AN EMPIRICAL STUDY OF PATENT LITIGATION TIMING: COULD A PATENT TERM REDUCTION DECIMATE TROLLS WITHOUT HARMING INNOVATORS?

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This Article conducts an empirical analysis of the relative ages of patents litigated by practicing and nonpracticing entities (NPEs). By studying all infringement claims for a sample of recently expired patents, I find considerable differences in litigation practices between these groups. Product-producing companies usually enforce their patents soon after issuance and complete their enforcement activities well before their patent rights expire. NPEs, by contrast, begin asserting their patents relatively late in the patent term and frequently continue to litigate until expiration. This variance in litigation timing is so dramatic that all claims asserting the average product-company patent are resolved before the average NPE patent is asserted for the first time. Further, I find that NPEs are the dominant source of patent enforcement in the final few years of the patent term. NPEs, enforcers of just twenty percent of all studied patents, are responsible for more than two-thirds of all suits and over eighty percent of all infringement claims litigated in the final three years of the patent term. These findings cast serious doubt on the utility of the last few years of the patent term and suggest that Congress should, at a minimum, consider increasing the frequency and magnitude of maintenance fee payments in the latter half of the term.

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INTRODUCTION

The impact nonpracticing entities (NPEs), or “patent trolls,” have on innovation may be the most important empirical question in patent law today. So far, however, scholars have analyzed litigation brought by various types of patent owners in a fragmented and indirect fashion. Some scholars have studied only the most litigious or easily identifiable trolls.\(^1\) Such studies miss as much as 85% of NPE-asserted patents.\(^2\) Others have focused

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\(^2\) Throughout this Article I refer to a dataset that I compiled using a random sample of 472 litigated patents that issued in 1993 and 1994. For a detailed discussion of my sample selection and
These studies fail to account for the vast differences among patents that happen to be litigated at the same time. It makes little sense, for example, to compare the first and only litigation of a one-year-old medical-device patent to the twentieth litigation of a nineteen-year-old software patent, even if both proceed contemporaneously.

Perhaps not surprisingly, these narrow studies have produced results at odds with one another. The empirical literature examining NPEs is, to put it mildly, internally inconsistent. Some studies strongly suggest that NPEs are every bit the tail that wags the dog. NPEs, for example, assert the lion’s share of “most-litigated” patents and are especially dominant in high-tech fields, where patents tend to be plentiful, cheap, and broad. Others report the exact opposite. Trolls really don’t exist at all, exist but are exceedingly

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4 Allison, Patent Quality and Settlement, supra note 1, at 692-93 figs.2 & 3 (reporting that NPEs filed 63.5% of the patent cases involving a patent litigated eight or more times, but just 21% of cases involving a patent litigated only once).

5 See id. at 695-96 & tbl.10 (reporting that over 74% of the most litigated patents cover software-related inventions); Chien, supra note 3, at 1600, 1604 (reporting that NPEs filed 17% of patent suits and were a party to 28% of patent claims in high-tech industries); Mark A. Lemley & Carl Shapiro, Patent Holdup and Royalty Stacking, 85 TEX. L. REV. 1991, 2009 (2007) (estimating that NPEs file 30-40% of patent suits in the computer and electronic industries).

rare,\(^7\) or exist in modest numbers but hold few of the traits attributed to them by their detractors.\(^8\)

This Article fills these gaps in the existing literature by studying a broad cross-section of patents over the entire patent term. Rather than studying a subset of patents linked by litigiousness or contemporaneous court filings, I study all patent enforcement for a random sample of recently expired patents.

With this data, I can for the first time account for the relative timing of lawsuits filed by practicing and nonpracticing entities. My findings are dramatic: opposing views of NPEs in the literature ring true but at opposite ends of the patent term. Product-producing companies predominantly enforce their patents soon after they issue and complete their enforcement activities well before their patents expire. NPEs, on the other hand, begin asserting their patents relatively late in the patent term and frequently continue to litigate their patents to expiration. Indeed, I find that the average product-company patent has been shelved by its owner before the average NPE patent has even been asserted.

The degree to which NPEs dominate the final few years of the patent term is especially surprising. Though asserting just over 20% of all studied patents, NPEs account for more than two-thirds of suits and over 80% of infringement claims litigated in the final three years of the patent term. Notably, NPEs’ domination of late-term litigation is almost completely attributable to firms that do nothing more than hold patents. NPEs that many do not consider trolls—universities\(^9\) and individual inventors\(^10\) in particular—do not drive the results reported below.

\(^7\) Ball & Kesan, \textit{supra} note 3, at 25 (concluding that the “number of patent licensing firms—the most obvious candidate for the role of troll—active in cases filed . . . was quite modest”); Nathan Myhrvold, Op-Ed., \textit{Inventors Have Rights, Too!}, \textit{Wall St. J.}, Mar. 30, 2006, at A14 (“Court records show that only 2% of all patent lawsuits are due to plaintiffs that have no ongoing product business.”).
\(^8\) See Risch, \textit{supra} note 1, at 474-91 (testing many of the common criticisms of NPEs and concluding that “most of the criticism is based on a few, perhaps anecdotal, cases”); Shrestha, \textit{supra} note 1, at 148-49 (finding that “NPEs may be demanding high royalty fees not because of opportunism, but because their patents are, in fact, more valuable” and that “NPE patents have had considerable influence on subsequent patents and are also not trivial improvements in a particular technology class”).
\(^9\) See Mark A. Lemley, \textit{Are Universities Patent Trolls?}, \textit{18 Fordham Intell. Prop. Media & Ent. L.J.} 611, 629 (2008) (arguing that universities are not patent trolls, at least in part because they are “not engaged in hiding the ball, waiting until people have developed an industry and then popping up and demanding a disproportionate share of royalties”); Randall R. Rader, Chief Judge, U.S. Court of Appeals for the Fed. Circuit, Remarks at the Eastern District Bench Bar: The State of Patent Litigation (Irving, Tex. Sept. 27, 2011) (“[T]he NPE designation sweeps in some unintended ‘culprits’ like universities and research clinics and can also extend to almost every corporation and business because they practice only a fraction of their patent portfolio.”). But see
I also compare the relative litigiousness of product-producing companies and NPEs, as well as differences in the subject matter and strength of their infringement claims. In addition to my overall findings, I report how these statistics change among patents litigated in the final years of the patent term. I find that NPEs are especially litigious: they overwhelmingly assert high-tech patents and lose at a relatively high rate when their infringement claims are adjudicated on the merits. The same is true for patents litigated late in the patent term: NPEs are more litigious, more high-tech focused, and more likely to lose on the merits of their infringement claims. Interestingly, an outsized percentage of product producing–company patents litigated late in the term are high-tech related. These patents are asserted by a unique group of companies, which sell a product and yet blur the line between practicing entities and trolls.

My findings add to mounting evidence that the costs of NPE litigation outweigh their benefits. In fact, they cast serious doubt on NPEs’ chief alleged benefits: that paper patentees help create a market for innovation and contribute to the dissemination of useful technology. Instead, NPEs overwhelmingly wait to assert their rights until the underlying technology is stale and unlikely to be of much use to accused infringers that independently developed the technology themselves years earlier. Overall, my findings suggest that Congress should shorten the patent term by three years or even longer. In these final years of patent protection, more than 80% of patent assertions are brought by patent-holding firms that have no intention of commercializing a product. Much of the remaining litigation is brought by product-producing companies asserting high-tech patents, often with far less than ideal motivation. At the very least, Congress or the Patent

Merges, supra note 6, at 1611 (“[U]niversities, at least some of them, have crossed the line between innovators and rent-seekers.”) (footnote omitted).

10 Chien, supra note 3, at 1587 (arguing that individual inventors should not be considered NPEs).

11 See Christopher A. Cotropia & Mark A. Lemley, Copying in Patent Law, 87 N.C. L. REV. 1421, 1444-46 (2009) (finding that allegations of copying are rare in patent litigation, especially in cases asserting high-tech patents); see also Markus Reitzig et al., On Sharks, Trolls, and Their Patent Prey—Unrealistic Damage Awards and Firms’ Strategies of “Being Infringed,” 36 RES. POL’Y 134, 150 (2007) (developing a model of NPE behavior suggesting that the NPEs can “act most profitably as sharks” when asserted patents are infringed inadvertently); John L. Turner, Patent Thickets, Trolls and Unproductive Entrepreneurship 23 (Sept. 2012) (unpublished manuscript), available at http://ssrn.com/abstract=1916798 (“[W]hen the frequency of inadvertent infringement is smaller . . . [,] my model predicts that trolls will cause less of a change in rates of invention and patenting and that their presence will harm welfare less.”).

12 For a discussion of study limitations that temper this recommendation, including a discussion of NPEs’ ability to simply file suit earlier in the event of a term reduction, see infra Section III.C.
and Trademark Office (PTO) should consider increasing the frequency and magnitude of maintenance fee payments required in the latter half of the patent term.

I. STUDY DESIGN

On the issue of patent reform, a civil war of sorts divides the technology community.\footnote{See, e.g., DAN L. BURK & MARK A. LEMLEY, THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT 4 (2009) ("Any doubts that the patent system is perceived by different industries in fundamentally different ways were dispelled during the course of congressional debates over patent reform in the four years beginning in 2005. The reform process ground to a halt because different industries couldn’t agree on a single principle of reform."); Merges, supra note 6, at 1608-09 ("[R]ecent battles over patent reform in Congress show that there is a major divergence between the interests of the biomedical industries . . . and information technology companies . . . .")}. Battle lines are drawn largely between industries. Pharmaceutical companies, on one side, argue that strong patent rights are crucial to continued innovation.\footnote{See BURK & LEMLEY, supra note 13, at 4 ("In the pharmaceutical industry, there seems to be a strong consensus . . . . that patents are critical to innovation.").} High-tech firms, on the other, view the patent system as more foe than friend.\footnote{See id. ("[T]he information technology industries . . . almost invariably see the patent system as a cost rather than a benefit to innovation.").} According to these firms, and many scholars and patent attorneys, the patent system is too often a vehicle for "patent trolls"—entities that assert patents they do not use and frequently did not invent—to extract undeserved royalties from "true" innovators working to build successful new high-tech products.\footnote{Patent "trolls" are so named because their behavior bears resemblance to mythological trolls who emerge without warning from beneath bridges to demand a toll from all who would pass. See Gerard N. Magliocca, Blackberries and Barnyards: Patent Trolls and the Perils of Innovation, 82 NOTRE DAME L. REV. 1809, 1814 (2007) ("The ensuing litigation comes as a surprise to a defendant, which is why these suits are analogized to mythical trolls that hid under bridges and leapt out to demand a ransom from travelers.").}

How these opposing views of the patent system should be reconciled turns in large part on questions concerning the utility of NPEs. Are NPEs the pervasive litigation-cost "extortionists" their detractors make them out to be?\footnote{Timothy J. Haller & Sally Wiggins, The Patent Troll Myth, INTELL. ASSET MGMT., http://www.buildingipvvalue.com/06US_Can/113_116.htm (last visited Mar. 15, 2013); see Magliocca, supra note 16, at 1816 ("[P]atent trolls] acquire an invention and then refuse to do anything until the technology becomes an industry standard. This behavior is akin to setting a deliberate trap and is not permitted elsewhere in the law."); Merges, supra note 6, at 1600-02 (comparing the patent troll business model to blackmail); Ted Sichelman, Commercializing Patents, 62 STAN. L. REV. 341, 368 (2010) (noting that NPEs “tend to exploit litigation and licensing market defects to extract unwarranted rents from commercializers”); see also Rader, supra note 9, at 8 ("[E]xpenses can force
disseminate useful technology,\textsuperscript{18} create markets for inventions,\textsuperscript{19} and provide capital for inventors.\textsuperscript{20}

\section*{A. Hypotheses}

Unfortunately, the existing literature has done little to settle the debate. One reason is that, even after several studies on the topic, commentators cannot agree on the percentage of patent enforcement attributable to NPEs. Results have been all over the map. NPEs, or some “trollish” subset thereof, account for 2\textsuperscript{18},\textsuperscript{21} 4\textsuperscript{22},\textsuperscript{22} 22\textsuperscript{23} or 27\textsuperscript{24} of patent litigation depending on whom you ask. Though diverse, these relatively modest estimates have led at least one scholar to declare that “the uniform findings indicate that NPEs file only a small fraction of all patent infringement suits.”\textsuperscript{25} Other clues, however, suggest that NPEs have anything but a modest effect on the accused infringers to acquiesce to non-meritorious claims. This only serves as an unhealthy tax on innovation and open competition.

\textsuperscript{18} See Brian D. Kacedon et al., Patent Trolls: A Stereotype Causes a Backlash Against Patents and Licensing, FINNEGAN (Dec. 2006), http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=c49b6d2-6ibf-4d90-99ad-304d6e9da23 (noting that the patent licensing community “performs a central role in helping commercial entities obtain the rights to use valuable technologies that produce new and beneficial products”).


\textsuperscript{20} See, e.g., John E. Dubiansky, An Analysis for the Valuation of Venture Capital-Funded Startup Firm Patents, 12 B.U. J. SCI. & TECH. L. 170, 171-72 (2006) (noting that venture capital firms have begun to “assess and remarket the intellectual property of failed startup firms”); Ronald J. Mann, Do Patents Facilitate Financing in the Software Industry?, 83 TEX. L. REV. 961, 1024 (2005) (”[T]rolls are serving a function as intermediaries that specialize in litigation to exploit the value of patents that cannot be exploited effectively by those that have originally obtained them.”).

\textsuperscript{21} See Ball & Kesan, supra note 3, at 15 (finding that “3% of plaintiffs, who were active in 4% of the cases, were licensing firms”).

\textsuperscript{22} Compare Patent Cases by United States District Court, LEX MACHINA (Jan. 15, 2013) (on file with author) [hereinafter LEX MACHINA] (reporting that 2541 patent cases were filed in U.S. district courts in 2008, 2521 in 2009, and 2724 in 2010), with Litigations Over Time, PATENT FREEDOM, https://www.patentfreedom.com/about-npes/litigations (last updated Jan. 18, 2012) (showing that there were 559 NPE-filed suits in 2008, 546 in 2009, and 623 in 2010).

\textsuperscript{23} See Colleen V. Chien, Predicting Patent Litigation, 90 TEX. L. REV. 283, 314 (finding in a sample of litigated patents issued in 1990 that 27% were asserted by either a “patent assertion entity” or an individual); Sara Jeruss et al., The America Invents Act 500: Effects of Patent Monetization Entities on U.S. Litigation, 11 DUKE L. & TECH. REV. 357, 375-78 (finding, in a study of 100 patent suits filed each year from 2007 to 2011, that the percentage attributable to NPEs was roughly 22% in 2007, 27% in 2008, 33% in 2009, 36% in 2010, and 40% in 2011).

\textsuperscript{24} Risch, supra note 1, at 466.
One study found that NPEs owned more than 60% of patents litigated eight times or more, and multiple studies have found that NPEs file as much as 40% of suits asserting high-tech patents.

What accounts for these seemingly inconsistent results? This Article argues that existing studies of NPE litigation are incomplete because they fail to take into account differences in the relative ages of patents asserted by practicing and nonpracticing entities. It further suggests that all previous empirical studies underestimate NPEs’ true impact because they fail to compare NPE patents with other patents of the same age.

To date, no empirical studies have accounted for time in examining patent litigation by NPEs. This omission is surprising because there is good reason to believe that product-producing companies and NPEs assert their patents on very different timelines. If, as many suggest, product-producing companies value their patents for exclusionary power, these companies should file suit (if at all) so soon after their patents issue to fend off competitors that are developing or introducing similar products.

In addition, because products generally have short lifecycles relative to the patent term and next generation products may be protected by newer patents, practicing patentees should generally cease litigating a patent well after it issues.

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26 See Allison, Patent Quality and Settlement, supra note 1, at 690, 692.
27 See Chien, supra note 3, at 1600, 1604 (reporting that NPEs file 17% of patent suits and are a party to 28% of patent claims in hardware and software industries); Lemley & Shapiro, supra note 5, at 2009 (estimating that NPEs file 30-40% of patent suits involving computer and electronic technology).
28 For example, Michael Risch found that highly litigious NPEs asserted their patents an average of 8.3 years after issue, but he did not compare this delay with data on when product-producing companies do the same. Risch, supra note 1, at 490.
29 See, e.g., Daniel A. Crane, Intellectual Liability, 88 TEX. L. REV. 253, 286 (2009) (noting that NPEs and product-producing companies “have asymmetrical incentives, since trolls are only interested in exacting payments”).
30 Product-producing companies are also discouraged from delaying patent enforcement until the patented technology matures by the risk that doing so will give their competitors time to amass their own arsenal of patents, which they could use to file a successful counterclaim. See, e.g., Tom Ewing, Indirect Exploitation of Intellectual Property Rights by Corporations and Investors: IP Privateering and Modern Letters of Marque and Repraison, 4 HASTINGS SCI. & TECH. L.J. 1, 35 (2012) (“Each company views its patent armamentarium as an instrument of mutually assured destruction, e.g., if one company sues another for patent infringement, then retaliation is guaranteed.”). Because NPEs do not sell products that could be the subject of a counterclaim, they do not face this risk when filing suit. See, e.g., John R. Allison et al., Patent Litigation and the Internet, STAN. TECH. L. REV., no. 3, 2012, at 5, http://stlr.stanford.edu/pdf/allison-patent-litigation.pdf (“[NPEs] do not make or sell products and thus are not vulnerable to patent infringement counterclaims, as are product companies that sue for infringement. NPEs consequently may be less reluctant to sue.”).
31 In the computer industry, for example, products become twice as powerful about every two years. See infra note 114 and accompanying text (describing Moore’s law).
before it expires and move on to litigating newer patents covering newer products.

By contrast, there is good reason to believe that NPEs overwhelmingly litigate their patents late in the patent term. For one, many NPEs do not file their own patent applications, but instead purchase patents on the secondary market (often from failed companies) for the purposes of litigation. Naturally, it takes time for such patents to reach NPEs. Further, because NPEs primarily value patents for their usefulness in extracting royalties and damages from product-producing companies, these patentees should generally wait to file suit until a lucrative industry has developed and continue to file suits as long as deep-pocketed targets remain.

If these characterizations are rooted in fact rather than anecdote, it makes little sense to base patent policy on calculations of the bare percentage of NPE suits among those brought during some year or group of years. Product-producing companies are far and away the chief players in the patent system and such studies will always reflect this fact. What these studies cannot reflect, however, is whether NPEs begin to have a disproportionate effect at some point during the patent term and how such a finding would color NPEs' (and their defenders') claims that they are beneficial market makers and disseminators of technology.

B. Compiling a Database

To test these hypotheses, I set out to collect data on all litigation asserting a sample of recently expired patents. Using Westlaw and PACER, I

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32 See Risch, supra note 1, at 489 (finding in a study of patents acquired by NPEs that more than 14% of the original patent-holder companies were no longer operating and suggesting that another 13% may have been in financial distress).

33 See, e.g., Crane, supra note 29, at 286 (“Patent trolls are firms that aggregate patents for technology that they usually did not themselves create and do not themselves use, but for which they seek to exact royalty payments from commercial users.”).

34 See infra notes 100-01 and accompanying text.

35 See supra note 29.

36 See Mann, supra note 20, at 1027 (noting the “especially damaging” strategy of “waiting after a patent has been issued while an industry advances using the covered technology and then suing widely for infringement only after the industry has become locked into the technology through independent innovation and development”); Merges, supra note 6, at 1590-91 (“The patent troll strategy is to take advantage of ‘lock-in’ that occurs as a result of [sunk cost] investments. Typically, the troll waits until a technology is fully entrenched before scouting around for patents to acquire or asserting patents it holds.” (footnote omitted)).

37 See infra Figure 1.

located every litigated\textsuperscript{39} patent\textsuperscript{40} that issued with a patent number falling between 5,210,000 and 5,309,999. These patents issued between May 11, 1993, and May 10, 1994 (“the study period”).\textsuperscript{41}

As shown in Table 1, I identified 1180 patents issued during the study period\textsuperscript{42} that were litigated in a district court (including in U.S. territories) or the Court of Federal Claims, or at the International Trade Commission (ITC).\textsuperscript{43} In the ninety district courts located in the fifty states and the

\textsuperscript{39} Here and throughout, by “litigated” I mean asserted in an action raising a claim for infringement (or for a declaration of noninfringement or invalidity) of the studied patent, as opposed to merely involved in litigation concerning ownership, inventorship, antitrust, contract, trademark, copyright, or other patent claims. For an additional discussion of the kinds of cases that were excluded from the study because they were not patent infringement cases, see infra Section I.C.

\textsuperscript{40} Here and throughout, I use “patent” to refer exclusively to “utility” patents. This study does not include design patents or plant patents, both of which are protected by separate statutory schemes. See 35 U.S.C. §§ 171–173 (2006) (covering design patents) (amended 2012); id. §§ 161–164 (covering plant patents).


\textsuperscript{43} Patent suits fall within the exclusive subject matter jurisdiction of federal courts, 28 U.S.C. § 1338(a), and may generally be brought in any United States district court which has personal jurisdiction over the defendant, see Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (“[D]ue process requires . . . that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it . . . .”), and where venue is proper, see 28 U.S.C. § 1400(b) (permitting a suit for patent infringement in any judicial district in which “the defendant resides” or “the defendant has committed acts of infringement and has a regular and established place of business”). However, patent claims against the United States must be brought in the Court of Federal Claims, 28 U.S.C. § 1498(a). Another exception is that the ITC has jurisdiction to investigate and exclude imported goods that infringe a United States patent from entry into the country, 19 U.S.C. § 1337(a)(1)(B)(i), (c), (d). ITC orders barring the entry of infringing goods may be appealed to the Court of International Trade, 19 U.S.C. § 1514(a). The Court of Appeals for the Federal
District of Columbia, court clerks’ offices report basic information on patent suits to the PTO, and searchable copies of these reports are available via Westlaw’s Derwent LitAlert database. From these reports I identified 1159 patents. The LitAlert database, however, does not include records for cases filed in the District Court of Puerto Rico and the three territorial district courts. To locate all patents asserted solely in these courts, I searched PACER docket reports and pleadings (where available) for all patent cases brought in each court during or after 1993 and cross-referenced these results with all relevant patent numbers cited in opinions or orders issued by these courts over the same period. From these records I found another two unique patent numbers and two duplicates. Similarly, to locate all patents asserted solely against the United States, I searched PACER docket reports and pleadings for all patent cases brought in the Court of Federal Claims during or after 1993 and cross-referenced these results with opinions or orders issued by the court. This search identified another seven unique patent numbers and one duplicate. Finally, to locate

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44 Searching the LitAlert database confirms that all ninety districts located in the fifty states and the District of Columbia submitted litigation reports to the PTO throughout the 1990s and 2000s. Thus, any missing patents should be attributable to idiosyncratic oversight rather than systematic failure of any particular district to file reports with the PTO.

45 Patents from this timeframe were asserted in seventy-four of the ninety districts. See Timing Dataset. Based on patent filing data from Lex Machina, these seventy-four districts account for over 98% of patent suits filed since 2000. See LEX MACHINA, supra note 23. And the top forty-six of those districts, ranked by number of patent filings since 2000, are represented in the dataset I analyze. Compare id., with Timing Dataset.

46 These three territorial courts are the District Court for the Northern Mariana Islands, the District Court of Guam, and the District Court of the Virgin Islands. That these courts are excluded is not surprising given that the District Court of Puerto Rico and the three territorial districts collectively receive about one patent case per year. See LEX MACHINA, supra note 23 (reporting just fourteen patent suits filed in these four districts between 2000 and 2010). Virtually all of these cases were filed in the District of Puerto Rico. See id.

47 Starting around the year 2000 and gradually increasing thereafter on a district-by-district basis, federal courts have published filings and orders online in PDF format. Prior to electronic filing, docket entries were described only briefly on docket reports. Thus, despite personally hand-searching patent dockets in these districts, my dataset is potentially underinclusive for the District Court of Puerto Rico, the territorial district courts, and the Court of Federal Claims. See Allison, Patent Quality and Settlement, supra note 1, at 682 n.22 (describing the limitations in data collected from PACER by the Stanford IP Litigation Clearinghouse). Nonetheless, collection in this manner gives “the best, most representative data set available.” Id.

48 I identified a total of four patents issued during the study period that were asserted in a territorial district court, but two were also asserted in a district court.

49 I identified a total of eight patents issued during the study period that were asserted in the Court of Federal Claims, but one was also asserted in a district court.
 patents asserted only at the ITC,\(^{50}\) I searched Westlaw’s database of ITC filings and cross-referenced these results with all relevant patent numbers cited in opinions or orders issued by the United States Court of International Trade in or after 1993.\(^{51}\) Here, I found another twelve unique patent numbers and twenty-two duplicates.

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C. Sampling and Data Collection

From these 1180 patents, I randomly selected a sample of 472 (exactly two-fifths) to investigate in depth. From this smaller sample, I excluded fifty-one patents because they were never asserted against an alleged patent infringer. Of these fifty-one, fourteen patents were involved solely in litigation brought to resolve a dispute between putative owners or inventors. Thirteen more were involved in patent false-marking cases brought after the patents’ expiration.\(^{53}\) Another eighteen were not litigated, but only cited

\(^{50}\) Technically, the ITC’s jurisdiction is in rem, so the suit is brought against the allegedly infringing goods themselves. See, e.g., Sealed Air Corp. v. U.S. Int’l Trade Comm’n, 645 F.2d 976, 985-86 (C.C.P.A. 1981) (noting that an ITC order to exclude products from entry into the United States operates “against goods, not parties”).

\(^{51}\) Westlaw’s coverage of ITC filings dates back to December 1994. See Scope USITC-FILINGS, WESTLAW CLASSIC, https://web2.westlaw.com/scope/default.aspx?db=USITC-FILINGS &RP=/scope/default.wl&RS=WLW12.10&VR=2.0&SV=Split&FN=_top&MT=208&MST= (last visited Mar. 15, 2013). Thus, this dataset is underinclusive to the extent that patents issued during the study period were asserted at the ITC within twelve to eighteen months of their issue.

\(^{52}\) See supra notes 38-51 and accompanying text.

\(^{53}\) In the past, it was unlawful to mark a product with an expired patent number. See Pequignot v. Solo Cup Co., 608 F.3d 1356, 1358, 1361 (Fed. Cir. 2010) (holding that a “now-expired patent” was “unpatented” under 35 U.S.C. § 292(a), which prohibits marking unpatented products with the word “patent” “for the purpose of deceiving the public”). The Leahy-Smith America Invents Act clarified that an expired patent does not violate § 292. See Pub. L. No. 112-
in pleadings.\textsuperscript{54} Five additional patent numbers were excluded because they contained typographical errors,\textsuperscript{55} and one final patent was erroneously asserted long after it had expired for failure to pay maintenance fees.

For each of the remaining 421 patents, I collected a variety of data to determine when the patents were asserted, how many times they were asserted, and against whom they were asserted. In order to compare the relative ages of patents asserted by practicing and nonpracticing entities, I categorized the party enforcing each patent using patentee classes developed by Mark Lemley and Nathan Myhrvold.\textsuperscript{56} Finally, in order to compare the diversity of technology enforced by practicing and nonpracticing entities, I categorized the invention claimed in each patent using technology and industry classes developed by Lemley, John Allison, and Joshua Walker.\textsuperscript{57}

1. Prosecution Data

First, to calculate each patent’s term, I determined the date on which each patent was filed and issued.\textsuperscript{58} Specifically, I identified the filing date of each patent’s application, or of the earliest United States parent application to which it claims priority.\textsuperscript{59} I also identified whether each patent’s owner

\textsuperscript{54} Seven patents were cited as prior art in an answer or declaratory judgment complaint. Eleven were cited for other extraneous reasons in pleadings bringing claims for trademark infringement, copyright infringement, unfair competition, or breach of contract.

\textsuperscript{55} Westlaw’s Derwent LitAlert database was rife with erroneously transcribed patent numbers. In the vast majority of cases, I was able to reverse-engineer the correct patent number. The vast majority of corrected patent numbers issued within the study period, but a small minority did not.

\textsuperscript{56} See Allison, Patent Quality and Settlement, supra note 1, at 683-84 (describing the typology of entity-status classes developed by Lemley and Myhrvold).

\textsuperscript{57} See id. at 685 tbl.2 (defining nine technology areas, including software, optics, and electronics, and thirteen industry areas, including pharmaceuticals, communications, and transportation). This Article does not address my findings with respect to technology and industry in detail. Those results are tentatively reserved for a forthcoming companion piece.

\textsuperscript{58} Both dates are found on the patent document itself.

\textsuperscript{59} Prior foreign filing dates do not start the twenty-year term. 35 U.S.C. § 154(a)(3).

\textsuperscript{60} Many patent applications blossom over time into a “family” of divisional, continuation, and continuation-in-part child applications, each of which may in turn spawn their own children, and so on. See 35 U.S.C. §§ 120–121; 37 C.F.R. § 1.53(b), (d) (2011) (permitting each of these types of applications). It is frequently these subsequent applications, rather than their parents, which ultimately issue patents. See Mark A. Lemley & Kimberly A. Moore, Ending Abuse of Patent Continuations, 84 B.U. L. REV. 63, 70 (2004) (noting that over half of all litigated patents issue from continuation applications); Mark A. Lemley & Bhaven Sampat, Is the Patent Office a Rubber Stamp?, 58 EMORY L.J. 181, 190-93 (2008) (finding that, taking continuation applications into account, the PTO grants patents to more than 70% of applicants).
made all three maintenance fee payments and, if not, on which date the patent prematurely fell into the public domain.\textsuperscript{61}

2. Litigation Data

Next, I collected enforcement data for each patent.\textsuperscript{62} Specifically, I identified:

(a) \textit{the date each patent was first enforced}: the filing date of the earliest complaint alleging infringement of the patent or seeking a declaration that the patent was not infringed or was invalid;\textsuperscript{63}

(b) \textit{the date enforcement of each patent ceased}: the date on which the very last claim asserting infringement of the patent, or seeking a contrary declaration, was resolved;\textsuperscript{64}

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\textsuperscript{61} Generally, patent owners are given a six-month grace period to pay their maintenance fees, and failure to pay beyond that period results in the patent's expiration. 35 U.S.C. § 41(b). But, a payment made within twenty-four months after the grace period may be accepted if the delay was "unintentional" or "unavoidable." \textit{Id.} § 41(c).

\textsuperscript{62} To locate the docket number of each case asserting a given patent, I cross-referenced results from three databases: (i) each case in which the patent was reported as asserted in Westlaw’s Derwent LitAlert database, (ii) each additional case, if any, from which a document was listed on Westlaw’s “citing references” for each studied patent, and (iii) each additional case, if any, returned by a search for the patent’s number on the Stanford IP Litigation Clearinghouse. To exclude false positives and gather litigation statistics from true assertions, I relied on PACER docket reports for cases filed prior to 2000 and Stanford IP Litigation Clearinghouse docket reports for cases filed in 2000 or later. The dockets for three cases filed pre-2000 were, for unknown reasons, not available via PACER. See Nos. 97-CV-285 (D. Nev.); 96-CV-1040 (D. Nev.); 95-CV-782 (W.D. Tex.). Because I could not determine when these three cases were resolved, I excluded the patents at issue in these cases from the analyses related to litigation end dates.

\textsuperscript{63} Patents can, of course, be enforced without filing litigation. For a detailed discussion, see infra Section III.C.

\textsuperscript{64} In suits resolved by settlement (the vast majority of cases), I identified the date on which the court granted the parties’ stipulated motion for dismissal or for a consent judgment. In suits resolved in the accused infringers’ favor, I identified the date of the jury’s verdict; the date on which the court granted the accused infringer’s dispositive motion to dismiss (e.g., following a ruling that the patentee is not the true owner of the patent-in-suit), motion for summary judgment, or motion for judgment as a matter of law. In the event of an appeal, I identified the date of the affirmance of any of the aforementioned motions. In suits resolved in the patentee’s favor, I identified the date on which the court awarded damages or an injunction, or, in the event of an appeal, the date of affirmance of these remedies. Finally, for three suits in which an unsuccessful petition for certiorari to the Supreme Court was filed, I identified the date certiorari was denied.

I did not identify the date on which the case was “terminated”—i.e., the date on which the court administratively closed the case. Doing so would have counted days, months, or years spent litigating nonsubstantive post-trial or post-judgment issues, like motions for attorneys’ fees and motions for sanctions. Also, in many cases, other claims (including claims for infringement of other patents) continued after claims asserting the studied patent had been resolved. In these multiclaim cases, I identified the date specific to the claim for infringement of (or declaratory judgment claim against) the studied patent.
(c) the total number of suits in which each patent was asserted: the total number of unique docketed cases in which the patentee asserted the patent or alleged infringers sought declaratory relief from an imminent assertion, excluding parallel case pairs and consolidated cases other than multi-district litigation;\(^65\)

(d) the total number of accused infringers against which each patent was asserted: the total number of unique parties against which an infringement claim has been filed or which filed a claim seeking a declaration of relief;\(^66\)

(e) litigation outcomes: whether each patent was ever adjudicated on the merits and, if so, whether the outcome was a finding of infringement, noninfringement, or invalidity;\(^67\) and

\(^{65}\) Accused infringers will often file suit preemptively, seeking a declaration of non-infringement or invalidity. The vast majority of these suits are filed close in time to a mirror-image patent infringement complaint brought by the patent owner. In fact, until recently, courts would only exercise jurisdiction over declaratory judgment actions in which the plaintiff held “a reasonable apprehension of imminent suit.” Teva Pharm. USA, Inc. v. Pfizer, Inc., 395 F.3d 1324, 1333 (Fed. Cir. 2005), abrogated by MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007). Patentees and accused infringers often race to the courthouse (albeit in different districts) in hopes of ultimately consolidating both suits in their forum of choice. See Kimberly A. Moore, Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box, 99 MICH. L. REV. 365, 404 (2000) (stating that infringers file declaratory judgment suits before patentees file infringement suits in order to choose the forum they think will be most favorable). As declaratory judgment plaintiffs, accused infringers may also hold a psychological advantage with juries. See id. at 406 fig.12 (showing that patentees win 68% of jury trials in patentee-filed infringement actions, but only 38% of jury trials in accused infringer–filed declaratory judgment actions). These case pairs typically involve the same parties and proceed in tandem. I counted these case pairs as one suit since, for all intents and purposes, they are. In a similar fashion, ITC investigations often coincide with a patent infringement suit filed contemporaneously in district court. Again, because an ITC investigation brought in parallel with a patent infringement action is in essence one suit, I counted them as such.

Finally, I merged data for individual suits that were so similar and contemporaneous that they were consolidated into a single action. The sole exception I made to this rule was for multi-district litigations (MDLs), which pull together a large number of cases filed over a long period of time. My sample included three MDLs: In re Rembrandt Techs., L.P. Patent Litig., 493 F. Supp. 2d 1367, 1369 (J.P.M.L. 2007) (consolidating fifteen suits in three different federal districts); In re Acacia Media Techs. Corp. Patent Litig., 360 F. Supp. 2d 1377, 1378-79 (J.P.M.L. 2005) (consolidating twenty suits in five districts); and In re Pabst Licensing, GmbH Patent Litig., No. 99-1298, 2001 WL 797315, at *1 (E.D. La. July 12, 2001) (addressing seven motions filed in response to the consolidation of four civil actions by the Panel on Multi-District Litigation).

\(^{66}\) I excluded “John Doe” parties from this number.

\(^{67}\) I did not count default judgments as “adjudications.” To make the most of extremely limited data, the litigation outcomes reported below are restricted to those at the district court level. The data is not adjusted to account for appellate outcomes. Analysis of district court outcomes alone is not uncommon in the patent litigation literature. Cf. Michael J. Mazzeo et al., Excessive or Unpredictable? An Empirical Analysis of Patent Infringement Awards 27-28 (June 17, 2011) (unpublished manuscript), available at http://ssrn.com/abstract=1765891 (examining district court damages awards without examining subsequent changes to damages award after appeal). The litigation outcome data also reflects the fact that a small number of patents (four product-
suit-specific and assertion-specific statistics for litigation ongoing six years prior to patent expiration: the start date, date of resolution, and number of accused infringers for each suit ongoing within at least six years of the patent-in-suit’s expiration, and the start date and date of resolution of each individual infringement claim in those suits.

3. Assignment History and NPE Status

In order to compare enforcement timing among practicing and non-practicing patentees, I also collected information concerning each patent’s owner, including:

(a) each patent’s chain of ownership: the number of times each patent changed hands between the time it was issued and the time it was first asserted in court, including the dates of the first assignment after issue and the last assignment prior to litigation; and

(b) the NPE status of each party asserting a patent: whether the entity asserting each patent sold a product and, if not, what kind of NPE it was.

For the purpose of comparing enforcement timing, I adopted the patentee classification system developed by Mark Lemley and Nathan Myhrvold, which is outlined below in Table 2. Only Class 8 patentees—those that produce a product—are “practicing” entities. Patentees whose status I could not determine fall under Class 10 and were excluded from my sample.

Company patents and one NPE patent) were adjudicated multiple times with varying results. See Timing Dataset.

I obtained this data from the PTO’s Assignment on the Web for Patents (AOTW-P). See Assignments on the Web > Patent Query, U.S. PATENT & TRADEMARK OFFICE, http://assignments.uspto.gov/assignments/?db=pat (last visited Mar. 15, 2013). Patent owners generally do, but are not required to, record assignments with the PTO. See Carlos J. Serrano, The Dynamics of the Transfer and Renewal of Patents, 41 RAND J. ECON. 686, 690 & n.14 (2010) (noting anecdotal evidence that patent transfers and related transactions are often recorded at the PTO even though recordation is not mandatory). Assignments recorded with the PTO within three months protect against ownership claims of subsequent purchasers. 35 U.S.C. § 261 (2006). However, there are no other benefits or penalties associated with recording. To ensure that my data reflects only true transfers of ownership, I excluded any assignments that occurred merely as a result of an owner’s name change or minor corporate reorganization. In a number of instances, the party asserting a patent in litigation did not match the last-recorded owner on file with the PTO. In the vast majority of such cases, I was able to determine from pleadings or other litigation documents whether the party was an owner by unrecorded assignment or simply the last-recorded owner’s exclusive licensee. I excluded the few instances in which I was unable to determine the party’s status as unrecorded owner or exclusive licensee.

Following Allison, Lemley, and Walker, I excluded Class 10 patents from my study. However, as they note, “[t]hat a diligent search could not identify what an entity did suggests that it is likely some form of NPE.” Allison, Patent Quality and Settlement, supra note 1, at 684 n.38. I excluded three patents because I was unable to determine their owners’ NPE statuses and also
Strictly speaking, all other classes are “nonpracticing” entities. Though NPEs are by no means homogeneous, for simplicity’s sake many of the results detailed below are reported for NPEs as a whole. Where practicable, however, results are broken down by entity class so that the reader may determine for herself where to draw the line between NPEs and “trolls.”

Table 2: Entity-Status Classes

<table>
<thead>
<tr>
<th>Entity Class</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Acquired patents</td>
</tr>
<tr>
<td>2</td>
<td>University heritage or tie</td>
</tr>
<tr>
<td>3</td>
<td>Failed startup</td>
</tr>
<tr>
<td>4</td>
<td>Failed product company</td>
</tr>
<tr>
<td>5</td>
<td>Individual inventor–started company</td>
</tr>
<tr>
<td>6</td>
<td>University, Government, or NGO</td>
</tr>
<tr>
<td>7</td>
<td>Start-up, pre-product</td>
</tr>
<tr>
<td>8</td>
<td>Product company</td>
</tr>
<tr>
<td>9</td>
<td>Individual inventor(s)</td>
</tr>
<tr>
<td>10</td>
<td>Undetermined</td>
</tr>
<tr>
<td>11</td>
<td>Industry Consortium</td>
</tr>
<tr>
<td>12</td>
<td>IP subsidiary of a product company</td>
</tr>
</tbody>
</table>

excluded four individually owned patents that were exclusively licensed to patentees of indeterminate NPE status.

70 See Allison, Patent Quality and Settlement, supra note 1, at 683-84 & tbl.1 (describing the typology of entity status classes developed by Lemley and Myhrvold).

71 There is a fine line between Class 1 and Classes 3 and 4 because many acquired patents come from failed product-producing companies and start-ups. In this study, I categorized a patentee as Class 3 or Class 4 when the entity filing suit was the failed company itself, and Class 1 when the entity filing suit was a distinct IP-holding firm that acquired the patent, even if that firm’s entire portfolio appeared to be salvaged from one failed company. For example, I categorized T.M. Patents, LP—a firm created to hold patent assets from the failed Thinking Machines Corporation—as Class 1, not Class 4. Because there is only a minor distinction between a failed company that began to assert its patents in its own name and a failed company that first reorganized into an LLC or LP before doing the same, I report below combined results for Classes 1, 3, and 4.

72 In this class and in Class 9, I included patents owned by licensing companies started by deceased inventors’ heirs and patents owned by such heirs, respectively. A number of patents were litigated by family members of the named inventor after the inventor’s death. See, e.g., First Amended Complaint for Declaratory Judgment and Other Relief and Demand for Jury Trial at 2, 4, 6-7, Black & Decker, Inc. v. Billy Star Holdings, Ltd., No. 08-1261 (D. Minn. May 12, 2008) (asserting a lawsuit against a licensee for failing to pay royalties to plaintiff who inherited patent from his deceased father, the original inventor).

73 In my sample, it turned out that all Class 6 patents were owned by universities. See Timing Dataset.
Because many patents were owned at the time of suit by an entity of one class but were asserted by an exclusive licensee of another, I identified the patent owner and the party asserting the patent in each litigation—i.e., the “patentee.” Unless stated otherwise, the results reported in this Article identify the NPE status of the party acting as patentee in court, even if that party is the patent’s exclusive licensee and thus, strictly speaking, is not its owner. Figure 1 below shows the disparity between patent ownership and responsibility for enforcement. Notably, a significant number of NPE-owned patents were exclusively licensed to product-producing patentees. All university-owned patents in my sample, and more than half of the individually-owned patents, were at the time of assertion exclusively licensed to product-producing companies that acted as plaintiffs or declaratory-judgment defendants. Firms organized for the purposes of exploiting unused patents—patent acquisition firms, firms holding the IP assets of failed companies, and inventor-affiliated licensing firms—therefore account for nearly two-thirds of all NPE-asserted patents. More controversial NPEs account for a small minority of NPE patents and do not drive the results reported below.

Finally, it is worth noting that by happenstance my random sample did not select any patents owned by class 5 patentees Ronald Katz (i.e., Ronald A. Katz Technology Licensing, LP) or Jerome Lemelson (i.e., Lemelson...

74 This convention is used consistently in the literature. See Allison, Extreme Value, supra note 1, at 10 (categorizing “the patent plaintiff”).

75 See Timing Dataset. In addition, one individually owned patent was asserted by a patent acquisition firm. Only one patent originally owned by a university found its way into the hands of another NPE. See id., U.S. Patent No. 5,260,093. Additionally, four patents were transferred in between suits to entities of a different class. One patent, initially asserted by a product company, was later assigned to an intellectual property–holding subsidiary. See id., U.S. Patent No. 5,289,183. Another was asserted by a product company that subsequently failed and was reborn as a litigation-oriented enterprise. See id., U.S. Patent No. 5,213,670. A third was asserted by an individual inventor who later assigned the patent to an acquisition firm. See id., U.S. Patent No. 5,279,051. And a final patent was initially asserted by a start-up company that subsequently failed and assigned the patent to a patent acquisition firm. See id., U.S. Patent No. 5,291,302. In order to compare litigation timing strictly across entity type, I divided these patents into multiple data points, one for each period of litigation supervised by a new entity type.

76 See Allison, Extreme Value, supra note 1, at 24 (referring to “licensing companies in the business of buying up and enforcing patents” as “‘trolls’ by virtually anyone’s definition”); Ball & Kesan, supra note 3, at 14-15 (noting that licensing firms “are among the parties most frequently cited as the most prominent form of patent ‘troll’”). Collectively, these patentee types account for 57 of 88 NPE-asserted patents, or 65%. See infra Table 7. Acquired patents account for 38 of 88, or 43%. Patents asserted by inventor-affiliated licensing companies account for the remaining 19 of 88, or 22%. Id.

77 See supra notes 9-10. As discussed later, see infra paragraph accompanying note 99, virtually all individually owned patents were asserted relatively early in the patent term and, therefore, also do not drive the results reported below.
Medical Education & Research Foundation), although several litigated patents owned by both were issued within the study period.\textsuperscript{78} Katz and Lemelson are perhaps the two most famous and most prolific patent plaintiffs of all time, and they have what can conservatively be described as an outsized impact on patent litigation statistics. Both, and especially Katz, have a history of filing extremely large numbers of suits against extremely large numbers of accused infringers, and authors of previous studies have grappled with whether to exclude their statistics.\textsuperscript{79} The addition of even one Katz patent to my sample—e.g., U.S. Patent No. 5,255,309 or U.S. Patent No. 5,251,252,\textsuperscript{80} both of which have been asserted in about eighty suits—would have significantly increased the per-suit and per-assertion results reported below.


\textsuperscript{79} In a study of patents litigated eight or more times between 2000 and 2007, Katz alone accounted for 60% of all studied lawsuits. See Allison, \textit{Extreme Value}, \textit{supra} note 1, at 26 (noting the enormity of the “Katz effect,” but ultimately deciding to retain Katz-related patents in the empirical analysis).

\textsuperscript{80} See \textit{supra} note 78.
Lastly, I categorized each patent by technology and industry. Rather than using the PTO classification system, I followed Allison, Lemley, and Walker’s taxonomy, which includes nine nonexclusive technology categories and thirteen nonexclusive industry categories listed below in Table 3.

4. Technology and Industry Categories

Lastly, I categorized each patent by technology and industry. Rather than using the PTO classification system, I followed Allison, Lemley, and Walker’s taxonomy, which includes nine nonexclusive technology categories and thirteen nonexclusive industry categories listed below in Table 3.

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See Timing Dataset. These statistics are generally consistent with Colleen Chien’s findings in a study of litigated patents issued in 1990, though I find a higher percentage of product company–asserted patents. See Chien, supra note 24, at 309, 314 (finding, in a study of 659 litigated patents issued in 1990, that 73% were litigated by product-producing companies, 9% by “patent assertion entities,” and 18% by individual inventors). For the precise breakdown of NPE-asserted patents among the various classes, see infra Table 7.

Table 3: Technology and Industry Areas

<table>
<thead>
<tr>
<th>Technology Categories</th>
<th>Industry Categories</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Software</td>
<td>1. Computer</td>
</tr>
<tr>
<td>2. Pure software</td>
<td>2. Semiconductor</td>
</tr>
<tr>
<td>4. Mechanical</td>
<td>4. Medical</td>
</tr>
<tr>
<td>5. Electronics</td>
<td>5. Pharmaceutical</td>
</tr>
<tr>
<td>7. Imaging</td>
<td>7. Chemical</td>
</tr>
<tr>
<td>8. Biotechnology</td>
<td>8. Communications</td>
</tr>
<tr>
<td></td>
<td>10. Energy and utility services</td>
</tr>
<tr>
<td></td>
<td>11. Financial</td>
</tr>
<tr>
<td></td>
<td>12. Consumer goods and services</td>
</tr>
<tr>
<td></td>
<td>13. Construction</td>
</tr>
</tbody>
</table>

Much of this data I have reserved for future research. I do, however, report results below that distinguish among "software," "high-tech," "medical device," "pharmaceutical," and "biotechnology" patents. Software patents, as used in this study, are those that fall within technology categories 1, 2, or 3, regardless of the industry in which they are employed. I label “high-tech” all patents covering computer, electronics, and/or telecommunications technology, including all software patents. These patents generally fall within one or more of technology categories 1-3 and 5-7, and one or more of industry categories 1-4 and 8-9. Finally, medical device, pharmaceutical, and biotech patents are classified as industry categories 4, 5, and 6, respectively. Medical device patents touch on almost every technology category, though most are strictly or primarily mechanical in nature. Some medical device patents—for example those covering computer- or electronically-assisted medical procedures—overlap with technology categories 1-3 and 5-7.

II. RESULTS

A. Two Patent Terms

I begin my analysis by investigating the relative ages of patents asserted by practicing and nonpracticing entities. To make this comparison, however,

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83 See supra note 82.
84 Categories 2 and 3 are both subsets of category 1. Allison, Extreme Value, supra note 1, at 6-7.
I must adjust for the fact that patents in my sample may have one of two different patent terms. All patents in this study issued just before a major event in the history of patent law: the United States’ 1994 ratification of the Agreement on Trade-Related Aspects of Intellectual Property Rights.\(^85\) To comply with the new international obligations, Congress changed the way United States patent law calculates the patent term for the first time since 1952. The legislation, effective June 8, 1995, altered the patent term from seventeen years from issue to twenty years from filing.\(^86\) Importantly, the legislation created a hybrid calculation for unexpired patents issued before or pending on June 8, 1995.\(^87\) Every patent issued during the study period is included in this group. These patents receive a term of either seventeen years from issue or twenty years from filing, \textit{whichever is longer}.\(^88\)

Thus, barring invalidation or a missed maintenance fee payment, every patent in this study received a term of \textit{at least} seventeen years from issuance and \textit{at least} twenty years from filing.\(^89\) The percentage of patents falling in each category is shown below in Table 4. For product-producing companies and NPEs alike, the average duration of prosecution among studied patents was nearly three years.\(^90\) Nonetheless, to account for these slight variations in the patent terms, I primarily report patent age measured in \textit{years prior to expiration}, whether the term is calculated as seventeen years from issue or twenty years from filing.\(^91\)


\(^88\) \textit{Id.}

\(^89\) Patents that issued from applications less than three years old received a longer term under the twenty-years-from-filing formulation. Patents that issued from applications spending longer than three years at the PTO received a longer term under the seventeen-years-from-issue formulation.

\(^90\) NPE patents spent an average of 1094 days at the PTO (almost exactly three years). Product-company patents spent an average of 1089 days, just five fewer days. \textit{See Timing Dataset}.

\(^91\) When measuring backwards from expiration, I use the date the term expired or would have expired for patents that fell into the public domain prematurely.
Table 4: Patent Term

<table>
<thead>
<tr>
<th>Event</th>
<th>Percentage of Patents</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Possible Term</td>
</tr>
<tr>
<td>20 Years from Filing</td>
<td>68.7%</td>
</tr>
<tr>
<td>17 Years from Issue</td>
<td>31.3%</td>
</tr>
<tr>
<td>Failure to Pay Maintenance Fee</td>
<td>--</td>
</tr>
<tr>
<td>Invalidated</td>
<td>--</td>
</tr>
</tbody>
</table>

B. Timing Per Patent

Figures 2 and 3 below show the relative timing of patent enforcement across NPE status on a per-patent basis. Figure 2 is a histogram of the dates on which patents were litigated for the first time, measured backward from the date each patent’s term ended. Figure 3 is a histogram of the dates on which litigation asserting patents ended once and for all, again measured backward from the date of expiration. The results are dramatic. As shown below in Table 5, on average, product-producing companies finish enforcing their patents before NPEs even begin.

Product producing–company litigation and NPE litigation follow opposing trends. On average, product-producing companies overwhelmingly begin litigating their patents early in the patent term, more than twelve years before expiration, and overwhelmingly finish with many years of patent life remaining, more than nine years from expiration. NPEs, on the other hand, begin litigating their patents much later in the term, less than nine years from expiration on average, and overwhelmingly finish in the final few years of the patent term, with an average of 4.4 years (and a median of under three years) remaining.

These opposing trends intersect one another about three to five years prior to expiration. With five years of patent life remaining, product-producing companies have started (and in most cases finished) litigating over 93% of their (asserted) patents, while over 31% of NPE patents have

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92 See Timing Dataset.
93 12.1 years, with a standard deviation of 4.4 years and a median of 12.7 years. See id.
94 9.2 years, with a standard deviation of 4.9 years and a median of 9.9 years. See id.
95 8.8 years, with a standard deviation of 5.2 years and a median of 8.5 years. See id.
96 4.4 years, with a standard deviation of 5.0 years and a median of 2.8 years. See id. These statistics are comparable to prior estimates. See John R. Allison & Mark A. Lemley, Empirical Evidence on the Validity of Litigated Patents, 26 AIPLA Q.J. 185, 237 (1998) (finding that patent suits, on average, are resolved 12.3 years from the application date of the patent-in-suit); Risch, supra note 1, at 490 (finding, among the most litigious NPEs, an average delay of 8.3 years between issue and filing a first complaint).
not yet been asserted. With three-and-a-half years of term remaining, product-producing companies have finished asserting more than 86% of their patents, while more than 59% of NPE patents remain in, or will soon enter, the court system. Though they constitute just one-fifth of all patentees, NPEs asserted almost 55% of patents litigated for the first time within five years of expiration and over 53% of patents in litigation resolved within three-and-a-half years of expiration.

Figure 2: Years from First Suit to Expiration

See Timing Dataset. For a breakdown of specific findings across patentee classes and the patent term, see infra Table 7.
Data on the chain of ownership of these litigated patents in Table 5 sheds additional light on NPEs’ relatively long delay in filing suit. NPE-asserted patents, particularly those acquired from other firms (failed or otherwise), change hands more frequently over a longer period of time than their counterparts litigated by product-producing companies. Moreover, once NPE-asserted patents reach the patentee who will ultimately assert them in court, they sit on average for another three years before they are litigated.

As a whole, NPE-asserted patents are three times more likely to have changed hands between issue and enforcement than product company–asserted patents. Litigant classes 1, 3, and 4, collectively, are more than four times as likely to be asserting a patent that has been transferred between owners post-issue. And assigned patents asserted by these classes have changed hands roughly 50% more often per patent. Patents do not reach acquisition firms until about 9.5 years after issue, and these firms wait 2.4 additional years on average before filing suit. Other NPEs fare little better. Inventor-affiliated licensing companies generally do not form until about six years after issue and, on average, wait more than five additional years before filing suit. And, on average, patents reach product-producing companies’ licensing subsidiaries about eight years after issue and sit for an

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98 See Timing Dataset.
99 See id. These statistics likely understate the disparity in the rate at which product-company and NPE patents are sold because many product-company assignments are the result of mergers, acquisitions, and spin-offs involving all of the patent owner’s assets, not just its patent rights. See generally Chien, supra note 24, at 310-11 (discussing the various ways in which patents can be conveyed).
additional four years before assertion. Individual inventors, by contrast, file suit quickly on almost the exact same timeline as product-producing companies.

Thus, with the notable exception of those claims litigated by individuals, NPE-asserted patents take a long, circuitous path from the PTO to the courthouse that often spans more than a decade and includes multiple prior owners. This finding strongly suggests that it makes little sense to discuss the percentage of NPE litigation among all suits filed. NPEs do not obtain patents until the patent term is half-spent and hold their patents for several years more before filing suit, perhaps while waiting for emerging industries to mature.\textsuperscript{100} Thus, the bare statistic that NPEs account for only about one-fifth of all patents litigated obscures the fact that NPEs account for the majority of patents litigated in the final few years of the term—the only portion of the term when NPEs are actively asserting their patent rights.

\textsuperscript{100} Again, my findings are consistent with prior estimates in the literature. See Risch, supra note 1, at 490 (finding that, among patents asserted by the ten most litigious NPEs, the average time span between issuance and last assignment was seven years).
See Timing Dataset. All statistical analysis reported in this paper was conducted using the Stata v.10.0 t-test, Pearson’s chi-squared, and Fisher’s exact functions, as appropriate. As explained above, the “percent assigned” statistics attempt to count only “true” transfers of ownership, not mere name changes or minor corporate reorganizations (both of which appear in PTO assignment records). See supra note 68. The percentage of patents assigned in the “Acquired/Failed” classes is not 100% because five patents remained in the name of their failed owner. The percentage of patents assigned in the “Individual” class is not zero because there were three assignments between joint inventors—in order to consolidate ownership of the patent in one inventor’s name.

Table 5: Litigation Timing and Assignment History

<table>
<thead>
<tr>
<th></th>
<th>Prod. Co. NPEs (Class 8)</th>
<th>All NPEs</th>
<th>Acquired/ Failed (Classes 1, 3-4)</th>
<th>Inventor Licensing Co. (Class 5)</th>
<th>Individual (Class 9)</th>
<th>IP Subsid. (Class 12)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Avg. litig. start</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Until exp’n</td>
<td>12.1 yrs</td>
<td>8.8</td>
<td>&lt; 0.001</td>
<td>6.7</td>
<td>7.9</td>
<td>12.1</td>
</tr>
<tr>
<td>From issue</td>
<td>5.7 yrs</td>
<td>9.0</td>
<td>&lt; 0.001</td>
<td>10.8</td>
<td>9.95</td>
<td>5.7</td>
</tr>
<tr>
<td>From filing</td>
<td>8.7 yrs</td>
<td>11.9</td>
<td>&lt; 0.001</td>
<td>14.2</td>
<td>12.4</td>
<td>8.6</td>
</tr>
<tr>
<td>Avg. litig. end</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Until exp’n</td>
<td>9.2 yrs</td>
<td>4.4</td>
<td>&lt; 0.001</td>
<td>1.5</td>
<td>3.1</td>
<td>9.3</td>
</tr>
<tr>
<td>From issue</td>
<td>8.6 yrs</td>
<td>13.2</td>
<td>&lt; 0.001</td>
<td>16.1</td>
<td>14.7</td>
<td>8.5</td>
</tr>
<tr>
<td>From filing</td>
<td>11.6 yrs</td>
<td>16.1</td>
<td>&lt; 0.001</td>
<td>19.4</td>
<td>17.2</td>
<td>11.4</td>
</tr>
<tr>
<td>Percent assigned</td>
<td>21%</td>
<td>6.2%</td>
<td>&lt; 0.001</td>
<td>87%</td>
<td>74%</td>
<td>14%</td>
</tr>
<tr>
<td>Assignment data</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total assigns.</td>
<td>1.4</td>
<td>1.9</td>
<td>0.0014</td>
<td>2.1</td>
<td>1.67</td>
<td>1</td>
</tr>
<tr>
<td>Time from issue to first assign.</td>
<td>4.2 yrs</td>
<td>6.0</td>
<td>0.0163</td>
<td>6.6</td>
<td>4.1</td>
<td>7.2</td>
</tr>
<tr>
<td>Time from first to last assign.</td>
<td>1.3 yrs</td>
<td>2.3</td>
<td>0.0085</td>
<td>2.9</td>
<td>1.7</td>
<td>0</td>
</tr>
<tr>
<td>Time from last assign. to assertion</td>
<td>2.9 yrs</td>
<td>3.1</td>
<td>0.3931</td>
<td>2.4</td>
<td>5.2</td>
<td>2.3</td>
</tr>
</tbody>
</table>
C. Per Suit and Per Assertion

The results above actually understate the true magnitude of late-term NPE enforcement. As shown below in Table 6, NPEs are far more litigious on average than product-producing companies. Overall, NPEs file more than twice as many suits per patent and assert each patent against more than four times as many alleged infringers.\footnote{See Timing Dataset. James Bessen et al. found a mean of 15.3 (and a median of 5) accused infringers per suit in a study of patent infringement cases filed by NPEs between 1990 and 2010. James Bessen et al., *The Private and Social Costs of Patent Trolls* 4, tbl.2 (Bos. Univ. Sch. of Law Working Paper No. 11-45, 2011), available at http://ssrn.com/abstract=1930272.} Moreover, NPEs are even more litigious late in the patent term. Per patent litigated in the last three years of its term, NPEs file two-and-a-half additional suits against thirteen additional infringers.\footnote{See Timing Dataset. Naturally, both product-producing companies and NPEs assert their oldest patents still in litigation more times than average.}

Table 6: Relative Litigiousness\footnote{See Timing Dataset.}

<table>
<thead>
<tr>
<th></th>
<th>Prod. Co.</th>
<th>NPE</th>
<th>(p)-value</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Overall</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Suits/Patent (105)</td>
<td>1.5</td>
<td>3.6</td>
<td>(&lt; 0.001)</td>
</tr>
<tr>
<td>Assertions/Patent</td>
<td>2.9</td>
<td>12.3</td>
<td>(&lt; 0.001)</td>
</tr>
<tr>
<td><strong>Litig. complete, more than 3 yrs. from exp’n</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Suits/Patent</td>
<td>1.4</td>
<td>1.7</td>
<td>(&lt; 0.001)</td>
</tr>
<tr>
<td>Assertions/Patent</td>
<td>2.6</td>
<td>5.0</td>
<td>(&lt; 0.001)</td>
</tr>
<tr>
<td><strong>Litig. ongoing, less than 3 yrs. from exp’n</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Suits/Patent</td>
<td>2.6</td>
<td>5.2</td>
<td>(&lt; 0.001)</td>
</tr>
<tr>
<td>Assertions/Patent</td>
<td>5.1</td>
<td>18.1</td>
<td>(&lt; 0.001)</td>
</tr>
<tr>
<td>(p)-value</td>
<td>(&lt; 0.001)</td>
<td>(&lt; 0.001)</td>
<td>(&lt; 0.001)</td>
</tr>
</tbody>
</table>

Taking into account NPEs’ relative litigiousness, NPEs’ dominance of late-term patent litigation grows considerably, as does their share of overall enforcement. Figure 4 below is a histogram of lawsuit filing dates for all suits filed within six years of the patent-in-suit’s expiration. Figure 5 is a histogram of lawsuit resolution dates for all suits resolved within six years of the patent-in-suit’s expiration. Both show a significant increase in NPEs’ late-term domination viewed on a per-suit basis. NPEs account for the

\footnote{Some studied patents were asserted together in the same suit, and all “per suit” data accounts for this fact. The rates reported in this Table, however, report the average number of suits in which each patent was asserted, whether or not another studied patent was asserted in the same suit.}
The majority of all new patent filings in each of the last five years of the patent term and account for more than 67% of all patent suits filed within five years of the patent-in-suit’s expiration. NPEs similarly account for the majority of patent suits resolved within each of the last four years of the patent term and account for more than 70% of all patent suits resolved within three years of the patent-in-suit’s expiration.

Figure 4: Years from Each Suit’s Filing to Patent-in-Suit’s Expiration

See Timing Dataset.

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106 See Timing Dataset.
Finally, viewed per accused infringer—or per “assertion”—NPEs’ domination of late-term patent litigation becomes even more overwhelming. Figure 6 below is a histogram of filing dates for all assertions filed within six years of the asserted patent’s expiration. Figure 7 is a histogram of resolution dates for all assertions resolved within six years of the patent-in-suit’s expiration. The results in both figures are dramatic. NPEs account for the majority of all new patent assertions in each of the last six years of the patent term and, in particular, account for more than 83% of all patent assertions filed within five years of the patent-in-suit’s expiration. NPEs similarly account for the majority of patent assertions resolved within each of the last five years of the patent term and, particularly, for more than 83% of all patent assertions resolved within three years of expiration.

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107 See id.
Figure 6: Years from Each Assertion’s Filing to Patent-in-Suit’s Expiration\textsuperscript{108}

Figure 7: Years from Each Assertion’s Resolution to Patent-in-Suit’s Expiration\textsuperscript{109}

\textsuperscript{108} See id.
\textsuperscript{109} See id.
As summarized below in Table 7, by comparing patents litigated at a similar age (rather than all litigated patents), it is clear that NPE-asserted patents are the overwhelmingly dominant source of patent litigation in the final years of the patent term. NPEs assert the majority of new patents, file roughly two-thirds of new suits and file over four-fifths of new assertions in the final five years of the patent term. They are also responsible for almost identical percentages of patents enforced, and suits and assertions resolved, within three years of expiration. Moreover, the lion's share of late-term NPE litigation is brought by patent acquisition firms, firms holding the IP remnants of failed companies, and inventor-affiliated licensing firms. Collectively, these classes account for about 92% of NPE suits active within three years of the patent expiration. Thus, while prior studies may have shown that “NPEs file only a small fraction of all patent infringement suits,” my results indicate that NPEs—specifically those NPEs most associated with litigation abuse—are responsible for an enormous fraction of infringement claims brought late in the patent term, precisely when litigation seems most abusive.\footnote{Risch, supra note 1, at 466.} \footnote{See supra note 76.} \footnote{See Risch, supra note 1, at 490 (“The longer [NPEs] waited, the more like mythical trolls their behavior might appear . . . ”).}
Table 7: Late-Term Litigation Summary

<table>
<thead>
<tr>
<th>Prod. Co. (Class 8)</th>
<th>Acquired/Failed (Classes 1-3-4)</th>
<th>Inventor Licensing Co. (Class 5)</th>
<th>New Startup (Class 7)</th>
<th>Individual (Class 9)</th>
<th>IP Subsid. (Class 12)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Patents</td>
<td>333</td>
<td>88</td>
<td>38</td>
<td>19</td>
<td>1</td>
</tr>
<tr>
<td>Enforcement ceased</td>
<td>38</td>
<td>48</td>
<td>31</td>
<td>12</td>
<td>0</td>
</tr>
<tr>
<td>w/in 3 yrs. of exp’n</td>
<td>(11.4%)</td>
<td>(54.5%)</td>
<td>&lt; 0.001</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Suits</td>
<td>456</td>
<td>288</td>
<td>189</td>
<td>45</td>
<td>1</td>
</tr>
<tr>
<td>Suits resolved w/in</td>
<td>60</td>
<td>143</td>
<td>112</td>
<td>19</td>
<td>0</td>
</tr>
<tr>
<td>3 yrs. of exp’n</td>
<td>(13.2%)</td>
<td>(49.6%)</td>
<td>&lt; 0.001</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Suits filed w/in 5</td>
<td>53</td>
<td>110</td>
<td>81</td>
<td>19</td>
<td>0</td>
</tr>
<tr>
<td>yrs. of exp’n</td>
<td>(11.6%)</td>
<td>(38.2%)</td>
<td>&lt; 0.001</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Assertions</td>
<td>964</td>
<td>1069</td>
<td>709</td>
<td>211</td>
<td>3</td>
</tr>
<tr>
<td>Assertions resolved</td>
<td>132</td>
<td>654</td>
<td>447</td>
<td>140</td>
<td>0</td>
</tr>
<tr>
<td>w/in 3 yrs. of exp’n</td>
<td>(13.7%)</td>
<td>(61.2%)</td>
<td>&lt; 0.001</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assertions filed</td>
<td>111</td>
<td>557</td>
<td>367</td>
<td>154</td>
<td>0</td>
</tr>
<tr>
<td>w/in 5 yrs. of exp’n</td>
<td>(11.5%)</td>
<td>(52.1%)</td>
<td>&lt; 0.001</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The “total suits” data was adjusted to account for the fact that some studied patents were asserted together in one suit.

See Timing Dataset.
D. Technology Areas and Litigation Outcomes

The results reported above suggest that the final few years of the patent term primarily benefit NPEs. Compared to product-producing companies, NPEs as a whole—and especially firms that hold patents purely for enforcement—assert more patents, in more suits, and against more accused infringers late in the patent term. In fact, as Table 6 shows, NPEs become more aggressive as their patents age. NPE status and litigiousness, however, are not the only traits commonly associated with patent trolls. In this Section, I investigate the prevalence of two other stereotypical characteristics of patent trolls: a propensity for asserting high-tech patents and a tendency to lose when forced to adjudicate their infringement claims on the merits.

In essence, this analysis further measures the extent to which NPEs take advantage of the tail end of the patent term. Product lifecycles in the high-tech industry are notoriously short. Computing power, after all, doubles roughly every two years.\footnote{This observation, which has held true for decades, is known as "Moore's law." See Gordon E. Moore, Progress in Digital Integrated Electronics, Int'l Electron Devices Meeting, IEEE (1975) (predicting that computing power will double approximately every two years), reprinted in SSCS: IEEE SOLID-STATE CIRCUITS SOC'Y NEWS, Sept. 2006, at 36, 37.} Thus, high-tech patents are the most likely to be grossly out of date—technologically speaking—when asserted nearly two decades after their filing dates. Additionally, the success rate of NPEs in infringement allegations suggests that they are relying on strained claim interpretations to stretch aging patents to cover more advanced technology.\footnote{See infra Table 9.}

Table 8 below provides a technology-by-technology breakdown of patent litigation filed by product-producing companies and NPEs; the Table also measures changes in the division of patented technology over time. This data reveals that high-tech patents play a disproportionate role in NPE litigation and in late-term litigation generally. Overall, about 65% of NPE-assisted patents cover computer- or electronics-related inventions, and almost 40% cover the narrower category of software-related inventions.\footnote{Michael Risch, who used PTO classification numbers to define high-tech subject matter, found that 40% of patents asserted by the ten most litigious NPEs were high-tech inventions. Risch, supra note 1, at 477; see also id. (finding that the majority of high-tech patents in his study were software patents (84 of 138 total)). Bessen et al. found that 62% of patents litigated by NPEs between 1990 and 2010 were "software patents" and 75% covered "computer and communications technology." Bessen et al., supra note 102, at 12.} By contrast, just over 40% of product company—asserted patents cover high-tech inventions and just 25% cover software-related subject matter.\footnote{The difference between product-producing companies' and NPEs' enforcement of software patents is statistically significant per patent (p = 0.008), per suit (p < 0.001), and per assertion (p < 0.001). The difference between product-producing companies' and NPEs' rates of
share of high-tech litigation by product companies is roughly the same whether measured by patent, by suit, or by assertion. However, for NPEs, high-tech litigation accounts for a substantially higher 82% of suits and 80% of assertions.\footnote{118}

Among patents asserted in the final three years of their terms, the proportion of high-tech–subject matter patents increases, surprisingly, for all patentees. That is, high-tech patents account for an outsized percentage of patent claims filed in that period by both product-producing companies and NPEs.\footnote{119} In fact, in the final three years of the patent term, the high-tech gap between NPEs and product-producing companies narrows considerably. This pattern exists not because the high-tech share of NPE litigation shrinks (it grows to 88% of assertions\footnote{120}), but rather because the high-tech share of product-company litigation skyrockets to over 71% of assertions.\footnote{121}

\footnote{118} As shown in Table 8, the difference between product-producing companies’ and NPEs’ share of all four technology categories is only statistically significant on a per-assertion basis (software $p < 0.001$; other high-tech $p < 0.029$; medical device $p < 0.001$; biotech-pharmaceutical $p < 0.001$).

\footnote{119} The prevalence of high-tech litigation in the final few years of the patent term, together with the large share of NPE litigation involving high-tech products, could suggest that my findings on litigation timing merely reflect the fact that high-tech patents tend to be litigated late in the patent term. Further analysis of my data directly contradicts this hypothesis, however. Product-producing companies asserting high-tech patents litigate those patents far earlier than their NPE counterparts. Among all high-tech patents, I find that product-producing companies begin enforcement with an average of 11.5 years of patent term remaining, while NPEs begin with just 8.3 years remaining. This difference is statistically significant ($p < 0.001$). Among the same group of patents, product-producing companies finish enforcement with an average of 9.0 years of term remaining, while NPEs conclude their enforcement efforts with just 3.4 years of term left. Again, this difference is highly statistically significant ($p < 0.001$). I find similar results looking at software patents only. On average, product-producing companies begin enforcement with 11.8 years of term remaining and finish with 8.9 years of term left. On average, NPEs begin with 8.6 years of term remaining and conclude just 2.9 years before expiration. These differences are both statistically significant ($p < 0.001$ for both).

\footnote{120} This growth is statistically significant among software claims ($p < 0.001$) and among other high-tech claims ($p = 0.009$).

\footnote{121} While growth in the number of product-company software claims is not statistically significant, growth in the number of other high-tech claims is highly significant ($p < 0.001$). Growth in the number of product-company high-tech suits is also significant ($p < 0.001$). Growth in the number of high-tech patents enforced by product companies is, however, not significant.
Table 8: Technology Areas

<table>
<thead>
<tr>
<th>Prod. Co.</th>
<th>NPE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Patent</td>
<td>Suit</td>
</tr>
<tr>
<td>Overall</td>
<td></td>
</tr>
<tr>
<td>% software</td>
<td>25.5</td>
</tr>
<tr>
<td>% other high-tech</td>
<td>16.2</td>
</tr>
<tr>
<td>% medical device</td>
<td>8.4</td>
</tr>
<tr>
<td>% bio-pharma</td>
<td>5.4</td>
</tr>
<tr>
<td>Litig. complete, more than 3 yrs. from exp’n</td>
<td></td>
</tr>
<tr>
<td>% software</td>
<td>24.4</td>
</tr>
<tr>
<td>% other high-tech</td>
<td>15.2</td>
</tr>
<tr>
<td>% medical device</td>
<td>8.1</td>
</tr>
<tr>
<td>% bio-pharma</td>
<td>4.4</td>
</tr>
<tr>
<td>Litig. ongoing, less than 3 yrs. from exp’n</td>
<td></td>
</tr>
<tr>
<td>% software</td>
<td>34.2</td>
</tr>
<tr>
<td>% other high-tech</td>
<td>23.7</td>
</tr>
<tr>
<td>% medical device</td>
<td>10.5</td>
</tr>
<tr>
<td>% bio-pharma</td>
<td>13.2*</td>
</tr>
</tbody>
</table>

*p < 0.05; **p < 0.10

Finally, Table 9 displays litigation outcomes for product companies and NPEs, including how these outcomes change with patent age. The results suggest that NPEs lose at a higher rate than product-producing companies when their infringement claims are adjudicated and, again, that this disparity is even larger among patents litigated late in the term. The small number of

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122 See Timing Dataset.
123 *p-values compare product company versus NPE patents, suits, and assertions.
124 Of the 28 product-company patents that cover medical devices, 10 (which collectively account for 11 suits and 15 assertions out of 35 and 102 total, respectively, involving medical devices), are also high-tech–related. Five of those 10, which account for 5 suits and 6 assertions, are software-related. See Timing Dataset.
125 Of 11 total NPE patents that cover medical devices, 4 (which collectively account for 7 suits and 24 assertions out of 15 and 58 total, respectively, involving medical devices), are also high-tech–related. One of those 4, which accounts for 3 suits and 6 assertions, is software related. See Timing Dataset.
126 *p-values comparing patents, suits, and assertions resolved more than and less than three years before expiration.
127 Two medical device patents, which collectively account for three suits and ten assertions, are also high-tech related. See Timing Dataset.
128 The data in Table 9 reports whether each patent has ever been found infringed, not infringed, or invalid at the district court level before appeal. Data on appeals is not considered in this study. See supra note 67.
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patents adjudicated, however, renders the detection of a statistically significant difference difficult. Overall, more than 55% of adjudicated NPE patents were found by a judge or jury not to be infringed, compared with just under 30% of adjudicated product company patents. Similarly, product-producing companies proved infringement of almost half their adjudicated patents, while NPEs proved infringement of less than a quarter. Moreover, the difference between product-producing companies’ and NPEs’ success at proving infringement grows with time, though not because NPEs become worse (to a statistically significant degree, anyway). Rather, product-producing companies become more successful. Among adjudicated patents litigated in the final three years of the patent term, product-producing companies proved infringement nearly 67% of the time, while NPEs fail to prove infringement or establish validity over 80% of the time.

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129 The difference is significant at the 95% level ($p = 0.038$).
130 This difference is significant at a 90% level ($p = 0.053$). Also, note that I do not count default judgments as “adjudications.”
131 This increase is not statistically significant ($p = 0.145$).
132 One NPE-asserted patent was found both invalid and not infringed. One possible confounding factor here is that, over time, it has become easier for accused infringers to locate prior art that restricts patentees’ ability to advance broad claim interpretations. See, e.g., F. Russell Denton, Plumb Lines Instead of a Wrecking Ball: A Model for Recalibrating Patent Scope, 16 J. INTELL. PROP. L. 1, 24 (2008) (noting that prior art searching “has become easier because of advances in search technology, online bandwidth, a growth industry in database searches . . . , and the appearance of free searchable PTO online databases, not to mention other public online databases”); see also Allison & Lemley, supra note 41, at 138 (discussing how computer searching may have improved patent examiners’ ability to locate prior art). Note, however, that the invalidity rates reported in Table 9 do not appear to support this hypothesis.
Table 9: Litigation Outcomes

<table>
<thead>
<tr>
<th></th>
<th>Prod. Co.</th>
<th>NPE</th>
<th>p-value*</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Overall</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Adjudicated</td>
<td>19.5%</td>
<td>21.6%</td>
<td></td>
</tr>
<tr>
<td>Infringed</td>
<td>47.7%</td>
<td>22.2%</td>
<td>0.053</td>
</tr>
<tr>
<td>Noninfringed</td>
<td>29.2%</td>
<td>55.5%</td>
<td>0.038</td>
</tr>
<tr>
<td>Invalid</td>
<td>30.8%</td>
<td>27.8%</td>
<td></td>
</tr>
<tr>
<td>*p-values &gt; 0.10 omitted</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Litig. complete, more than 3 yrs. from exp’n</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Adjudicated</td>
<td>18.0%</td>
<td>17.5%</td>
<td></td>
</tr>
<tr>
<td>Infringed</td>
<td>43.4%</td>
<td>28.6%</td>
<td></td>
</tr>
<tr>
<td>Noninfringed</td>
<td>32.1%</td>
<td>57.1%</td>
<td></td>
</tr>
<tr>
<td>Invalid</td>
<td>28.3%</td>
<td>28.6%</td>
<td></td>
</tr>
<tr>
<td>Litig. ongoing, less than 3 yrs. from exp’n</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Adjudicated</td>
<td>31.6%</td>
<td>22.9%</td>
<td></td>
</tr>
<tr>
<td>Infringed</td>
<td>66.7%</td>
<td>18.2%</td>
<td></td>
</tr>
<tr>
<td>Noninfringed</td>
<td>16.7%</td>
<td>54.5%</td>
<td></td>
</tr>
<tr>
<td>Invalid</td>
<td>41.7%</td>
<td>27.3%</td>
<td></td>
</tr>
</tbody>
</table>

III. IMPLICATIONS

The results presented above demonstrate that NPEs play a more important role in the patent system than previously recognized, a role that becomes fully apparent only when accounting for the age of the patents they litigate. In short, while NPEs do not assert the majority of litigated patents or even file the majority of patent suits, they play a dominant role in patent litigation in the waning years of the patent term.

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133 See Timing Dataset.
134 One product company–asserted patent was found both infringed and not infringed in different cases. See id.
135 Four product company–asserted patents were adjudicated before being invalidated. Two were found infringed, and two were found not infringed. See id.
136 One NPE-asserted patent was found both not infringed and invalid. See id.
137 The only change that is statistically significant at a confidence level of 90% or greater is the increase in the percentage of product company patents adjudicated, which is statistically significant at the 95% level (p = 0.046).
A. NPEs Are Mostly Not Technology Disseminators; Product-Producing Companies Are Not Entirely Blameless

What does this fact mean for our opinion of NPEs? For one, it serves as one more nail in the coffin containing NPEs’ claims that they play a “central role in helping commercial entities obtain the rights to use valuable technologies that produce new and beneficial products.” NPEs asserting patents filed by others roughly two decades ago cannot credibly claim that they are championing the rights of their accused infringers’ contemporaneous competitors. Similarly, with the notable exception of individual inventors, NPEs asserting their own patents are by no means rushing to the courthouse to vindicate their own rights soon after their patents issue. Instead, NPEs appear to be engaged in classic troll-like behavior: suing the better part of a well-established industry for infringement of an aging patent, generally one covering software or high-tech subject matter, and consistently losing those claims when pushed to prove their infringement allegations.

According to the data discussed above, NPEs’ claims that they are vindicators of hard-fought patent rights become even less plausible after considering the breakdown of NPE-asserted patents by technology and industry. Almost 65% of NPE patents cover high-tech subject matter in general, and about 40% are software related. Worse still, more than 80% of NPE-filed suits assert high-tech patents generally, and more than 65% have software-related claims. None cover pharmaceutical or biotech inventions, and less than 13% cover medical devices.

Among NPE patents asserted in suits ongoing within three years of their expiration, almost 46% are software patents and more than 72% are high-tech related. And, on a per-assertion basis, almost 88% of NPE patent enforcement in the final three years of the

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138 Kacedon et al., supra note 18.
139 The breadth and age of NPE patents could alternatively (and more generously) suggest that these patents are far from stale and, instead, cover inventions so ahead of their time that it is not until years later that commercial applications (and thus products) emerge. A growing body of scholarship, however, strongly suggests that “pioneering inventions” of this sort are quite rare. See Mark A. Lemley, The Myth of the Sole Inventor, 110 MICH. L. REV. 709, 713, 715-33 (2012) (offering historical evidence to show that the vast majority of the so-called “pioneering inventions” of the past two centuries, including the steam engine, the telephone, and the lightbulb, were independently and contemporaneously invented by multiple inventors); Brian J. Love, Interring the Pioneer Invention Doctrine, 90 N.C. L. REV. 379, 429-35 (2012) (listing a large number of pioneering inventions that were independently and contemporaneously invented); Samson Vermont, Independent Invention as a Defense to Patent Infringement, 105 MICH. L. REV. 475, 478-79 (2006) (listing a large number of inventions invented contemporaneously, and noting that “[s]ome historians and philosophers of science believe convergence is the rule rather than the exception”).
140 Many of these medical device patents, in turn, have a significant high-tech or software component. See supra notes 124-25 & 127 (describing the overlap in these categories).
patent term is high-tech focused. In essence, where innovation is rapid and
cheap, NPEs dominate; where innovation is slow and expensive, NPEs are
nowhere to be found.

Interestingly, a significant portion of product-company litigation on-
going in the waning years of the patent term fares little better. Among
product-company patents in litigation within three years of expiration, a
large percentage (about 58%) cover high-tech inventions. On a per-assertion
basis, this rate jumps to over 71%. Perhaps not surprisingly, upon closer
examination, many of the suits responsible for this jump bear the hallmarks
troll litigation even though they are brought by product-producing
patentees. Several are suits filed by failing companies hoping to use patent
litigation to keep their doors open just a little while longer. Now-bankrupt
film and camera maker Kodak, for example, sued virtually every
smartphone manufacturer, seeking $1 billion in damages for infringement of
old software patents covering image capture, compression, and preview
technology. A struggling Encyclopaedia Britannica launched a similar


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notoriously broad software patent. Other suits were filed by product-producing companies that acquired patent rights purely for litigation purposes. Gemstar-TV Guide, for example, acquired the right to assert, among others, patents owned by former satellite-TV company SuperGuide in a long-running patent battle with the DVR industry. Other product-producing companies suddenly asserted aging high-tech patents that had changed hands several times or asserted these patents against an entire industry. These suits, the likes of which do not occur earlier in the patent


147 See, e.g., id. at 873-74 (noting that Gemstar was impleaded as a third-party defendant to SuperGuide’s infringement suit, and that Gemstar alleged that defendant EchoStar infringed each of the three asserted patents); Certain Set-Top Boxes and Components Thereof, Inv. No. 337-RA-454, USITC Pub. 3564 (Nov. 2002) (Final) (discussing an investigation into a patent-infringement case brought by Gemstar against several companies, including Pioneer Corp. and EchoStar Communications Corp.); see also 2 RICHARD RAYSMAN ET AL., EMERGING TECHNOLOGIES AND THE LAW § 8.05[5] (2003) (describing how Gemstar “expanded its portfolio of patents through various licensing arrangements” and began to enforce those rights aggressively in an effort to gain “a controlling position in the market for interactive program guides,” a market which matured to include technology far more advanced than what was envisioned in Gemstar’s “aging patent portfolio”).

148 My sample included a number of high-tech patents originally assigned to AT&T Bell Labs that changed hands after the company’s spin-off to Lucent and eventually found their way into court in the mid-to-late 2000s. See, e.g., Timing Dataset, U.S. Patent No. 5,298,047; id., U.S. Patent No. 5,287,427; id., U.S. Patent No. 5,243,229; id., U.S. Patent No. 5,235,659. Another high-tech patent, owned by Anvik Corp., was asserted in twelve suits against thirty-five defendants (essentially every flat-panel display/TV manufacturer) in the late 2000s. See Timing Dataset, U.S. Patent No. 5,285,236. One other software patent changed hands in 2009 and was asserted for the first time that same year in three suits against six defendants. See Timing Dataset, U.S. Patent No. 5,233,629.
term, support one point that NPEs have made for years: product-producing companies are just as capable of filing suspect patent suits as NPEs are.  

B. Patent Term Reform

Together, the suspect quality of litigation brought by NPEs and product-producing companies late in the patent term suggests that Congress might enhance innovation by shortening the patent term by three years or even longer. In these final years of the patent term, product-producing companies seem to have all but abandoned enforcement of patents for products from years earlier. Many of those product-producing companies still litigating aging patents appear to have the same motives and characteristics attributed to their much-maligned troll adversaries—and presumably impose the same social costs.  

All other things being equal, a three-year term reduction would impact almost 50% of all NPE suits, while affecting roughly 13% of product-company suits. On a per-assertion basis, a three-year term reduction could cut short more than 26% of all NPE assertions and eliminate another 35% of NPE assertions, while cutting short less

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149 See Merges, supra note 6, at 1610-11 (“[T]ypically, it is not specific entities, but rather specific tactics or practices that are most relevant . . . . Trolling, to put it simply, is a matter of behavior rather than status.”).

150 In a study of accused infringers’ stock prices following a lawsuit, Bessen et al. found that the average NPE suit cost accused infringers $122 million. Bessen et al., supra note 102, at 16. Between 1990 and 2010, the aggregate wealth lost to NPE suits was approximately $500 billion. Id. at 17. In a subsequent article, Bessen and Meurer estimate that in 2011, firms spent approximately $29 billion defending against NPE infringement claims. James Bessen & Michael J. Meurer, The Direct Costs from NPE Disputes 19 (Bos. Univ. Sch. of Law, Working Paper No. 12-34, 2012), available at http://ssrn.com/abstract=2091210.

151 Of course, all things might not remain equal following patent term reform. See infra Section III.C.

152 Of 288 total NPE suits, 72 were filed in the last three years of the patent-in-suit’s term and another 71 were resolved within the same time period though filed a bit earlier. See Timing Dataset.

153 Of 456 total product company suits, 31 were filed in the last three years of the patent-in-suit’s term and another 29 were resolved within the same time period though filed a bit earlier. Id.

154 By “cut short,” I mean that the patent-in-suit would expire during litigation. Patentees could continue to litigate for past infringement, but they would be precluded from receiving an injunction or ongoing royalty after winning summary judgment or at trial because the alleged infringer’s future activities would no longer potentially infringe.

155 Of 1069 total NPE assertions, 376 were brought within three years of the patent-in-suit’s expiration and another 278 were resolved during the same period but filed earlier. See Timing Dataset.
than 8% of product company assertions and eliminating less than 6% of product company assertions.\textsuperscript{156}

Though the majority of affected patents would merely expire during their final assertions (rather than before those are filed), there is good reason to believe the balance of power would still shift dramatically in these cases. Without live patents, patentees cannot seek permanent injunctions\textsuperscript{157} or ongoing royalties\textsuperscript{158} even if they ultimately win their infringement claims. The possibility of both remedies gives patentees leverage to hold up accused infringers for outsized settlements.\textsuperscript{159}

Furthermore, there is good reason to believe that product-producing companies could easily be, and as a practical matter would be, insulated from a term reduction to a degree greater than the statistics above suggest. For one, any legislation reforming the patent term could exclude practicing patentees in the biotech, pharmaceutical, and medical-device industries, which collectively assert about 24% of product-company patents litigated in the final three years of the patent term. Unlike their high-tech counterparts, these patents cover well-defined and well-known products approved by the Food and Drug Administration (FDA), and are frequently litigated at the very end of the patent term against generic manufacturers seeking a leg up in the production of low-cost alternatives to successful name brand drugs, diagnostics, and devices. Would a term reduction harm incentives to produce more of these life-saving inventions? Perhaps not. Pharmaceutical companies are exceedingly skillful at extending their market power over drugs by filing newer patents covering related subject matter—a process

\textsuperscript{156} Of 964 total product company claims, 56 were brought within 3 years of the patent-in-suit’s expiration and another 76 were resolved during the same period but filed earlier. See Timing Dataset.

\textsuperscript{157} After eBay, Inc. v. MercExchange, L.L.C., the possibility that a successful NPE will receive injunctive relief is diminished, but certainly nonzero. See 547 U.S. 388, 393-94 (2006) (rejecting the Federal Circuit’s “general rule” . . . that a permanent injunction will issue once infringement and validity have been adjudged”), rev’g MercExchange L.L.C. v. eBay, 401 F.3d 1323 (Fed. Cir. 2005); see also Lily Lim & Sarah E. Craven, Injunctions Enjoined; Remedies Restructured, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 787, 798 (2009) (noting that, post-eBay, “a patentee who directly competes in the marketplace with the infringing party gets an injunction 79.6% of the time, while an NPE’s chance of an injunction falls precipitously to 33.3%”).

\textsuperscript{158} See Mark A. Lemley, The Ongoing Confusion Over Ongoing Royalties, 76 MO. L. REV. 695, 702-03 (2011) (noting, for example, that some courts have granted \textit{treble} ongoing royalties on the theory that adjudicated infringers who continue to sell the infringing products are “willful” infringers).

\textsuperscript{159} See Lemley & Shapiro, supra note 5, at 2008 (explaining that a threat of injunction can “enable a patent holder to negotiate a settlement for an amount of money significantly exceeding the amount that the patent holder could expect to earn in damages based on reasonable royalties . . . . [because of] the cost to the defendant of switching technologies [in their products] midstream . . . .”).
known as “evergreening.” In fact, for this very reason, a term reduction would impact product-producing companies far less than one might anticipate because, unlike NPEs, a product company can always file new patents covering improved, next-generation versions of its products. That is, while a product company with an expired patent likely has recourse to additional similar patents, an NPE with an expired patent is out of luck and must purchase a replacement.

In any event, it would be logistically simple to exclude medical, biotech, and pharmaceutical patents from any legislation curtailing late-term patent rights because the PTO already has experience singling out such inventions for special treatment. For example, current law already permits term extensions for patents covering products that require FDA approval. These existing provisions could be reformed to lower the bar for term extensions or simply to exclude patents owned by the makers of FDA-approved medicines, diagnostics, or devices from any term reduction reforms.

Excluding cases and assertions brought by pharmaceutical, biotech, and medical device firms, a modified three-year term reduction would impact less than 10% of all product-company suits and roughly 11% of assertions. Taking product-company “trolling” into account would reduce this percentage even further. Additionally excluding those suits and assertions brought

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160 See Rebecca S. Eisenberg, The Role of the FDA in Innovation Policy, 13 MICH. TELECOMM. & TECH. L. REV. 345, 354 (2007) (providing examples of evergreening, such as “patents on ‘metabolites’ (i.e., the products into which drugs are transformed in a patient’s body); patents on intermediate products used in producing drugs; patents on new uses for drugs; and patents on new formulations or preparations”); see also Tamsen Valoir, Six Methods of Preserving Market Exclusivity, 18 INTELL. PROP. & TECH. L.J. 12, 14 (2006) (“[A] generic class of drug molecules might be claimed in an initial patent application, but specific members can be claimed in later unrelated applications as the pharmaceutical data for such members becomes available. Because the follow-on patent does not claim priority to the original application, its term will run from the new filing date.”).

161 See 35 U.S.C. § 156 (2006) (establishing that a product patent can receive a term extension if, among other conditions, the product has “been subject to a regulatory review period [by the FDA] before its commercial marketing or use”). Thus, while it may be exceedingly difficult, if not impossible, to draw bright lines between many other industries, it appears to be relatively simple to separate this cohort of patents. None of the pharmaceutical, biotech, or medical device patents in my sample received a term extension. For a list of extended patents, see Patent Term Extensions, U.S. PATENT AND TRADEMARK OFFICE (Apr. 4, 2012, 3:57 PM), http://www.uspto.gov/patents/resources/terms/156.jsp.

162 Requiring the commercialization of a product would exclude NPE-asserted medical device patents—more than 12% of all NPE patents, see Timing Dataset—from the benefit of any such reform.

163 Collectively, these patentees filed fifteen suits, accounting for twenty-five assertions, resolved within three years of the patent-in-suit’s expiration. See Timing Dataset.
by the troll-like product-producing companies mentioned above, a three-
year reduction in the patent term would disrupt roughly 5.5% of “legiti-
mate” product company patent suits and assertions.164

C. Limitations

One thing this study cannot predict, however, is how patentees would
adjust their litigation timing in response to a term reduction. Though, as
discussed above, patents often do not reach NPEs for years, a substantial
component of NPE litigation delay is simply that: delay. On average, NPEs
wait about 3.1 years to file suit after obtaining a patent.165 Is it possible,
then, that NPEs could dodge a term reduction simply by filing suit several
years earlier than they presently do? The answer is almost certainly “no” for
the vast majority of NPEs, which overwhelmingly target successful high-
tech products.166 NPEs cannot file suit before targeted products hit the
market and generally will not do so before those products go on to become
popular with consumers. Thus, because the lifecycles of very few high-tech
products exceed three years, as a practical matter very few NPE claims can
be expedited beyond three years.167 Put simply, most of the products that
NPEs target today did not exist three years ago. In any event, requiring
NPEs to race to the courthouse would, by itself, produce significant ben-
efits. It would, for example, force some NPEs to litigate before allegedly
infringing products are incorporated into technology standards or costly
fixed investments,168 thus weakening NPEs’ hold-up power.169 Nonetheless,
the results reported above must be discounted to some extent by uncertainty
about NPEs’ ability to sue at an earlier time.

Further, while I have used the terms “enforcement” and “litigation” inter-
changeably above, the results of this study are only as strong as the degree

164 Collectively, these patentees filed twenty suits, accounting for fifty-three assertions, re-
solved within three years of the patent-in-suit’s expiration. See Timing Dataset.

165 See supra Table 5.

166 See Mark A. Lemley, Should Patent Infringement Require Proof of Copying?, 105 MICH. L.
REV. 1525, 1526 (2007) (noting that patent trolls “assert patents against successful companies that
independently develop and manufacture technology without knowledge of those patents”); Shrestha, supra note 1, at 140 (noting that NPEs tend to sue “manufacturers of successful
products”).

167 See Moore, supra note 114, at 37 (observing that computing power advances at a rapid rate,
doubling every two years).

168 Cf. Robert P. Merges & Jeffrey M. Kuhn, An Estoppel Doctrine for Patented Standards, 97
hide “the existence of patents in order to assert them against industry members who become
locked into a standard”).

169 See supra note 159 and accompanying text.
to which the temporal bounds of litigation match those of all patent enforcement. Because patent licenses negotiated outside the court system are almost always kept confidential, it is virtually impossible to measure the total level of patent enforcement that product-producing companies undertake after ceasing litigation, that NPEs undertake before filing suit, and that all patentees undertake with patents that are never asserted in court.

While the amount of each type of nonlitigation patent enforcement is certainly nonzero, there is good reason to believe that this source of uncertainty is not fatal to studies of this kind. First, while some NPEs do license their patents without litigation, they face at least one very strong incentive not to do so: the importance of forum selection. If litigation appears imminent, a threatened product company can and generally will file a declaratory judgment action in a favorable jurisdiction to prevent the impending suit from proceeding in a patentee-friendly district. What it almost certainly will not do is closely review unsolicited license offers from small NPEs. Accordingly, it seems reasonable to assume that the most sophisticated NPEs, especially those who are repeat players, adopt a litigate-first strategy, and that sophisticated product-producing companies do, too, when confronted with serious NPE infringement claims.

Unlike NPEs, however, product-producing companies more frequently resolve patent disputes without litigation. One reason is that patent litigation is especially costly for accused infringers. Thus, unlike NPEs, which cannot be counter-sued for patent infringement, product-producing companies are exposed to potential patent infringement claims, and must therefore be careful about suing other product-producing companies. In
addition to litigation expenses, competitors face other strong incentives not
to challenge each other’s patents. For example, they bear the cost of the
challenge but share the benefit of invalidation with the rest of the industry,
including competitors. 174 All of these factors suggest that, among product-
producing companies, patent litigation is generally a last resort used against
especially recalcitrant competitors. Finally, at least among product-
producing companies that actively license their patent portfolios, it is
standard practice to license relatively large pools of patents, rather than a
select few. 175 It is unlikely that removing the oldest patents from a large
pool would substantially reduce the pool’s value to a competitor looking to
clear a path to commercialize a new, cutting edge product. Accordingly,
only very little, if any, of the value of such a license should be attributed to
the most aged patents in the pool. 176

Finally, some in the patent community perceive an increase in the share
of patent litigation attributable to NPEs in recent years. If this trend does
exist, my findings on late-term NPE litigation could be inflated by the fact
that fewer NPEs existed during the 1990s and early 2000s when, perhaps,
they might have enforced younger patents. One oft-repeated narrative
explains the NPE business model as a recent phenomenon popularized after
the burst of the dot-com bubble. 177 Recent scholarship, however, casts
serious doubt on this conventional wisdom. Michael Risch reports, for
example, that large-scale NPE operations date back to at least the mid-1980s,
were very active in the 1990s, and, in some instances, markedly decreased their activity in the 2000s. Other scholars have documented the existence of NPEs throughout U.S. history. Nonetheless, there appears to be at least a kernel of truth to the conventional wisdom that NPEs ascended from the ashes of the 2000–2001 tech stock crash. Two recent studies of patent suits filed post-2000 suggest that the percentage of patent suits brought by NPEs has, on net, increased over the last decade. Pending additional, broader studies on this topic, my findings should be interpreted with the caveat that they reflect some degree of selection bias caused by an increase over time in the percentage of litigation activity attributable to NPEs.

D. Maintenance Fee Reform

Is the potential disruption of roughly 5.5% of product-company assertions (54 claims in this study) worth trading for the potential elimination of more than 35% of NPE claims and the dilution of another 26% of claims (654 total claims in this study)? Perhaps not, given the limitations discussed

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178 See Risch, supra note 1, at 475 (reporting that, of the ten most litigious NPEs since 2003, two filed their first suit in 1986, nine filed their first suit before 2000, and three ceased filing suits during the 2000s).

179 See Merges, supra note 6, at 1592-96 (summarizing the long history of patent-related “rent-seeking” in the United States, especially in the agricultural industry in the 1860s and 1870s, in the railroad industry during the next few decades, and in the automobile industry after the turn of the century); see also Colleen V. Chien, Reforming Software Patents, 50 HOUSTON L. REV. 325, 335-36 (2012) (recounting similar historical examples of patent trolling).

180 See Chien, supra note 3, at 1604 fig.2 & n.168 (finding, in a study of 2300 high-tech patent suits filed between 2000 and 2008, that NPEs filed 10% of all suits between 2000 and 2001, 16% between 2002 and 2003, 16% between 2004 and 2005, and 20% between 2006 and 2008); Jeruss et al., supra note 24, at 378 (finding, in a study of 100 patent suits filed each year from 2007 to 2011, that the percentage asserted by “monetizers,” or NPEs, was roughly 22% in 2007, 27% in 2008, 33% in 2009, 30% in 2010, and 40% in 2011). Neither study makes any findings with respect to the ages of asserted patents.

181 The availability of inter partes reexamination is another possible confounding influence. Potential infringers have the option to request the inter partes reexamination of patents filed on or after November 29, 1999, 37 C.F.R. § 1.913 (2011); see also Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 6, 125 Stat. 284, 299-313 (2011) (developing procedures for new “post grant review” and “inter parties review” proceedings). Thus, during this time period, patentees concerned about the prospect of inter partes reexamination had an incentive to assert patents filed before the November 1999 deadline. Greater fear of inter partes reexamination by NPEs than by product-producing companies might introduce some bias into the analysis of my data. However, the risk of bias appears low given the infrequency of inter partes reexaminations. Compare Inter Partes Reexamination Filing Data—June 30, 2012, U.S. PATENT & TRADEMARK OFFICE (June 2012), http://www.uspto.gov/patents/stats/ipt quarterly report_june_30 2012.pdf (showing that, since 2000, there have been 1659 total requests for inter partes reexamination), with LEX MACHINA, supra note 23 (showing that more than 37,000 total patent suits were filed in the United States since 2000).
above. Furthermore, recall that the United States is a party to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS),\(^{182}\) which requires WTO member nations to offer a minimum of twenty years’ patent protection.\(^{183}\) Were the United States to formally reduce the patent term without first renegotiating with the WTO, it could face trade sanctions from most of the industrialized world.\(^{184}\)

A less drastic reform, and one that has the added benefit of not violating the United States’ obligations under TRIPS, would be to increase the frequency and magnitude of maintenance fee payments in the latter half of the patent term. Today, patent owners are free from payment obligations less than twelve years after issue, not long after the tide of patent litigation shifts toward NPEs.\(^{185}\) Congress, or the PTO itself,\(^{186}\) could require additional annual fees for years nine through eleven and thirteen through sixteen (or longer) and, moreover, could substantially increase the fee required for each year.

This sort of reform could operate as something of a porous de facto term reduction, bringing about the premature expiration of many patents that would otherwise end up in the hands of patent acquisition firms,\(^{187}\) while at the same time permitting product-producing companies that profit from lucrative confidential licensing agreements to extend their patents up to

\(^{182}\) See supra note 85.

\(^{183}\) TRIPS Agreement, supra note 85, at 314.

\(^{184}\) TRIPS incorporates the dispute settlement provisions set forth in the General Agreement on Tarriffs and Trade. See General Agreement on Tarriffs and Trade, arts. XXII, XXIII, Oct. 30, 1947, 55 U.N.T.S 187, 266; TRIPS Agreement, supra note 85, at 327. As a practical matter, however, WTO member nations including the U.S. violate various aspects of the TRIPS agreement quite often without ramification. See Colleen V. Chien, Tailoring the Patent System to Work for Software and Technology Patents 1 (Nov. 15, 2012) (unpublished manuscript), available at http://ssrn.com/abstract=2176520 (“The open secret among international law scholars is that despite ‘TRIPS’ broad pronouncements, the treaty actually contains many flexibilities and exceptions.”).

\(^{185}\) Under current law, maintenance fees are due at 3.5 years ($980), 7.5 years ($2480), and 11.5 years ($4110). 37 C.F.R. § 1.20(e)–(g) (2012). Patentees that qualify as “small entities” pay only half this amount. Id. Those that qualify as “micro entities” pay one quarter. Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 10, 125 Stat. 284, 316-17 (2011) (to be codified at 35 U.S.C. § 41). The size, but not the timing, of these fees may change soon. See infra note 191.

\(^{186}\) The America Invents Act grants the PTO power to set its own fees “to recover the aggregate estimated costs to the Office for processing, activities, services, and materials relating to patents.” Leahy-Smith America Invents Act § 10. As interpreted by the PTO, this provision gives the agency “flexibility to set individual fees in a way that furthers key policy considerations.” Setting and Adjusting Patent Fees, 77 Fed. Reg. 55,028 (proposed Sept. 6, 2012).

twenty years from filing. Moreover, the rates at which patentees renewed their patent rights late in the term would shed additional light on the private value of aging patents—information that could help tailor a potential term reduction years down the road.\footnote{See Chien, supra note 24, at 305 (“The decision to maintain a patent signals its private value to the patent owner.”). Other possible reforms exist that might mitigate the costs of late-term patent enforcement. For example, the United States could implement a rule, loosely related to the “working requirements” in effect in many other countries, that patent rights expire unless they have been the subject of at least one bona fide license or good faith patent suit within a certain number of years following issue. See Janice M. Mueller, The Tiger Awakens: The Tumultuous Transformation of India’s Patent System and the Rise of Indian Pharmaceutical Innovation, 68 U. Pitt. L. Rev. 491, 595 (2007). (“Several advanced developing countries including India and Brazil have retained domestic working requirements . . . .”). Alternatively, Congress or the courts could institute a new defense akin to laches that denies relief to patentees who fail to quickly seek out potential infringers and initiate licensing negotiations before filing suit. See Tun-Jen Chiang, The Reciprocity of Search, 66 Vand. L. Rev. 1, 50-58 (2013) (arguing that 35 U.S.C. § 287 should be interpreted to “reallocate the search duty to patentees”).}

Such a reform would be far from radical.\footnote{Many commentators throughout the years have called for an increase in the size or frequency of patent maintenance fee payments. See Chien, supra note 179, at 361 (noting arguments in favor of increasing maintenance fees that were voiced as early as the nineteenth century); Francesca Cornelli & Mark Schankerman, Patent Renewals and R&D Incentives, 30 RAND J. Econ. 197, 208 (1999) (finding that “renewal fees should rise much more with patent length than existing fee schedules”); Magliocca, supra note 16, at 1836-37 (describing a “dormancy tax . . . . scheme in which [maintenance] fees are sharply increased and assessed more frequently”); Kimberly A. Moore, Worthless Patents, 20 Berkeley Tech. L.J. 1521, 1551-52 (2005) (recommending annual maintenance fee payments).} By international and historical standards, United States patent fees seem to have a considerable amount of room to grow. Many countries, including the United Kingdom, Germany, and Canada, already charge annual maintenance fees after the first few years of patent life.\footnote{Renewing Your Patent, INTELL. PROP. OFFICE (U.K.), http://www.ipo.gov.uk/types/patent/p-manage/p-renew.htm (last visited Mar. 15, 2013) (explaining that in the UK patents must be renewed “on the 4th anniversary of the filing date and every year after that . . . up to 20 years”); GERMAN PATENT & TRADE MARK OFFICE, PCT APPLICANT’S GUIDE 5 (2012), available at http://www.wipo.int/pct/guide/en/gdvol12/annexes/de.pdf (explaining that fees are “payable for the third and each subsequent year following the international filing date”); CANADIAN INTELLECTUAL PROP. OFFICE, MANUAL OF PATENT OFFICE PRACTICE § 24.02.01 (last updated 2010), available at http://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/html/ rpbb-mopop-eng.pdf (“In order to maintain a patent application in effect, an applicant must pay maintenance fees for each one-year period from the second anniversary of the filing date of the application.”).} Also, relative to GDP per capita, United States patent fees this decade have been at or near an “all-time low”—about ten times cheaper than they were in 1800.\footnote{Gaëtan de Rassenfosse & Bruno van Pottelsbergh, The Role of Fees in Patent Systems: Theory and Evidence 6 (Intellectual Prop. Research Inst. of Austl., Working Paper No. 7/10, 2010), available at http://www.ipria.org/publications/wp/2010/Working%20Paper%207_2010.pdf. Recently proposed changes to the maintenance fee schedule would increase (for small and large entities) the
CONCLUSION

Whatever the precise mechanism employed, the results presented in this Article suggest that society might be better off if patent rights diminished earlier than they do under current law. In a world in which at least some products are out of date by the time they hit store shelves, the last few years of a two decade-long patent term seem unlikely to incentivize greater innovation. To the contrary, it appears that the waning years of patent protection primarily benefit litigation-oriented patentees who do little more with their aging patent rights than impose steep legal costs on those selling successful products. Perhaps through future research that dispels concerns raised by the limitations discussed above, we will soon gain a deeper understanding of the practical costs and benefits of the final years of the patent term that will spur legislative action to trim the nation’s ever-increasing thicket of aging patents.

first fee by 42%, the second by 26%, and the third by 56%. See Setting and Adjusting Patent Fees, 77 Fed. Reg. 55,028, 55,040 tbl.4 (proposed Sept. 6, 2012) (displaying the current and proposed fee structure).