Notes

A Bridge over the Patent Trolls: Using Antitrust Laws to Rein in Patent Aggregators

Eric Young*

Patents, by their very nature, are a type of monopoly, and are so important to our country's intellectual and technological advancement that the Founding Fathers granted Congress the power "to promote the progress of science and useful arts, by securing for limited times to . . . inventors the exclusive right to their respective . . . discoveries."[1] *But in recent decades, that imperative has lost its footing. Mass patent aggregators, companies that compile, hoard, and assert patent rights without contributing products to the world have contorted that vision. "Patent Trolls" assemble portfolios of weak patents to corner and dominate technological spaces, crowding out innovators and demanding extortionate licensing fees from unsuspecting targets. Federal antitrust laws forbid improper accumulation and assertion of monopoly power, which is precisely how trolls' business model operates. And yet, courts traditionally have not found a patent portfolio to constitute a "relevant market" under the Sherman Act. This Note explains why they should, and in doing so examines two cases between identical litigants, the latter of which may provide a roadmap for pursuing antitrust counterclaims against serial patent assertion entities.*

---

* J.D. Candidate, University of California Hastings College of the Law, 2017. This Note is dedicated to my loving wife Jackie for being an unbending source of reassurance and guidance, and to my daughter Brier for all of her "help" throughout law school. I could not have done it without them. I would also like to thank Professors Robin Feldman and Samuel Miller for their sage advice as well as our family for their love and support.

1. U.S. Const. art. I, § 8, cl. 8.

Table of Contents

Introduction

Article I of the U.S. Constitution grants Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[2] In including patent rights in the Constitution,[3] the Founders envisioned a system that encouraged thinkers and tinkerers to strive for the new and novel, and to seek advances for our society as a whole.[4] That vision led to the passage of the Patent Act in 1790,[5] just a year after the Founders ratified the Constitution and organized a new government. The Patent Act granted a patentee the "sole and exclusive right and liberty of making, constructing using, and vending to others to be used" of his or her invention.[6] But somewhere along the way, and perhaps most conspicuously since 1972 with the explosion of software patents,[7] that vision has been obscured. For better or worse, depending on one's perspective, the patent litigation landscape is changing due to Non-Practicing Entities ("NPEs"), or what are known more pejoratively in Silicon Valley as the dreaded "Patent Trolls."[8]

This Note discusses the harms NPEs pose to the philosophical basis the patent system stands on, and how antitrust laws may represent a tool

---

2. *Id.*
3. *Id.*
4. *See* Mazer v. Stein, 347 U.S. 201, 219 (1954), *reh'g denied*, 347 U.S. 949 (1954).
5. *See* Patent Act of 1790, ch. 7, 2 Stat. 110 (1790) (defining its purview as "any useful art, manufacture, engine, machine, or device, or any improvement therein not before known or used").
6. *Id.*
7. *See* Gottschalk v. Benson, 409 U.S. 63, 72 (1972).
8. *See This American Life*: *When Patents Attack!*, National Public Radio (July 22, 2011), http://www.thisamericanlife.org/radio-archives/episode/441/when-patents-attack.

to defend against sham patent litigation. This Note argues that the emergence of the patent aggregators' effective monopoly power makes them vulnerable to the antitrust laws in the United States. In doing so, this Note explores two divergent opinions from district courts in the Fourth Circuit—one dismissing antitrust counterclaims, and the other allowing amendment to include nearly identical counterclaims—in cases involving identical parties.[9] The NPE model as it exists today is tantamount to the hijacking of certain industry-standard markets, and tightly couching those markets will be key to convincing courts that the Sherman, Clayton, and Cartwright Acts proscribe such conduct. The technicalities of Federal Rule of Civil Procedure 12(b) and section 2 of the Sherman Act have allowed courts to do away with defensive antitrust claims for years, but early adjudication without discovery of an NPE's practices or the merits of a Sherman section 2 claim allows NPEs to abuse the patent system and shirk their responsibilities under the antitrust laws.

Encouragingly, recent federal court decisions point to an evolution of the doctrine and a reassessment of the lay of law. Litigants should follow these recent examples and submit pleadings with firm definitions as to relevant markets and specific information on how an NPE's patent aggregation methods have adversely affected those defined markets, which constitute only the technologies controlled by the patents-in-suit. In turn, courts should take the baton and more readily permit antitrust counterclaims past the 12(b)(6) stage—or at least not punt them simply because relevant markets in the patent space are nebulous by definition—allowing a more academic and meritorious discussion in later stages of litigation.

I. The Problem

NPEs account for a staggering sixty-two percent of all recently filed patent litigation in federal courts.[10] Typically, these entities own a patent or patents, but do not produce a product that incorporates that patented technology or idea.[11] Rather, these entities are set up with the *enforcement* of patents as a business model. "The business model of

---

9. *Compare* Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 1:13-cv-00740, 2013 WL 6682981 (E.D. Va. Dec. 18, 2013) (dismissing antitrust claims), *with* Intellectual Ventures I LLC v. Capital One Fin. Corp., 127 F. Supp. 3d 506 (D. Md. 2015) (granting motion to amend to add antitrust claims).

10. *See* Mark S. Popofsky & Michael D. Laufert, *Antitrust Attacks on Patent Assertion Entities*, 79 Antitrust L.J. 445, 445 (2014) (citing Comments of Google, BlackBerry, Earthlink & Redhat to the Federal Trade Commission and U.S. Department of Justice on Patent Assertion Entities 1 (Apr. 5, 2013), www.justice.gov/atr/public/workshops/pae/comments/paew-0049.pdf); *see also* 2015 Patent Dispute Report (Dec. 31, 2015), http://unifiedpatents.com/news/2016/5/30/2015-patent-dispute-report (reporting that NPEs accounted for about two-thirds of all patent lawsuits, and two-thirds of patent lawsuits are filed in the technology sector).

11. *See* Popofsky & Laufert, *supra* note 10, at 445 n.2.

[NPEs] focuses on purchasing and asserting patents against manufacturers already using the technology, rather than developing and transferring technology."[12] The loudest complaint, perhaps, concerns these entities' proclivity for locking in to particular technologies by buying up patents in a certain field (including those involving industry standards), and "imposing enormous innovation-sapping costs without producing corresponding social benefits."[13] NPEs typically target companies in a certain technological space, or even businesses that might use something as basic as a wireless router to provide Wi-Fi to customers.[14] They allege infringement of their patent(s), threatening massively expensive and protracted litigation, and extorting exorbitant licensing fees as a less expensive alternative. The U.S. Patent and Trademark Office ("USPTO") has been inundated with weak patents containing broad claims over various swathes of technology, and many are granted due to a simple lack of technical understanding and available resources to conduct adequate review. Thus, an entity with enough patents in one area can essentially monopolize a technology space, and the more patents and resources it acquires, the more intimidating its demand letters become.

Enter the patent mass-aggregator. This relatively new form of patent monetization entity amasses patents at an alarming rate, pooling the rights in various markets that control certain technological sectors. The largest and most shrouded of these entities is Intellectual Ventures ("IV").[15] Aggregators, IV famously included among them, often create subsidiaries to manage their acquired intellectual property portfolios, or transfer their rights to third parties who purchase patents to assert on behalf of the parent company.[16] Research shows that IV, as an indicative case study, has accumulated somewhere in the neighborhood of 30,000 to 60,000 patents worldwide within the last ten years, giving it one of the largest patent portfolios in the world.[17] It is unclear exactly how many

12. *Id.*

13. *Id.* at 446; *see also* FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 8 (2011), www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf.

14. *See In re* Innovatio IP Ventures, LLC Patent Litig., 921 F. Supp. 2d 903, 906–08 (N.D. Ill. 2013).

15. There are many mass-aggregators in the market, including Acacia Research Corporation, Transpacific IP, Ltd., RPX, and Round Rock Research. *See* Tom Ewing & Robin Feldman, *The Giants Among Us*, 2012 STAN. TECH. L. REV. 1, 15–18. Another model involves a company "reverse engineering" the monetization process by funding a company like "Rockstar Consortium," who studies manufacturer's products looking for ways to claim infringement. *See* Robin Feldman, *Intellectual Property Wrongs*, STAN. J.L. BUS. & FIN. 250, 267 (2013) (citing Robert McMillan, *How Apple and Microsoft Armed 4,000 Patent Warheads*, WIRED (May 21, 2012), http://www.wired.com/2012/05/rockstar/).

16. *See* Feldman, *supra* note 15, at 20.

17. *See* Ewing & Feldman, *supra* note 15, at 1.

shell and holding companies IV has; many are empty offices that exist only in vacant office space and in government corporate records.[18]

Aggregators like IV argue that their methods in fact *foster* innovation by facilitating an inventor's monetization of a patent that the inventor may not have adequate capital to affect himself.[19] Even if, assuming *arguendo*, the force of massive portfolios behind extortionate litigation does improve a patent's chances of success in a lawsuit of attrition, this Note suggests that this mechanism for enforcing patents is fundamentally out of line with the *overarching and original purpose* of the Patent Act—innovation for the betterment of society. The Federal Trade Commission ("FTC") has stated that, while the benefits of NPEs are uncertain, they can "distort competition in technology markets, raise prices and decrease incentives to innovate."[20] So what tools do the government or citizens themselves have at their disposal to combat these tactics?

II. The Lay of the Land and the Laws That Govern

Federal antitrust laws (which state laws often emulate[21]) are codified in the Sherman and Cartwright Acts. Section 2 of the Sherman Act makes it an offense to monopolize, attempt to monopolize, or combine or conspire to monopolize any part of the nation's interstate foreign commerce.[22] The Department of Justice ("DOJ") additionally enforces section 2 through civil actions in the federal district courts.[23] Likewise, private parties have extensive civil enforcement powers by way of treble damages actions[24] and injunctive suits.[25] Section 2 extends antitrust claims beyond concerted "conspiracy" misconduct covered by section 1, further proscribing unilateral conduct.[26] "It has, thus, played a pivotal role in antitrust actions where concerted action between multiple parties was either not present or difficult to prove . . . ."[27] Cases brought under section 2 have generally fallen into four broad categories, though only three are relevant: (1) "Actual monopolization, in which a firm acquires or retains actual monopoly power through competitively unreasonable practices;" (2) "[a]ttempted monopolization, in which a firm not yet in possession of actual monopoly power engages in competitively

18. *See This American Life*, *supra* note 8.
19. *See* Ewing & Feldman, *supra* note 15, at 20.
20. Fed. Trade Comm'n, *supra* note 13, at 71.
21. *See, e.g.*, Cal. Bus. & Prof. Code §§ 16720–16728 (West 2016).
22. *See* 15 U.S.C. § 2 (2016).
23. *See id.* § 4.
24. *See id.* § 15.
25. *Id.* § 26.
26. *Id.* § 2.
27. William Holmes & Melissa Mangiaracina, Antitrust Law Handbook § 3:2, Westlaw (database updated Nov. 2015).

unreasonable practices that create a dangerous probability of monopoly power being achieved;" and (3) "[i]ncipient conspiracies to monopolize, in which parties not yet in possession of monopoly power conspire to seize monopoly control of a market, but where monopoly power has not yet actually been reached."[28]

Put bluntly, patent acquisitions are subject to antitrust laws.[29] Patents are no different from other assets, and thus, the use of antitrust laws to rein in the monopolization of technologies that inflate consumer prices is not a novel idea.[30] The misuse of patent pools, cross-licenses, and vast networks of shell and holding companies for the assertion of patent rights has been at the "forefront of antitrust law for over a hundred years."[31] For example, in the 1912 case *Standard Sanitary Manufacturing Co. v. United States*, the Supreme Court "condemned the pooling of patents by competitors for the purpose of restraining competition," holding that the "added element of the patent in the case at bar cannot confer immunity" from the antitrust laws, which act as a "limitation of [patent] rights,—rights which may be pushed to evil consequences, and [must] therefore [be] restrained."[32] *Standard Sanitary Manufacturing Co.* remains good law.[33] In *United States v. New Wrinkle, Inc.*, the Supreme Court opined that "two or more patentees in the same patent filed may (not) legally combine their valid patent monopolies to secure mutual benefits for themselves through contractual agreements, between themselves and other licensees, for control of the sale price of the patented devices."[34] By law, a single patent owner is allowed to exert market power for the patent only to promote inventions.[35] However, as the Supreme Court has made patently clear, that narrow monopoly exception does *not* apply to agreements between two or more parties.[36] Thus, when patent aggregators like IV enter into license or sale agreements for the use and rights in a patent, it moves "outside of the patent monopoly exception and into the zone of antitrust law."[37] The concept of acquiring and pooling patents to corner market power is hardly

28. *Id.*

29. *See* SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1205 (2d Cir. 1981) ("Patent acquisitions are not immune from the antitrust laws.").

30. *See* J. Robert Robertson & Logan M. Breed, *United States v. Widget Co., Newco, and Patent Aggregator Plus LLC: A Hypothetical Closing Argument*, 79 ANTITRUST L.J. 527, 529 (2014).

31. *Id.*

32. *See id.* (citing Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912)).

33. *See* FTC v. Actavis, Inc., 133 S. Ct. 2223, 2232–33 (2013), *rev'g* FTC v. Watson Pharm., Inc., 677 F.3d 1298 (2012) (citing *Watson Pharm., Inc.*, 677 F.3d at 1312; United States v. Line Materials Co., 333 U.S. 287, 308 (1948); United States v. Singer Mfg. Co., 374 U.S. 174, 190–97 (1963)).

34. United States v. New Wrinkle, Inc., 342 U.S. 371, 379 (1952) (quoting *Line Materials Co.*, 333 U.S. at 305).

35. *See* Robertson & Breed, *supra* note 30, at 530 (citing *Actavis, Inc.*, 133 S. Ct. at 2232).

36. *See id.*

37. *Id.*

a new mechanism, and has been illegal for decades.[38] The accumulation of large patent portfolios by companies like IV enables those entities to "obtain[] royalties in excess of the market value" of whatever technology niche they have targeted, "which is the hallmark of market power."[39]

Section 7 of the Clayton Act is designed to "stop anticompetitive harm in its 'incipiency'—meaning in its earliest beginnings—when the 'effect' of an 'acquisition may be substantially to lessen competition, or tend to create a monopoly.'"[40] NPEs' acquisition of hundreds or thousands of patents and the technology boom of the past thirty years have spawned an explosion of potential—and therefore cornerable—technology markets. Society increasingly relies on many of these technologies every day, and the appurtenant advances continue to push innovation to new heights.

The case of *United States v. Baker Hughes Inc.* explains each party's burdens when an NPE asserts its portfolio against an allegedly infringing company.[41]

> Once [a plaintiff can] show that an acquisition—[or] in this case, hundreds of acquisitions—creates "undue concentration," we have established a "presumption that the transaction will substantially lessen competition." The burden then shifts to the defendants to rebut the presumption by "show[ing] that the market share statistics give an inaccurate account of the [merger's] probable effects on competition" in the relevant market.[42]

Additionally, section 7 "does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger," or collection of patents, in IV's case, "create an appreciable danger of such consequences in the future."[43]

Aggregators often raise some of the same defenses when accused of abusing their portfolios for improper market share or diminishing innovation. IV often claims that its revenues are passed on to inventors to encourage more innovation.[44] IV also argues that "patent enforcement by [NPEs] creates significant efficiencies that offset any potential anticompetitive effect."[45] However, the original inventor/owner/practitioner

---

38. *Id.* (citing *New Wrinkle*, 342 U.S. at 379).

39. *Id.* (quoting Fiona Scott-Morton, Deputy Assistant Attorney Gen. Econ. Analysis, Antitrust Div., U.S. Dep't of Justice, Presentation at the Fifth Annual Searle Conference on Antitrust Economics and Competition Policy: Patent Portfolio Acquisitions—An Economic Analysis (Sept. 21, 2012), www.justice.gov/atr/public/speeches/288072.pdf.

40. *Id.* at 531 (citing 15 U.S.C. § 18; United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 589 (1957)).

41. *See* United States v. Baker Hughes Inc., 908 F.2d 981, 982 (D.C. Cir. 1990).

42. Robertson & Breed, *supra* note 30, at 531 (citing *Baker Hughes Inc.*, 908 F.2d at 982; United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 120 (1975)).

43. *Id.* at 531–32 (quoting Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir. 1986)); *see also* FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26, 35 (D.D.C. 2009) (holding that the government must show that harm is "sufficiently probable," not that it "*will*" happen) (internal citations omitted).

44. *See, e.g.*, *This American Life*, *supra* note 8.

45. Robertson & Breed, *supra* note 30, at 532.

of a patent is fully capable of enforcing or licensing a patent without the assistance of a middle-man; the presence of such an intervener would only *add* dollars to the transaction(s) in the form of higher costs for competitors or the build-in of legal expenses to the cost of a product on the market—that is, passing the licensing or litigation costs right on to the consumer.[46]

> Large portfolios can shield weak patents and raise total royalties through a mechanism that can be described as achieving "strength in numbers" or "safety in numbers." In certain circumstances, the more patents a[n NPE] brings under common ownership (relative to circumstances where each patent is individually owned), the greater both the [NPE's] incentive to assert each patent and an enforcement target's willingness to pay to terminate the litigation.[47]

The value of this technique to the aggregator is obvious: Bringing patents under common ownership can "enhance litigation leverage and thereby increase—in some cases radically—incentives to assert even very weak patents."[48] In essence, where an individual patent owner considers asserting her monopoly rights, her cost/benefit analysis only contemplates her *own* prospect of victory, which is balanced against the expenditure of cost and time. By its nature, a patent has ill-defined boundaries (especially in the context of software patents), and lacks quick and inexpensive methods for resolving that uncertainty, significantly amplifying costs of assertion.[49] An aggregator, however, asserts many patents against a single usage or by casting a wide net to extract licensing deals from "competitors," and may therefore consider the "prospect of achieving *any* victory."[50] Pooling ten patents in this way can increase the prospect of victory from ten percent to sixty-five percent, whereas pooling five hundred patents, even if each has only a one percent chance of prevailing on its own, can increase the likelihood of victory from one percent to ninety-nine percent.[51] Aggregation is a demonstrably powerful tool that drastically alters the analysis as to whether to bring a suit, and what companies (or in most cases, how many companies) to assert the patents against. Under such circumstances, a rational company may opt to settle rather than face those odds and expense of litigation.[52]

Some scholars argue that the definitions of "relevant markets" in the technology/antitrust space makes the anticompetitive provisions in

---

46. *See id.*
47. Popofsky & Laufert, *supra* note 10, at 448.
48. *Id.*
49. *See* Feldman, *supra* note 15, at 13.
50. Popofsky & Laufert, *supra* note 10, at 448.
51. *Id.* "0.9 to the 10th power is 0.348, which is the prospect that the [NPE] will lose on all its patents." *Id.* at 448 n.16. "0.99 to the 500th power is 0.0065, which is the prospect that *each* of the 500 patent suits fail." *Id.* at 449 n.17.
52. *See* Feldman, *supra* note 15, at 16.

the Sherman and Clayton Acts dull or inefficient tools for reining in patent mass-aggregators and extortionate lawsuits.[53] But that is not necessarily so. Such doubters claim that while the Acts and state antitrust laws "can prohibit discreet acquisitions that threaten to create or anticompetitively facilitate the exercise of market power," those laws "do not impose a general prohibition on the alienability of property."[54] The argument suggests that while antitrust laws can "condemn the assertion of intellectual property rights,"[55] the *Noerr-Pennington* doctrine[56] places certain enforcement activities outside the Sherman Act's purview.[57] This theory rests on two premises. First, companies seeking to assert Sherman and Clayton Act affirmative defenses when faced with an assertion lawsuit deal with the reality that patents enjoy a presumption of validity.[58] Second, "bringing . . . patents under common ownership *can* produce efficiencies."[59] However, the major hurdle, the argument

53. *See, e.g.*, Popofsky & Laufert, *supra* note 10, at 446–47 ("[T]he antitrust laws, we further posit, likely do not ban one particular PAE model that has garnered significant attention—mass aggregators.").

54. *Id.* at 447.

55. *Id.* (citing Walker Process Equip. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965) (finding a potential Sherman Act violation in the enforcement of a patent that was obtained through intentionally defrauding the USPTO); Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 996 (9th Cir. 1979) (disapproving of what was deemed to be a bad faith and objectively baseless patent assertion made by a monopolist)).

56. The *Noerr-Pennington* Doctrine instructs that, in general, one attempting to influence the exercise of government power, even for the purpose of gaining an anticompetitive advantage, does not create liability under the antitrust laws. *See generally* E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (holding that a publicity campaign "directed toward obtaining governmental action adverse to the interests of trucking companies was not illegal"). In *In re Innovatio IP Ventures, LLC Patent Litig.*, 921 F. Supp. 2d 903 (N.D. Ill. 2013), alleged patent infringing defendants brought counterclaims under the RICO, California unfair competition, and civil conspiracy laws based on plaintiff's patent assertion methods. However, while the district court's decision discusses antitrust claims, it does so to explore the application of *Noerr-Pennington* outside the antitrust context. So it may inform litigants on the use of RICO and other claims to combat questionable patent claims, but it is not relevant to this Note's focus. In another interesting case, a patent owner brought antitrust claims against a licensee for engaging in improper "hub-and-spoke" use of a purported "defensive patent aggregator" or "anti-troll" affiliate to lower the cost of acquiring the patentee's portfolio. Cascades Comput. Innovation LLC v. RPX Corp., No. 12-CV-1143 YGR, 2013 WL 6247594, at *1–2 (N.D. Cal. Dec. 3, 2013). There, the district court allowed plaintiff's amended complaint to get past a pair of concurrent motions to dismiss, finding that while the court was wary of the patents' validity, plaintiffs had successfully raised an inference of a conspiracy to "force sub-competitive pricing for Cascades' patent licenses by monopolizing the market therefor." *Id.* at *1. The antitrust claims focused on section 1 of the Sherman Act for conspiracy, and as an argument over licensing discussions, it is not as instructive to our instant discussion as some other cases.

57. *See, e.g.*, Q-Pharma, Inc. v. Andrew Jergens Co., 360 F.3d 1295, 1304–05 (Fed. Cir. 2004) ("A patent owner who brings a suit for infringement, without more, is generally exempt from the antitrust laws for that action . . . .").

58. *See* 35 U.S.C. § 282 (2016).

59. *See* Popofsky & Laufert, *supra* note 10, at 450 n.25 ("The Cournot-complements effect arises when multiple input owners each charge more than marginal cost for their input, thereby raising the price of the downstream product and reducing sales of that product. Effectively, each input supplier imposes a negative externality on other suppliers when it raises its price, because this reduces the

suggests, is the "relevant market" requirement.[60] A "viable antitrust theory—whether under Section 1 or 2 . . . of the Sherman Act, or section 7 of the Clayton Act—likely would need to identify a particular relevant market adversely affected by the [NPE's] amassing of patents."[61] Aggregators' shielding of weak patents through combined assertion methods does not require an increase in concentration in any particular market, making it difficult to concretely identify a detrimentally affected relevant market.[62] And therein lays the problem. In one of the two cases examined below, the Eastern District of Virginia agreed that IV's patent portfolio could not constitute a relevant market for antitrust purposes.[63]

There are counterarguments, of course, and a competing implication from within the Fourth Circuit.[64] This Note suggests that a defendant can meet the market definition element through specific and exhaustive pleading, and that future counterclaimants should focus their efforts on elucidating the facts surrounding a plaintiff's entry into the market and how the collection of patents essentially creates a market for these technology spaces. This would allow courts to at least curtail the deluge of patent infringement suits by mass-aggregators, or otherwise weed out frivolous and extortionate suits by putting the aggregators on notice that antitrust defenses are available to, and a viable protective weapon for, defendants.

"Market definition is merely a tool that courts use to analyze whether a proposed acquisition is likely to harm competition in the future."[65] But, in many cases, there is no need for hypothetical analysis because there is primary evidence of actual anticompetitive effects.[66] In such a case, the analysis should be whether the acquisitions of thousands of patents in a given market or technological space significantly increased the aggregator's ability to get a higher price than what previous owners would have received when they held the patent rights individually.[67]

---

number of units of the downstream product that are sold." (quoting Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 Tex. L. Rev. 1991, 2013–14 (2007) (emphasis added))).

60. *See* J. Douglas Richards, *Is Market Definition Necessary in Sherman Act Cases When Anticompetitive Effects Can Be Shown with Direct Evidence?*, 26 Antitrust 53, 53 (2012) (stating that the "proper definition of the market is a 'necessary predicate' to determining whether the effect of a merger may substantially be to lessen competition, or to tend to create a monopoly, 'in any line of commerce,' in the context of a suit seeking to enjoin a proposed merger." (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 335 (1962))).

61. Popofsky & Laufert, *supra* note 10, at 450–51.

62. *See id.* at 451.

63. *See* Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 1:13-cv-00740, 2013 WL 6682981, at *10 (E.D. Va. Dec. 18, 2013) (granting motion to strike antitrust counterclaims).

64. *See* Intellectual Ventures I LLC v. Capital One Fin. Corp., 99 F. Supp. 3d 610, 610 (D. Md. 2015) (granting motion to amend to add antitrust claims).

65. Robertson & Breed, *supra* note 30, at 533.

66. *Id.*

67. *See id.*

Further, evidence of such an increase would not be hard to come by in cases where the intent or practice is anticompetitive, or where adhesive licensing deals include weak or tenuously related patents that are built into the lump sum the aggregator demands. For example, if none of the manufacturers in a given case has ever paid for a license for any of the patents they are accused of infringing, and if those patents had previously been available at fair, reasonable, and nondiscriminatory ("FRAND") rates,[68] it takes elementary arithmetic to ascertain whether or not the market for that technology or patent has been adversely affected.[69] Defining the scope of the relevant market therefore fades from relevancy, and the courts can place the import where it belongs: on how that artificially inflated cost has become incorporated into the price the manufacturer charges American consumers.

The word "may" in section 7 of the Clayton Act[70] creates a very low standard for finding anticompetitive conduct in a multiparty transaction,[71] and "[a]chieving market power to raise prices as a result of an acquisition more than satisfies [the] incipiency test. Market power exists if the defendant 'can raise price without a total loss of sales.'"[72] Therefore, if an acquisition "or a series of IP acquisitions may create market power, then Section 7 has been violated."[73] Further, the Supreme Court has held that any agreement between two or more persons to unreasonably restrain trade is a violation of section 1 of the Sherman Act, even if the agreement involves patent licenses.[74]

With these arguments in mind, we turn to two real-world applications, conveniently arising from the same circuit. If the concern is whether antitrust claims might limit the carnage NPEs' suits wreak in innovative communities or on consumer prices for software and electronics, the underlying question is whether such claims fit the pleading standards our legal system has set in place. The divergence in the Fourth Circuit illuminates the state of the argument, and this Note suggests that the pleading stage is not the correct place for adjudication.

68. *See generally* Anne Layne-Farrar et al., *Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments*, 74 Antitrust L.J. 671 (2007) (discussing the ways courts evaluate behavior and whether that behavior complies with FRAND commitments).

69. *See, e.g.*, Robertson & Breed, *supra* note 30, at 533–34.

70. 15 U.S.C. § 18 ("[T]he effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.").

71. Robertson & Breed, *supra* note 30, at 534.

72. *Id.* (quoting 2B Phillip E. Areeda et al., Antitrust Law ¶ 501, at 109 (3d ed. 2009)).

73. *Id.* (citing *In re* Montedison S.p.A., 119 F.T.C. 676 (1995)).

74. *See* FTC v. Actavis, Inc., 133 S. Ct. 2223, 2232–33 (2013).

III. The *IV v. Capital One* Tug-of-War

To sufficiently plead a claim for monopolization under section 2 of the Sherman Act, a party must allege facts that could plausibly lead to a determination that: (1) the other party has a monopoly in a relevant market; and (2) they engaged in anticompetitive conduct to acquire or maintain that monopoly.[75] A cause of action also exists under section 2 for attempted monopolization, for which "a claimant must plead: (1) the use of anticompetitive conduct, (2) with specific intent to monopolize, and (3) a dangerous probability of success."[76]

A. Battleground I: Eastern District of Virginia

Capital One Financial Corporation ("Capital One") is a bank holding company specializing in credit cards, loans, and banking products,[77] and IV has a portfolio of back-end technologies used across the banking industry in its holdings. IV filed its first of two lawsuits against Capital One and a handful of related companies, accusing the defendants of infringing five patents, three of which were quickly removed from the case.[78] In its complaint, IV broadly alleged that:

> Capital One provides online banking services and other systems and services via electronic means including, but not limited to, the website https://bankofcapitalone.com. In connection with these online banking services and other systems and services, Capital One infringes one or more claims of [the patents-in-suit].[79]

The patents relate to online banking and electronic banking systems and methods. IV alleged that various products and services, including envelope-free ATMs, online banking account alerts, bill pay, and others, were infringing upon those patents.[80] IV has brought similar claims against several other banks across the country.[81] Capital One filed an answer and amended answer, appending counterclaims for monopolization[82] as well as attempted monopolization under section 2 of the Sherman Act,[83] unlawful asset acquisition in violation of section 7 of the Clayton Act,[84] and a defense for patent misuse that included claims of impermissible collection

75. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).
76. E. I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 453 (4th Cir. 2011).
77. Captial One, https://www.capitalone.com (last visited Nov. 4, 2016).
78. *See* David McAfee, *Capital One Escapes Patent Co.'s Online Banking Patent Suit*, Law360 (Ap. 16, 2014, 8:17 PM), http://www.law360.com/articles/529010.
79. Complaint at 6, Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 1:13-cv-00740 (E.D. Va. June 19, 2013), 2013 WL 3246734.
80. *Id.* at 6–14.
81. *See* McAfee, *supra* note 78, at 1.
82. Answer to Complaint at 26–34, Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 1:13-cv-00740 (E.D. Va. Oct. 14, 2013), 2013 WL 6046922.
83. *Id.* at 34–35.
84. *Id.* at 36–37.

of royalties and unlawful monopolization.[85] In its most robust claim, alleging Sherman Act section 2 monopolization, Capital One let loose a litany of accusations regarding IV's pattern of "secrecy, misdirection, and obfuscation," its use of shell companies, and its status as a non-practitioner of its patent portfolios.[86] It went on to cite Department of Justice hearings and presidential opinions on the company and its ilk, concluding that:

> [B]y accumulating patents that serve as a crutch for its anticompetitive scheme, not building any goods or services that might make it vulnerable to claims of patent infringement, hiding its patent accumulation using thousands of shell companies, and not telling its targets what patents are in its portfolio, Intellectual Ventures acquires monopoly power where there was previously none. Intellectual Ventures creates an inescapable threat by aggregating so many weak patents that it can attack successful products and redesigned alternatives. Intellectual Ventures thus eliminates competition and cuts off escape avenues for the innovators it attacks. [It] further bolsters its monopoly power by asserting sham patent-infringement suits, entirely without regard to their substantive merits, for the subjective, improper purpose of using the legal process itself as a weapon to pummel its targets into submission.[87]

Capital One went on to allege that IV had "engaged in exclusionary and anticompetitive conduct to obtain and maintain its monopoly power in the relevant market"—that is, the ex post market for common banking industry business processes—by acquiring huge numbers of patents ostensibly related to banking services, aggregating those patents, forcing licensing agreements on banks, and initiating sham infringement suits.[88]

IV promptly filed a motion to dismiss Capital One's antitrust counterclaims for failure to state a cognizable claim.[89] IV's argument against the monopolization claims can be broken down into three parts: (1) Capital One's Sherman Act monopolization claim failed because it could not allege a plausible relevant market;[90] (2) Capital One could not plausibly allege the required market share necessary for such a claim;[91] and (3) the conduct Capital One alleged—acquisition of large patent portfolios, using the portfolios to force licensing, and sham litigation—were not unlawful *monopolization* acts.[92] IV also attacked the

85. *Id.* at 12–17.
86. *See id.* at 27.
87. *Id.* at 29.
88. *Id.* at 30–32.
89. *See generally* Plaintiff/Counterclaimants' Opening Brief in Support of Motion to Strike or Dismiss Amended Antitrust Counterclaims 11, 12 and 13 and Motion to Dismiss Eighth Affirmative Patent Misuse Defense, Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 1:13-cv-00740 (E.D. Va. Oct. 28, 2013), 2013 WL 6046771.
90. *See id.* at 10.
91. *See id.* at 12.
92. *See id.* at 14–20.

complaint for its alleged failure to state any antitrust injury,[93] arguing that "Capital One suffered no antitrust injury as a result of any alleged anticompetitive act of Intellectual Ventures because any injury to Capital One was caused by the patents themselves, and not Intellectual Ventures' ownership of them."[94] IV's motion then attempted to undermine the Clayton Act section 7 claim for unlawful patent acquisition, contending that legality of patent acquisition is measured at the time of acquisition, and must, at *that* time, be demonstrably injurious to competition.[95]

At oral argument on IV's motion, IV asserted that the crux of Capital One's counterclaims was not about antitrust, monopolization, or market power. Rather, IV asserted that it was about a petulant company accustomed to infringing at will, upset that it could not counter with patent infringement claims of its own because IV was, by definition, a "non-practicing entity."[96] IV went on to argue that there has been no effect on price, and without such an effect, there is no foundation for a monopolization claim, no relevant market, and no detrimental effect on said market.[97] Finally, in what appeared to be the major push, IV argued that the number of patents it possessed did not equate to any cognizable market share, and for those reasons, the antitrust counterclaims faltered and failed to meet the requisite pleading requirements.[98]

However, it was the number of patents and the way IV acquired them that went directly to the issue of market power and anticompetitive acts:

> What matters is that [IV] operates in an upstream market where people buy and sell intellectual property. It's that aggregation of the property and that upstream market that they are now using to control prices and eliminate competition in the downstream market. The consumers of that intellectual property, the banks.[99]

93. This is another element for a monopolization claim. Prohibited monopolization "must be directed toward competitors and must be intended to injure competition." Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1353 (Fed. Cir. 1999) (dismissing monopolization and attempted monopolization claims because Intel and Intergraph were not competitors).

94. *See* Plaintiff/Counterclaimants Opening Brief in Support of Motion to Strike, *supra* note 89, at 25 ("Thus, the anticompetitive act of purchasing Mechaneer did not cause the plaintiff's alleged injury. The patents were an impenetrable barrier to the plaintiff's entry before Micafil purchased Mechaneer, and they remained as great a barrier afterwards." (quoting Axis, S.p.A. v. Micafil, Inc., 870 F.2d 1105, 1107 (6th Cir. 1989)).

95. *See id.* at 27 (citing SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1211–12 (2d Cir. 1981)).

96. Transcript of Hearing on Plaintiffs' Motion to Strike or Dismiss Amended Antitrust Counterclaims at 7:20–8:22, Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 1:13-cv-00740 (E.D. Va. Dec. 2, 2013).

97. *See id.* at 10:16–11:24.

98. *See id.* at 12:14–19.

99. *Id.* at 24:15–21.

Capital One argued that such a scheme was analogous to a price fixing case where all the competitors could get together and price fix and raise the prices for consumers.[100] That harm to consumers is still monopolization. Essentially, it is the act of aggregation that leads to increased market share and anticompetitive conduct. Capital One argued that IV's market share did not exist before IV had the patents, but does exist now following IV's acquisition.[101] Capital One also argued that a patent's chance of success in an infringement suit increases exponentially when a plaintiff asserts several patents along with it,[102] as this Note touched upon *infra*. "Before IV, no one has offered to license these patents. . . . They've changed the market with this business model and made it profitable to acquire a large number of weak patents and assert those, not based on their merits, but based on their probability of success."[103]

The district court entered a boilerplate order granting IV's motion to dismiss the monopolization and other antitrust claims at the pleading stage with no explanation as to which of IV's arguments it found compelling, or which Capital One arguments it found lacking.[104] Spectators are thus left to rely on the positions that the parties presented at oral argument and to assume that the court found persuasive IV's contention that amassing patents, even in a particular field, does not in and of itself offend the antitrust statutes because it is difficult to define a relevant market, and because the number of patents and how they interact do not affect prices and do not create market share.[105]

Given the Court's succinct order, the window for analysis is small. While the Eastern District of Virginia Court found antitrust to be the wrong tool to dispose of the lawsuit, in the end, the court ruled in Capital One's favor, holding that the remaining two patents were invalid for claiming only abstract ideas.[106] The court further opined that certain claims of the patents-in-suit were "insolubly ambiguous," rendering the patents unenforceable.[107] And while it is not clear why the court ruled the way it did regarding the counterclaims, the final adjudication of weak patents may echo in other cases for patent infringement against the banking industry. Perhaps the problem was simply a matter of robust

100. *Id.* at 24:22–25.
101. *Id.* at 25:19–26:25.
102. *Id.* at 27:9–22.
103. *Id.* at 28:11–21.
104. *See* Order re Plaintiffs/Counterclaim Defendants' Motion to Strike of Dismiss Amended Antitrust Counterclaims 11, 12, and 13, and Eight Affirmative Patent Misuse Defense, Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 1:13-cv-00740 (E.D. Va. Dec. 5, 2013).
105. *See* Transcript of Hearing on Plaintiffs' Motion to Strike or Dismiss, *supra* note 96, at 17:10–22:20.
106. *See* McAfee, *supra* note 78.
107. *Id.*

pleading, as this Note suggests will be the case as more and more defendants stand up to the NPEs.

B. Battleground II: The District of Maryland

In January 2014, IV filed another case against Capital One in the District Court for the Federal District of Maryland,[108] propounding fresh allegations that Capital One infringed four patents covering mobile banking and security technologies.[109]

Following its complaint and two amendments, Capital One filed a motion to amend a third time in order to include antitrust counterclaims.[110] Once again, Capital One alleged that IV, along with a few of its subsidiaries, had amassed monopoly power in violation of section 2 of the Sherman Act.[111] Capitol One based these "new" counterclaims on much of the same conduct as cited in the Virginia case, but included a vastly more robust set of allegations and background facts to support its antitrust claims against IV.[112] The motion also sought to add new counter-defendants.[113] Further, Capital One filed a third-party complaint against the IV companies, which included the same three antitrust claims that Capital One presented as counterclaims, with small additions.[114]

The adjudication standards for Federal Rule of Civil Procedure 15, leave to amend, and Rule 12(b)(6), dismissal under *Iqbal/Twombly*, are admittedly different. However, the court's grant of the motion nonetheless strongly indicated that the monopolization and acquisition claims had merit.[115] On such a motion, the standard analysis investigates whether an amendment would be futile.[116]

Having learned from the Virginia case, for its Sherman Act section 2 claim, Capital One immediately established and defined the relevant market for the patents-in-suit as the "licensing market for the patents in

108. *See generally* Complaint, Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 8:14-cv-00111-PWG, 2014 WL 282400 (D. Md. Jan. 14, 2014).

109. *Id.*

110. *See* Defendant's Motion for Leave to File Third Amended Answer, Defenses, and Counterclaims at 1–2, Intellectual Ventures I LLC v. Capital One Fin. Corp., 8:14-cv-00111-PWG (D. Md. Sept. 18, 2014).

111. *Id.*

112. *See generally id.* It is worth noting that much of this additional pleading has been redacted in the public docket subject to a protective order. Perhaps Intellectual Ventures was not so keen in this round to have its business model revealed to the general public.

113. *Id.*

114. *See generally* Third Party Counter-complaint, Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 8:14-cv-00111-PWG (D. Md. Mar. 27, 2015).

115. *See* Memorandum Opinion at 29, Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 8:14-cv-00111-PWG (D. Md. Mar. 2, 2015).

116. *See* Katyle v. Penn Nat'l Gaming, Inc., 637 F.3d 462, 471 (4th Cir. 2011).

IV's financial-services portfolio."[117] It alleged that there were no substitutes for licenses to the portfolio because IV had removed the original patentees from the market, forcing banks to engage IV either in licensing discussions or infringement lawsuits.[118] As this Note argues, *this* should be the guiding law on market definition. Essentially, the allegations suggest that IV eliminated banks' access to substitutes for an IV license, "both in the form of other patent licenses and banking-product designs, through a carefully orchestrated campaign of patent aggregation, concealment, and sham litigation."[119]

Capital One went on at length in a preliminary section of its brief entitled "Facts Supporting Capital One's Antitrust Counterclaims," delving into great detail about IV's history, methods, portfolios, and litigation tactics.[120] That section concluded that IV's monopoly power stemmed from its accumulation of 3500 patents to create a portfolio that is "essential to conduct commercial banking, including patents that it claims are standard-essential . . . ."[121] Capital One was also careful to allege specific antitrust injury flowing from IV's monopolistic practices, citing a choice between paying IV's "ransom" licensing fees or leaving the banking industry.[122] Interestingly, Capital One also included alter ego and agency allegations to connect the disparate and hidden shell corporations IV used to assert its various portfolios.[123]

Once again, based perhaps on its success in the Virginia case, IV filed a motion to dismiss.[124] IV maintained that Capital One could not establish the existence of the 3500-patent portfolio, a novel argument in the prior disputes between the two parties.[125] In doing so, IV insisted that the several IV companies against whom Capital One leveled its accusations were separate legal entities with separate portfolios.[126] IV argued for dismissal on essentially three grounds: (1) the counterclaims still did not allege a plausible relevant market; (2) they likewise did not allege sufficiently that IV had monopoly power in that market; and (3)

117. Defendant's Third Amended Answer, Defenses, and Counterclaims to Original Complaint at 51–52, Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 8:14-cv-00111-PWG (D. Md. Mar. 2, 2015).

118. *Id.*

119. *Id.* at 52.

120. *See id.* at 40–71.

121. *Id.* at 69.

122. *Id.*

123. *E.g.*, *id.* at 16; *see also This American Life*, *supra* note 8.

124. *See* Memorandum in Support of Plaintiff's Motion to Dismiss Amended Antitrust Counterclaims, Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 8:14-cv-00111-PWG (D. Md. Mar. 19, 2015).

125. *Id.*

126. *See* [Plaintiff/Counter-defendants'] Motion to Dismiss Amended Antitrust Counterclaims 12, 13, and 14, at 8–9, Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 8:14-cv-00111-PWG (D. Md. Mar. 19, 2015).

that none of the purportedly unlawful acts of monopolization Capital One alleged were actually unlawful.[127] The court dealt with each in turn.

1. Relevant Market

Failure to plead a relevant market rarely establishes grounds for dismissal at the pleading stage because the market definition inquiry is deeply "fact-intensive," and often requires discovery.[128] Dismissal is still an option, however, when a "glaring deficienc[y]" exists, where, for example, a plaintiff fails to plead such a market at all.[129] The issue then becomes whether a "relevant market" can consist of (or be limited to) the patents in IV's portfolio. "'[A] single brand of product or service' may 'be a relevant market under the Sherman Act' if no substitute exists for that brand's products or services."[130] The district court in Maryland cited the case of *Eastman Kodak v. Image Technical Services, Inc.* In *Eastman Kodak*, Kodak limited the availability of certain parts for its machines, making it more difficult for independent servicers of the machines to sell their services and forcing some contractors out of business, thus leaving customers with no option but to go to Kodak for repairs.[131] In defining the relevant market, the Supreme Court held that "[t]he relevant market for antitrust purposes [was] determined by the choices available to Kodak equipment owners."[132] In other words, the service and parts were not interchangeable with other manufacturers' equipment, and the Court saw the "relevant market" from the perspective of the equipment owner as composed of, and limited to, the companies that serviced Kodak machines.[133] The district court in the IV-Capital One case drew a parallel conclusion, holding that the banks had no choice but to pay licensing fees the same way Kodak customers had no option but to get service from Kodak.[134]

Capital One similarly alleged that IV's financial services portfolio in the United States constituted a relevant licensing market because IV demands that banks license the portfolio to continue their commercial banking services, "threatening and suing those banks that resist."[135] However, "[b]ecause Intellectual Ventures sought and obtained such a

---

127. Memorandum Opinion, *supra* note 115, at 11.
128. *Id.* at 12 (quoting E. I. du Pont de Nemours & Co. v. Kolon Indus. Inc., 637 F.3d 435, 443 (4th Cir. 2011)).
129. *E. I. du Pont de Nemours & Co.*, 637 F3d at 444 (quoting Allen v. Dairy Farmers of Am., Inc., 748 F. Supp. 2d 323, 339 (D. Vt. 2010)).
130. Intellectual Ventures I LLC v. Capital One Fin. Corp., 99 F. Supp. 3d 610, 620 (D. Md. Mar. 2, 2015).
131. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 455–56 (1992).
132. *Id.* at 481–82.
133. *Id.* at 456–57.
134. *See* Memorandum Opinion, *supra* note 115, at 13.
135. Defendant's Third Amended Answer, *supra* note 117, at 52.

large portfolio, banks do not have the option to license alternative portfolios . . . ."[136] The Maryland court also addressed the case of *Meredith Corp. v. SESAC LLC*, drawing on other strong parallels.[137] In *Meredith Corp.*, the plaintiffs claimed that the relevant market was the market for television performance rights that the defendant licensed in an anticompetitive manner.[138] In denying summary judgment, the *Meredith Corp.* court observed that "market definition" is a "highly factual one best allocated to the trier of fact."[139] The case involved rights to use music, and the court concluded, in short, that because radio stations are required to have licenses to play music, and because the rights to the music were controlled by just three organizations, the stations had no choice but to pay licensing to each.[140] And when the defendant, SESAC, significantly increased its prices, "local stations [did] not respond[] to SESAC's price increases by replacing SESAC licenses with alternative licenses."[141] Similar to the organizations in *Meredith* that amassed distinct collections of music and the license rights thereto,[142] IV also created a "single licensing source" thereby "eliminat[ing] all competition between patentees that would otherwise compete with each other for financial-services licensing opportunities."[143]

In reaching a decision, the Maryland District Court ultimately relied on the additional pleadings and specifics regarding the relevant market that Capital One appended in its Third Amended Counterclaims—allegations that were absent in the Virginia case (where the court dismissed largely for failure to establish exactly that element of a Sherman Act section 2 claim).[144] This additional pleading led the court to conclude that there were sufficient allegations to find a relevant market, an element on which a great deal of future antitrust litigation against NPEs may now turn.

2. *Monopoly Power*

The Maryland court next addressed the second issue in the Virginia case: monopoly power. A party can establish monopoly power either through "direct evidence of supracompetitive prices and restricted

136. *Id.*
137. *See* Memorandum Opinion, *supra* note 115, at 14.
138. Meredith Corp. v. SESAC LLC, 1 F. Supp. 3d 180, 218 (S.D.N.Y. 2014).
139. *Id.* at 219.
140. *See id.* at 185–89.
141. *Id.* at 218.
142. *See* Memorandum Opinion, *supra* note 115, at 15.
143. Defendant's Third Amended Answer, *supra* note 117, at 61.
144. The Virginia court opined that the relevant market as Capital One pleaded was defined in terms of what a business necessity was for the complaining business' lawful operations. The only "business necessity" the court saw from the allegations was Capital One's need to avoid future litigation, leaving the technology itself largely irrelevant. Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 1:13-cv-00740, 2013 WL 6682981, at *5 (E.D. Va. Dec. 18, 2013).

output" or by inference "from the structure and composition of the relevant market."[145] Monopoly power must be substantial enough to create a barrier to entry into a market such that it constrains the normal operation of the market to the extent that the problem is not likely to correct itself.[146] Patents can be barriers, as they were in *Eastman Kodak*, where the Ninth Circuit found meaningful barriers in the form of Kodak's 220 patents and its control of its designs and tools.[147] Capital One similarly argued that the portfolio was a barrier to entry into that technological space, and IV's use of the patents was evidence of IV's market power.[148]

Whereas in the Virginia case, Capital One had relied heavily on "direct" evidence of market power for its Sherman Act section 2 claim, it took a different avenue in the Maryland case. In the Maryland case, Capital One alleged circumstantial evidence, to wit, that "IV has 100 percent share of the relevant market because it alone sells a license to what it contends to be an indispensable body of patents, and licenses to patents held by other entities cannot halt IV's activities . . . ."[149] Capital One theorized that by controlling one hundred percent of the market without any supply- or demand-side constraints over how it priced its licenses, IV had monopoly power.[150] This was a relatively novel argument in pursuing a monopoly claim against a patent aggregator, and the Maryland court agreed that Capital One had sufficiently met its pleading burden.[151] Thus, Capital One was allowed to amend a third time to include these newly beefed-up claims as an added weapon against an NPE patent suit.[152]

3. *Unlawful Acts of Monopolization*

Finally, the Maryland court addressed the second element in a Sherman Act section 2 claim: the requirement that a (counter)claimant allege not only the existence of market power, but also the unlawful wielding of that power.[153] In other words, Capital One had to allege that IV "use[d] [its] monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor,'"[154] or acquired or maintained that power willfully, and not "from growth or development as a consequence of a superior product, business acumen, or historic

145. Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007).
146. Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1208 (9th Cir. 1997).
147. *See id.*
148. Defendant's Third Amended Answer, *supra* note 117, at 55–56.
149. *Id.* at 55.
150. *Id.*
151. Memorandum Opinion, *supra* note 115, at 20.
152. *Id.*
153. *See* Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481–83 (1992).
154. *Id.* at 482–83 (quoting United States v. Griffith, 334 U.S. 100, 107 (1948)).

accident."[155] IV countered this allegation by arguing that once a patent is legally acquired, the analysis is complete. But the Maryland court took the analysis another step, holding that even *properly acquired rights* cannot be used as "levers for obtaining objectives proscribed by the antitrust laws."[156] Ultimately, the court found that IV had no market share at all before acquiring the alleged 3500 patents.[157] And, because products practicing the patents were already in place in the banking industry, Capital One had sufficiently alleged that IV had, *at least,* willfully acquired its monopoly power, meeting the final element of a Sherman Act section 2 claim.[158] Capital One was thus allowed to amend for a third time to add its antitrust claims,[159] in what may well set the groundwork for future patent defense cases against gargantuan patent aggregators.

As a closing note on the Maryland action, IV eventually filed a motion to dismiss, arguing many of the same positions it did in the Virginia case, even in the face of the newly strengthened allegations. Capital One further filed a third-party complaint against several "new" IV companies, alleging the same three antitrust claims that it had presented as counterclaims against the "original" IV companies.[160] The original IV companies filed a motion to dismiss the counterclaims, which the court denied, based principally on the same grounds on which it granted the motion to amend, finding that Capital One had sufficiently pled its Sherman Act section 2 claim.[161] In a renewed motion, however, IV raised another argument—that the IV companies are separate legal entities—undermining Capital One's alter ego and agency allegations.[162] The court granted the motion *without prejudice*, allowing Capital One to amend yet again, and did so on a ground that does not disturb the previous, novel decisions regarding the monopoly allegations.[163] The case remains open, as does the question of whether the survival of Capital One's antitrust claims makes IV any more inclined to settle. Or perhaps they will simply throw more patents into the fray.

155. *Id.* at 481 (quoting United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)).

156. *See* Memorandum Opinion, *supra* note 115, at 20–21 (quoting Ford Motor Co. v. United States, 405 U.S. 562, 576 n.11 (1972)).

157. *Id.* at 19.

158. *Id.* at 22.

159. *Id.* at 2.

160. Plaintiff's Motion to Dismiss and Strike Antitrust Counterclaims, *supra* note 124.

161. *See* Memorandum Opinion and Order at 1–2, Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 8:14-cv-00111-PWG (D. Md. Jan. 14, 2016).

162. *Id.*

163. *Id.* at 14.

Conclusion

Many critics argue that the patent system, even in its purest and most noble permutations, is broken, and that those fundamental cracks allow NPEs and patent aggregators like IV to thrive without adding anything to society's collective advancement or consciousness. This Note does not suggest that the patent system is or is not flawed, or what solutions might exist for its repair. Two conflicting decisions from the Fourth Circuit perhaps provide an anvil against which to hold abusers of the system, and certainly a reason for courts to reconsider their tack on anti-aggregator antitrust counterclaims. While the antitrust claims faltered in the Virginia case, their subsequent success in Maryland hints at several lessons for potential NPE aggregator targets. First, one *can* establish a relevant market limited only to the patents-in-suit or the area/practice/industry for which the NPE asserts them. Second, however, such allegations must be fleshed out, alleging at least circumstantially that the aggregator has acquired one hundred percent or some other hefty market share through its acquisition of industry standard technology. Ignoring this step could mean practitioners will be held hostage by licensing deals (read: prices) that remain unaffected by the normal market forces. And third, the element requiring actual, detrimental use of monopoly power *can* be met by demonstrating that the patents were in use before some patent "land-grab" acquisition took place, and it was only by that acquisition that an aggregator had any market share at all.

These lessons will surely take some time to impact aggregators' models and methods, but the antitrust laws are alive and well, and the implication seems to be that they are a weapon defendants can hone over time to stem the tide of abusive patent litigation. Ideally, with another tool in the anti-sham patent litigation repertory, the courts will see some respite, and both the patent and antitrust systems will settle back and serve their longstanding and noble purposes.