

DON'T FORGET ABOUT THE LITTLE GUYS: TROLLS, STARTUPS, AND FEE SHIFTING

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ABSTRACT

High-profile lawsuits by patent assertion entity (more commonly known as patent trolls) have led many commentators to suggest large-scale litigation reform to discourage predatory lawsuits. One of the most prominently proposed solutions is fee shifting, where trolls would be required to pay the victorious defendant's cost of litigation. This solution could potentially limit the patent troll problem, but it also has many challenges.

The major problem with post-judgment fee shifting is that it requires a defendant to litigate all the way to a judgment in order to recover attorneys' fees. Generally, fee shifting has not been a substantial deterrent to frivolous lawsuits from sophisticated plaintiffs. Many patent trolls are thriving, not by winning large monetary judgments at trial, but by forcing companies into settling to avoid litigation. Startup companies, who are particularly vulnerable targets for patent trolls, often lack the capital, time, and experience to realistically consider litigation. Therefore, it is unlikely that fee shifting would have much protective effect on small startup companies. Further, because fee shifting would

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protect larger companies from troll suits, it is foreseeable that trolls would move away from large companies and focus their efforts on startups.

Instead, potential reformers should consider enabling courts to shift the cost of discovery pre-trial, especially in interactions between patent trolls and small, startup companies. This article proposes requiring a plaintiff to post a bond that can be used to cover some or all of the costs of discovery, which will be repaid if the startup is found to be infringing.

INTRODUCTION

Parts I-III explain why patent trolls suing small companies alleging patent infringement are a problem. Part I provides general background data on patent trolls, and why they have garnered so much public attention. Part II illustrates how many different types of trolls make money. Part III explains why startup companies (those making less than \$10 million annually) are particularly vulnerable to patent trolls, as well as why protecting them is important.

Parts IV–VII outline various forms of potential fee shifting reform. Part IV will look at the reasons fee shifting has become a frequent suggestion to combating the patent troll problem. Part V analyzes provisional fee shifting where a plaintiff in a patent infringement suit who is specifically found to be a PAE (or patent troll) and loses is forced to pay the defendant’s attorneys’ fees. Part VI analyzes the English Rule, where the losing party is forced to pay for the prevailing party’s attorneys’ fees regardless of the two parties’ roles in litigation and whether or not the plaintiff was a PAE. Part VII explains a method for shifting the cost of discovery before the suit goes to trial.

Parts VIII and the Conclusion provide concrete recommendations. Part VIII analyzes how post-judgment fee shifting could strengthen larger companies’ positions against patent trolls to the detriment of smaller, less financed startups. Finally, I conclude with why pre-trial discovery fee shifting could dramatically increase a startup’s options and bargaining power when dealing with PAEs.

I. BACKGROUND

During the past decade, patent litigation has seen a dramatic rise in large part due to the emergence of Patent Assertion Entities, or PAEs.¹ In fact, lawsuits involving PAEs have increased an average of 22 percent per annum since 2004, rising from 235 lawsuits in 2004 to 3174 in

1. *Litigations Over Time*, PAT. FREEDOM (Feb. 7, 2014), <https://www.patentfreedom.com/about-npes/litigations/>.

2013.² One major problem with patent litigation is that it is extremely complex, and thus immensely expensive.³ According to the American Intellectual Property Law Association, for patent lawsuits in which the claimed damages are between \$1 million and \$25 million, the median legal fees are \$2.5 million per defendant.⁴ Patent lawsuits are also increasingly being brought against end-users and consumers of technology, rather than the companies developing the new technology.⁵ Some of the more egregious examples include a suit against 8,000 coffee shops, hotels, and retailers over Wi-Fi networks.⁶ Another indicative example of predatory PAE activity is a suit against small businesses for attaching a document scanner to a computer.⁷

As a result, patent litigation and PAEs are garnering more and more public notoriety. PAEs have begun to receive mainstream media attention.⁸ In June 2013, President Obama called for regulators to address growing concerns and “to protect innovators from frivolous litigation” by PAEs.⁹ This has led to Congress proposing no less than nine different pieces of new legislation through 2013, all attempting to curb the growing number of lawsuits and reduce the disruption caused by PAEs.¹⁰ Some individual states are also attempting to address the problem.¹¹ Vermont recently passed a state law, which allows counter-suits against

2. *Id.*

3. Jim Kerstetter, *How much is that patent lawsuit going to cost you?*, CNET (Apr. 5, 2012 10:00 AM), http://news.cnet.com/8301-32973_3-57409792-296/how-much-is-that-patent-lawsuit-going-to-cost-you/.

4. Steven Auvil & David Devine, *Report of the Economic Survey 2011*, AM. INTELLECTUAL PROP. L. ASS'N, July 2011.

5. Colleen Chien, *Everything You Need to Know About Trolls (The Patent Kind)*, WIRED (June 26, 2013 9:25 AM), <http://www.wired.com/opinion/2013/06/everything-you-need-to-know-about-trolls-the-patent-kind/>.

6. Eric Goldman, *Vermont Enacts the Nation's First Anti-Patent Trolling Law*, FORBES (May 22, 2013 2:22 PM), <http://www.forbes.com/sites/ericgoldman/2013/05/22/vermont-enacts-the-nations-first-anti-patent-trolling-law/>.

7. Edward Wyatt, *Obama Orders Regulators to Root Out 'Patent Trolls'*, N.Y. TIMES (June 4, 2013), http://www.nytimes.com/2013/06/05/business/president-moves-to-curb-patent-suits.html?pagewanted=1&_r=0&adxnnl=1&adxnnlx=1381859031-kxuG9qqCMbXatXZxc2ugTw.

8. See *This American Life: When Patents Attack . . . Part Two!*, CHI. PUB. RADIO (May 31, 2013), <http://www.thisamericanlife.org/radio-archives/episode/496/when-patents-attack-part-two>; David Segal, *Has Patent, Will Sue: An Alert to Corporate America*, N.Y. TIMES (July 13, 2013), <http://www.nytimes.com/2013/07/14/business/has-patent-will-sue-an-alert-to-corporate-america.html?pagewanted=all>.

9. Wyatt, *supra* note 7.

10. See *Current Legislative Proposals for Patent Reform*, ELEC. FRONTIER FOUND. (Dec. 9, 2013), <https://www EFF.org/issues/current-legislative-proposals-patent-reform> (referencing the SHIELD Act, H.R. 6245, 113th Cong. (2013); End Anonymous Patents Act, H.R. 2024, 113th Cong. (2013); Patent Quality Improvement Act, S. 866, 113th Cong. (2013); Patent Abuse Reduction Act, S. 1013, 113th Cong. (2013); Patent Litigation and Innovation Act, H.R. 2639, 113th Cong. (2013); STOP Act, H.R. 2766, 113th Cong. (2013)).

11. Wyatt, *supra* note 7.

PAEs to cost shift attorneys' fees to the losing litigant.¹² One of the more prominent legislative proposals was the bipartisan SHIELD Act.¹³ Introduced by Congressman Peter DeFazio (D-Oregon), the Saving High-tech Innovators from Egregious Legal Disputes Act was introduced to "ensure that American tech companies can continue to create jobs, rather than waste resources on fending off frivolous lawsuits."¹⁴ The SHIELD Act attempts to enable the one-way shifting of attorneys' fees in cases in which both the defendant in a patent infringement suit wins the lawsuit and the court determines that the plaintiff was a PAE.¹⁵ Similarly, the Innovation Act, which passed in the House of Representatives, sponsored by Congressman Bob Goodlatte (R-Virginia), would have shifted "reasonable attorneys' fees and other expenses" to the prevailing party in all but exceptional cases by adopting the English Rule.¹⁶ The exceptional circumstances in which the losing party could avoid fee shifting under the Innovation Act would have been when "the losing party was acting in a way that was reasonably justified by law and fact" or in cases of "extreme financial hardship."¹⁷

The major concern with PAEs is that they stifle innovation and job growth by harassing small companies and start-ups, while providing little benefit to society.¹⁸ Some studies have estimated that trolls may have social costs exceeding \$20 billion per year.¹⁹ This contention is reinforced by the fact that at least 55 percent of unique defendants in PAE initiated lawsuits reported income of less than \$10 million in annual revenue, and between 66–82 percent reported less than \$100 million.²⁰ These companies are particularly susceptible to PAE suits because of the

12. *Id.*

13. Iain Thomson, *SHIELD Act Proposed to Make Patent Trolls Pay*, REGISTER (Feb. 28, 2013), http://www.theregister.co.uk/2013/02/28/shield_patent_act/.

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

15. Tim Worstall, *The Shield Act Tries to Kill the Patent Trolls. But Does It Go Far Enough?*, FORBES (Mar. 1, 2013 12:16 PM), <http://www.forbes.com/sites/timworstall/2013/03/01/the-shield-act-tries-to-kill-the-patent-trolls-but-does-it-go-far-enough/>.

16. Innovation Act, H.R. 3309, 113th Cong. § 285 (2013); Gene Quinn & Steve Brachmann, *Patent Reform: Will Fee-Shifting Solve the Patent Troll Problem?*; IPWATCHDOG (Dec. 18, 2013 7:45 AM), <http://www.ipwatchdog.com/2013/12/18/patent-reform-will-fee-shifting-solve-the-patent-troll-problem/id=46854/>.

17. Quinn, *supra* note 16.

18. Colleen Chien, *Patent Assertion and Startup Innovation*, NEW AM. FOUND. 3, 15 (2013), *available at* http://newamerica.net/sites/newamerica.net/files/policydocs/Patent%20Assertion%20and%20Startup%20Innovation_updated.pdf.

19. James Bessen et al., *The Private and Social Costs of Patent Trolls* 17 (B.U. School of Law Working Paper No. 11-45, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930272.

20. Colleen Chien, *Startups and Patent Trolls*, 17 STAN. TECH. L. R. 461, 471 (2014).

high cost of fighting via litigation.²¹ While patent transferability does benefit businesses by creating a secondary market for unused patents and the occasional influx of capital for struggling companies, PAEs are generally seen as a substantial barrier to innovation and economic growth.²²

II. HOW PATENT TROLLS OPERATE

PAEs are referred to by a number of different terms, with only slight differences in meaning. This paper will use PAE, a term coined by Professor Colleen Chien, to refer to a business entity with the singular purpose of making money via patent lawsuits and settlements and that only acquires patents through purchase, rather than research and development.²³ PAE is generally analogous to the term patent troll, preferred by the media, and the two will be used interchangeably throughout this paper.²⁴ These terms are only slightly narrower than the more common term, Non-Practicing Entity (“NPE”), which may also include early-stage startups and universities that do not make a product, yet have vastly different goals than PAEs.²⁵

PAEs are typically complex and experienced legal entities that knowingly exploit weaknesses in the legal system.²⁶ The cost of patent litigation is so extreme that companies often view litigation with a patent troll as a last resort.²⁷ Thus, many PAEs typically derive most of their revenue from settlements and licensing agreements rather than damages awarded via lawsuit.²⁸ In fact, PAEs who are forced to litigate to judgment fare very poorly, losing nearly 90 percent of cases.²⁹ However, these losses may be part of a larger strategy to intimidate future alleged infringers into settling by making it known that a troll will do whatever it takes, scorch the earth, and drive up litigation costs for their opponent if necessary.³⁰ Even though patent trolls tend to fair poorly in court, the business model itself is “not only surviving, but thriving.”³¹

21. Chien, *Patent Assertion and Startup Innovation*, *supra* note 18, at 3.

22. *Id.* at 4.

23. Chien, *Everything You Need to Know About Trolls (The Patent Kind)*, *supra* note 5.

24. *Id.*

25. *Id.*

26. See generally Mark Lemley & Douglas Melamed, *Missing the Forest for the Trolls*, 113 Colum. L. R. 2117 (2013) available at <http://www.columbialawreview.org/wp-content/uploads/2013/12/LM-Final-2.pdf>; Chien, *Patent Assertion and Startup Innovation*, *supra* note 18.

27. Lemley & Melamed, *supra* note 26, at 2127–28.

28. Erik Hovenkamp, *Predatory Patent Litigation* 3 (Aug. 22, 2014) (unpublished manuscript) (on file with the Northwestern University Department of Economics), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2308115.

29. *Id.* at 2.

30. *Id.* at 3.

31. Lemley & Melamed, *supra* note 26, at 2124.

Individual PAEs invoke different strategies targeting particular business weaknesses in order to generate revenue. Lemley and Melamed have suggested that trolls can be broken up into three separate categories: “lottery ticket trolls,” “bottom-feeder trolls,” and “patent aggregators.”³² Lottery ticket trolls typically litigate to completion and attempt to win large jury judgments, usually from very large technology companies.³³ Unlike other categories of PAEs, lottery ticket trolls are extremely concerned with patent validity and infringement, as they are necessary to prevail in court.³⁴

Bottom-feeder trolls employ a very different strategy to monetize patents.³⁵ Bottom-feeder trolls instead attempt to force quick, low-value settlements and licensing agreements on a large number of companies, regardless of the size of the company.³⁶ The trolls use the high cost of litigation as leverage and realize that companies would much rather settle for a small amount today, than spend years and millions of dollars in litigation.³⁷ Increasingly, bottom-feeder trolls will take zero dollar upfront licensing agreements with huge escalating royalty payments.³⁸ Because the patents are typically never litigated to completion, patent quality and infringement are typically unimportant to the bottom feeder troll.³⁹

Patent aggregators are the larger, scarier cousins of bottom-feeder trolls.⁴⁰ Patent aggregators, like bottom-feeder trolls, seek to demand royalties and settlements from potential infringers using the threat of litigation.⁴¹ However, patent aggregators typically amass huge patent portfolios and rely on the fact that businesses have a difficult time analyzing, and thus are less likely to challenge, a large portfolio of patents.⁴² Patent aggregators are not concerned with the quality of the individual patents, instead relying on sheer quantity to force settlement.⁴³

III. WHY PROTECT STARTUPS

This article will focus on patent trolls and their interactions and harassment of “startups.” Admittedly, startup is a fairly nebulous term that could be used to describe any range of small companies. For the

32. *Id.* at 2127.

33. *Id.* at 2126.

34. *Id.* at 2128.

35. *Id.* at 2126.

36. *Id.*

37. *Id.*

38. Chien, *Startups and Patent Trolls*, *supra* note 20, at 473.

39. Lemley & Melamed, *supra* note 26, at 2126.

40. *Id.*

41. *Id.* at 2126–27.

42. *Id.* at 2127.

43. *Id.*

purpose of this article, startup will be defined as, companies with less than \$10 million in annual revenue, as these size companies are often targeted by PAEs and, due to the high cost of litigation, are especially vulnerable.⁴⁴ Using revenue as a basis for a startup makes no distinction as to whether the company has received financing (typically from a Venture Capital firm); however, companies who are yet to receive funding are particularly defenseless.⁴⁵

As previously mentioned, the reason PAEs have drawn a considerable amount of ire is the concern that they hamper economic growth and innovation.⁴⁶ Startups are one sector of the economy that has been traditionally associated with growth and innovation.⁴⁷ Recent census bureau research found that startups created 2.6% of all U.S. jobs from 2000–2009.⁴⁸ And while startup job creation has declined over the past three decades, the growth provided by startups typically represents the difference between a growing economy and a shrinking one.⁴⁹ Many of the most prominent startups have come from the high tech and software industries, where PAEs are rampant.⁵⁰

Startups, specifically early-stage startups, are particularly ill-equipped to deal with PAEs due to lack of resources, information asymmetry, and the deliberate timing of the demand.⁵¹ Startups are often forced to settle with a PAE, regardless of the merits of the patent or the claimed infringement.⁵² First and foremost, even if a startup believes that it can prevail at trial, the tremendous cost and risk associated with patent litigation makes “sett[ement] the only rational decision”.⁵³ Additionally, a large amount of information asymmetry exists between a startup and the PAE, and the startup often has little or no resources to devote to analyzing patent validity or infringement, and little or no experience with

44. Chien, *Patent Assertion and Startup Innovation*, *supra* note 18, at 3 (“Companies with less than \$10 [million] in revenue comprise 55% of unique defendant’s in PAE lawsuits” and can least afford to engage in litigation).

45. Chien, *Startups and Patent Trolls*, *supra* note 20, at 474 (“Receiving a demand was described as potentially representing a ‘death knell’ for a prefunded company: no one wants to invest in a company where founder time and investor money is going to be ‘bled to patent trolls.’”).

46. Hovenkamp, *supra* note 28, at 2.

47. Chien, *Patent Assertion and Startup Innovation*, *supra* note 18, at 3.

48. E.J. Reedy & Robert Litan, *Starting Smaller; Staying Smaller: America’s Slow Leak in Job Creation*, EWING MARION KAUFFMAN FOUND. 3 (2011), available at http://www.kauffman.org/~media/kauffman_org/research%20reports%20and%20covers/2011/07/job_leaks_starting_smaller_study.pdf.

49. *Id.*

50. Lemley & Melamed, *supra* note 26, at 2124.

51. Steven Levy, *The Patent Problem*, WIRED (Nov. 13, 2012 6:30 AM), <http://www.wired.com/opinion/2012/11/ff-steven-levy-the-patent-problem/all/>.

52. Chien, *Startups and Patent Trolls*, *supra* note 20, at 485.

53. Levy, *supra* note 51.

the patent system.⁵⁴ The lack of information is compounded by the fact that startups are often allegedly infringing a technology being used as a consumer, rather than a technology they have developed and have great familiarity with.⁵⁵ Another factor is that PAEs can often show that several other companies have already settled on a similar infringement claim, adding a presumption that the claimed infringement has some validity.⁵⁶ Finally, PAEs tend to target startups during critical phases in the startup's economic development, such as just prior to a funding event or initial public offering.⁵⁷ This further forces startups into settlement because investors are far less likely to invest if the company has potential or ongoing patent litigation.⁵⁸ If the company is very-early stage (pre-venture capital or "series A funding"), the PAE's demand can be a "death knell" to that company.⁵⁹

IV. FEE SHIFTING AS THE PROPOSED SOLUTION

As patent trolls have gained notoriety due to public outrage, fee shifting has become an oft-proposed solution to deter trolls from bringing frivolous and potentially damaging lawsuits.⁶⁰ As of early 2014, there are fourteen bills before Congress attempting "to deal with some aspect of the patent troll issue."⁶¹ At least four of these proposed reforms include some form of fee shifting mechanism, either provisional fee shifting or the English Rule.⁶² Judge Rader, Chief Judge of the Federal Circuit, has suggested that the judiciary should more frequently invoke Section 285 of the Patent Act and Rule 11 of the Federal Rules of Civil Procedure, which allow the judge to shift the defendant's attorney fees in "exceptional cases."⁶³ Law review articles have been dedicated to the idea that fee shifting would also help dissuade patent troll litigation.⁶⁴

54. Chien, *Patent Assertion and Startup Innovation*, *supra* note 18, at 10.

55. *Id.* at 12.

56. *Id.* at 5.

57. *Id.* at 11.

58. *Id.* at 12.

59. *Id.*

60. *Current Legislative Proposals for Patent Reform*, *supra* note 10.

61. Matt Levy, *Patent Progress's Guide to Federal Patent Reform Legislation*, PAT. PROGRESS, <http://www.patentprogress.org/2014/01/12/patent-progresss-guide-to-patent-reform-legislation/> (last visited Oct. 4, 2014).

62. *Id.* (Innovation Act, H.R. 3309, 113th Cong. (2013); Patent Abuse Reduction Act, S. 1013, 113th Cong. (2013); SHIELD Act, H.R. 845, 113th Cong. (2013); and Patent Litigation Integrity Act, S. 1612, 113th Cong. (2013)).

63. Randall Rader et al., *Make Patent Trolls Pay in Court*, N.Y. TIMES (June 4, 2013), http://www.nytimes.com/2013/06/05/opinion/make-patent-trolls-pay-in-court.html?smid=pl-share&_r=1& (stating that although the means for judges to shift fees are already in place, fees were actually shifted in only 20 of nearly 3000 patent cases filed in 2011).

64. Emily H. Chen, *Making Abusers Pay: Deterring Patent Litigation by Shifting Attorneys' Fees*, 28 BERKELEY TECH. L. J. 351 (2013).

Major media publications are suggesting that fee shifting is at least one major reform that could be helpful in curbing the tide.⁶⁵ Major patent blogs have long put fee shifting near the top of their lists of proposed solutions.⁶⁶ Finally, an early draft of the Leahy-Smith America Invents Act (“AIA”) amended Section 285 of the Patent Act to automatically shift attorneys fees to the prevailing party “unless the court finds that the position of the non-prevailing party . . . was substantially justified;”⁶⁷ however, the clause was removed from the final draft of the AIA.⁶⁸

Theoretically, fee shifting (specifically the English Rule) deters low-merit but high-damage cases that are unlikely to succeed but would result in a large judgment by increasing the potential cost and risk for plaintiffs.⁶⁹ However, fee shifting reform should also consider and attempt to deter patent infringement (or other legal violations), minimize transaction costs, and “make whole” parties who prevail against predatory suits.⁷⁰

Increasingly, patent trolls pay their legal counsel on a contingency fee basis.⁷¹ Under a contingency arrangement trolls do not pay their attorneys an hourly rate, but instead agree to give up between 28–40% of any monetary award or settlement if the suit is successful.⁷² Under the traditional American Rule, where each party is responsible for their own attorneys’ fees, contingency fee plaintiffs incur very few litigation costs.⁷³ Traditional plaintiffs may be deterred from suing by non-financial considerations – such as “reputation, commitment of the plaintiff’s resources, or threat of a countersuit” – but these considerations do not generally apply to patent trolls.⁷⁴ Thus, fee shifting is an attempt to create a financial consequence for patent trolls who sue and lose.

Some scholars and proponents of patent reform have noted that fee shifting is not without its limitations. Noted patent troll scholar Prof. Colleen Chien has said that “fee-shifting generally has less of an impact on repeat-player plaintiffs and may deter certain meritorious suits by

65. Julie Samuels, *Finally: This is How to Fix the 'Patent Fix' We're All In*, WIRED (Apr. 2, 2013 9:30 AM), <http://www.wired.com/opinion/2013/04/this-is-how-to-fix-the-patent-fix-were-in/>.

66. See, e.g., Daniel Nazer, *Troll-Killing Patent Reform One Step Closer*, ELEC. FRONTIER FOUND. (Sept. 23, 2013), <https://www.eff.org/deeplinks/2013/09/troll-killing-patent-reform-one-step-closer>.

68. Patent Reform Act of 2006, S. 3818, 109th Cong. § 5(b)(2006).

69. Chen, *supra* note 64, at 365.

70. See generally, Mark Liang & Brian Berliner, *Fee Shifting in Patent Litigation*, 18 VA. J. L. & TECH. 59 (2013).

71. *Id.* at 67.

72. *Id.* at 72.

73. *Id.* (citing David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 ALA. L. REV. 335, 360 (2012)).

74. *Id.* at 81.

75. *Id.*

plaintiffs.”⁷⁵ She goes on to conclude that fee shifting likely would positively impact the economics of patent troll litigation, and would deter certain troll behavior, but would not “necessarily help those against whom litigation is threatened, but not brought.”⁷⁶ Fee shifting aimed directly at patent trolls will also likely be either over-inclusive or under-inclusive, and thus may curb some, but not all, predatory litigation.⁷⁷

Fee shifting is often suggested as a deterrent to frivolous lawsuits in other areas of law; however, legal scholars have questioned its efficacy as a deterrent.⁷⁸ In his *Journal of Legal Studies* article, Prof. Mitchell Polanski analyzed the application of the English Rule (where the loser in litigation pays for both sides attorney’s fees) and how it affected the decisions of plaintiffs who were unlikely to prevail in court.⁷⁹ Specifically, Polinsky found that when settlement offers are taken into account, the English Rule makes it more likely that a plaintiff with a very low probability of winning the law suit will take the suit to trial.⁸⁰ Polinsky found the English Rule encouraged a defendant to lower settlement offers to a degree that more than offset the increased risk to plaintiffs, and thus plaintiffs with a low chance of winning were better off taking the case to trial.⁸¹

Traditional analysis of fee shifting fails to take into account two major factors in lawsuits involving patent trolls and startups: opportunity costs and reputation.⁸² First, due to the high cost of litigation the opportunities forgone by pursuing litigation will often continue to make settlement the only viable business decision for startups.⁸³ A majority of startups report that PAE demands have non-financial consequences to the company, such as limiting the ability to hire a needed new employee or meet a financial milestone.⁸⁴ Patent trolls are often able to time their demands to coincide with a stage of the startup’s development that leaves the startup extremely vulnerable, such as a funding event or a business milestone.⁸⁵ If the demand is timed correctly, the startup is often forced

75. Chien, *Startups and Patent Trolls*, *supra* note 20, at 22.

76. *Id.* at 22.

77. Hovenkamp, *supra* note 28, at 17–18.

78. See, e.g., A. Mitchell Polinsky & Daniel L. Rubinfeld, *Does the English Rule Discourage Low-Probability-of-Prevailing Plaintiffs?*, 27 J. LEGAL STUD. 519 (1998).

79. *Id.*

80. *Id.* at 526.

81. *Id.* at 530–31 (“[T]he English Rule causes more plaintiffs to go to trial and that these additional plaintiffs are all ones whose probability of prevailing is relatively low – less than the lowest-probability-of-prevailing plaintiff under the American rule”).

82. Chien, *Patent Assertion and Startup Innovation*, *supra* note 18, at 4; Hovenkamp, *supra* note 28, at 15.

83. Levy, *The Patent Problem*, *supra* note 51.

84. Chien, *Patent Assertion and Startup Innovation*, *supra* note 18, at 4.

85. *Id.* at 11.

to settle regardless of the merits of the alleged infringement.⁸⁶ One example is that a company seeking venture capital funding has almost no option but to settle, as investors are extremely unlikely to invest in an early stage company that will spend a great deal of its resources, both time and money, dealing with a lawsuit.⁸⁷ Additionally, even in the situation where a startup has the resources to fully litigate and the potential to recover its legal fees by a fee shifting mechanism, litigation represents a huge investment with a great deal of risk.⁸⁸ Over 60% of patent suits take more than 2 years to reach trial (with 18% taking more than 4 years).⁸⁹ It's unrealistic to suggest that startups would be able to commit millions in capital for such long periods of time, even if the chances of prevailing at trial are good. Even if the startup were able to win at trial, under all but the most extreme fee shifting regimes, the startup would only receive what it had spent and would lose all the potential returns of using its capital in more productive ways.⁹⁰ Given that patent litigation tends to be more volatile than other forms of litigation, especially when appeals are considered, startups still risk losing the investment regardless of the strength of the case.⁹¹ Therefore, even with a strict fee shifting mechanism in place, startups are unlikely to be in a position in which litigation is a valid business option.

Another problem is that patent trolls have a strong incentive to develop a reputation as being aggressively litigious because it acts as a signal to future defendants that it is willing to force defendants to incur large litigation costs.⁹² An aggressively litigious reputation then encourages future defendants to settle to avoid long, drawn-out litigation.⁹³ A troll's aggressive reputation can be further enhanced by abusing the discovery process with expansive document requests that further drive up costs.⁹⁴ A 2011 empirical study found that PAEs lose over 90% of cases that are litigated to completion and concluded PAEs

86. *Id.* at 4.

87. *Id.* at 12.

88. Levy, *The Patent Problem*, *supra* note 51.

89. *2012 Patent Litigation Study*, PwC (2012), available at <http://patentlyo.com/media/docs/2013/03/2012-patent-litigation-study.pdf>.

90. Hovenkamp, *supra* note 28, at 19 (“[L]itigation expenses might force the defendant to pass on a valuable investment opportunity that would greatly increase its profitability.”).

91. Liang & Berliner, *supra* note 69, at 68 (citing S. Jay Plager, *The Federal Circuit as an Institution: On Uncertainty and Policy Levers*, 43 *LOY. L.A. L. REV.* 749 (2010); Kelly C. Mullally, *Legal (Un)Certainty, Legal Process, and Patent Law*, 43 *LOY. L.A. L. REV.* 1109 (2010)).

92. Hovenkamp, *supra* note 28, at 3.

93. *Id.*

94. Sean Vitka, *Patent Trolls Have a New Enemy*, *SLATE* (Oct. 24, 2013 8:06 PM), http://www.slate.com/blogs/moneybox/2013/10/24/patent_trolls_the_innovation_act_is_their_public_enemy_number_one.html.

“are not as worried about losing as they should be.”⁹⁵ Further, patent trolls should be more likely to settle in these cases because a court finding of invalidity destroys both the patent itself and all other lawsuits the PAE may be engaged in over the same patent.⁹⁶ It is therefore likely that certain trolls (namely the bottom-feeders and aggregators) knowingly pursue cases they are likely to lose in order to increase their litigious reputation.⁹⁷ Obviously, fee shifting would discourage this behavior by making it potentially much more expensive. However, this strategy also illustrates the complexity and legal sophistication of PAEs. Trolls are seemingly thriving, despite these losses.⁹⁸ Although an economic shift could be a step in the right direction, there is little to suggest that PAEs couldn’t reduce this behavior and continue to survive via what must be their primary source of revenue: settlements and licensing.⁹⁹

There are various forms of fee shifting that could be implemented as deterrents to patent trolls. As previously mentioned, Section 285 of the Patent Act and the Federal Rule of Civil Procedure 11 already allow judges to shift fees in “exceptional cases”; however, judges have done so in less than 1% of cases.¹⁰⁰ Practitioners have argued that fee shifting occurs more regularly, in 6% of cases litigated to completion, but is nonetheless fairly rare.¹⁰¹ Although several variations are possible, the two major doctrines of possible fee-shifting reforms are provisional fee shifting and full English Rule adoption. This note will focus on three major possibilities: (a) provisional fee shifting where fees are only shifted if the plaintiff is found to be a PAE, (b) English Rule fee shifting in which the losing party pays the other party’s fees in all but exceptional cases, and (c) discovery fee shifting where fees are shifted, at least temporarily, during the discovery period and before a judgment is entered.

To be effective, any fee shifting reform that is intended to deter patent troll activity should be accompanied by a bond requirement.¹⁰² A bond requirement forces plaintiffs to “post a bond of an amount intended to cover all of the adverse party’s anticipated litigation costs, including attorneys’ fees.”¹⁰³ Patent trolls, because they have few assets and don’t make products, are “potentially specifically structured to be judgment

95. John R. Allison et al., *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO. L.J. 677, 694 (2011).

96. *Id.* at 678.

97. Hovenkamp, *supra* note 28, at 1.

98. Lemley & Melamed, *supra* note 26, at 2124..

99. *Id.* at 2126.

100. RADER ET AL., *supra* note 63.

101. Liang & Berliner, *supra* note 69, at 87.

102. *Id.* at 135.

103. *Id.*

proof.”¹⁰⁴ A bond requirement would increase the cost of filing a patent infringement suit, but would ensure that recovery would occur should attorneys’ fees be awarded.¹⁰⁵ Without a bond requirement, defendants would face real difficulties in recovering fees in any fee shifting regime.¹⁰⁶

V. PROVISIONAL FEE SHIFTING

A provisional fee shifting regime would attempt to specifically target patent trolls by shifting fees only in one direction, away from the Plaintiff to the Defendant, and only in cases where the Plaintiff was found to be a PAE. Provisional fee shifting is proposed in the SHIELD Act and has gained media support.¹⁰⁷ Conceptually, targeting only patent trolls seems ideal and would theoretically reduce the possibility of deterring meritorious lawsuits by practicing entities.¹⁰⁸

However, two major problems arise with provisional fee shifting: properly defining a PAE for fee shifting purposes and increasing the total cost and risk of litigation¹⁰⁹ Statutorily defining exactly what constitutes a PAE for the purposes of fee shifting will almost certainly be either over-inclusive or under-inclusive.¹¹⁰ One possibility is that the plaintiff is assumed to be a PAE unless they are the original inventor of the technology or have “substantially invested in the exploitation of the patented technology.”¹¹¹ Even with explicit exceptions for beneficial organizations that could be considered PAEs, such as universities, a risk exists that companies who are not truly behaving as PAEs could be targeted for fee shifting purposes.¹¹² Traditional companies who purchase a technology would be deterred from meritorious suits until they “substantially invest” in said specific technology.¹¹³ If the substantial investment hurdle is too high small companies may not have yet “invested,” while if the investment hurdle is too low, trolls may be able to show substantial investment and protect themselves from the fee shifting mechanism. Another potential PAE definition would be to

104. Chien, *Startups and Patent Trolls*, *supra* note 20, at 22.

105. Liang & Berliner, *supra* note 69, at 135.

106. Chien, *Patent Assertion and Startup Innovation*, *supra* note 18, at 28.

107. See Samuels, *supra* note 65 (“we support the SHIELD Act, important legislation that would require a losing patent troll to pay the other side’s costs and legal fees”).

108. Chien, *Patent Assertion and Startup Innovation*, *supra* note 18.

109. Worstall, *supra* note 15 (criticizing one version of the SHIELD Act for lacking the definition of a “shell company”); Hovenkamp, *supra* note 28, at 20 (“[provisional fee shifting] necessitates lengthy debate over whether the plaintiff is actually a PAE, making the litigation process even more daunting for defendants”).

110. Hovenkamp, *supra* note 28.

111. *Id.* at 19.

112. *Id.*

113. DeFazio, *supra* note 14.

consider the pretrial motivations of the plaintiff, or the likelihood of the plaintiff prevailing at trial.¹¹⁴ However, determining a plaintiff's pretrial state of mind reliably would often be nearly impossible.¹¹⁵ Given the legal sophistication of PAEs, an effective statutory definition of a PAE may be elusive.

This leads to the second potential problem with provisional fee shifting; the increase in litigation cost and complexity created by adding an additional element that defendants must prove (or plaintiffs must disprove) in order for fee shifting to be awarded.¹¹⁶ Depending on how potential reform would define a PAE, this could be a rather complex issue for defendants and thus increase litigation costs.¹¹⁷ There is also a great deal of information asymmetry between the startup and the PAE in this respect, as the startup would have very little insight into the PAEs business model before discovery has commenced.¹¹⁸ Further, it adds a second level of uncertainty for startup defendants because it creates an additional possible outcome of litigating to completion: the startup may win the substantive case but lose the fee shifting element. This result could be devastating to startups who only litigated under the assumption that they would recover litigation fees. Alternatively, uncertainty regarding the plaintiffs legal status as a PAE may simply further reduce a startup's incentive to litigate and further promote settlement.

VI. THE ENGLISH RULE (NON-PROVISIONAL FEE SHIFTING)

Another potential vein of fee shifting is full adoption of the English Rule—where the losing party pays for all of the attorneys' fees regardless of whether they are found to be a patent troll.¹¹⁹ The English Rule is included in the Innovation Act, which has already been passed by the House of Representatives.¹²⁰ The English Rule would solve many of the issues surrounding fee shifting by removing the requirement of statutorily defining a PAE and add no further complexity to the litigation process.

The first drawback with an English Rule fee shifting regime is that would grant PAEs larger rewards for prevailing at trial, but given that PAEs prevail at trial less than 10% of the time, this concern is greatly

114. Hovenkamp, *supra* note 28, at 20.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. Chen, *supra* note 64, at 359.

120. John Villasenor, 'Fee-Shifting' And Patent Reform: A Double-Edged Sword for Startup Companies, FORBES (Dec. 18, 2013, 3:59 PM), <http://www.forbes.com/sites/johnvillasenor/2013/12/18/fee-shifting-and-patent-reform-a-double-edged-sword-for-startup-companies/>.

reduced.¹²¹ Some large PAEs, notably IP Nav and Intellectual Ventures, have shown public support for reforms that would adopt the English Rule for patent cases.¹²² IP Nav and Intellectual Ventures appear to fall within the lottery ticket troll category (or a new “super troll” category combining aspects of lottery ticket trolls and patent aggregators) described by Lemley, as “they’re not necessar[il]y seeking small-value, low-dollar settlements.”¹²³ This category of troll is much more likely to target large companies who have the funds to pay a large settlement, than focusing on small startups.¹²⁴ The English Rule would also mean that startups would risk larger judgments if they litigate to completion and lose.¹²⁵ However, given the aforementioned incentives to settle for startups, it is unlikely that startups are litigating cases in which infringement is likely to be found. Further, given their limited resources, in many cases a judgment against a startup may result in bankruptcy, regardless of whether the startup is required to pay for the patent holders attorneys fees.

The greater concern with an English Rule fee-shifting regime is that it may increase the bargaining power of the PAEs with meritorious cases, thus increasing the cost of settlement.¹²⁶ Polinsky calculates the settlement by multiplying the estimated damages with the probability of victory for the plaintiff.¹²⁷ The English Rule actually tends to discourage settlement if the plaintiff is optimistic about their chances at trial.¹²⁸ Thus, if the estimated damages are increased because the winner would also recover attorneys’ fees, the amount required by the Plaintiff to reach settlement is also increased.¹²⁹ Wealthy, i.e. PAE, litigants may also be able to use this to their advantage by driving up the cost of litigation in cases they feel they’re likely to win.¹³⁰ This means for seemingly valid patents, or for defendants that still chose to settle, PAEs theoretically would extract higher settlements.¹³¹

The English Rule may also act as more of a deterrent to meritorious lawsuits than provisional fee shifting.¹³² All potential plaintiffs would

121. Allison et al., *supra* note 95.

122. Timothy Lee, *There are Two Patent Troll Problems. The House Bill Only Fixes One of Them*, WASH. POST BLOG (Dec. 4, 2013 1:52 PM), <http://www.washingtonpost.com/blogs/the-switch/wp/2013/12/04/there-are-two-patent-troll-problems-the-house-bill-only-fixes-one-of-them/>.

123. *Id.*

124. Lemley & Melamed, *supra* note 26, at 2126.

125. Chen, *supra* note 64, at 369.

126. Liang & Berliner, *supra* note 69, at 91.

127. Polinsky & Rubinfeld, *supra* note 78, at 527.

128. Liang & Berliner, *supra* note 69, at 91.

129. See Polinsky & Rubinfeld, *supra* note 78, at 528.

130. Liang & Berliner, *supra* note 69, at 92.

131. See Polinsky & Rubinfeld, *supra* note 78, at 527.

132. Chen, *supra* note 64, at 369.

face the risk of fee shifting, increasing the risk associated with bringing suit.¹³³ This is true for startups that tend to be undercapitalized – however startups generally are rarely plaintiffs in patent litigation in any case.¹³⁴ For plaintiffs with “valid, valuable patents” who are genuinely considering litigation, the English Rule does not seem likely to substantially deter litigation.¹³⁵

English Rule fee shifting would also protect startups from large or rival companies bringing frivolous, predatory patent lawsuits.¹³⁶ Large technology companies are increasingly using their patent portfolio against smaller companies they fear may become competitors.¹³⁷ There are examples of both large and small companies using predatory patent litigation as a means to disrupt competition, in effect behaving like patent trolls.¹³⁸ Predatory lawsuits have the same negative effects on both startup companies and innovation regardless if they come from a patent troll or a practicing entity and, thus, should not be treated differently.¹³⁹ In this respect, the English Rule is favorable because it would make no distinction as to the plaintiff in the lawsuit.

Of the two potential regimes, the English rule appears to be more beneficial to startups. The added complexity and cost associated with a provisional fee shifting regime would be more onerous to startups, who are likely far less legally sophisticated than either patent trolls or large, established companies. The result may be that startups are more incentivized to settle, which goes directly against the stated goals of fee shifting. Provisional fee shifting may be preferred by large companies, especially those acting as both plaintiffs and defendants, that may be less concerned with the additional investment of time and money required to recover fees. Although the English rule may increase the settlement cost, it would still act as an incentive to litigate frivolous suits to completion. Therefore, when considering only the interaction between patent trolls and startups, the English rule may be preferable. Further, it has the added benefit of protecting startups from predatory suits regardless of the plaintiff.

VII. PRE-TRIAL DISCOVERY SHIFTING

Discovery is a major issue in patent suits, especially in suits

133. Chien, *Patent Assertion and Startup Innovation*, *supra* note 18.

134. Liang & Berliner, *supra* note 69 at 93.

135. Lee, *supra* note 122.

136. Hovenkamp, *supra* note 28.

137. Charles Duhigg & Steve Lohr, *The Patent, Used as a Sword*, N.Y. TIMES, at A1 (Oct. 8, 2012), available at <http://www.nytimes.com/2012/10/08/technology/patent-wars-among-tech-giants-can-stifle-competition.html>.

138. *Id.*

139. *Id.*

involving patent trolls.¹⁴⁰ However, the general focus regarding patent reform for discovery is to settle key issues, such as claim construction, before discovery begins.¹⁴¹ These proposed reforms, including the Innovation Act and several others, would allow plaintiffs to establish key elements in the case before having to invest a substantial amount of capital in the case during the discovery period.¹⁴² Such reforms are laudable and would conceivably reduce the cost of frivolous lawsuits by reducing the potential for discovery abuse, benefiting all defendants in frivolous patent infringement suits.¹⁴³ Then, if a general fee shifting reform is adopted, those plaintiffs who prevail at trial would be able to recover the costs of discovery and litigation after a judgment has been entered.¹⁴⁴ However, to address startup's lack of available capital, granting courts the ability to shift the cost of discovery during the discovery period would allow more startups to consider litigation against frivolous patent troll lawsuits.¹⁴⁵

The discovery phase of litigation is particularly daunting to startups; in fact “the bulk of [patent suit] expenses are incurred during the discovery phase of litigation, before the party accused of infringement has the opportunity to test the merits of the claims made against it.”¹⁴⁶ Patent trolls, who have no products and few documents, often make excessive discovery demands in order to drive up litigation costs for defendants.¹⁴⁷ On the other hand, defendants may have millions of documents subject to discovery requests.¹⁴⁸ This lopsided discovery burden “is one of the biggest weapons in a patent troll's arsenal.”¹⁴⁹

The Federal Rules of Civil Procedure already provide a limited mechanism for shifting excessive discovery costs before the conclusion of the trial.¹⁵⁰ Rule 26, in conjunction with Rule 37, allows the court to

140. See generally Dennis Crouch, *IP Law Professors Rise-UP Against Patent Assertion Entities*, PATENTLYO (Nov. 25, 2013), <http://patentlyo.com/patent/2013/11/ip-law-professors-rise-up-against-patent-assertion-entities.html>.

141. Lee, *supra* note 122.

142. *Id.*

143. Vitka, *supra* note 94.

144. See generally Chen, *supra* note 64.

145. Chien, *Patent Assertion and Startup Innovation*, *supra* note 18, at 28.

146. Crouch, *supra* note 140.

147. Josephine Benkers, *Fee-Shifting in Patent Cases: Will proposed Legislation actually change anything?*, INSIDECOUNSEL (Jan 29, 2014), <http://www.insidecounsel.com/2014/01/29/fee-shifting-in-patent-cases-will-proposed-legisla>.

148. Vitka, *supra* note 94.

149. *Id.*

150. Emily Madavo et al., *Recent Key Developments in Shifting E-Discovery Costs*, 4 A.B.A. EDDE JOURNAL 2, 2 (2013), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0CGEQFjAF&url=http%3A%2F%2Fwww.americanbar.org%2Fcontent%2Fdam%2Faba%2Fadministrative%2Fscience_technology%2Feddejournal_volume4_issue2_authcheckdam.pdf&ei=cjHpUseNKMqArAHHI4Cg&usq=AFQjCNG18BLiEgLiQuJCYbDY08YFtbWzw&sig2=ZBP8M5K0I

award expenses during discovery “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”¹⁵¹ Rule 26 elaborates on what should be considered an undue burden or expense by providing examples such as “the parties’ resources” and “the importance of the proposed discovery in resolving the issues.”¹⁵² Courts have applied Rule 26 and Rule 37 in other contexts to shift discovery costs from the defendant to the requesting plaintiffs in other legal realms.¹⁵³ For example, in class action suits courts have required the plaintiff to cover additional discovery expenses “at least until the class [is] certified.”¹⁵⁴ Similarly, courts have held that plaintiffs must pay a specific fraction, such as 75%, of the defendant’s costs for certain aspects of discovery.¹⁵⁵

Pre-trial discovery shifting would also inherently be primarily focused on patent trolls, or at least those plaintiffs who are using discovery in a predatory manner. Patent trolls take advantage of a “lopsided discovery burden” because they don’t have a great deal of documents because they don’t make products.¹⁵⁶ A traditional company on the other hand, has millions of discoverable documents even when it is the plaintiff.¹⁵⁷ Although the discovery burden will always tend to be heavier for defendants, this advantage is greatly reduced when both parties are traditional businesses.¹⁵⁸

Many of the proposed reforms do attempt to curb the use of discovery as a weapon during litigation. For example, the Innovation Act defines “core documentary evidence” and requires the requesting party to pay for any documents beyond those defined, a form of pre-trial discovery shifting.¹⁵⁹ However, providing a more concrete and potent mechanism to shift the up-front costs during the discovery period would go for in reducing the amount a startup would need to invest in order to consider litigation.¹⁶⁰

VIII. FEE SHIFTING BETWEEN TROLLS AND LARGE COMPANIES

Fee shifting would undoubtedly change the economics surrounding

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151. *See id.*; FED. R. CIV. P. 26(c)(1).

152. Madavo, *supra* note 150, at 3; FED. R. CIV. P. 26(b)(2)(C)(iii).

153. *See generally* Madavo, *supra* note 150.

154. *Id.* at 7 (*citing* Boeynaems v. LA Fitness Int’l, LLC 2012 WL 3536306 at *21–22 (E.D. Pa. Aug. 16, 2012)).

155. *Id.* at 6 (*citing* Major Tours, Inc. v. Colorel, 2009 WL 3446761 (D.N.J. Oct. 20, 2009)).

156. Benkers, *supra* note 147.

157. Vitka, *supra* note 94.

158. *See id.*

159. Levy, *Patent Progress's Guide to Patent Reform Legislation*, *supra* note 61.

160. Chien, *Patent Assertion and Startup Innovation*, *supra* note 18, at 28.

PAE litigation.¹⁶¹ The major effect of fee shifting reform would be to strengthen the position of larger companies (those with annual revenue greater than \$100 million) in interactions with patent trolls, as these companies have the resources to consider litigation.¹⁶² Fee shifting would give large companies a very strong incentive to litigate rather than settle with patent trolls in cases in which the company thought the claim was frivolous or merely weak.¹⁶³ The threat of fee shifting would have the greatest effect between large companies with “deeper pockets” and bottom feeder trolls hoping for settlement rather than litigation.¹⁶⁴

It can be argued that by strengthening large companies position against trolls, PAE lawsuits would immediately recede and the troll problem would be reduced, if not eradicated. However, another outcome seems more likely. Instead trolls may alter their behavior and instead of targeting large, now well-defended companies, they would seek the weaker prey of smaller companies and startups. Given the legal sophistication and current revenue of trolls, it is very unlikely that they would simply cease to exist because large judgments against them are now possible. Trolls could continue to target startups, specifically before funding events or other periods of weakness, and for all the previously stated reasons, force settlement.

There is another, more insidious way that trolls could attempt to survive under a fee shifting regime – they could begin to play on both sides of litigations. Some trolls have already adopted this tactic, by taking equity in startups in exchange for defending them against other trolls.¹⁶⁵ If successful, fee shifting would allow a “troll slayer” (term for a troll who protects against other trolls) to gain equity in the company regardless of the outcome in litigation, while potentially winning legal fees as well. While the long-term effects of this behavior on PAEs and the patent system are difficult to hypothesize, they would likely damage startups in the short term. Giving up equity in the early stages of the startup would reduce owner control and make future funding more difficult. Further, this behavior may allow patent trolls to continue to be profitable even with the shift in economics provided by fee shifting reform.

161. Chien, *Startups and Patent Trolls*, *supra* note 20, at 22.

162. Chien, *Patent Assertion and Startup Innovation*, *supra* note 18, at 28 (“[E]xpensive, bureaucratic systems always favor those with deep pockets.”).

163. *See* Chen, *supra* note 64.

164. Chien, *Patent Assertion and Startup Innovation*, *supra* note 18, at 28.

165. Marcus Wohlsen, *Patent Trolls Are Killing Startups – Except When They’re Saving Them*, WIREd (Sept. 10, 2013 6:30 AM), <http://www.wired.com/business/2013/09/patent-trolls-versus-startups/>.

CONCLUSION

Post-judgment fee shifting will do little to protect small startups from predatory litigation from patent trolls. First and foremost, most startups are unable to realistically consider fully litigating a patent infringement suit due to the time and money to invest in a trial that is likely to take several years. Secondly, fee shifting may go far in protecting larger companies from low-merit predatory lawsuits from patent trolls, which may in turn lead to those trolls focusing on companies for whom settlement is the only realistic option. However, some sort of fee shifting would at least create some financial risk for patent trolls who hire attorneys on a contingent fee basis. Of the two possibilities, a full English Rule adoption is likely preferable to startups because it adds no additional complexity to the litigation and fee shifting is assured should the startup prevail at trial.

Reformers should consider an aggressive pre-trial discovery fee shifting regime to protect startups in conjunction with other proposed reforms. Drastically lowering the upfront cost of discovery would allow startups to “go all the way” in litigation and limit the extortive effect of patent trolls demands.¹⁶⁶ Given startups’ important role in the economy and their particular vulnerability to patent troll demands, reforms that focus specifically on startups are an important component of any comprehensive patent reform.

Discovery shifting could be directly tied to the bond requirement and an English Rule fee shifting regime. Instead of simply holding the plaintiff’s bond in escrow, the bond could instead be used to fully or partially fund the costs of discovery. If the plaintiff prevails at trial, the defendant would repay the bond with interest, as well as the plaintiffs’ attorneys’ fees. Even a simple mechanism requiring the plaintiff’s bond to pay for half of all discovery costs would greatly curb a plaintiffs’ ability to abuse discovery in order to drive up litigation costs. Further, discovery requests beyond the core documents defined in the Innovation Act could be fully paid for by the bond, which would likely remove any incentive the plaintiff has for making them. Beyond removing the advantages to trolls making excessive requests, this relatively simple reform would allow startups to consider litigation in low merit cases and dramatically increase a startups bargaining power in negotiations with predatory PAEs.

A strong pre-trial discovery shifting regime would drastically alter the balance of power between patent infringement plaintiffs and defendants. However, if discovery fee shifting is used in conjunction with English Rule fee shifting, plaintiffs would recover their own

166. Chien, *Patent Assertion and Startup Innovation*, *supra* note 18, at 28.

attorneys' fees if infringement is found. This additional reward to prevailing plaintiffs would further encourage high merit cases, and help offset the discouraging effect of the bond requirement. Further, discovery shifting could be limited to certain plaintiffs and defendants. For example, discovery fee shifting could only be available to companies with annual revenues under a certain threshold, making it only available to companies that otherwise would be unable to litigate. However, even if applied to all patent cases, the English Rule and discovery fee shifting would simply discourage low merit lawsuits.

Discovery fee shifting is an important consideration because it addresses some of the inequities in patent lawsuits between large sophisticated parties and small, but important, startup companies. Most other proposed reforms, while addressing other major issues in current patent law, lack any mechanism for directly protecting startups. Discovery fee shifting thus represents a way in which Congress, or other reforms, could protect small companies who may otherwise be forgotten in the modern legislative process.

