

IMPACT OF NON-PRACTICING ENTITIES ON U.S.

BUSINESS: A DISCUSSION OF THE UPCOMING GAO

REPORT

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# THE GAO REPORT

## LEGISLATIVE REQUIREMENT

- This study will include the volume of litigation in the 20 years before enactment of the AIA, the volume of cases which are found to be without merit after judicial review, the impact of litigation on the time to resolve patent claims, the costs with such litigation, its economic impact on the U.S. economy and job creation, and any benefits created by NPEs or PAEs. Within one year from the date of enactment of the AIA, i.e., by September 16, 2012, the GAO must report to Congress the results of this study, including recommendations to minimize any negative impact of such patent litigation.  
([http://www.uspto.gov/aia\\_implementation/aia\\_studies\\_reports.jsp#heading-5](http://www.uspto.gov/aia_implementation/aia_studies_reports.jsp#heading-5))

## SCHEDULE

- Multiple delays

## PARALLEL DEVELOPMENTS

- Proposed “SHIELD” legislation

# WHAT ARE NON-PRACTICING ENTITIES?

## TERMS:

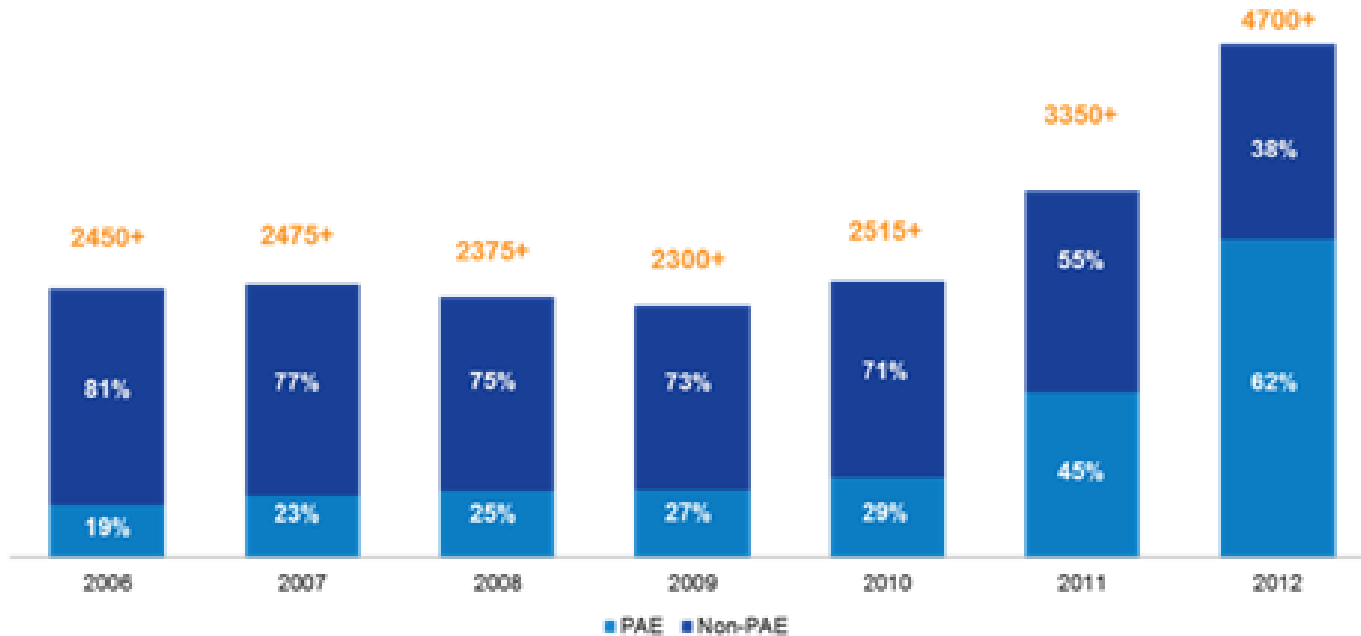
- Non-Practicing Entity
- Patent Assertion Entity
- Troll
- There is no general agreement on these terms

# WHAT CAN BE A NON-PRACTICING ENTITY?

- Again, there is no general agreement on this, but....
- Universities
- Individual inventors
- Failed Start-Ups
- “Pureplay” R&D Companies
- Patent Holding Companies
- Companies with non-core patents

# WHY ARE NPES GETTING ATTENTION?

ACCORDING TO RPX CORPORATION, NPES INITIATED 62% OF ALL PATENT LITIGATION IN 2012



The AIA joinder provisions took effect on September 16, 2012

# WHY ARE NPES GETTING ATTENTION?

- In 2012, PAEs sued more non-tech than tech companies
- Some allege that in 2012 more corporate than individual NPEs filed suits
  - RPX Report: 94% corporate, 5% individual, 1% university and others
  - PWC Report: 51% individual
- 55% of unique patent defendants make \$10 million or less in revenues; 66% make \$100 million or less
- 9 out of 10 litigated patents were bought – not asserted by the owner

\* Source: RPX Corporation

## WHY ARE NPES GETTING ATTENTION?

- First, are the assertions reliable?
- Second, are the numbers meaningful?
  - Are there norms; if so, what are they?
  - Can one ascribe a “value judgment” – whether positive or negative – to a specific level of activity?
- There are all types of litigation -- securities, products liability, class actions -- that companies regularly deal with

# WHY ARE NPES GETTING ATTENTION?

➤ High litigation costs

➤ Unique litigation issues

- There is currently no insurance for patent litigation
  - > RPX
- NPEs have limited downside to bringing suit
  - > Asymmetric discovery costs
  - > No potential business disruption
  - > Patents are presumed valid
  - > Often, no counterclaims available
  - > Some claim less opportunity for substantive resolution before trial



# WHY ARE NPES GETTING ATTENTION?

## ➤ High Litigation Costs

Amount in Controversy	Cost through discovery	Cost through trial
< \$1 million	\$490,000	\$916,000
\$1 -25 million	\$1.6 million	\$2.8 million
< \$25 million	\$ 3.6 million	\$ 6 million

➤ 2011 AIPLA Patent Litigation Statistics

# WHY ARE NPES GETTING ATTENTION?

## PRESIDENT OBAMA ON NPES:

“They don’t actually produce anything themselves...They are essentially trying to leverage and hijack somebody else’s idea and see if they can extort some money out of them.”

READ MORE: [HTTP://WWW.BUSINESSINSIDER.COM/OBAMAS-PATENT-COMMENTS-AT-GOOGLE-CHAT-2013-2#IXZZ2PVZN8VEV](http://www.businessinsider.com/obamas-patent-comments-at-google-chat-2013-2#ixzz2pvzn8vev)

## BUT, NPES DO CREATE VALUE

- The importance of the assignability of patents has been recognized for centuries in the US
- Create a marketplace for patents
- Provide incentives for inventors
- Achieve a monetary return to the inventor and his successors in interest
- Monetize assets that might otherwise not be monetized

## BUT, NPES DO CREATE VALUE

- 60% of patents are owned by small companies, individual inventors, universities and research labs
- These entities generate 1% of U.S. revenues\*
- Low litigation costs for NPEs encourage contingency and can support this 60% to obtaining a fairer portion of the value they contribute to the US economy
- New business models are forming: litigation investors

\* Source: Acacia investor presentation, citing Intellectual Ventures

## SO, WHAT QUESTIONS NEED ANSWERING?

- Do NPE's *encourage* innovation?
- Do NPE's *discourage* innovation?
- Does NPE litigation increase costs for consumers?
- Does NPE litigation increase costs for companies?
- Do inventors benefit from NPE litigation?
- Does the US ultimately benefit from NPE litigation?
- Is legislation needed?
  - Is the proposed SHIELD legislation the answer?