PUSHING PATENT BOUNDARIES: AN EMPIRICAL ASSESSMENT OF HOW PATENT TROLLS AND OTHER LITIGANTS USE PATENT CLAIMS

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One widespread belief that both underlies negative opinions about non-practicing entities ("NPEs", known colloquially as patent trolls) and shapes proposals for patent reform is the understanding that NPEs litigate aggressively, indiscriminately, and perhaps improperly, across a patent's breadth – pushing the boundaries of their patents and suing every likely defendant falling even arguably within the scope of the patent. This Article presents novel empirical evidence that calls this belief into question. Specifically, this Article exploits a feature of patent procedure that requires plaintiffs to state whether they are asserting a narrow segment of their patent (dependent claims) or the broadest portions of their patent (independent claims) in litigation.

Unexpectedly, NPEs are *less* likely to litigate at the boundaries of their patents than practicing entities. This is counterintuitive with respect to conventional narratives of NPE behavior and our understanding of NPE business practices, both of which drive policy changes aimed at curbing NPEs. This Article suggests that NPEs are litigating predominantly in the core of their patents because they acquire patents *after* the infringing activity has begun, meaning that they can select a patent that squarely encloses their target. NPEs can litigate using the dependent claims of a patent because they are able to select patents *ex post* to fit their needs, whereas small players with only one patent must predict patent requirements *ex ante*. This Article concludes with cautions that proposals to reduce the harms caused by NPEs may have little effect on the litigation practices of NPEs and may instead disproportionately affect practicing entities and small innovators.

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