AGGREGATE PATENT LITIGATION
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Patent holders often sue multiple unrelated companies for infringing the same patent based on independent and competing products. These factually independent but legally related claims pose unique questions of whether, and to what extent, they should be resolved collectively. The prototypical example of aggregate litigation is a large number of plaintiffs suing the same defendant for the same or similar conduct, such as a defective product or a misleading statement to shareholders. When aggregate litigation is the reverse—a plaintiff suing many defendants—the defendants normally are factually related, such as alleged co-conspirators or participants in the same supply chain. Existing aggregate procedures have developed in the context of one or both of these more traditional models of aggregate litigation.

Seeking to efficiently resolve similar patent claims, courts tried to fit the square peg of aggregate patent litigation into the round hole of existing aggregation procedures, stretching procedural devices like joinder, consolidation, and transfer. In doing so, courts gave the power to patentees to dictate when, where, and for what purposes their adversaries would be forced to litigate together, concentrating aggregate patent litigation in the most pro-patentee courts and forcing defendants to litigate all issues, whether common or unique to a defendant, in a single trial. This increased cost and risk for defendants, incentivized settlement of even strong defenses, and fueled the activities of patent assertion entities. Under heavy industry pressure, Congress responded. But rather than adopt aggregate procedures tailored to the unique nature of patent litigation, Congress simply prohibited consolidated trials of any issue absent consent of all defendants. This allows defendants to expose the patentee to repeated and identical invalidity challenges, knowing they all benefit even if only a single defendant is successful.

Rather than the all-or-nothing approach that has resulted from efforts to apply existing aggregation procedures to the unique context of aggregate patent litigation, this Article first develops an optimal approach to aggregate patent litigation and only then considers the relationship to existing procedures. The result is staged litigation with partial aggregation under the auspices of an impartial body similar to the Judicial Panel on Multidistrict Litigation. The first stage would resolve common issues like claim construction, invalidity, and inequitable conduct in a centralized
court chosen by the impartial body, with the patentee giving notice of the common proceedings to all potential infringers. The second stage would resolve the semi-common issue of infringement in the centralized court, so as to harness the technical understanding developed in the common proceedings. But the centralized court would decide on a case-by-case basis whether, and to what extent, infringement should be resolved in common or individual proceedings. The third stage would remand each individual defendant to a defendant-specific court for resolution of the non-technical issues unique to that defendant—damages, willfulness, contract defenses, etc.