a 2009 survey found that the median total cost of an infringement lawsuit where between \$1 million and \$25 million was at stake was \$2.5 million.¹² This figure more than doubled where the potential recovery was greater than \$25 million.¹³ Even as early as the mid-1980s, parties were combining to spend upwards of several hundred million dollars to litigate patent-infringement suits.¹⁴

⁸ Moore, *supra* note 3, at 891–94 (“[D]espite the creation of the Federal Circuit, choice of forum continues to play a critical role in the outcome of patent litigation. . . . The lack of uniformity in patent enforcement is problematic in and of itself.”).

⁹ James F. Holderman & Halley Guren, *The Patent Litigation Predicament in the United States*, 2007 U. Ill. J.L. Tech. & Pol’y 1, 10 (“Pretrial discovery in a patent case typically takes several months and sometimes years.”).

¹⁰ Kevin R. Casey, *Alternate Dispute Resolution and Patent Law*, 3 Fed. Cir. B.J. 1, 4 (1993) (“The United States federal district courts are so overloaded with criminal cases that their major civil cases, especially patent cases, suffer delay. It may take years to try a patent case.”); Gregg A. Paradise, *Arbitration of Patent Infringement Disputes: Encouraging the Use of Arbitration Through Evidence Rules Reform*, 64 Fordham L. Rev. 247, 251–53 (1995) (“[T]he federal district courts’ civil dockets are very overcrowded. . . . Courts do not have the time to hear lengthy patent cases which typically take several weeks to litigate. Thus, patent cases often lie dormant for many months or years.”).

¹¹ See, e.g., Jay P. Kesan & Gwendolyn G. Ball, *How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes*, 84 Wash. U. L. Rev. 237, 312 (2006) (“[T]he transaction costs associated with patent litigation loom large”); Jay P. Kesan & Andres A. Gallo, *Why “Bad” Patents Survive in the Market and How Should We Change?—The Private and Social Costs of Patents*, 55 Emory L.J. 61, 68–69 (2006) (“[F]irms and individuals do try to avoid or minimize the extent of patent litigation, since the associated costs are very high.”).

¹² Am. Intellectual Prop. Law Ass’n, Report of Economic Survey 2009, at 29 (2009) [hereinafter AIPLA Report 2009].

¹³ *Id.* (median total cost of \$5.5 million).

¹⁴ Casey, *supra* note 9, at 4 n.13. The parties in *Polaroid Corp. v. Eastman Kodak Co.*, 789 F.2d 1556 (Fed. Cir. 1986), spent a total of almost \$200 million on the lawsuit. *Id.* (citation omitted).

When evaluated holistically, the high litigation costs and uncertainty of recovery thus raise the question of why patentees involve themselves in such expensive lawsuits,¹⁵ and when they do, what they really desire to gain. As several prominent scholars have noted, “[p]arties arguing over a patent worth \$1 million in damages may have little incentive to litigate their claim[] because the cost of litigation will eat up much of the surplus.”¹⁶ This Article endeavors to explore the real reason underlying patentees’ incentives to litigate. It does so by evaluating the nature of the patent-driven technology industry and by comparing the value of high-dollar settlement agreements with that of permanent injunctions and monetary damages awards. In short, I argue that what patentees really desire from infringement lawsuits are handsome settlements—i.e., large, up-front payouts or licensing agreements, often enhanced by the threat that the court will find willful infringement—not the traditional remedies of long-term injunctions or unpredictable damages awards. While several scholars have advanced the theory that parties are prone to settle disputes in the interest of avoiding costly trials,¹⁷ the intricate issues that are inherent to patent litigation provide a platform for discussing why patentees are especially willing to settle to avoid additional harms other than just the expense of litigating. This Article examines why patent litigation is particularly tailored to fit this model, and is grounded on the following principal theories: first, patent litigation is, indeed, very costly; second, patent disputes do not fit the Priest–Klein framework for civil litigation; and third, litigation-for-settlement has emerged as a way of doing business for many companies.

Part II of this Article examines the reasons that patentees may not want to assert their exclusionary rights in litigation. First, Part II.A contemplates that patentees may face significant challenges even getting their infringement claims past the dismissal phase of a lawsuit in light of the Supreme Court’s *Twombly–Iqbal* plausibility standard. Next, Part II.B analyzes the high costs of litigation and the substantial time investments that are typical of infringement lawsuits should the patentee successfully plead the elements of an infringement claim, and Part II.C contemplates the harms that can emerge from the litigation itself. Part III of this Article evaluates remedies for patentees. Part III.A analyzes injunctive relief. Part III.B then surveys monetary relief as a remedy for patentees. Part III.C then evaluates settlement agreements as a form of “remedy” for patent owners. Finally, in Part IV.A of the Article, I argue that as a general matter, the inherent drawbacks of infringement lawsuits yield the conclusion that the reason

¹⁵ In fact, studies show that many patentees choose not to assert their rights in court. See Mark A. Lemley, Essay, *Rational Ignorance at the Patent Office*, 95 Nw. U. L. Rev. 1495, 1501 (2001) (presenting statistics that of the roughly two million patents in force, only about 1600 new infringement lawsuits were filed per year between 1995 and 1999).

¹⁶ John R. Allison, Mark A. Lemley, Kimberly A. Moore & R. Derek Trunkey, *Valuable Patents*, 92 Geo. L.J. 435, 442 (2004).

¹⁷ See, e.g., Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 Notre Dame L. Rev. 221, 225–26 & n.31 (1999) (“In a nutshell, the reason so many cases settle is because the alternative to settlement is litigation, which is generally quite costly.”).

patentees litigate is for high-dollar settlement agreements. This is not to say, however, that injunctions are not valuable or that damages awards are never worth the expense and time of a trial. Indeed, there are many instances where courts find the infringement to be of a nature such that damages are higher than the amount for which a settlement could have been negotiated, especially if the court finds willful infringement. Part V.B then considers several proposals to reform the system of patent litigation to avoid, or at least diminish to an extent, the previously discussed complexities and drawbacks of litigation.

In summary, this Article does not posit that the traditional patent remedies are per se inadequate; rather, this Article advances the theory that the statutory remedies offered by the Patent Act might not always be the most desirable given the several time-consuming and expensive challenges that patentees face at trial. Moreover, this Article advances the theory that litigation-for-settlement among patent owners is merely a way of life and is “business as usual” for those firms with robust patent portfolios, and that for those firms without substantial patent portfolios, litigation-for-settlement is a way to survive in the marketplace and is in fact an emerging business model.

II. THE DISINCENTIVES OF PATENT LITIGATION

Patent prosecution is not for those with shallow pockets. Depending on the complexity of the subject matter, some firms spend upwards of \$30,000 to obtain a single patent.¹⁸ Because such a large amount of capital is invested to procure patents,¹⁹ it would seem to logically follow that firms would likewise vigorously protect these rights through litigation. However, this is not always the case. Indeed, a study by Professor Lemley revealed that less than two tenths of one percent of all patents ever issued actually found their way into courtrooms.²⁰ Although filings for patent lawsuits have shown a steady rise over the last two decades,²¹ unenforced patent infringement is nevertheless widespread.²²

¹⁸ Lemley, *supra* note 14, at 1498; *see also* Gideon Parchomovsky & R. Polk Wagner, *Patent Portfolios*, 154 U. Pa. L. Rev. 1, 4 n.3 (2005) (reporting the average patent to be valued between \$7500 and \$25,000, and noting that this figure “is generally less than average acquisition costs”).

¹⁹ Lemley, *supra* note 14, at 1499 (estimating a total annual expenditure of \$4.33 billion on patent prosecution).

²⁰ *Id.* at 1501 (“About 1,600 patent lawsuits are filed each year. . . . Only about one hundred cases per year (and 125 patents) actually make it to trial.”).

²¹ Jason Rantanen, *Patent Suit Filings for 2010 Show a Slight Rise*, Patently-O Blog, Jan. 28, 2011, <http://www.patentlyo.com/patent/2011/01/patent-suit-filings-for-2010-show-a-slight-raise.html>.

²² *See* Dan L. Burk, *Patenting Speech*, 79 Tex. L. Rev. 99, 148 (2000) (“[P]olicing prohibited uses of patented inventions is notoriously difficult. . . . [P]rocess infringement occurs behind the scenes, in use or production of the unpatented materials, and it is not always possible

The fact that patent owners are not enforcing these instances of infringement reveals—or at the least, indicates—that they harbor anxiety when it comes to litigating. These reservations can be rooted in both legal and economic concerns surrounding a patent lawsuit. The following subparts detail several reasons that patent owners might be deterred from asserting their rights against an infringer in litigation.

A. *Overcoming the (Heightened) Pleading Requirement*

Patent infringement lawsuits are no different than any type other civil action.²³ To that end, plaintiffs' complaints for patent infringement must satisfy the minimum level of specificity for pleading in accordance with Federal Rule of Civil Procedure 8(a).²⁴ Two recent Supreme Court decisions—*Bell Atlantic Corp. v. Twombly*²⁵ and *Ashcroft v. Iqbal*²⁶—have arguably reshaped the landscape for pleading in the past few years to the detriment of plaintiffs. In *Twombly*, the Court dismissed a complaint under Section 2(a) of the Sherman Act, reasoning that the plaintiffs' complaint did not “nudge[] their claims across the line from conceivable to plausible.”²⁷ This standard appeared markedly different from the longstanding “no set of facts” construction of Rule 8(a) set forth in *Conley v. Gibson*²⁸ that emerged fifty years earlier and that had formed the foundation for modern pleading under the Federal Rules.²⁹ For nearly two years following *Twombly*, circuit courts were split as to what extent the Court's plausibility language in *Twombly* changed standard for notice pleading, and if it did, whether the new standard applied to

to tell whether the materials were made via the patented process or via some other public domain process.”).

²³ 35 U.S.C. § 281 (2006) (“A patentee shall have remedy by civil action for infringement of his patent.”); Moore, *supra* note 4, at 479 (“A patent infringement suit is merely a specific type of civil action.”).

²⁴ Fed. R. Civ. P. 8(a)(2) (requiring a pleading to contain “a short and plain statement of the claim showing that the pleader is entitled to relief”).

²⁵ 550 U.S. 544 (2007).

²⁶ 129 S. Ct. 1937 (2009).

²⁷ *Twombly*, 550 U.S. at 570.

²⁸ 355 U.S. 41, 45–46 (1957) (“[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”).

²⁹ A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. Rev. 431, 431 (2008) (“[U]ntil recently [*Conley v. Gibson*] was the bedrock case undergirding the idea that ours is a system of notice pleading in which detailed facts need not be pleaded.”).

only antitrust claims.³⁰ *Iqbal* subsequently resolved this confusion and clarified that the *Twombly* threshold applies to all civil actions.³¹ Reflecting on these cases, commentators have concluded that *Twombly* and *Iqbal* significantly altered the criteria for what plaintiffs must plead to advance to the discovery phase of a civil lawsuit.³²

While a heightened pleading standard is troublesome for complainants in all types of civil actions,³³ the new formulation for pleading presents several particular hindrances for plaintiffs in the patent infringement context. For instance, since *Twombly–Iqbal*, several district courts have imposed the requirement that plaintiffs specifically plead how the defendant infringed the asserted patent.³⁴ Additionally, at least one district court has

³⁰ Compare *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 974 n.43 (11th Cir. 2008) (“We understand *Twombly* as a further articulation of the standard by which to evaluate the sufficiency of *all* claims brought pursuant to Rule 8(a).” (emphasis supplied)), and *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (“[W]e decline at this point to read *Twombly* so narrowly as to limit its holding on plausibility to the antitrust context.”), with *Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008) (rejecting the district court’s interpretation of *Twombly* “as establishing a new threshold for complaints,” and “conclud[ing] that *Twombly* leaves the long-standing fundamentals of notice pleading intact”), and *McZeal v. Spring Nextel Corp.*, 501 F.3d 1354, 1356 n.4 (Fed. Cir. 2007) (“[There is no suggestion] that [*Twombly*] changed the pleading requirement of Federal Rule of Civil Procedure 8 as articulated in *Conley*.”).

³¹ *Iqbal*, 129 S. Ct. at 1953 (holding that *Twombly* “expounded the pleading standard for *all* civil actions” (emphasis supplied)).

³² E.g., *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 6 (2009) (testimony of Arthur R. Miller), available at http://judiciary.house.gov/hearings/printers/111th/111-36_53090.PDF (“I have spent my entire life with the Federal Rules of Civil Procedure, and I firmly believe that [*Twombly* and *Iqbal*] represent a philosophical sea of change in American civil litigation.”); Moore, *supra* note 4, at 452 (“[T]o survive a motion to dismiss [after *Twombly* and *Iqbal*], plaintiffs must now include more detailed allegations that demonstrate a plausible entitlement to relief.”); see also Douglas G. Smith, *The Twombly Revolution?*, 36 Pepp. L. Rev. 1063, 1099 (2009) (“[T]he Rule 8(a) pleading standard [i]s the gateway to further proceedings under the generous discovery provisions of the Federal Rules.”)

³³ See generally, e.g., Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. Pa. L. Rev. 517, 520 (2010) (“Empirical studies of the effect of *Twombly* and *Iqbal* suggest that these decisions have resulted in the disproportionate dismissal of civil rights cases.”).

³⁴ E.g., *Bender v. LG Elec. U.S.A., Inc.*, No. C 09-02114 JF (PVT), 2010 WL 889541, at *6 (N.D. Cal. Mar. 11, 2010) (“Sufficient allegations would include, at a minimum, a brief description of what the patent at issue does, and an allegation that certain named and specifically identified products or product components also do what the patent does, thereby raising a plausible claim that the named products are infringing.”); *Eidos Commc’ns, LLC v. Skype Techs. SA*, 686 F. Supp. 2d 465, 466, 467 (D. Del. 2010) (granting defendants’ motion to dismiss and on

held that plaintiffs must specify in the complaint which claims the defendants are alleged to have infringed.³⁵ These supplemental criteria, when construed against the canvas of a heightened pleading standard, emphasize a high premium on pre-filing investigative work to ensure that patent litigation is not commenced without “plausible” facts upon which to support the complaint. Therefore, notwithstanding the high costs of discovery and trial that are already inherently characteristic of patent litigation,³⁶ the cost of a patent lawsuit can become substantial for plaintiffs even before the patent owner ever initiates an action in court. Additionally, because many patent owners hinge their decision to litigate a patent on the prospect of being awarded enhanced damages due to willful infringement,³⁷ patentees may decline to file suit on the theory that pleading willful infringement is too steep a mountain to climb under the Court’s *Twombly–Iqbal* framework for pleading.³⁸ Thus, plaintiffs face significant obstacles and deterrents to asserting their patent rights even before commencing formal litigation.

B. *The Cost of Litigating Patents*

Even if a patent owner believes he has a watertight case against an alleged infringer and is able to proceed beyond the dismissal phase of a lawsuit, there are nevertheless numerous reasons that a plaintiff might be better off settling a patent dispute and avoiding discovery and a potential trial. Whether directly or indirectly, these several reasons boil down to one fundamental, underlying factor—cost. From the perspective of a

the grounds that “[n]o specific products or methodologies [were] named in the complaint” and that the plaintiffs failed “to specify, at a minimum, a general class of products or a general identification of the alleged infringing methods.”); *Ware v. Circuit City Stores, Inc.*, No. 4:05-CV-0156-RLV, 2010 WL 767094, at *2 (N.D. Ga. Jan. 5, 2010) (“[T]he plaintiffs again failed to supply sufficient factual allegations to identify what each individual defendant has done to infringe the patent in question. . . . [A] complaint must identify how the defendants have allegedly infringed a patent.”).

³⁵ *Taurus IP, LLC v. Ford Motor Co.*, 539 F. Supp. 2d 1122, 1127 (W.D. Wis. 2008), *remanded*, 315 Fed. Appx. 252 (Fed. Cir. 2008) (“[A] plaintiff’s failure to specify which claims it believes are infringed by a defendant’s products places an undue burden on the defendant, who must wade through all the claims in a patent and determine which claims might apply to its products to give a complete response.”).

³⁶ *See infra* Part II.B.1 (discussing the time and monetary costs of patent litigation).

³⁷ *See infra* text accompanying notes 142 and 143 (noting how the possibility of enhanced damages incentivizes patent owners to take a case all the way to trial).

³⁸ *See generally* Damon C. Andrews, Note, *Iqbal-ing Seagate: Plausibility Pleading of Willful Patent Infringement*, 25 Berkeley Tech. L.J. 1955 (2011) (arguing that *Twombly–Iqbal* will make pleading willful infringement virtually impossible when construed against the Federal Circuit’s “objective recklessness” framework, *see In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007), *cert denied*, 552 U.S. 1230 (2008)).

defendant facing allegations of patent infringement, “there is simply no cheap and easy exit route.”³⁹ However, this sentiment is in no way reserved only for defendants and to the exclusion of their plaintiff counterparts. Indeed, the monetary considerations of litigating a patent and likelihood of recovery are often enough of a deterrent to patent owners to avoid the risks of a lawsuit entirely and to arrive at a resolution without the aid of the legal system.⁴⁰ Part II.B.1 reviews just how costly patent litigation is in terms of out-of-pocket expenses. Part II.B.2 then evaluates the cost of litigating from the temporal aspect of a patent lawsuit. Finally, Part II.B.3 contemplates whether the high costs of litigating are worth it for plaintiffs in light of statistical evidence pertaining to their likelihood of recovery in patent cases and the corresponding value of the award should they prevail.

1. Monetary Considerations

It is no secret that patent infringement litigation is expensive. Indeed, scholars and commentators have repeatedly referred to the costs associated with patent litigation as “exorbitant.”⁴¹ Even as early as 1993, one district court judge hypothesized that the parties’ costs in a patent trial combined to exceed \$100,000 per *day*.⁴² The magnitude of attorneys’ fees alone is also exemplified in judicial opinions that shift costs between parties in patent cases.⁴³ Unfortunately, statistical trends throughout the last decade do

³⁹ Tun-Jen Chiang, *The Advantages of Inter Partes Reexamination*, 90 J. Pat. & Trademark Off. Soc’y 579, 584 (2008).

⁴⁰ See Kesan & Gallo, *supra* note 10, at 69 (“The high cost of going to court also discourages challenges to incorrectly issued patents. Indeed, it is suggested that many firms may be discouraged altogether from using the legal system. In fact, even when the patent is not valid, using the courts may be more expensive than both licensing costs and the transaction costs of the bargaining required to reach a private agreement.”).

⁴¹ E.g., Jonathan M. Barnett, *Property As Access: How Innovation Markets Select Innovation Regimes*, 119 Yale L.J. 384, 398 (2009); Xuan-Thao Nguyen, *Dynamic Federalism and Patent Law Reform*, 85 Ind. L.J. 449, 455 (2010); Robert M. Seto, *A Federal Judges’ View of the Most Important Changes in Patent Law in Half-a-Century*, 11 J. Tech. L. & Pol’y 141, 147 (2006).

⁴² *Burroughs Wellcome Co. v. Barr Labs., Inc.*, 828 F. Supp. 1208, 1210 (E.D.N.C. 1993), *aff’d in part, vacated in part*, 40 F.3d 1223 (Fed. Cir. 1994) (“It is highly conceivable that the cost of this trial for the parties exceeds \$100,000 per day, in addition to the time and expense associated with this court and the jury.”).

⁴³ See e.g., *Smith Eng’g Co. v. Eisenmann Corp.*, 28 Fed. Appx. 958, 962 (Fed. Cir. 2002) (\$3.1 million in attorneys’ fees and costs); *Owens-Ill., Inc. v. BTL PLC*, No. 05 Civ. 2873(LLS), 2010 WL 2607146, at *5, *12 (S.D.N.Y. June 29, 2010) (awarding \$10 million in costs and attorneys’ fees for defending infringement claim); *Powell v. Home Depot U.S.A., Inc.*, 715 F. Supp. 2d 1285, 1288 (S.D. Fla. 2010) (\$2.8 million in attorneys’ fees); *Auto. Prods. PLC v. Tilton*

not indicate a plateau in these costs, and infringement litigation is only becoming increasingly expensive. For example, the median cost of litigating a patent where between \$1 million and \$25 million was at risk increased twenty-five percent from 2003 to 2009.⁴⁴ This increase was even steeper where the potential recovery was greater than \$25 million.⁴⁵ Thus, depending on the size of the plaintiff firm, litigation costs to enforce a single patent can constitute a significant part of a company's budget,⁴⁶ thus deterring that company from asserting its patent rights.

One proposed solution to combat the expenses of a patent lawsuit is to insure it. Under this scheme, potential patent litigants can pay insurance companies to indemnify them when involved in patent disputes.⁴⁷ This insurance is generally available to companies on both the offensive and defensive sides of a lawsuit,⁴⁸ and covers, *inter alia*, expenses such as attorneys' fees and expert witnesses.⁴⁹ For a corporation such as IBM, who is a leader in patent applications and consequently often finds itself in related

Eng'g, Inc., 855 F. Supp. 1101, 1106 (C.D. Cal. 1994), *appeal dismissed*, 36 F.3d 1109 (Fed. Cir. 1994) (awarding \$1.84 million in attorneys' fees for patent claim); *Howes v. Med. Components, Inc.*, 761 F. Supp. 1193, 1202 (E.D. Pa.1990) (\$1.95 million in attorneys' fees, costs, and expenses).

⁴⁴ AIPLA Report 2009, *supra* note 11, at 29 (reporting an increase from \$2 million in 2003 to \$2.5 million in 2009, inclusive of all costs).

⁴⁵ *Id.* (reporting an increase in litigation costs from \$3.995 million to \$5.5 million between 2003 and 2009, respectively—a rise of greater than thirty-seven percent).

⁴⁶ See Jon E. Wright, *Willful Patent Infringement and Enhanced Damages—Evolution and Analysis*, 10 Geo. Mason L. Rev. 97, 97 (2001) (“[P]atent infringement lawsuits are enormously expensive and often swamp balance sheets” (citation and internal quotation marks omitted)); see also Symposium, *supra* note 1, at 681 (statement of Judge Saris) (“I have seen statistics ranging from a run of the mill case costing \$1.2 million to get through [claim construction] to a bet-the-company kind of case where lawyers are giving numbers between two and ten million for a case budget on a really important patent.”). The expense of litigation cuts both ways and likewise places a heavy burden on defendants. See Shashank Upadhye, *Understanding Willfulness in Patent Infringement: An Analysis of the “Advice of Counsel” Defense*, 8 Tex. Intell. Prop. L.J. 39, 40 (1999) (“A large damages award can often bankrupt a company.”).

⁴⁷ J. Rodrigo Fuentes, Note, *Patent Insurance: Toward a More Affordable, Mandatory Scheme?*, 10 Colum. Sci. & Tech. L. Rev. 267, 268 (2009) (“High litigation costs and ambiguous patent rights stimulate demand for patent insurance. Unsurprisingly, insurance companies provide coverage for these types of risks.”).

⁴⁸ *Id.* at 269 (“There are two types of patent insurance. Patent litigation insurance, or defensive insurance, covers the litigation expenses incurred defending against allegations of patent infringement. Patent enforcement insurance, or offensive insurance, reimburses patentees for litigation expenses arising from the pursuit of an infringer.”).

⁴⁹ *Id.* at 272–73 (“The money can be used for expenses like attorneys' fees, expert witnesses, raising a defense of invalidity, and reexamination proceedings.”).

litigation,⁵⁰ this insurance may be a good investment to serve as a preventative measure for combating the expense of litigation. However, small firms may not have the capital to procure patent litigation insurance. Although the average reported cost of insurance according to one company is only \$13,000 annually, this premium can exceed \$100,000 per year for plaintiffs depending on the nature of the industry and insured amount.⁵¹ Thus, while sound in theory, only a few, very large and litigious companies may actually be able to benefit from the added expense.

2. Time Considerations

In addition to the bottom-line dollar value of an infringement lawsuit, patent litigation is costly with respect to the overall time spent litigating. One third of patent cases take more than three years to reach trial from the time the patent owner's complaint was filed, and more than one in every ten patent infringement cases takes longer than five years to reach the trial stage.⁵² This is due in large part to the complex nature of discovery proceedings in patent cases and the proprietary nature of the information at issue, which often results in numerous motions to quash discovery requests.⁵³ Also contributing to this protracted timetable is the fact that patent trials are often overshadowed by criminal cases that crowd district courts' dockets.⁵⁴ Once at trial, patent cases can endure for months—and even years.⁵⁵

The often-unconsidered consequence of a long litigation period or trial is the fact that, as a general matter, patents lose value with time. This is evident when analyzed by any of several empirical factors. For instance, Professor Moore determined in a study that more than half of all patentees allowed their patents to expire for failure to pay

⁵⁰ See Parchomovsky & Wagner, *supra* note 17, at 46 (“Since 1994, IBM has amassed over 25,000 U.S. patents, far more than any other company, each year ranking first on the USPTO’s list of top patent earners.”); see also Robert C. Bird, *Pathways of Legal Strategy*, 14 Stan. J.L. Bus. & Fin. 1, 32 (2008) (“Litigating to halt infringement is important for any firm, and IBM has done so regularly.”).

⁵¹ Fuentes, *supra* note 46, at 282.

⁵² Moore, *supra* note 4, at 461 (citations omitted).

⁵³ *Id.*; see Daniel A. Crane, *Exit Payments in Settlements of Patent Infringement Lawsuits: Antitrust Rules and Economic Implications*, 54 Fla. L. Rev. 747, 757–58 (2002) (“Under the liberal rules of discovery, competitors in litigation may request one another's most sensitive trade secrets, including marketing studies, pricing information, and customer lists.”).

⁵⁴ See *supra* notes 8–9 and accompanying text.

⁵⁵ Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. Rev. 889, 908 (2001) (average length of 1.12 years for patent trials filed in district courts from 1995 to 1999).

maintenance fees before their allotted statutory monopoly period had run.⁵⁶ Likewise, additional data reveals that the longer a patent stays out of litigation, the less valuable it tends to be.⁵⁷ The result of this is that litigation may be for nothing, thus discouraging patentees from asserting their rights.⁵⁸ To illustrate this concept, consider that a patent that introduces a novel invention in a niche field of technology may catch on quickly and enjoy instantaneous and enormous success in the marketplace. Realizing this market, peer firms may immediately invest substantial resources to introduce competing products in the marketplace based on the original “breakthrough” patent. By using the breakthrough patent’s written description as a guideline and further modifying the original firm’s successful patent, competitors are able to “design around” the firm’s rights.⁵⁹ Moreover, by allowing consumers to determine what improvements could be made to the first patent, competitors may actually gain an advantage by *not* being the first to introduce a product since they can then free-ride on the research-and-development investments of the original firm to produce a better product.

3. The Litigation “Lottery”

Coupled with the fact that patent litigation is very costly is the idea that litigation yields unpredictable results. Indeed, several prominent scholars have stated that litigation can result in “debilitating uncertainty” for patent owners.⁶⁰ This is due in part to the requisite level of technical knowledge required to understand the inherent complexities of

⁵⁶ Kimberly A. Moore, *Worthless Patents*, 20 Berkeley Tech. L.J. 1521, 1526 (2005).

⁵⁷ Allison et al., *supra* note 15, at 460 (“[I]t is rare for a patent to become valuable and be litigated late in its life.”)

⁵⁸ Ted Sichelman & Stuart J.H. Graham, *Patenting by Entrepreneurs: An Empirical Study*, 17 Mich. Telecomm. Tech. L. Rev. 111, 134–35 (2010) (“It has been said that patents can be a ‘gigantic waste of time and money.’ Some innovators—particularly in some technology fields—believe that patents can be easily “designed around,” a notion that can lead companies to regard patenting as a worthless activity. This view maintains that if the claims of the patent are sufficiently narrow, a third party can escape infringement by making simple changes to the underlying invention while achieving the same functionality.” (citation omitted)).

⁵⁹ This is a particular concern depending on the industry. *See, e.g.*, Maxwell R. Morgan, *Regulation of Innovation under Follow-On Biologics Legislation: FDA Exclusivity as an Efficient Incentive Mechanism*, 11 Colum. Sci. & Tech. L. Rev. 93, 104 (2010) (“[T]he biotechnology industry organization has expressed concern that patent protection is narrower for biologics products than for pharmaceuticals and that, as a result, generic manufacturers will be able to easily design around biologics product patents to avoid infringement liability should biologics innovators attempt to litigate.”).

⁶⁰ Herbert Hovenkamp, Mark Janis & Mark A. Lemley, *Anticompetitive Settlement of Intellectual Property Disputes*, 87 Minn. L. Rev. 1719, 1723 (2003).

a patent's subject matter, as well as the patent document itself.⁶¹ Moreover, the fact that courts must apply what appear as enigmatic legal doctrines to the underlying technologies further muddies the waters with respect to predictability in patent litigation. This one-two combination of science and law has led several commentators to question district court judges' abilities to adjudicate patent infringement cases.⁶² However, much to their credit, it may be that district court judges are in fact "the lesser of two evils" when it comes to patent trials.⁶³ Professor Leslie has commented that "[t]he only thing more fear-inspiring to the infringement defendant than a bench trial is a jury trial."⁶⁴ Therefore, whether adjudicated by a judge or jury, patent infringement trials have produced a litigation "lottery"⁶⁵ wherein the plaintiff purchases a ticket that increases in cost over time in hope of a handsome reward based on slightly favorable odds.

The lottery ticket of a patent lawsuit at the trial court level can be scratched away in two layers: determining liability and awarding relief. With respect to the first layer, patent owners roll the dice as to whether the adjudicator will find that the defendant infringed the asserted claims. This gamble is less risky when plaintiffs try patent cases before a jury as opposed to a judge.⁶⁶ In fact, several scholars have commented that juries

⁶¹ See S. Jay Plager, 2001 U. Ill. L. Rev. 69, 72 ("Because claims in U.S. patents are written using words and phrases that *purport* to be in the English language, it might help if the rest of English language practice was used: short declarative sentences, careful and precise phrasing, and so on." (emphasis supplied)).

⁶² See e.g., David L. Schwartz, *Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Cases*, 107 Mich. L. Rev. 223 (2007) (finding that district court judges do not improve their ability to construe patent claims with increased experience); see also *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 993 (Fed. Cir. 1995) (Mayer, C.J.) ("[T]here is simply no reason to believe that judges are any more qualified than juries to resolve the complex technical issues often present in patent cases.").

⁶³ See Moore, *supra* note 5, at 3–4.

⁶⁴ Christopher R. Leslie, *The Anticompetitive Effect of Unenforced Invalid Patents*, 91 Minn. L. Rev. 101, 135 (2006); see Fisher, *supra* note 6, at 55 ("The Seventh Amendment right to have a jury is meaningless if the jury lacks the ability to make a non-arbitrary decision.").

⁶⁵ Edmund L. Andrews, *A 'White Knight' Draws Cries of 'Patent Blackmail'*, N.Y. Times, Jan. 14, 1990, § 3, at 5 (calling a patent case tried before a jury "a 'judicial lottery,' an often unpredictable system that can yield huge rewards for those who are sufficiently aggressive"); Richard B. Schmitt, *Juries' Role in Patent Cases Reconsidered*, Wall St. J., Feb. 18, 1994, at B6 (stating that allowing juries to decide the outcomes of patent cases has created "a system of justice that is basically a lottery").

⁶⁶ Moore, *supra* note 6, at 386 tbl.2 (reporting a 68% win rate for patentee-plaintiffs in cases adjudicated by juries and a 51% in cases adjudicated by district court judges).

“tend to love” and even “idealize” inventors.⁶⁷ However, others have noted that jury decisions in patent cases are often marked by “unpredictability, irrationality, and unreliability.”⁶⁸ Whatever bias might exist may be related more to which party initiated the lawsuit as opposed to the “good guy–bad guy” mentality of plaintiffs and defendants.⁶⁹ Therefore, despite the legal and economical obstacles facing plaintiffs when commencing an infringement action, it may be advantageous in the long run for the party claiming infringement to initiate the proceedings involving a patent as opposed to being a counterclaimant.

The second layer of the lottery pertains to remedies. When considering the uncertainty that accompanies this aspect of a patent lawsuit, the identity of the parties can play a significant role in the award of damages. For instance, juries tend to disfavor large companies.⁷⁰ Thus, the jury that is comprised of unemployed workers or blue-collar citizens may be reluctant to compel a local or regional small-to-midsize firm to pay a large national corporation tens of millions of dollars notwithstanding returning a verdict that the plaintiff’s patent was infringed. Moreover, the jury comprised of laypersons may opine that an award of \$2 million, for example, is sufficient to compensate a plaintiff for a defendant’s patent infringement. However, this amount may be only a small percentage of what the plaintiff views as the patent’s true value and the real economic injury suffered. Jurors’ inability to comprehend patents and the corresponding value derived from them often leads to underestimating reasonable royalty rates for calculating damages awards.⁷¹ While these same principles can no doubt favor the prevailing patent owner as plaintiff in an infringement action, plaintiffs must nevertheless always take into

⁶⁷ See *id.* at 372 (stating that juries “appear to love inventors”); Jonathon Taylor Reavill, *Tipping the Balance: Hilton Davis and the Shape of Equity in the Doctrine of Equivalents*, 38 Wm. & Mary L. Rev. 319, 366 (1996) (stating that juries “tend to idealize inventors”).

⁶⁸ Paul R. Michel & Michelle Rhyu, *Improving Patent Jury Trials*, 6 Fed. Cir. B.J. 89, 105 (1996).

⁶⁹ Moore, *supra* note 6, at 368 (finding that patentees prevailed in only 38% of cases tried before juries when a potential infringer initiated a declaratory judgment action as opposed to being called into court as a defendant).

⁷⁰ See *TXO Prods. Corp. v. Alliance Res. Corp.*, 509 U.S. 433, 490-91 (1993) (O’Connor, J., dissenting) (“Courts long have recognized that juries may view large corporations with great disfavor. . . . Corporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy.”).

⁷¹ See Einer Elhauge, *Do Patent Holdup and Royalty Stacking Lead to Systematically Excessive Royalties?*, 4 J. Competition L. & Econ. 535, 556–576 (2008) (“[T]he juries that award patent damages have far from perfect knowledge and perfect accuracy. . . . Hindsight bias may cause juries to underestimate [value] because patented inventions often seem more obvious after they have been created. Underestimations may also exceed overestimations if patent owners have information about the value of their patents that they either cannot communicate to courts or must bear large costs to communicate to courts.”).

account the pool of potential adjudicators when deciding whether to file suit, or alternatively, at what stage of the litigation lottery to consider settlement negotiations.

C. *Litigation Harms*

Under the Priest–Klein framework for modeling the probability of settlement in civil litigation, the stakes for each party to a lawsuit are symmetrical,⁷² i.e., “the plaintiff stands to gain exactly what the defendant stands to lose.”⁷³ However, patent infringement lawsuits deviate from this formulation and are thus considered asymmetrical insofar as “the patent holder has a much greater stake in the outcome of the litigation than does the alleged infringer.”⁷⁴ This difference is attributable to the fact that litigation can reduce—and even entirely destroy—the scope of a plaintiff’s patent rights by rendering some or all of the asserted patent claims invalid or unenforceable.⁷⁵ This is particularly damaging since patents are by their very nature a right to exclude the general public from making, using, or selling an invention, and therefore, a finding of invalidity or unenforceability adversely affects a patentee’s rights as against *all* competitors in a given technology market, not only the opposing party to the lawsuit.⁷⁶ Parts II.C.1 and II.C.2 detail two ways that patent litigation can leave patentee–plaintiffs in an objectively worse position

⁷² George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. Legal Stud. 1, 24 (1984).

⁷³ Kimberly A. Moore, *Xenophobia in American Courts*, 97 Nw. U. L. Rev. 1497, 1547 n.171 (2003).

⁷⁴ Moore, *supra* note 6, at 377. The pendulum of asymmetry can likewise swing toward the defendant’s potential for incurring a greater loss in litigation. *See, e.g.*, Peter J. Hammer & William M. Sage, *Antitrust, Healthcare Quality, and the Courts*, 102 Colum. L. Rev. 545, 599 (2002) (“Defendants often have more to lose in antitrust litigation than the plaintiffs stand to gain, a fact that violates one of the basic assumptions of the Priest–Klein model.”); *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, 318 (2010) (stating that unlike defendants, “patentees are not burdened by the need to manage investor expectations or minimize disruption to the company’s core business”).

⁷⁵ *See* Vivek Koppikar, *Using ADR Effectively in Patent Infringement Suits*, 89 J. Pat. & Trademark Off. Soc’y 158, 159–60 (2007) (“[I]f a defendant successfully pleads the defense of patent invalidity it can be fatal to a plaintiff since they will not only have lost the lawsuit at hand but also their patent rights to the invention.”).

⁷⁶ Moore, *supra* note 6, at 377; *see also* Joseph S. Miller, *Building a Better Bounty: Litigation-Stage Rewards for Defeating Patents*, 19 Berkeley Tech. L.J. 667, 668, 688 (2004) (“A patent challenger who succeeds in defeating a patent wins spoils that it must share with the world, including all its competitors. . . . A court judgment that a patent claim is invalid is a public good.”).

than a court's mere finding of noninfringement, thus making patent holders even more risk-averse and further discouraging them from asserting their exclusionary rights.⁷⁷

1. Invalidity

Among the defenses to an infringement allegation that are provided in the Patent Act is the statutory shield of invalidity.⁷⁸ A defendant has two options by which to attempt to invalidate patent claims: *inter partes* reexamination or trial.⁷⁹ *Inter partes* reexamination occurs at the PTO and is similar to an *ex parte* reexamination procedure, the major difference being that during *inter partes* reexamination the third-party requester, i.e., the defendant seeking to invalidate the patent, is permitted to reply and counter the plaintiff-patent owner's arguments for sustained validity.⁸⁰ While statistics demonstrate that defendants are utilizing *inter partes* reexamination with increasing frequency,⁸¹ the primary method of invalidating patent claims remains to be a determination by a judge or jury.⁸² When a defendant elects this avenue to attack a patent's validity, the factfinder weighs in on whether the contested claims are invalid for failure to satisfy any number of the various statutory requirements of patentability.⁸³

⁷⁷ Moore, *supra* note 6, at 377 ("Because the patent holder stands to lose more than the defendant, the patent holder will be more risk-averse to trial.").

⁷⁸ 35 U.S.C. § 282 (2006).

⁷⁹ See Roger Shang & Yar Chaikovsky, *Inter Partes Reexamination of Patents: An Empirical Evaluation*, 15 *Tex. Intell. Prop. L.J.* 1, 2 (2006) ("The *inter partes* reexamination procedure was created by Congress in 1999 as a litigation alternative to challenge a patent's validity.").

⁸⁰ See Roger Shang, *Inter Partes Reexamination and Improving Patent Quality*, 7 *Nw. J. Tech. & Intell. Prop.* 185, 188–191 (2009); see also USPTO Rules of Practice in Patent Cases, 37 C.F.R. §§ 1.947, 1.951(b) (2010).

⁸¹ *Performance and Accountability Report: Fiscal Year 2010*, at 137 tbl.13B, U.S. Patent & Trademark Office, available at <http://www.uspto.gov/about/stratplan/ar/2010/USPTOFY2010PAR.pdf> (reporting a 612% increase in the number of *inter partes* reexamination requests known to have related litigation from 2006 to 2010).

⁸² Cf. *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1360 (Fed. Cir. 2001) ("[Validity] is a matter for resolution at trial.").

⁸³ See *Structural Rubber Prods. Co. v. Park Rubber Co.*, 749 F.2d 707, 720 (Fed. Cir. 1984) ("[W]e have held that a trial court may, with proper instructions, present a patent case to a jury for a general verdict encompassing all of the issues of validity and infringement . . ."); Jeanne C. Fromer, *Patentography*, 85 *N.Y.U. L. Rev.* 1444, 1469 (2010) ("[N]umerous issues in patent cases are considered factual, including the ultimate question of patent infringement and many issues related to a patent's validity—principally an invention's utility and novelty.").

When compared with trial, challenging a patent's validity utilizing the *inter partes* reexamination procedure yields numerous advantages for defendants. For instance, *inter partes* reexamination is significantly less expensive than trial.⁸⁴ Thus, the plaintiff who tries to push the cost-conscious defendant into settlement in the early stages of a lawsuit may find that the defendant is more willing to stick around to fight the patent than if a judge or jury determination were the only route to invalidity. Moreover, the cost-saving benefits for defendants of *inter partes* reexamination can be magnified if the outcome of the proceeding is able to stay copending discovery in a subsequent trial.⁸⁵ Additionally, unlike at trial—where patentees enjoy a statutory presumption of validity and defendants bear the burden of proving a patent invalid based on clear and convincing evidence⁸⁶—there is no presumption of validity when a patent is scrutinized during *inter partes* reexamination.⁸⁷ Furthermore, the “lottery” that occurs when litigants ask judges and juries to construe claim language to determine validity does not present as great a risk for defendants during reexamination since PTO examiners are better versed in the technological field of a patent's subject matter.⁸⁸

⁸⁴ Compare AIPLA Report 2009, *supra* note 11, at 29 (reporting a median total cost of \$2.5 million for a patent infringement lawsuit in 2009 where between \$1 million and \$25 million was at stake), with AIPLA Report 2009, *supra* note 11, at 30 (reporting a median cost of \$188,000 for *inter partes* reexamination through an appeal to the Board of Patent Appeals and Interferences in 2009).

⁸⁵ 35 U.S.C. § 318 (2006); see Paul Morgan & Bruce Stoner, *Reexamination Versus Litigation—Making Intelligent Decisions in Challenging Patent Validity*, 86 J. Pat. & Trademark Off. Soc'y 441, 454–55 (2004).

⁸⁶ 35 U.S.C. § 282 (2006) (“A patent shall be presumed valid. . . . The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.”); Titan Tire Corp. v. Case New Holland, Inc., 566 F.3d 1372, 1376 (Fed. Cir. 2009) (“[A]n alleged infringer who raises invalidity as an affirmative defense has the ultimate burden of persuasion to prove invalidity by clear and convincing evidence”). This standard is currently being challenged in the Supreme Court in *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 647 (2010) (granting certiorari to determine the proper standard of for sustaining a patent's validity under 35 U.S.C. § 282).

⁸⁷ 35 U.S.C. § 314 (2006) (“[R]eexamination shall be conducted according to the procedures established for initial examination”); *In re Etter*, 756 F.2d 852, 856 (Fed. Cir. 1985) (Markey, C.J.) (“[T]he presumption is operative to govern procedure in *litigation* involving validity of an *issued* patent. A statute setting rules of procedure and assigning burdens to litigants in a court trial does not automatically become applicable to proceedings before the PTO.”).

⁸⁸ Chiang, *supra* note 38, at 582–83 (“While the quality of the examiner corps has been subject to much criticism, there seems little doubt that PTO examiners are better qualified to evaluate the technical disclosures of prior art references than lay jurors and district court judges.”).

However, there are disadvantages to *inter partes* reexamination for defendants that benefit patentees. The greatest downside is the estoppel effect.⁸⁹ Pursuant to 35 U.S.C. § 315(c), a third-party requester is estopped from asserting at a later time “the invalidity of any claim finally determined to be valid and patentable on any ground which the third-party requester raised or could have raised during the *inter partes* reexamination proceedings.”⁹⁰ Although defendants can assert new prior art not considered during the reexamination at a later trial,⁹¹ the general sentiment is that defendants get only one bite at the invalidity apple.⁹² Additionally, there is no opportunity for defendants to cross-examine and depose inventors during *inter partes* reexamination, and consequently they must rely solely on written documents to invalidate a patent.⁹³ Notwithstanding these and other drawbacks,⁹⁴ it is fair to say that two methods for invalidating patent claims are better than one, and by giving defendants a choice of forum and adjudicator based on the circumstances of a particular case, plaintiffs ultimately face a greater risk of their patents being invalidated.

To understand more clearly the harm of invalidity, one need only look to the pharmaceutical industry and the practice of reverse payments. In a reverse-payment scenario, brand-name pharmaceutical companies compensate their generic counterparts to settle patent challenges and delay market entry for patented drugs.⁹⁵ These reverse-payment agreements—which can reach well into the tens of millions of dollars⁹⁶—have been heavily scrutinized in the context of antitrust violations,⁹⁷ though the principal

⁸⁹ *Id.* at 583.

⁹⁰ 35 U.S.C. § 315(c) (2006).

⁹¹ *Id.*

⁹² *See Chiang, supra* note 38, at 580 (“[A]ccused infringers should realize that *inter partes* reexamination is effectively a substitute for a jury trial. Litigation estoppel means that *inter partes* reexamination will become (in almost all cases) the *only* chance of contesting validity.”).

⁹³ Morgan & Stoner, *supra* note 84, at 455.

⁹⁴ For a more comprehensive list of drawbacks to *inter partes* reexamination, see *id.* at 454–56.

⁹⁵ Henry N. Butler & Jeffrey Paul Jarosch, *Policy Reversal on Reverse Payments: Why Courts Should Not Allow the New DOJ Position on Reverse-Payment Settlements on Pharmaceutical Patent Litigation*, 96 Iowa L. Rev. 57, 60 (2010).

⁹⁶ *See, e.g., Valley Drug Co. v. Geneva Pharm., Inc.*, 344 F.3d 1294, 1300 (11th Cir. 2003), *cert denied*, 543 U.S. 939 (2004) (payment plan from brand-name company to generic company of \$3 million up front, \$3 million after three months, and \$6 million every three months thereafter for roughly two years).

⁹⁷ *Compare In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323 (Fed. Cir. 2008), *cert denied*, 129 S. Ct. 2828 (2009) (declining to find that brand-name and generic

reason underlying the brand-name patent holders' willingness for paying to quell the competition rather than asserting their patent rights in litigation is fear of their patents being found invalid.⁹⁸ If a court invalidates what a brand-name company perceives to be a valuable patent, the floodgates of competition would open for all generic pharmaceutical companies to freely manufacture and sell similar drugs.

2. Inequitable Conduct

Another harm that can befall plaintiffs who assert their patent rights in litigation is a finding of inequitable conduct that consequently renders the patent unenforceable. For a defendant to prevail under this theory, the defendant must "provide[] evidence of 'affirmative misrepresentations of a material fact, failure to disclose material information, or submission of false material information, coupled with an intent to deceive'" by the plaintiff during prosecution of the patent.⁹⁹ If the court finds that the plaintiff violated his duty of "candor, good faith, and honesty" before the PTO, the patent will be rendered unenforceable.¹⁰⁰

Although the end result may be the same as a simple finding of invalidity, i.e., judgment for the defendant, a court's determination that a patent is unenforceable due to inequitable conduct can have a greater damning effect on the patent as a whole. This is because a finding of inequitable conduct renders the entire patent unenforceable, regardless of whether the patentee-plaintiff was asserting all claims against an alleged infringer.¹⁰¹ On the other hand, a simple finding of invalidity pertains to only those claims asserted against a defendant, and thus a patentee is able to retain the presumption

companies violated the Sherman Act by entering into settlement agreement); *Schering-Plough Corp. v. F.T.C.*, 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 548 U.S. 919 (2006) (same), *with In re Cardizem CD Antitrust Litig.*, 332 F.3d 896 (6th Cir. 2003), *cert. denied*, 543 U.S. 939 (2004) (holding that reverse payments are per se unlawful). *See generally* Christopher M. Holman, *Do Reverse Payment Settlements Violates the Antitrust Laws?*, 23 Santa Clara Computer & High Tech. L.J. 489 (2007) (assessing the legality of reverse-payment patent settlements).

⁹⁸ Hovenkamp et al., *supra* note 59, at 1761–62 ("What the pharmaceutical patentees who agree to exclusion payments seek is . . . a guaranteed insulation from competition, without the risk that the patent is held invalid."); *see In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 210 (2006), *cert denied*, 551 U.S. 1144 (2007) ("[L]arge reverse payments indicate a patent holder's lack of confidence in its patent's strength or breadth . . .").

⁹⁹ *Purdue Pharma L.P. v. Boehringer Ingelheim GMBH*, 237 F.3d 1359, 1366 (Fed. Cir. 2001) (quoting *Baxter Int'l, Inc. v. McGaw, Inc.*, 149 F.3d 1321, 1327 (Fed. Cir. 1998)).

¹⁰⁰ *Honeywell Int'l Inc. v. Universal Avionics Sys. Corp.*, 488 F.3d 982, 999 (Fed. Cir. 2007).

¹⁰¹ *Kingsdown Med. Consultants, Ltd. v. Hollister, Inc.*, 863 F.2d 867, 877 (Fed. Cir. 1988) ("When a court has finally determined that inequitable conduct occurred in relation to one or more claims during prosecution of the patent application, the *entire patent* is rendered unenforceable." (emphasis supplied)).

of validity for all claims not determined to be invalid.¹⁰² Even worse for patentees, a court's finding of inequitable conduct as to one patent can have a ripple effect by rendering the corresponding family of related patents unenforceable.¹⁰³ Moreover, courts often award defendants attorney's fees when a plaintiff is found to have obtained the patent fraudulently,¹⁰⁴ thus adding to the list of harms for plaintiffs that can result from litigating.

III. RELIEF FOR PATENTEES

The Patent Act provides two types remedies for prevailing patent owners in infringement lawsuits: injunctive relief¹⁰⁵ and damages.¹⁰⁶ Because these remedies form the basis of a plaintiff's incentive to initiate litigation (or at least his formally stated motivation in a complaint),¹⁰⁷ it is appropriate to evaluate the role that each relief mechanism plays in a patent owner's subsequent decision to pursue an infringement claim all the way through to the trial stage of a lawsuit. Parts III.A and III.B detail injunctive and damages awards, respectively, with regard to the likelihood that a patent owner will obtain either remedy, as well as the magnitude of each remedy in terms of their dollar values. Part III.C then analyzes settlement agreements between plaintiffs and potential infringers as a third form of relief.

¹⁰² Christopher A. Cotropia, *Modernizing Patent Law's Inequitable Conduct Doctrine*, 24 Berkeley Tech. L.J. 723, 764 (2009) ("Invalidity affects only those asserted patent claims. If a patentee does not want to risk the value in a particular claim, she simply does not assert it. Inequitable conduct, in contrast, causes the assertion of a single patent claim to expose the whole patent, and potentially all related patents, to a finding of unenforceability.").

¹⁰³ See *Consol. Aluminum Corp. v. Foseco Int'l Ltd.*, 910 F.2d 804, 809 (Fed. Cir. 1990) (finding a substantial relationship between patents and concluding that inequitable conduct as to one patent significantly affected others).

¹⁰⁴ 35 U.S.C. § 285 (2006) ("The court in exceptional cases may award reasonable attorney fees to the prevailing party."); see, e.g., *Brasseler, U.S.A. I, L.P. v. Stryker Sales Corp.*, 267 F.3d 1370, 1380 (Fed. Cir. 2001) ("Exceptional cases are normally those involving bad faith litigation or those involving inequitable conduct by the patentee in procuring the patent.").

¹⁰⁵ 35 U.S.C. § 283 (2006).

¹⁰⁶ *Id.* § 284.

¹⁰⁷ For example, Form 18 of the Federal Rules of Civil Procedure (Complaint for Patent Infringement) sets forth the plaintiff's demands as "a preliminary and final injunction against the continuing infringement" and "an accounting for damages. Fed. R. Civ. P. form 18. *But see infra* Part V.A (arguing that neither damages nor injunctions are the real reason that patent owners engage in litigation).

A. Injunctive Relief

One underlying premise of this Article is that given the sharply decreasing value of many patents with respect to time (particularly in the electronic arts, where innovation occurs seemingly overnight), an injunction may be of little or no value to a plaintiff whose patented technology is long outdated at the conclusion of a lengthy trial.¹⁰⁸ Nevertheless, one would be remiss not to assess the availability of equitable relief to patent owners who, based on the nature or field of their inventions, would indeed benefit from injunctions. Part III.A.1 chronicles the state of equitable relief for patent owners during the years leading up to the Supreme Court's decision in *eBay Inc. v. MercExchange, L.L.C.* Part III.A.2 then provides an analysis of the opinion itself and the resulting rule of law. Finally, Part III.A.3 evaluates the current state of equitable relief and the role that potential injunctions plays in patentees' motivation to litigate.

1. The Pre-*eBay* Golden Years

For over two decades before the Supreme Court's 2006 decision in *eBay Inc. v. MercExchange, L.L.C.*,¹⁰⁹ the Federal Circuit presumptively granted equitable relief in patent cases.¹¹⁰ This framework allowed patentees to enjoy exclusivity in their inventions merely as a matter of course upon a finding of actual infringement.¹¹¹ For instance, during the ten-year span from 1983 to 1993, district courts granted injunctive relief to

¹⁰⁸ See *supra* Part II.B.2 (discussing competitors' abilities to invent around a product and the shelf life of a patented product in the marketplace).

¹⁰⁹ 547 U.S. 388 (2006)

¹¹⁰ E.g., *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1247 (Fed. Cir. 1989) ("It is the general rule that an injunction will issue when infringement has been adjudged, absent a sound reason for denying it."); *Smith Int'l Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1581 (Fed. Cir. 1983) ("Once the patentee's patents have been held to be valid and infringed, he should be entitled to the full enjoyment and protection of his patent rights. . . . A court should not be reluctant to use its equity powers once a party has so clearly established his patent rights.").

¹¹¹ See, e.g., Vincenzo Denicolò et al., *Revisiting Injunctive Relief: Interpreting eBay in High-Tech Industries with Non-Practicing Patent Holders*, 4 J. Competition L. & Econ. 571, 572 (2008) ("Before 2006, many observers felt that lower courts faced with patent infringement cases frequently granted injunctions as a matter of course to those who sought them."); Andrei Iancu & W. Joss Nichols, *Balance the Four Factors in Permanent Injunction Decisions: A Review of Post-eBay Case Law*, 89 J. Pat. & Trademark Off. Soc'y 395, 395 (2007) ("In the past, the Federal Circuit has noted a 'general rule' that permanent injunctions are appropriate after a finding of infringement. Permanent injunctions were granted almost as a matter of course to a prevailing patentee." (footnoted omitted)).

patent owners in greater than sixty-one percent of cases.¹¹² Because of the very nature of an injunction, courts' preference for granting equitable relief amounted to a great deal of leverage for plaintiffs when negotiating licensing agreements and one-time settlement payments with alleged infringers.¹¹³ For example, when facing a permanent injunction from the continued manufacture and sale of its BlackBerry[®] device,¹¹⁴ defendant Research in Motion, Ltd. paid plaintiff NTP a one-time sum of more than \$612 million for licensing rights to the technology.¹¹⁵ To that end, whether or not a patent owner actually saw an infringement case through all the way to trial, it is fair to say that injunctions were extremely valuable, even for their bullying power alone.¹¹⁶

2. eBay Inc. v. MercExchange, L.L.C.

In 2006, the Supreme Court examined what the Justices themselves viewed as a presumptive grant of injunctive relief to patent owners by the Federal Circuit in the landmark case *eBay Inc. v. MercExchange, L.L.C.*¹¹⁷ *eBay* involved a business method patent owned by MercExchange for an electronic marketplace designed to foster commercial transactions between private individuals through a common trusted entity.¹¹⁸ Upon finding that eBay infringed the asserted patents, the district court awarded MercExchange damages, but denied its request for a permanent injunction.¹¹⁹ The

¹¹² M.A. Cunningham, *Preliminary Injunctive Relief in Patent Litigation*, 35 IDEA 213, 231 (1995).

¹¹³ See Lily Lim & Sara E. Craven, 25 Santa Clara Computer & High Tech. L.J. 787, 792 (2009) ("The pre-*eBay* threat of a near automatic injunction gave a patentee a very powerful bargaining chip in licensing and settlement negotiations.").

¹¹⁴ *NTP, Inc. v. Research in Motion, Ltd.*, 418 F.3d 1282 (Fed. Cir. 2005).

¹¹⁵ Tom Krazi & Anne Broache, *Blackberry Saved*, CNET News (Mar. 3, 2006), http://news.cnet.com/BlackBerry-saved/2100-1047_3-6045880.html.

¹¹⁶ See Mark A. Lemley, *Should Property or Liability Rules Govern Information?*, 85 Tex. L. Rev. 783, 798 (2007) ("The threat that a patent holder will obtain an injunction that will force the downstream producer to pull its product from the market can be very powerful. These threats can greatly affect licensing negotiations, especially in cases where the injunction is based on a patent covering one small component of a complex product.").

¹¹⁷ See *eBay*, 547 U.S. at 395 (Roberts, C.J., concurring) ("[F]rom at least the early 19th Century, courts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases."); *id.* at 396 (Kennedy, J., concurring) ("To the extent earlier cases establish a pattern of granting an injunction against patent infringers almost as a matter of course, this pattern simply illustrates the result of the four-factor test in the contexts then prevalent.").

¹¹⁸ *Id.* at 390 (majority opinion).

¹¹⁹ *MercExchange, L.L.C. v. eBay, Inc.*, 275 F. Supp. 2d 695 (E.D. Va. 2003).

Federal Circuit reversed, applying its “general rule” that “a permanent injunction will issue once infringement and validity have been adjudged.”¹²⁰ The Supreme Court then reversed the Federal Circuit, holding that prevailing patent owners must satisfy a four-factor test before a court can grant injunctive relief.¹²¹ Writing for a unanimous Court, Justice Thomas distinguished between the statutory right conferred by a patent and the remedies that are available once it is proven that the right is infringed.¹²²

In a concurring opinion, Justice Kennedy commented on the significant change in the “economic function” of patents over time.¹²³ He stated that firms have shifted from a regime in which patents were used “as a basis for producing and selling goods” to one in which patents are primarily “bargaining tool[s] [used] to charge exorbitant fees to companies that seek to buy licenses to practice the patent.”¹²⁴ This language has formed much of the foundation for the widespread sentiment that injunctive relief would be more difficult to obtain after *eBay*.¹²⁵

3. The Current State of Equitable Relief

Much ink was spilled in legal scholarship after the Supreme Court’s *eBay* decision with regard to the future direction of injunctive relief in various types of intellectual property cases.¹²⁶ However, the loquaciousness of many commentators concerning the perceived increase in the difficulty of obtaining injunctions post-*eBay* turned out to largely unwarranted once empirical data became available. For example,

¹²⁰ *MercExchange, L.L.C. v. eBay*, 401 F.3d 1323, 1338 (Fed. Cir. 2005).

¹²¹ *eBay*, 547 U.S. at 391.

¹²² *Id.* at 392 (“[T]he creation of a right is distinct from the provision of remedies for violations of that right.”).

¹²³ *Id.* at 396 (Kennedy, J., concurring).

¹²⁴ *Id.*

¹²⁵ *E.g.*, Nina Medlock et al., *The Non-Practicing Patentee’s Right to a Permanent Injunction Restraining Patent Infringement: Going Once, Going Twice, Gone?*, 18 NO. 9 *Intell. Prop. & Tech. L.J.* 1, 2–3 (2006) (“Justice Kennedy appears to take a more restrictive view of a patentee’s right to an injunction.”); Jaideep Venkatesan, *Compulsory Licensing of Nonpracticing Patentees after eBay v. MercExchange*, 14 *Va. J.L. & Tech.* 26, 32 (2009) (“Justice Kennedy’s concurrence struck a far different tone, focusing in particular on why nonpracticing patentees should be refused injunctions.”).

¹²⁶ *E.g.*, David H. Berstein & Andrew Gilden, *No Trolls Barred: Trademark Injunctions after eBay*, 99 *Trademark Rep.* 1037 (2009) (applying *eBay* to injunctions in trademark cases); Michael W. Carroll, *Patent Injunctions and the Problem of Uniformity Cost*, 13 *Mich. Telecomm. Tech. L. Rev.* 421 (2007) (patent cases); Jetty Gibson, *Almost Quiet on the Copyright Front: eBay’s False Alarm*, 14 *Rich. J.L. & Tech.* 6 (2007) (copyright cases).

early reports revealed that in the first three years since *eBay*, district courts granted injunctions in seventy-six percent of cases¹²⁷—a far cry from the drop-off feared by many patentees. In fact, the most current data available shows that this plateau has continued for nearly five years since the Supreme Court decision, as district courts have awarded permanent injunctions in more than seventy-five percent of the 164 patent cases since *eBay*.¹²⁸

However, while there has not been a substantial change in the overall frequency that district courts have granted permanent injunctions after *eBay*, there has been a marked development in the criteria upon which courts grant equitable relief. For instance, several district courts have interpreted the irreparable-injury factor set forth in *eBay* to largely pertain to whether the parties in the lawsuit are in direct competition with each other.¹²⁹ In the overwhelming majority of cases in which the factfinder found that the parties directly compete, injunctions issued.¹³⁰ Likewise, where courts determined that there was no direct competition, plaintiffs were generally denied injunctions.¹³¹ Additionally, courts have hinged the grant or denial of an injunction on whether a party is a patent “troll.”¹³² Of the relatively small sample of district court cases denying

¹²⁷ Stacy Streur, *The eBay Effect: Tougher Standards but Courts Return to the Prior Practice of Granting Injunctions for Patent Infringement*, 8 Nw. J. Tech. & Intell. Prop. 67, 67 (2009) (finding that permanent injunctions were granted in fifty-two of sixty-eight cases).

¹²⁸ *Post-eBay Permanent Injunction Rulings by District Courts to 1-16-2011*, PatStats.org (Jan. 30, 2011), <http://www.patstats.org/Patstats2.html> (reporting that 124 of 164 district court cases have granted permanent injunctions).

¹²⁹ *E.g.*, *TruePosition Inc. v. Andrew Corp.*, 568 F. Supp. 2d 500, 531 (D. Del. 2008) (“Courts awarding permanent injunctions typically do so under circumstances where plaintiff practices its invention and is a direct market competitor.”). It is worth noting also that “direct competition” has been interpreted broadly. *See Commonwealth Sci. & Indus. Research Org. v. Buffalo Tech., Inc.*, 492 F. Supp. 600, 604 (E.D. Tex. 2007) (“While [plaintiff] does not compete with [defendant] for marketshare, [plaintiff] does compete internationally with other research groups—such as universities—for resources, ideas, and the best scientific minds to transform those ideas into realities.”).

¹³⁰ Douglas Ellis et al., *The Economic Implications (and Uncertainties) of Obtaining Permanent Injunctive Relief after eBay v. MercExchange*, 17 Fed. Cir. B.J. 437, 442–43 (2008) (noting that injunctions granted in twenty-four of twenty-six cases in which the parties were found to compete directly, and in the two cases where no injunction issued, the courts refused on other grounds).

¹³¹ *Id.* at 443–44 (finding that injunctions were denied in five of nine cases in which the parties were found to not compete directly).

¹³² The counterpart “villain” to a practicing patentee is a patent troll. *See* John M. Golden, “Patent Trolls” and Patent Remedies, 85 Tex. L. Rev. 2111, 2112 (2007) (defining “patent troll” as “one of a class of patent owners who do not provide end products or services themselves, but who do demand royalties [on their patents] as a price for authorizing the work of others”).

injunctions after *eBay*, several have hinged on the fact that the plaintiff was a non-practicing entity.¹³³ Based on these emerging criteria, plaintiffs should consider numerous specific factors surrounding their own patent use and their relationship to potential defendants when deciding whether to file suit if their incentive for litigating is to obtain equitable relief.

B. Monetary Damages

The second available remedy for patentees under the Patent Act is a damages award. The first benchmark courts look to for assessing monetary harm resulting from a defendant's infringement is a measure of actual damages (e.g., lost profits or an established royalty rate).¹³⁴ However, when actual damages cannot be determined, patent owners who prevail in infringement lawsuits are entitled to a floor of damages that corresponds with a reasonable royalty were they to license the technology to the defendant.¹³⁵ While in theory this is a practical method for approximating harm, actually determining such a value has long troubled courts and has been the subject of much legal scholarship.¹³⁶ For instance, Judge Learned Hand once famously wrote that “[t]he whole notion of a reasonable royalty is a device in aid of justice, by which that which is really incalculable shall be approximated”¹³⁷ Over the years, courts have developed several factors to help guide this hypothesis,¹³⁸ and the general formulation that has

¹³³ See, e.g., *z4 Techs. v. Microsoft Corp.*, 434 F. Supp. 2d 437, 440 (E.D. Tex. 2006).

¹³⁴ *Trell v. Marlee Elecs. Corp.*, 912 F.2d 1443, 1445 (Fed. Cir. 1990).

¹³⁵ 35 U.S.C. § 284 (2006) (“Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.”); *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1324 (Fed. Cir. 2009) (“A reasonable royalty is, of course, merely the floor below which damages shall not fall.”) (citation omitted) (internal quotation marks omitted); *Hanson v. Alpine Valley Ski Area, Inc.*, 718 F.2d 1075, 1078 (Fed. Cir. 1983) (“If actual damages cannot be ascertained, then a reasonable royalty must be determined.”).

¹³⁶ E.g., *Fromson v. W. Litho Plate & Supply Co.*, 858 F.2d 1568, 1574 (Fed. Cir. 1988) (Markey, C.J.) (“Determining a fair and reasonable royalty is often . . . a difficult judicial chore, seeming often to involve more the talents of a conjurer than those of a judge.”); see generally Mark A. Lemley, *Distinguishing Lost Profits from Reasonable Royalties*, 51 Wm. & Mary L. Rev. 655, 674 (2009) (discussing the “systematic distortions in the reasonable royalty structure” due to blurring with lost profits).

¹³⁷ *Cincinnati Car Co. v. N.Y. Rapid Transit Corp.*, 66 F.2d 592, 595 (2d Cir. 1933).

¹³⁸ See *Ga.-Pac. Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970), cited with approval, *Micro Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1393 (Fed. Cir. 2003) (setting forth a non-exhaustive list of fifteen factors for determining a reasonable royalty); see

emerged is that a reasonable royalty is the amount that the alleged infringer would be able to contract with the plaintiff for the right to make, use, or sell the patented invention in the relevant market while still making a reasonable profit.¹³⁹

Taken alone, proven or assessed damages can be substantial. One need only to canvas a small sampling of patent opinions to understand the magnitude of the stakes involved.¹⁴⁰ For instance, as early as the mid-1990s, juries were already awarding patent owners damages amounts in the billions.¹⁴¹ Additionally, courts' flexibility and leniency with regard to the "realities of the marketplace" has led reasonable royalty damages to increase in excess of the amount for which parties would normally be found to negotiate.¹⁴² Moreover, notwithstanding the fact that compensatory damages by themselves can be highly rewarding for prevailing patentees, the real prize to be won from an infringement lawsuit is a court's determination that the defendant infringed the plaintiff's patent willfully. Under the willful infringement doctrine, courts can increase monetary damages up to three times the amount awarded as a punitive measure for a defendant's bad-faith infringement.¹⁴³ With compensatory damages routinely spiking into

also ResQNet.com, Inc. v. Lansa, Inc., 594 F.3d 860, 869 (Fed. Cir. 2010) ("[A] reasonable royalty analysis requires a court to hypothesize, not to speculate.").

¹³⁹ *Wang Labs., Inc. v. Toshiba Corp.*, 993 F.2d 858, 870 (Fed. Cir. 1993) (citation omitted) (internal quotation marks omitted).

¹⁴⁰ *See, e.g., i4i P'ship Ltd. v. Microsoft, Corp.*, 598 F.3d 831, 857 (Fed. Cir. 2010) (holding that a jury award of \$200 million is not clearly excessive); *Laser Dynamics, Inc. v. Quanta Computer, Inc.*, 2010 WL 2574059, *1 (E.D. Tex. June 22, 2010) (finding a reasonable royalty award of \$52 million); *Mobil Oil. Corp. v. Amoco Chem. Corp.*, 915 F. Supp. 1333, 1374 (D. Del. 1994) (allowing a \$48 million award).

¹⁴¹ *See, e.g., Litton Sys., Inc. v. Honeywell, Inc.*, 87 F.3d 1559, 1576 (Fed. Cir. 1996) (recounting jury award of \$1.2 billion to plaintiff), *vacated*, 520 U.S. 1111 (1997); *see also* Robert A. Armitage, Commentary, *Now That the Courts Have Beaten Congress to the Punch, Why Is Congress Still Punching the Patent System?*, 106 Mich. L. Rev. First Impressions 43, 48 (2007) (discussing a \$1.53 billion verdict for Microsoft in *Lucent Technologies, Inc. v. Gateway, Inc.*, though that amount was later set aside).

¹⁴² *See* Brian C. Love, *The Misuse of Reasonable Royalty Damages as a Patent Infringement Deterrent*, 74 Mo. L. Rev. 909, 920 (2009) ("[A]n ongoing trend in patent law [is] nudging the reasonable royalty formulation further and further away from the traditional willing licensor-willing licensee negotiation and, therefore, [away] from representing the market value of the patented invention."); *see also* Eric E. Bensen & Danielle M. White, *Using Apportionment to Rein in the Georgia-Pacific Factors*, 9 Colum. Sci. & Tech. L. Rev. 1, 40 (2009) ("Modern decisional law does not restrict reasonable royalties to some portion of the economic value actually provided by the patent and, in fact, provides almost no concrete guidance to the fact-finder in determining a reasonable royalty. The result is that reasonable royalty awards are at best arbitrary and at worst punitive. This is not what patent law traditionally provides.").

¹⁴³ *See* 35 U.S.C. § 284 (2006) ("[T]he court may increase the damages up to three times the amount found or assessed."); *see also In re Seagate Tech., LLC*, 497 F.3d 1360, 1368 (Fed. Cir.

the hundreds of millions of dollars, it is no wonder that nearly every claim of patent infringement includes an allegation that the defendant infringed the patent willfully.¹⁴⁴ Thus, depending on the strength of a patent owner's case for infringement—as well as his resources to endure years of litigating and to see the lawsuit all the way through to the trial stage—seven-, eight-, nine-, or even ten-figure judgment amounts certainly provide a strong incentive to assert one's patent rights.

C. Settlement Agreements

Despite the fact that the Patent Act includes only damages awards and injunctions in its remedies provisions, I have also categorized and included settlement agreements in this Part of the Article as a patent “remedy” for three reasons.¹⁴⁵ First, because such a small percentage of patent cases ever reach the trial stage,¹⁴⁶ the available data on damages awards may be not be representative of the monetary value at stake in patent infringement suits on the whole. Second, of those cases that do go to trial, patent owners prevail only fifty-eight percent of the time,¹⁴⁷ thus further narrowing the available data for assessing monetary relief. Lastly, whether a defendant is found liable for infringement in court, or alternatively, settles and pays a one-time sum or licensing fees to the plaintiff, the result is the same—transfer of capital to the party asserting his patent rights.

This Article has previously discussed reverse-settlement payments in the context of the pharmaceutical industry;¹⁴⁸ however, this subpart refers to traditional settlement agreements, wherein defendants compensate plaintiffs to avoid a finding of liability at a

2007), *cert denied*, 552 U.S. 1230 (2008), (discussing the relationship between a court's decision to award enhanced damages and the nature of a defendant's infringement).

¹⁴⁴ See Kimberly A. Moore, *Empirical Statistics on Willful Patent Infringement*, 14 Fed. Cir. B.J. 227, 232 (2004) (finding that between 1999 and 2000, plaintiffs pled willfulness in 92.3% of patent-infringement cases); see also Wright, *supra* note 45, at 97 (“A charge of willful infringement has become a routine adjunct to almost every pleading asserting patent infringement.”).

¹⁴⁵ Cf. Christopher R. Leslie, *Patents of Damocles*, 83 Ind. L.J. 133, 155 (2008) (“Licensing activity does not currently qualify as enforcement for *Walker Process* purposes. Courts have held that a patentee's ‘cautioning possible infringers and offering licenses, does not constitute a charge of infringement.’” (quoting *Am. Needle & Novelty Co. v. Schuessler Knitting Mills, Inc.*, 379 F.2d 376, 378 (7th Cir. 1967))).

¹⁴⁶ See *supra* note 19 and accompanying text.

¹⁴⁷ See Moore, *supra* note 6, at 385. This percentage includes those cases tried to both judges and juries.

¹⁴⁸ See *supra* notes 94–97 and accompanying text.

trial.¹⁴⁹ This exchange of capital between parties generally takes either of two forms. In one scenario, defendants pay plaintiffs a one-time lump sum to settle all past infringement, but without the option to continue use of the plaintiff's patented invention in the future. These agreements are referred to as retroactive.¹⁵⁰ Alternatively, in a forward-looking arrangement, defendants compensate a plaintiff through a series of scheduled payments, wherein the plaintiff licenses its patented technology to the defendant for use alongside its own product.¹⁵¹ Even within the forward-looking framework for settlement agreements, there are several variations on how a licensing arrangement between a plaintiff and defendant appear.¹⁵²

Like court-awarded damages, settlement values can provide a strong incentive for patentees to litigate (and as this Article contends, are the most likely reason underlying a plaintiff's decision to litigate). For example, settlement values to plaintiffs can rise well in to the tens of millions of dollars when patent owners license their technologies to only a single entity.¹⁵³ These fees are capable of exceeding the billion-dollar mark when evaluated in the context of a company's entire IP portfolio.¹⁵⁴ Because of the nature of several high-tech industries—most notably software, computers, and semiconductors—licensing often occurs between competitors. This can be beneficial to patentees by giving them access to a competitor's portfolio of complementary patents, thus enabling them to

¹⁴⁹ See Michael J. Chapman, *Using Settlement Licenses in Reasonable Royalty Determinations*, 49 IDEA 313, 315–16 (2009) (“The key consideration in determining whether an agreement qualifies as a settlement license is whether the terms of the agreement are influenced by the belief that, absent the agreement, the dispute is likely to be argued before (and potentially resolved by) a third party such as a court or an arbitration panel.”).

¹⁵⁰ See *id.* at 316 (“Retroactive settlement licenses grant the alleged infringer authorization for its past use of the patent-at-issue in exchange for compensation to the patent holder. Under such licenses, the licensee does not receive permission to use the patent in the future and is expected to cease its infringing activity after the agreement is executed.”).

¹⁵¹ *Id.* (“[I]n a forward-looking settlement license, the parties agree to terms that permit the alleged infringer to continue using the patent-at-issue in exchange for compensation to the patent holder.”).

¹⁵² See Hovenkamp et al., *supra* note 59, at 1721 (“Settlements of IP disputes often take the form of unrestricted or restricted licenses, which may or may not be exclusive; cross-licensing arrangements; pools; agreements not to license third parties or to license only jointly; or market division or field-of-use agreements.”).

¹⁵³ See, e.g., Stuart J.H. Graham & Ted Sichelman, *Why Do Start-Ups Patent?*, 23 Berkeley Tech. L.J. 1063, 1076–77 (2008) (discussing Microsoft's licensing payments to IBM that are estimated to be in the range of \$20–30 million).

¹⁵⁴ *Id.* at 1075–76 & n.49 (noting how IBM generates over \$1 billion in annual revenue from licensing agreements).

enter a previously monopolized market.¹⁵⁵ Under this scheme, parties enter into a mutual agreement to cross-license, or “pool,” their patent rights, thus affording one another access to many technologies that they would otherwise be precluded from using.¹⁵⁶ Moreover, notwithstanding the narrow scope of many patents, patent owners can extract considerable value from their rights without the harm of increased competition by licensing their patents to entities with whom they do not compete, or at least not directly.¹⁵⁷ Thus, whether through licensing fees or the access and ability to infringe others’ patents without the risk of liability, the many forms that settlement agreements can take are a powerful incentive for patentees to litigate.

However, there is a significant disadvantage to settlement agreements that is not inherent in either damages awards or injunctions. This drawback pertains to potential violations by settling parties under the antitrust laws. While this Article does not endeavor to explore, or even scratch the surface, of the plethora of scholarship and case law on the antitrust implications of patent settlement agreements,¹⁵⁸ it is at least worth mentioning here that there are serious harms that can befall on plaintiffs and defendants entering into such arrangements.

¹⁵⁵ See John H. Barton, *Antitrust Treatment Oligopolies with Mutually Blocking Patent Portfolios*, 69 *Antitrust L.J.* 851, 871–72 (2002) (“[I]t is impossible for either firm to enter the market without infringing the other’s intellectual property; the cross-license [of complementary technologies] therefore makes it possible for both firms to enter the market.”).

¹⁵⁶ For an explanation of patent pools, see Roger B. Andewelt, 53 *Antitrust L.J.* 611, 611–14 (1985) (“The essence of a patent pool . . . is this mutual agreement among patent owners to waive their respective exclusive patent rights.”); Phillip W. Goter, Note, *Princo, Patent Pools, and the Risk of Foreclosure: A Framework for Assessing Misuse*, 96 *Iowa L. Rev.* 699, 712–13 (2011) (“Patent pools . . . involve a bundle of patents ‘pooled’ together through cross-licenses by distinct firms, usually for the purposes of research and development or sublicensing for commercialization.”).

¹⁵⁷ See Robert P. Merges, *Commercial Success and Patent Standards: Economic Perspectives on Innovation*, 76 *Calif. L. Rev.* 803, 869–70 (1988) (“[F]irms which license technology do not necessarily sell into the same markets as the licensee. At least one empirical study undercuts the assumption that direct competitors frequently engage in licensing. . . . The reason is obvious: Firms are reluctant to enable their direct competitors to compete because they fear an immediate threat to their competitive position would result.”).

¹⁵⁸ See generally Herbert Hovenkamp, Mark D. Janis, Mark A. Lemley & Christopher R. Leslie, *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law* (2d ed. 2010) (analyzing firms’ exercise of intellectual property rights in light of the antitrust laws); Christopher R. Leslie, *Antitrust Law and Intellectual Property Rights: Cases and Materials* (2010) (same). For a sampling of cases where courts have considered the legality of patent settlement agreements in the context of the antitrust laws, see *supra* note 96.

IV. ENFORCING YOUR RIGHTS: WHY WE LITIGATE

The previous Parts of this Article have explored the disincentives of patent litigation,¹⁵⁹ the statutory remedies conferred by the Patent Act,¹⁶⁰ and the time–value of patents respective of how long it may take a court to reach a decision on the merits as to infringement.¹⁶¹ It is no coincidence that each of these aforementioned discussions intersects the others en route to the same underlying conclusion: patentees want to avoid trial and settle infringement-related disputes outside the courtroom. However, as Part IV.A details below, unlike most other areas of law, where court filings are the *result* of parties' failure to reach an earlier agreement,¹⁶² patent litigation is more akin to a way of doing business—a means to an end rather than an end in and of itself. Part IV.B then reviews several proposals for institutional change in the patent system to reflect the unique nature of infringement litigation.

A. *Litigation as a Way of Life*

While plaintiffs might initially file patent infringement lawsuits under the guise of seeking one of the two available statutory remedies available in court, it may very well be that these patent owners have no intention of ever seeing a case through to trial to collect these rewards; statistics strongly support this hypothesis.¹⁶³ In Part III.A above, I discussed how the perceived value of an injunction is derived from its ability to foster settlement negotiations.¹⁶⁴ However, in Part III.C, I subsequently classified settlement

¹⁵⁹ See *supra* Part II (discussing the pleading problem, expense of litigating, and potential harms to plaintiffs associated with litigating).

¹⁶⁰ See *supra* Part III.A and III.B (reviewing injunctive relief and monetary relief pursuant to 35 U.S.C. §§ 283, 284).

¹⁶¹ See *supra* Part II.B.3 (applying several criteria to demonstrate the general assertion that patents value rapidly with time after issuance).

¹⁶² See, e.g., John Lande, *Principles for Policymaking about Collaborative Law and Other ADR Processes*, 22 Ohio St. J. on Disp. Resol. 619, 660 (2007) (“Litigation and court adjudication can certainly create or exacerbate problems for disputants—especially in family cases—and should normally be used as a last resort.”).

¹⁶³ Lemley, *supra* note 4, at 1501 (“The overwhelming majority of [patent] lawsuits settle or are abandoned before trial.”).

¹⁶⁴ See *supra* notes 112–115, 123 and accompanying text; see also *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 122 (2007) (“If respondents were to prevail in a patent infringement action, petitioner could be ordered to pay treble damages and attorney’s fees, and could be enjoined from selling Synagis, a product that has accounted for more than 80 percent of its revenue from sales since 1999. Unwilling to risk such serious consequences, petitioner paid the demanded royalties”)

agreements themselves as a separate form of relief for plaintiffs since they often involve the exchange of cash or other calculable assets between parties. This amphibious nature of settlement agreements forms the backbone of this Article's underlying thesis: because settlements provide patentees some hybrid variation of both monetary relief and injunctive relief, and because plaintiffs are able to obtain either or both of these benefits without subjecting their patents to the harms associated with trial, patentees litigate for the bounties associated with out-of-court settlement. As an tangential corollary to this assertion, it is also reasonable to infer that patentees are concerned primarily with improving their own economic circumstances, even if this means engaging in behavior to the shared benefit of another firm;¹⁶⁵ else, patent owners would stay the course for injunctions with greater resolve. At first glance, this framework for litigation seems wholly unremarkable and commonplace in light of the widespread commentary on settlement schemes as an alternative to costly and prolonged trial.¹⁶⁶ And admittedly so, patent litigation looks like any of several other areas of law in both form and result (e.g., party P and party D are unable to resolve a dispute; party P sues party D; party P and party D settle the dispute at a value that maximizes their own interests).¹⁶⁷ However, a closer examination of several factors unique to patent litigation reveals that patent owners should be able to make the litigate-to-settle determination *ex ante* as opposed to *ex post* with respect to the filing of a lawsuit, and that in fact, litigation is a way of life for patent owners.

First, the vast majority of patent owners are large corporations who manage robust patent portfolios, not individual inventors.¹⁶⁸ This is due in large part to the expense of patent procurement,¹⁶⁹ which could arguably be deemed the first step in a

¹⁶⁵ See Chapman, *supra* note 148, at 330 (“[A] patent holder’s decision to grant a settlement license, or any other license, involves a cost-benefit analysis in which one expects the patent holder to seek maximum compensation in exchange for permission to practice the patent.”); see also *supra* notes 154, 155 and accompanying text (discussing licensing agreements between firms for complementary technologies).

¹⁶⁶ See Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 Mich. L. Rev. 319, 320 (1991) (“With some notable exceptions, lawyers, judges, and commentators agree that pretrial settlement is almost always cheaper, faster, and better than trial. Much of our civil procedure is justified by the desire to promote settlement and avoid trial.”); see also *supra* note 16 and accompanying text.

¹⁶⁷ Hovenkamp et al., *supra* note 59, at 1722 (“[T]he parties to an IP dispute have a strong incentive to enter into agreements that maximize their own interests . . . [T]he uncertain scope and validity of IP rights may encourage a collusive settlement, serving both to remove the uncertainty and to permit the two firms to share monopoly profits.”)

¹⁶⁸ John R. Allison & Mark A. Lemley, *Who’s Patenting What? An Empirical Exploration of Patent Prosecution*, 53 Vand. L. Rev. 2099, 2117 (2000) (finding that in a sample of 1000 randomly selected patents from a two-year period of study, over seventy percent were assigned to what the PTO classifies as “large entities”).

¹⁶⁹ See *supra* notes 17 and 18 and accompanying text.

plaintiff's lawsuit, however attenuated. The result of this patent-holding structure is that plaintiffs are frequently repeat-litigants in infringement lawsuits, often asserting the same patent or related patents from the same family.¹⁷⁰ As an expected consequence of this repetition, plaintiffs obtain a sense of familiarity with the litigation,¹⁷¹ and settlement negotiations involving patent licensing become a second-nature operation for a company just like any other routine business practice. The frequency of *inter partes* negotiations with potential infringers thus translates into increased efficiency within a company. By realizing this efficiency, firms are able to maximize the value of their patents through licensing arrangements without paying for the cost of trying each patent individually.

Second, the fact that patent litigation can be insured on both the offensive and defensive ends of a lawsuit indicates that companies are now beginning to include litigation among the "myriad [of] risks"¹⁷² that are commonplace in a business's everyday operations. This is especially true in the case of start-up companies, which often lack capital, resources, and tangible assets, and which rely on licensing fees derived from litigation settlements as a primary source of revenue. In fact, patent infringement litigation has become so intertwined in a part of firms' routine operations that it has been called a "daily fact of life for most corporate legal departments"¹⁷³ and "the business model of the new millennium."¹⁷⁴

Finally, one of the greatest indicators that patent litigation is simply a way of life for firms is embodied in a simple question: why else obtain a patent? One widely held theory suggests that, at least for start-up firms, patents indicate value to outside investors.¹⁷⁵ However, for well-established companies, this same reasoning does not necessarily apply, thus continuing to beg the question. The answer lies in litigation. Based on the current framework for increasing damages in patent cases, companies are discouraged from carefully reading patents and seeking an outside opinion, but rather are incentivized to simply engage in what could be infringing behavior to avoid a court's

¹⁷⁰ Allison et al., *supra* note 15, at 467 ("Litigated patents also tended to be part of 'families' of issued patents.").

¹⁷¹ *See supra* note 167

¹⁷² Fuentes, *supra* note 46, at 267.

¹⁷³ Ranganath Sudarshan, *Nuisance-Value Patent Suits: An Economic Model and Proposal*, 25 Santa Clara Computer & High Tech. L.J. 159, 160 (2008).

¹⁷⁴ Mark A. Lemley, *Ten Things to Do About Patent Holdup of Standards (and One Not to Do)*, 48 B.C. L. Rev. 149, 155 (2007).

¹⁷⁵ Clarisa Long, *Patent Signals*, 69 U. Chi. L. Rev. 625, 653 (2002) ("Among venture capitalists, both the quantity and quality of patents have long been factors that are taken into consideration when deciding whether to invest in a company, particularly in its early stages."); *see* Sichelman & Graham, *supra* note 57, at 122 ("[A]lthough patents may have no intrinsic value for the company that owns them, they can provide an extrinsic value to outsiders estimating the company's worth.").

later finding that they infringed the patent willfully.¹⁷⁶ Thus, if patents no longer serve a preventative role to put competitors on notice of one's rights, their purpose is largely reduced to an enforcement role that is used to drive settlement agreements.

B. *Changing the Landscape*

To address the concerns previously raised in this Article surrounding the inherent drawbacks of patent litigation,¹⁷⁷ several commentators have suggested ways to improve the patent system from both an administrative standpoint and from a legal standpoint. Collectively, this inventory of proposals covers the gamut of patent litigation from the patent prosecution process all the way through a lawsuit to an infringement trial. While I certainly do not hold these proposals out as my own, I do attempt to frame them in a way that underscores the objective of settlement in patent litigation. The following subparts detail three such proposals and how they can reduce the cost and harms of litigating while increasing efficiency and predictability.

1. Reform at the PTO

Even as early as a decade ago, there were nearly 400,000 patent applications pending before the PTO.¹⁷⁸ This number has undoubtedly only increased as the number of patent applications has exploded over the past ten years.¹⁷⁹ Because of this backlog, and due to limited human capital to evaluate the applications, patent examiners are encouraged to spend a finite amount of time per application.¹⁸⁰ This practice results in the issuance of a relatively large percentage of patents that are later found to be invalid under

¹⁷⁶ See Note, *The Disclosure Function of the Patent System (Or Lack Thereof)*, 118 Harv. L. Rev. 2007, 2019–2020 (2005) (“[W]enever innovators read a patent, they lay the groundwork for a later finding of willful infringement. Consequently, innovators must weigh the cost of either an opinion letter or the increased risk of enhanced damages against the potential benefits from reading patents. Faced with this calculation, many innovators have ceased using patents as a research tool; they either use them only to search for potential infringement problems, or simply avoid reading them altogether.”).

¹⁷⁷ See *supra* notes 1–15 and accompanying text.

¹⁷⁸ Nancy J. Linck et al., *A New Patent Examination System for the New Millennium*, 35 Hous. L. Rev. 305, 307 (1998) (citation omitted).

¹⁷⁹ See Cotropia, *supra* note 101, at 750 & n.38 (“The number of patent applications is rising exponentially each year while, at the same time, the USPTO faces a significant examiner attrition rate.”).

¹⁸⁰ See Warren K. Mabey, Jr., *Deconstructing the Patent Application Backlog . . . A Story of Prolonged Pendency, PCT Pandemonium & Patent Pending Pirates*, 92 J. Pat. & Trademark Off. Soc’y 208, 241–42 (2010).

heavier judicial scrutiny.¹⁸¹ Knowing this, defendants may be more willing to fight a patent in court or through *inter partes* reexamination procedures, thus encouraging expensive litigation.

The solution to complex and unpredictable patent litigation may be to attack the problem on the front end. Professor Lemley and others have suggested shifting to a registration-based system for patents akin to that of copyrights, and allowing courts to determine validity later.¹⁸² This would effectively eliminate the backlog of applications pending examination on the merits. And while this would seemingly exacerbate the problem of litigating patents by encouraging more challenges by defendants, tailoring such a scheme towards a settlement structure could actually prove to be a useful remedy to the current system of litigation. For example, in keeping the *inter partes* examination procedures intact, a registration system would allow examiners to spend more time scrutinizing patents that are the subject of litigation, thus providing the parties involved with a better idea of how a court might later rule as to validity. In other words, eliminating the current initial examination procedures, but instituting a much more rigorous *inter partes* reexamination framework, may sway parties to settle a dispute based on examiners' findings rather than pursue a trial. Such a system also confers a significant benefit on the PTO itself by relieving its financial strain since the number of requests for reexamination is but a tiny fraction of the number of applications received.

2. Alternative Dispute Resolution

While the above proposal pertains to an *ex ante* method for remedying the current state of patent litigation, this subpart interjects a proposal right into the middle of the litigation process itself—alternative dispute resolution (ADR). Generally speaking, ADR can take the form of a mediation or arbitration.¹⁸³ In a nonbinding mediation, an impartial third party conducts joint and separate meetings with the plaintiff and defendant to encourage a mutual agreement between them.¹⁸⁴ In arbitration, parties subject themselves to a type of “private judging” in which a neutral third party determines the outcome of the

¹⁸¹ Moore, *supra* note 6, at 392 (finding judges to invalidate patents in 36% of cases and juries in 29% of cases).

¹⁸² Lemley, *supra* note 14, at 1526 (“[N]ot only shouldn’t we increase the time spent in prosecution, but we should also reduce or eliminate examination entirely, and rely on the litigation process to sort the good patents from the bad.”); *see also* F. Scott Kieff, *The Case for Registering Patents and the Law and Economics of Present Patent-Obtaining Rules*, 45 B.C. L. Rev. 55, 70–74 (2003).

¹⁸³ *See* David A. Fitzgerald II, *Saving Alternative Dispute Resolution in Patent Law: Countering the Effects of the Patent Troll Revolution*, 23 Ohio St. J. on Disp. Resol. 345, 353–58 (2008). Although negotiation is typically a third arm of alternative dispute resolution trio, I have chosen to not include negotiation in this analysis.

¹⁸⁴ *See* Bruce B. Brunda, *Resolution of Patent Disputes by Non-Litigation Procedures*, 15 AIPLA Q.J. 73, 77–79 (1987).

dispute.¹⁸⁵ And unlike mediation, a resolution reached through arbitration can be binding on parties.¹⁸⁶

While both of these are very sound in theory, there are some reasons to think that they might be unsuccessful. First, although ADR can help abate, and even eliminate, the cost of a patent trial by reducing the issues to be litigated, its overall financial benefits to parties are debatable, at least in the context of arbitration.¹⁸⁷ Moreover, while seemingly counterintuitive (especially given this Article's criticism of patent trials), the lack of predictability in patent trials that can result in extremely large damage awards for patent owners is not present in ADR;¹⁸⁸ thus, plaintiffs might not be willing to subject themselves to procedures where the windfall factor for damages based on the litigation lottery is not available. Notwithstanding these and other hurdles, the growing expense and complexity of litigation is driving parties to use ADR as a method of settling patent disputes without the use of judges and juries. And as sign that ADR is in fact succeeding, Kevin Casey estimates that between sixty and seventy percent of patent cases settle through mediation procedures that would not otherwise.¹⁸⁹

3. Specialized Trial Courts

One late-stage solution to remedying the unpredictability in patent litigation is for Congress to establish specialty trial courts just as it has directed all patent appeals to the Court of the Appeals for the Federal Circuit. There is no shortage of discussion on this idea among academics,¹⁹⁰ and indeed, practitioners have likewise called for specialized

¹⁸⁵ Fitzgerald, *supra* note 182, at 354–55.

¹⁸⁶ 35 U.S.C. § 294(a) (2006).

¹⁸⁷ See Brunda, *supra* note 183, at 82 (“Cost savings associated with arbitration are widely assumed but uncertain. Savings resulting from reduced attorney time, hearings and fewer witnesses are offset by arbitrator’s fees. Moreover, the applicable costs are accelerated to the point that they may be more burdensome than the delayed costs of conventional litigation. Consequently any presumed cost advantage must be closely reviewed.”); see also William F. Heinze, *Patent Mediation: The Forgotten Alternative in Dispute Resolution*, 18 AIPLA Q.J. 333, 342 (1991).

¹⁸⁸ See *supra* notes 65 and 66 and accompany text.

¹⁸⁹ Casey, *supra* note 9, at 11–12 (“Mediation is especially effective, in contrast to binding arbitration or court trials, in cases involving three to five parties each with different positions. Mediation is now commonly used to settle large, complex intellectual property disputes.”).

¹⁹⁰ See, e.g., Donna M. Gitter, *Should the United States Designate Specialist Patent Trial Judges? An Empirical Analysis of H.R. 628 in Light of the English Experience and the Work of Professor Moore*, 10 Colum. Sci. & Tech. L. Rev. 169 (2009); Holderman & Guren, *supra* note 8, at 18–20; LeRoy L. Kondo, *Untangling the Tangled Web: Federal Court Reform Through Specialization for Internet Law and Other High Technology Areas*, 2002 UCLA J.L. & Tech. 1;

patent courts.¹⁹¹ The justification for this proposal is the same as that driving the creation of the Federal Circuit: predictability and uniformity.¹⁹² Congress recently passed a law to “establish a pilot program in certain United States district courts to encourage enhancement of expertise in patent cases among district judges.”¹⁹³ Under this law (which has a scheduled trial period of roughly ten years¹⁹⁴), Congress aims to reduce the Federal Circuit’s high reversal rate of district court decisions pertaining to patent law, thus resulting in more predictability for litigants at the trial level.¹⁹⁵

VI. CONCLUSION

This Article has provided a comprehensive review of the perils that await plaintiffs to patent litigation in terms of expense, time consumption, and potential harms. It has also examined patentees’ incentives to litigate infringement disputes based on available remedies and the likelihood of receiving them in a court of law depending the identity of the arbiter. In particular, this Article illuminated settlement and licensing agreements as the real underlying reason that parties to a patent dispute involve themselves in litigation. In doing so, this Article concluded that litigation-for-settlement is not a destination at which patent owners arrive, but rather a means of doing business in light of the fact that it can be insured and, for many emerging companies, is the primary source of revenue. Based on this analysis, although unassuming, the answer to the question “why do patentees litigate?” is, simply, because it’s what they do.

Nancy Olson, Comment, *Does Practice Make Perfect? An Examination of Congress’s Propose District Court Patent Pilot Program*, 55 UCLA L. Rev. 745 (2008); Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 Colum. L. Rev. 1035 (2003).

¹⁹¹ E.g., Jennifer F. Miller, *Should Juries Hear Complex Patent Cases?*, 2004 Duke L. & Tech. Rev. 4, at ¶ 33 & n.107, 108.

¹⁹² See S. Rep. No. 97-275, at 2–3 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, at 12–14 (“The creation of the Court of Appeals for the Federal Circuit provides such a forum for appeals from throughout the country in areas of the law where Congress determines that there is special need for national uniformity.”); see also Lee Petherbridge, *Patent Law Uniformity?*, 22 Harv. J.L. & Tech. 421, 422–23 (2009) (“As Congress saw it, enabling a single body of national precedents for patent law would, among other things, repair the legal infrastructure of the patent system by improving uniformity of doctrinal development, and improving doctrinal stability and predictability.”).

¹⁹³ Pilot Program in Certain District Courts, Pub. L. No. 111-349, 124 Stat 3674.

¹⁹⁴ *Id.* § 1(c).

¹⁹⁵ See Gitter, *supra* note 189, at 171–72.