Patent trolls – patent owners who don’t make products but sue those who do – are on everyone’s mind. NPR has run feature stories on them. The New York Times and the Wall Street Journal have run front-page articles about them. The Federal Trade Commission has issued reports about them. Congress passed patent reform that was designed to deal with the problem of trolls, and is currently considering new legislation that would specifically apply to patent trolls. Companies, engineers, lawyers, and scholars have spent enormous amounts of time complaining about trolls. There are publicly traded companies devoted to fighting patent trolls, and there are even companies devoted to figuring out what patents particular trolls own. Even President Obama criticized them in a recent speech.

Trolls do seem to be a significant feature of the patent system. They account for a large number of suits, now a majority of all patent assertions in the information technology (IT) industries. They win both larger judgments and larger settlements than traditional patentees. And they do so despite complaints that trolls assert weak patents, and some evidence that troll patents are more likely to lose in court. A recent
academic study calculates that trolls cost society $30 billion/year and $500 billion total for society over the past twenty years. And the harshest criticism is reserved for companies like Intellectual Ventures, sometimes called a “super-troll” or “troll aggregator” for gathering and asserting or licensing tens of thousands of patents.

We think the focus on patent trolls obscures a more complex set of challenges confronting the patent system. In this paper, we make three points. First, patent trolls are not a unitary phenomenon. We see at least three different troll business models developing, and those models have different effects on the patent system. Second, patent assertions by practicing entities can create just as many problems as assertions by patent trolls. The nature of many industries obscures some of the costs of those assertions, but that doesn’t mean they are cost-free. And we have even seen the development of “patent privateering,” in which product-producing companies take on many of the aspects of trolls. So whatever problems beset the patent system, they are more systemic than simply a group of bad actors known as trolls. Third, many of the problems associated with trolls are in fact problems that stem from the disaggregation of necessary patents into too many different hands. That in turn suggests that groups like Intellectual Ventures might be reducing, not worsening, the problem (though as we will see the aggregate effects are ambiguous). And conversely, antitrust authorities should worry less about acquisition of IP rights and more about spinning IP rights out to others.
Understanding the true economics of patent assertion by both trolls and practicing entities allows us to move beyond labels or the search for “bad actors” and focus on things about the patent system itself that drive our problems. Patent trolls aren’t the problem; they are a symptom of larger problems with the modern patent system. Treating the symptom isn’t going to solve the problem. In a very real sense, critics have been missing the forest for the trolls. Exposing the larger problems allows us to contemplate patent reform that will actually tackle the underlying pathologies of the patent system. It leads us to suggest reforms of the patent system in general and IT patents in particular, including changes to obviousness law, remedies law, and attorneys fees. It also suggests that we should rethink our worry about aggregation. It is disaggregation, not aggregation, that may be the biggest problem with patent trolls.

In Part I, we discuss the rise of patent trolls and the anti-troll backlash. We identify different sorts of patent troll business models and how they overlap with the business models of practicing entities. In Part II, we consider the economics of patent assertion by both trolls and practicing entities, and explore whether trolls are a problem – specifically, whether, and if so under what circumstances, they impose more excess costs than do practicing entities (PEs) that hold patents. In Part III, we suggest that the focus on trolls is misplaced. We argue that we should pay more attention to the underlying economics that make patent trolls
profitable and less on identifying and weeding out those who take advantage of that underlying economics.