

*The Rise and Fall of the End User in Patent Litigation
and the Attorney Fee Shifting Debate*

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The patent system focuses on the actions of two players: the patentee and its competitor. It assumes that the competitor will represent the interests of the end user. But increasingly, end users are becoming significant players in the patent system, their interests sometimes diverging from those of competitors. Attention has recently turned to Patent Assertion Entities ("PAE") - also known as patent trolls - who are suing vast numbers of customers using patented technologies in their everyday businesses. End users were also principal players in the main patent cases before the Supreme Court in 2013. In *Bowman v. Monsanto*, Monsanto sued farmers for re-using its patented self-replicating seeds. In *Association for Molecular Pathology v. Myriad Genetics*, patients and physicians sued to invalidate breast cancer gene patents. And, patients and drug stores repeatedly challenge pay-for-delay agreements between patentees and competitors, claiming they undermine patients' interests in access to generic drugs. The drafters of the America Invents Act (the "AIA") intended the legislation to catch up with the changing patent landscape. Yet, this Article reveals that the AIA did not predict and is largely ill-equipped to address the growing role of end users. The AIA addresses needs of small entities, mainly, by adding procedures to challenge patents in the United States Patent and Trademark Office ("PTO"), providing a cheaper and faster forum for challenging validity. However, end users are different from small technological competitors. End users lack technological sophistication, they are often one-time players and tend to become involved in the patent dispute relatively late in the life of the patent. The AIA's novel PTO procedures are largely unsuitable for end users because they permit expansive challenges mostly early in the life of the patent before end users are likely to be implicated. Paradoxically, as end users play an increasingly larger role in patent law disputes, they have few legal tools to assert their interests. This Article argues for the need to equip end users with tools to defend their interests in this new litigation landscape. Specifically, since end users, who lack internal resources of technological sophistication, are especially ill suited to fund the expense of patent litigation, fee shifting is particularly warranted when the prevailing party is an end user. This year, the Supreme Court decided two fee shifting cases: *Highmark v. Allcare* and *Octane Health v. Octane Fitness*, in which it lowered the standard courts need apply to award fee shifting in patent cases. And, at the same time, a flurry of Congressional bills proposes different versions of fee shifting. Yet, while these bills and cases address the general fee shifting standard and the issue of PAE lawsuits, they do not consider the unique status of the end user. This Article argues for the need to consider the special status of end users in any fee shifting reform.

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