

## *Predatory Patent Litigation*

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Despite their expertise in patent law, the most litigious patent assertion entities (PAEs) frequently file dubious infringement claims on which they are ostensibly very unlikely to turn a profit. Thus one might conjecture that these PAEs are mistaken to follow through on their litigation threats when their chances of coming out ahead are so scant. To the contrary, this paper demonstrates that this is in fact a calculated strategy of predatory patent litigation: by following through on its threats of seemingly irrational litigation, the PAE convinces other producers that these threats are credible, leading them to accept licensing offers they would ordinarily rebuff. This allows the PAE to garner substantial licensing revenues using low quality patents that would otherwise be difficult or impossible to monetize. Like predatory pricing, this strategy involves a short run loss that is recouped over time through supra-competitive pricing. This paper develops a stylized dynamic model of patent assertion and reputation building by a PAE with low quality patents. The model has a unique equilibrium that involves predatory patent litigation, and in which the PAE intermittently forfeits and rebuilds its litigious reputation over time. Predatory patent litigation generates substantial social costs, and creates a perverse incentive for patent applicants to seek coverage of technologies so obvious or non-novel that they are likely to be widely unintentionally infringed by unsuspecting producers. Importantly, fee shifting will not solve the problem. Rather, it will lead predatory PAEs to focus their ire on small, vulnerable targets, such as technology startups, for whom litigation may be crippling even if attorney's fees are ultimately recouped. Potential defendants could better deter predatory PAEs by entering a litigation cost-sharing agreement in which members jointly pay one another's litigation costs and litigate all meritless claims to judgment. If properly limited in scope, such an arrangement will not materially undermine meritorious infringement actions.

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