

Patent Troll Myths

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* Associate Professor of Law, Villanova University School of Law. The author thanks Brian Broughman, Colleen Chien, Mark Lemley, Peter Menell, David Schwartz, commentators on various blogs, and participants of the 2011 Cyberlaw Colloquium, 2011 IP Scholars Conference, and 2010 Law & Society Association Conference (Law & Entrepreneurship group) for their helpful comments and feedback. The author further thanks Chris Reohr and PatentFreedom; the IP Litigation Clearinghouse; and John Allison, Mark Lemley, and Joshua Walker for providing data used in this study. This seemingly endless project could not have been completed without the seemingly endless support provided by the West Virginia College of Law and the Villanova University School of Law. Valuable research assistance was provided by Dustin Bednarz, Doug Behrens, Brian Corcoran, Richard Eiszner, Nate Griffith, Simran Kaur, and Josh Nightingale.

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I. INTRODUCTION

It turns out that just about everything we thought about patent trolls—good or bad—is wrong. Using newly gathered data, this Article presents an ethnography of sorts about highly litigious non-practicing entity (NPE) plaintiffs. The results are surprising: they show that the conventional wisdom about patent trolls likely finds its basis in anecdotal, but infrequently occurring, events. Instead, the patents enforced by so-called trolls—and the companies that obtained them—look a lot like other litigated patents and their owners.

Scholars, practitioners, and entrepreneurial businesses have all recognized the growing number of patent plaintiffs who do not produce a product or sell a service, leaving them immune to a counterclaim for patent infringement.¹ Such immunity significantly reduces the likelihood of a low-cost, cross-licensing settlement;² the ten most active NPEs generate legal costs of \$500 million at a minimum.³ There are many types of NPEs—failed companies, universities, and individuals, to name a few. Other NPEs are in business simply to assert patents; they obtain their patents from others or even apply for their own.

¹ See Daniel McCurdy, *Patent Trolls Erode the Foundation of the U.S. Patent System*, SCI. PROGRESS, Jan. 12, 2009, at 81, available at <http://www.scienceprogress.org/wp-content/uploads/2009/01/issue2/mccurdy.pdf> (“NPEs do not derive any significant portion of their revenue from designing, developing, manufacturing, or selling products, they are essentially immune to counter-assertion claims by the companies from which they seek royalties.”).

² For a good discussion of the importance of cross-claims and defensive patenting, see Colleen Chien, *From Arms Race to Marketplace: The Complex Patent Ecosystem and Its Implications for the Patent System*, 62 HASTINGS L.J. 297 (2010).

³ The minimum legal costs generated by the ten most active NPEs is based on the estimate that the legal costs of a single NPE at the summary judgment stage are at least \$500,000. See *supra*, note 46 and accompanying text.

“Patent troll” is a pejorative moniker commonly assigned to NPEs⁴ because they allegedly wait for an industry to develop, then appear to exact a toll on companies who commercialize the technology.⁵ According to the detractors’ narrative, trolls are recent fly-by-night shops that assert business-method and internet patents.⁶ Trolls assert low-quality patents in low-quality litigation.⁷ They obtain patents from failed companies in fire sales.⁸ Worse, because trolls do not make anything, their patents do not provide anything of value to society.⁹ In short, according to their critics, patent trolls represent a significant break from past practices and foreshadow the downfall of innovative society.

NPEs are not, however, without their defenders.¹⁰ According to their proponents, NPEs create patent markets, and those markets enhance investment in start-up companies by providing additional liquidity options.¹¹ NPEs help businesses crushed by larger competitors—competitors who infringe valid patents with impunity.¹² NPEs allow individual inventors to monetize their inventions. These functions, the proponents argue, justify the existence of NPEs.¹³

To be sure, whether an NPE qualifies as a “troll” depends on who is doing the name-calling. Regardless of how they define “troll,” though, commentators have used little evidence to support their positions.¹⁴ The reason is simple: there has been little research about the patents litigated by NPEs and even less about the sources of those patents.

⁴ Tam Harbert, *If You Can't Beat Patent Trolls, Join Them*, EDN (Sept. 9, 2008), <http://www.edn.com/index.asp?layout=article&articleid=CA6594114>.

⁵ See Sannu K. Shrestha, Note, *Trolls or Market-Makers? An Empirical Analysis of Nonpracticing Entities*, 110 COLUM. L. REV. 114, 119–31 (2010) (providing an overview of relevant literature and competing arguments).

⁶ Jason Rantanen, *Slaying the Troll: Litigation as an Effective Strategy Against Patent Threats*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 159, 167 n.36 (2009); see J.P. Mello, *Technology Licensing and Patent Trolls*, 12 B.U. J. SCI. & TECH. L. 388, 391 (2006).

⁷ Shrestha, *supra* note 5, at 119.

⁸ Mello, *supra* note 6, at 392.

⁹ See, e.g., Shrestha, *supra* note 5, at 121–24 (examining arguments that patents do not add value).

¹⁰ *Id.* at 115–16.

¹¹ *Id.* at 130.

¹² *Id.* at 127.

¹³ *Id.* at 126–29.

¹⁴ Gerard N. Magliocca, *Blackberries and Barnyards: Patent Trolls and the Perils of Innovation*, 82 NOTRE DAME L. REV. 1809, 1810 (2007) (“Like most fresh legal questions, the debate on patent trolls is long on passion and short on proof.”).

The source of NPE patents matters. If NPEs are acquiring their patents from productive, inventive entities, then the patent system may be working better than we thought. Of course, the most efficient world is one where people spend a lot of time and money inventing, disclose their ideas through patents, and then refuse to enforce them. But the patent world has never worked this way, and many would argue that it should not work this way. Without the potential for enforcement, there may be less inventive activity.

Understanding NPEs is critically important to better understanding the role of patents in society and in entrepreneurial business.¹⁵ The debate cannot be resolved without further study of the companies whose patents are now litigated by NPEs.¹⁶

This case study of the ten most litigious NPEs is the first step toward understanding some real facts about NPEs and their patents. It examines their litigation, their patents, and the companies that created those patents. The study includes information about 350 patents asserted in nearly 1000 cases. More importantly, it is the first study to examine the provenance of patents asserted by NPEs to see what happened to the inventors/assignees of those patents. Much of the conventional wisdom is supported by one-time stories that do not reflect the whole picture.

Most of the “factual” criticisms of NPEs are unsupported by the evidence.

- First, NPEs are not particularly new.
- Second, their patents look like other litigated patents. Business methods are not the dominant form, though there are plenty of software patents and no biotech, pharmaceutical, or chemical patents.
- Third, while measuring patent quality is extremely difficult, the available information implies that NPE patent quality is not drastically lower than other litigated pa-

¹⁵ See 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, 136–37 (2007).

¹⁶ See, e.g., Magliocca, *supra* note 14, at 1810–11 (discussing differing claims about trolls but noting lack of proof to support either side); Jennifer Kahalelio Gregory, Note, *The Troll Next Door*, 6 J. MARSHALL REV. INTELL. PROP. L. 292, 292 (2007) (“The use of the term Patent Troll is a mask for underlying fears based on real shortcomings in the patent system, which need to be addressed.”); Andrew Gelman, *Info on Patent Trolls*, ANDREWGELMAN.COM (Sept. 6, 2011, 9:55 PM), <http://andrewgelman.com/2011/09/info-on-patent-trolls> (“This guy (Michael Risch) actually did a survey. It seems like cheating to add actual systematic knowledge to the debate. . .”).

tents'. The same cannot be said for litigation quality; trolls almost never won infringement judgments.

- Fourth, productive companies originally obtained most of the patents now asserted by NPEs, and non-productive companies whose only purpose was to obtain and monetize patents originally obtained a few of the patents.
- Fifth, very few of the companies supplying patents to NPEs are out of business; instead, most patents came from productive companies and most of those continue to operate.
- Finally, while the timing of lawsuits was not consistently "trollish," the moniker may be somewhat accurate. The average patent sat on the shelf for more than seven years before being litigated, though several were asserted almost immediately.

Those defending NPEs do not fare much better.

- First, the evidence does not support a theory that NPEs incentivize investment by providing a market for patents. A small percentage of the companies that obtained NPE patents received venture capital investment, as did a random group of companies that held patents. While there is a difference between the two, that difference is not clearly attributable to NPE activity. That said, any startup holding a patent is much more likely to receive funding than a company without patents, and it is at least possible that NPEs contribute to this increased probability.
- Second, it is unlikely that NPEs are vindicating the rights of small companies forced out of business by infringers. Very few of the initial owners of NPE patents failed, and the patents were held for a long time before they were asserted.
- Finally, the evidence does support one defense of NPEs: NPEs provide a better way for individual inventors to enforce their patents than bringing lawsuits themselves.

To be sure, this study could not provide the answer to every question, nor can it conclusively answer some underlying questions, such as whether NPEs hinder innovation by asserting patents that are no longer owned by productive companies. Non-litigious NPEs, including universities, were not studied, and the data does not lend itself to rigorous empirical regressions. Even so, this study is a critical first step to a better understanding the role of NPEs in society.

Part I presents some background about the NPE debate, including a discussion of the various criticisms of and justifications for NPEs. Part II describes the methodology and novel data set developed for this study. Part III applies the data from this study to criticisms of NPEs, while Part IV considers how the data applies to defenses of NPEs. The Article concludes with the observation that NPEs represent a microcosm of inventive society, and how one views each type of inventor should inform how one views NPEs.

II. BACKGROUND

The assertion of patents by NPEs has captured the imagination and fears of many who follow the patent system. As this Article is being completed, a simple Google search for “patent trolls” yields more than 500,000 hits. The same search in Lexis’s LGLPUB database of law reviews and legal periodicals yields nearly 700 articles. The rhetoric is so heated, and the moniker “patent troll” so pejorative, that blogs have been devoted to tracking NPEs and have been sued for defamation for doing so.¹⁷ There is an active debate but little evidence supporting either side’s claims.

A. *The Debate*

The debate centers on a few different areas, namely, quality, innovation, and investment.

One group considers the quality of NPE patents. Some argue that the patents are of low quality¹⁸ and not infringed, so that the NPE is a nuisance extracting rents from those who would rather avoid the expensive cost of litigation.¹⁹ Others argue that NPEs fully research their patents, pursuing only those least likely to be found invalid.²⁰ This leaves defendants with no choice but to settle or face a large

¹⁷ See, e.g., Joe Mullen, *Troll Tracker Sued: Judge Ward’s Son is One of the Plaintiffs*, PRIOR ART BLOG (Mar. 11, 2008, 12:45 AM), http://thepriorart.typepad.com/the_prior_art/2008/03/judge-wards-son.html.

¹⁸ Magliocca, *supra* note 14, at 1827.

¹⁹ See, e.g., *id.* at 1829–30 (postulating that vague NPE patents and litigation costs increase uncertainty and may drive settlements); Ted Sichelman, *Commercializing Patents*, 62 STAN. L. REV. 341, 368 (2010) (arguing that NPEs impose transactions costs that harm commercialization). *But see* John M. Golden, “Patent Trolls” and Patent Remedies, 85 TEX. L. REV. 2111, 2129 (2007) (asserting that problem of settlements in excess of value is not limited to NPEs).

²⁰ See e.g., Timo Fischer & Joachim Henkel, Patent Trolls on Markets for Technology—An Empirical Analysis of Trolls’ Patent Acquisitions 1 (unpublished manuscript) (Apr. 28, 2011) (arguing that NPEs acquire high quality patents), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1523102.

judgment.²¹ Characterizing this latter observation as a “problem” is questionable; while the social costs of patent litigation by non-producing companies might be debated, it seems doubtful that society is worse off if such entities only chose to enforce the most meritorious patents.²² However, to the extent that any plaintiff can rely on injunctions or royalties on small pieces of complex products, there is a potential detriment to society.²³

Another group argues that NPEs hinder innovation because their “blocking patents” stop otherwise industrious companies from delivering desired products and services to the market.²⁴ This is more costly than other litigation because NPEs do not themselves use the patents to create anything of value,²⁵ and the evidence is clear that most infringers do not copy from patents but rather independently

²¹ See Magliocca, *supra* note 14, at 1828 (arguing that defendants settle not out of nuisance, but because of fears of high damages and high costs of non-infringing substitutes); Tim Wu, *Weapons of Business Destruction How a Tiny Little “Patent Troll” Got BlackBerry in a Headlock*, SLATE (Feb. 6, 2006, 3:04 PM), <http://www.slate.com/id/2135559>.

²² See *Real Drawback to NPE Model is Inefficiency, Not Greed*, RPX BLOG (Aug. 13, 2009), <http://www.rpxcorp.com/index.cfm?pageid=14&itemid=10> (suggesting NPEs would serve society better if it were cheaper to enforce patents); *cf.* Magliocca, *supra* note 14, at 1827–28 (pointing out that NPEs were only important during two instances in history of patents, so that patent merit cannot be the sole basis for the “troll problem”).

²³ See, e.g., Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2002–03 (2007) (arguing that multiple royalties creates a social cost). *But see* Einer Elhauge, *Do Patent Holdup and Royalty Stacking Lead to Systematically Excessive Royalties?*, 4 J. COMPETITION L. & ECON. 535 (2008) (expressing skepticism that holdup creates excessive royalties).

²⁴ David G. Barker, *Troll or No Troll? Policing Patent Usage with an Open Post-Grant Review*, 2005 DUKE L. & TECH. REV. 9, ¶ 7 (2005), <http://www.law.duke.edu/journals/dltr/articles/pdf/2005dltr0009.pdf>; *cf.* James Bessen & Robert M. Hunt, *An Empirical Look at Software Patents*, 16 J. ECON. & MGMT. STRATEGY 157, 184 (2007) (noting that software patents may not be consistent with incentive theory of patents); Sichelman, *supra* note 19, at 343 (positing that every patent has the potential to block commercialization by others). *But see* Golden, *supra* note 19, at 2155–57 (highlighting the fact that the problem of strategic injunctions may be greater for competitive companies rather than NPEs).

²⁵ See Magliocca, *supra* note 14, at 1818–19; Robert P. Merges, *Commercial Success and Patent Standards: Economic Perspectives on Innovation*, 76 CALIF. L. REV. 803, 845 (1988) (“The patent system . . . rewards invention directly, and innovation only indirectly.”); *id.* at 850 (“By separating a firm’s revenue predictions from its assessment of technical feasibility, the Kamien and Schwartz model lends analytical rigor to the skepticism some judges have felt intuitively: sometimes firms *decide* not to innovate; they do not always try and fail.” (internal citation omitted)). *But see* Jack Kaufmann, *Afterword*, 66 ANTITRUST L.J. 527 (1998) (explaining that true technology suppression is rare).

develop their own technology that happens to infringe.²⁶ Others argue that the companies that assign their patents to NPEs attempt to commercialize technology,²⁷ only to lose in the marketplace to large companies that infringe without payment.²⁸ Thus, it may be that NPEs are simply licensing entities that give all inventors better credibility²⁹ in early commercialization and patent enforcement.³⁰

²⁶ Christopher Cotropia & Mark Lemley, *Copying in Patent Law*, 87 N.C. L. REV. 1421 (2009). Of course, failure to copy may mean wasteful, duplicative inventive activities.

²⁷ See, e.g., Brief for Rembrandt IP Mgmt., LLC as Amicus Curiae Supporting Respondent at 7–8, *eBay v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (No. 05-130).

²⁸ 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, 172 (2006) (noting that NPEs create exit strategy for failed start-ups); Magliocca, *supra* note 14, at 1817–18; James F. McDonough III, Comment, *The Myth of the Patent Troll: An Alternative View of the Function of Patent Dealers in an Idea Economy*, 56 EMORY L.J. 189, 209–11 (2006); *Real Drawback to NPE Model is Inefficiency, Not Greed*, RPX BLOG, <http://www.rpxcorp.com/index.cfm?pageid=14&itemid=10> (last visited Jan. 25, 2012). *But see* Merges, *supra* note 25, at 845–46 (discussing many factors other than technical superiority that can affect commercial success).

²⁹ See Christopher A. Cotropia, *The Individual Inventor Motif in the Age of the Patent Troll*, 12 YALE J.L. & TECH. 52, 63–64 (2009) (suggesting that NPEs might damage individual inventor mystique, thus reducing their credibility); McDonough, *supra* note 28, at 198 (pointing out that Thomas Edison, one of the most famous inventors, would be considered a patent troll today); cf. Iain M. Cockburn & Stefan Wagner, *Patents and the Survival of Internet-Related IPOs*, 39 RES. POL'Y 214, 226 (2010) (asserting that patents and patent applications have significant effect on likelihood of acquisition versus failure of internet bubble companies). *But see* Gwendolyn G. Ball & Jay P. Kesan, *Transaction Costs and Trolls: Individual Inventors, Small Firms and Entrepreneurs in Patent Litigation* 14 (Univ. Ill. Law. & Econ., Working Paper No. LE09-005, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1337166 (noting that large percentage of patent plaintiffs are individuals and small companies).

³⁰ See Brief for Qualcomm, Inc. and Tessera, Inc. as Amici Curiae Supporting Respondent at 2–3, *eBay v. MercExchange L.L.C.*, 547 U.S. 388 (2006) (No. 05-130); Jean O. Lanjouw & Mark Schankerman, *Protecting Intellectual Property Rights: Are Small Firms Handicapped?*, 47 J.L. & ECON. 45 (2004) (explaining that small inventors are at a significant disadvantage in enforcement); Magliocca, *supra* note 14, at 1818; cf. Joshua S. Gans et al., *When Does Start-Up Innovation Spur the Gale of Creative Destruction?*, 33 RAND J. ECON. 571 (2002) (contending that the value of cooperation increases as IP control becomes stronger and transaction costs decrease); Thomas J. Prusa & James A. Schmitz, Jr., *Are New Firms an Important Source of Innovation? Evidence from the PC Software Industry*, 35 ECON. LETTERS 339, 339 (1991) (explaining that new firms have comparative advantage in developing new technology while existing firms have advantage in developing improvements); Sichelman, *supra* note 19, at 394 (suggesting that failure to enforce patents through compulsory licensing might reduce ex ante incentive to enter into license agreements with patentees).

A third group looks at investment incentives. The idea that patents might be used as tools to obtain venture funding is not new.³¹ Indeed, studies now suggest that a primary benefit of patents—and even patent applications—is that they signal company value to potential investors.³² It is no surprise, then, that some commentators have suggested that NPEs play a critical role in venture financing. Some propose that NPEs offer another exit strategy that increases the value of patents.³³ The potential ability to transact with an NPE provides a type of insurance, but one that applies ex post, as most companies would not pay to obtain ex ante enforcement insurance.³⁴ This ex post insurance makes the patent more valuable by providing a potential revenue stream even if the company fails. Others, however, argue that signal value leads to proliferation of non-productive dormant patents that are later used by NPEs.³⁵ They deride the system, claiming that such patents are merely fire-sale castoffs that lack any commercial value.

³¹ See, e.g., Dirk Engel & Max Keilbach, *Firm-Level Implications of Early Stage Venture Capital Investment—An Empirical Investigation*, 14 J. EMPIRICAL FIN. 150, 166 (2007); Samuel Kortum & Josh Lerner, *Assessing the Contribution of Venture Capital to Innovation*, 31 RAND J. ECON. 674, 675 (2000); Mark A. Lemley, *Reconceiving Patents in the Age of Venture Capital*, 4 SMALL & EMERGING BUS. L. 137, 144 (2000) (suggesting that study should shift to role of patents in obtaining venture funding); Ronald J. Mann & Thomas W. Sager, *Patents, Venture Capital, and Software Start-Ups*, 36 RES. POL'Y 193, 199–200 (2007); Ronald J. Mann, *Do Patents Facilitate Financing in the Software Industry?*, 83 TEX. L. REV. 961, 961–62 (2005).

³² Stuart J. H. Graham et al., *High Technology Entrepreneurs and the Patent System: Results of the 2008 Berkeley Patent Survey*, 24 BERKELEY TECH. L.J. 1255, 1280 (2009); Kortum, *supra* note 31, at 691 (noting that venture funding has causal effect on patenting); Carolin Haeussler et al., *To Be Financed or Not . . . —The Role of Patents for Venture Capital Financing* 5–6 (Univ. of Munich, Discussion Paper No. 2009-02, 2009), available at http://epub.ub.uni-muenchen.de/8970/1/Haeussler_et_al_VCPat_Jan2009LMU_WP_Reihe.pdf; David H. Hsu & Rosmarie H. Ziedonis, *Patents as Quality Signals for Entrepreneurial Ventures* 2–3 (May 2007) (unpublished manuscript), available at <http://www2.druid.dk/conferences/viewpaper.php?id=1717&cf=9>.

³³ See, e.g., Dubiansky, *supra* note 28, at 171–72 (2006) (“The new potential of the R&D licensing market, coupled with the slump in the IPO market, has increased the attractiveness of using technology transfer as an exit strategy. Firms such as Cerian Technology Ventures have sprung up to assess and remarket the intellectual property of failed startup firms.”). *But see* Mann & Sager, *supra* note 31, at 200 (“On rare occasions, patents might generate licensing revenues, but that is quite uncommon for software startups and rarely, if ever, the ex ante aim of a venture capital investment.”).

³⁴ Luigi Buzzacchi & Giuseppe Scellato, *Patent Litigation Insurance and R&D Incentives*, 28 INT'L REV. L. & ECON. 272, 282 (2008).

³⁵ See, e.g., Magliocca, *supra* note 14, at 1815–17.

Similarly, some argue that NPEs create a market for patents, even if the firm remains in business.³⁶ Some argue that such a market enhances the value of invention, and thus incentivizes inventive pursuits.³⁷

Patent market theories are generally consistent with a strong patent rights theory;³⁸ even so, some commentators suggest that there are better ways to create patent markets.³⁹ No one has studied whether the initial assignees of NPE-litigated patents themselves attempted to commercialize technology or were productive companies.

B. Evidence to Date

Some studies have looked at NPE litigation. Many have examined the number of NPE suits in comparison with patent litigation generally; the uniform findings indicate that NPEs file only a small fraction of all patent infringement suits.⁴⁰ It appears, however, that many highly litigated patents are owned by NPEs.⁴¹

Other studies have examined the quality of patents owned by trolls. The findings are discussed in more detail below, but none of these studies has been comprehensive.

Finally, a few studies have examined NPE behavior. One scholar describes the conditions that foster NPE activity, including difficulty in avoiding patent infringement, low costs of patenting, and incremental improvements, as the dominant inventive contribution.⁴²

³⁶ See, e.g., McDonough, *supra* note 28, at 209–11; Marc Morgan, Comment, *Stop Looking Under the Bridge for Imaginary Creatures: A Comment Examining Who Really Deserves the Title Patent Troll*, 17 FED. CIR. B.J. 165, 173 (2008); Gary Odom, *Patent Liquidity*, PATENT PROSPECTOR (Oct. 3, 2005, 8:23 PM), http://www.patenthawk.com/blog/2005/10/patent_liquidity.html; cf. Paul J. Heald, *A Transaction Costs Theory of Patent Law*, 66 OHIO ST. L.J. 473, 490 (2005).

³⁷ See, e.g., Steven Rubin, *Defending the Patent Troll: Why These Allegedly Nefarious Companies Are Actually Beneficial to Innovation*, 10 J. PRIVATE EQUITY 60, 62–63 (2007).

³⁸ See F. Scott Kieff, *Property Rights and Property Rules For Commercializing Inventions*, 85 MINN. L. REV. 697 (2001); Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265 (1977).

³⁹ See, e.g., Elizabeth D. Ferrill, *Patent Investment Trusts: Let's Build a Pit to Catch the Patent Trolls*, 6 N.C. J.L. & TECH. 367, 369 (2005); Mark A. Lemley & Nathan Mhyrvold, *How to Make a Patent Market*, 36 HOFSTRA L. REV. 257, 257–59 (2007).

⁴⁰ Ball & Kesan, *supra* note 29, at 18; Colleen Chien, *Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*, 87 N.C. L. REV. 1571, 1572 (2009).

⁴¹ See John R. Allison, Mark A. Lemley & Joshua Walker, *Extreme Value or Trolls on Top? The Characteristics of the Most Litigated Patents*, 158 U. PA. L. REV. 1, 32 (2009) (showing that approximately half of the most litigated patents are enforced by NPEs).

⁴² Magliocca, *supra* note 14, at 1812.

These features appear to be true of software and IT patents, but there is no definitive study showing the technology of NPE-enforced patents. Another study found that licensing companies are more likely to settle cases than other small entities.⁴³ This follows a theory that NPEs are most successful when they do not reach a jury verdict.⁴⁴

None of the prior evidence settles the debate about NPEs. Existing studies examine the behavior of NPEs once they have patents without considering the source of their patents. This study is the first to examine the provenance of NPE patents; this new evidence sheds light on the debate about NPEs.

III. METHODOLOGY AND DATA COLLECTION

The goal of this study was to find evidence to support the various positive and negative assertions made about NPEs. To do so, this study uses a novel data set gathered from several sources, allowing a look into not only the cases filed by NPEs, but also the sources of the underlying patents.⁴⁵ It is, however, decidedly a study of litigious NPEs—indeed, the most litigious NPEs.

Patent litigation is notoriously expensive. Legal fees in a case can range from \$500,000 through summary judgment to \$4,000,000 or more through trial, not to mention administrative costs.⁴⁶ Furthermore, evidence shows that patent litigation can lead to a multi-million-dollar market value reduction for companies involved in patent litigation and that at least some of such losses are social costs that are not recouped by the plaintiff.⁴⁷ By extension, litigation can drag down productivity and value of privately held defendants.⁴⁸

The most litigious NPEs are worth studying because they, by definition, impose the greatest costs associated with litigation. Even with a minimal cost of \$500,000 per case, these ten NPEs alone generate costs of nearly \$500 million dollars. Additionally, many litigious parties can impose additional social costs by making litigation very complex, most notably by suing many defendants at the same time or as-

⁴³ Ball & Kesan, *supra* note 29, at 20.

⁴⁴ See Magliocca, *supra* note 14, at 1812–13.

⁴⁵ The information was gathered by the tireless work of several dedicated assistants in addition to the author's efforts.

⁴⁶ JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK 132 (2008).

⁴⁷ *Id.* at 137–38.

⁴⁸ See *id.*

serting many patents at the same time.⁴⁹ As a result, studying just these ten entities should lead to important conclusions, even if the results do not extend to other NPEs.

While the focus is on active NPEs, this study excludes large but non-litigious NPEs,⁵⁰ such as Intellectual Ventures, for a few reasons. First, and most practically, information relating to nonlitigated patents is not readily available. Second, while non-litigious NPEs are by no means popular, they are not the object of scorn that litigious entities are. The wrath Intellectual Ventures received when it filed its first lawsuit illustrates this fact.⁵¹

Third, NPEs that never (or even rarely) file suits may not impose the same social costs as those that litigate patents. At the very least, litigation costs are avoided when there is no litigation. Additionally, early stage settlements and license agreements may cost potential infringers less than post-litigation settlements, though not always. Also, while one can never know why defendants settle, NPEs that never have to bring suits may be asserting stronger patents against potential defendants that are more likely to actually infringe. To be sure, study of non-litigious NPEs is a worthy exercise, but it is beyond the scope of this Article.

Similarly, NPEs such as universities are excluded by virtue of not having sufficient litigation activity to become some of the most litigious. In fact, universities are very rarely patent plaintiffs.⁵²

Some might argue that, because this study examines only litigated patents by a small subset of NPEs, the results may not apply to all NPEs. In some ways this is certainly true; the studied NPEs are very different than universities, which generate most of their patents through faculty research rather than through assignment and licensing. Further, a highly litigious NPE will have more experience select-

⁴⁹ For examples of both tactics, see *In re Katz Interactive Call Processing Patent Litig.*, 639 F.3d 1303, 1309–13 (Fed. Cir. 2011), *reh'g and reh'g en banc denied*, No. 2009-1450, 2011 U.S. App. LEXIS 9473 (Fed. Cir. Apr. 22, 2011).

⁵⁰ These include the so-called “defensive” patent pools that obtain patents to use as a defense to suits by competitors. Chien, *supra* note 2, at 321–22.

⁵¹ See, e.g., Gene Quinn, *Intellectual Ventures Becomes Patent Troll Public Enemy #1*, IP WATCHDOG (Dec. 9, 2010, 1:39 PM), <http://ipwatchdog.com/2010/12/09/intellectual-ventures-becomes-patent-troll-public-enemy-1/id=13711>; see also *When Patents Attack!* (This American Life radio broadcast July 22, 2011), available at <http://www.thisamericanlife.org/radio-archives/episode/441/when-patents-attack>.

⁵² Ball & Kesan, *supra* note 29, at 14. But see Jacob H. Rooksby, *University Initiation of Patent Infringement Litigation*, 10 J. MARSHALL REV. INTELL. PROP. L. 623, 661–62 (2011) (finding that the rate of litigation is high among universities that patent, even if the absolute number of lawsuits is low).

ing patents to enforce than a solo inventor suing on his or her own patent. Indeed, solo-inventor and university plaintiffs have fewer (or even single) patents, limiting their choices about which patents to pursue. Non-litigious NPEs, such as Intellectual Ventures, may be different as well, though there is less theoretical reason to think so; the initial Intellectual Ventures patent litigation implies the opposite.⁵³

Further, the study's results should extend to other litigious NPEs that use similar enforcement models. There is no reason to believe that slightly less litigious NPEs will acquire and enforce patents differently than the studied NPEs. The least active NPE studied filed forty-three lawsuits over a twenty-year period while the most active brought 293, so there is a wide range of activity among the studied plaintiffs. Also, different types of NPEs are represented in the study, including those that acquire patents, those that enforce the intellectual property (IP) of a related practicing entity, and those operated by the inventor of the patents at issue. These types of NPEs mirror smaller NPEs in kind, even if not in size.

Finally, while statistical methods analyzing the data presented here lead to some inferences about NPEs, this Article is a cautious first step. Regression analysis would require more information about missing, but likely important, covariates as well as a more developed control data set. Consequently, this Article leaves such analysis to future work.

A. *Phase I: NPEs and Their Litigation*

We⁵⁴ selected the ten most litigious NPEs based on recent filings. The list includes the NPEs involved in the most cases since 2003, when comprehensive data became available on PACER. PatentFreedom, an information company that tracks more than 250 NPEs,⁵⁵ provided this list.⁵⁶ Because only recently were litigious NPEs studied, notorious NPE Jerome Lemelson is not on the list—most of

⁵³ See Michael Risch, *A Patent Behemoth Rears Its Head*, MADISONIAN BLOG (Dec. 8, 2010), <http://madisonian.net/2010/12/08/a-patent-behemoth-rears-its-head> (arguing that Intellectual Ventures patents have characteristics similar to the patents in this study, such as the fact that they are coming from individual inventors, start-ups, and large corporations).

⁵⁴ The use of “we” throughout this Article refers to the author and research assistants/data coders. Final decisions about methodology and data collection were the author's.

⁵⁵ *All About NPEs*, PATENTFREEDOM, <https://www.patentfreedom.com/about-npes> (last visited Mar. 26, 2012).

⁵⁶ The version of the list used in this Article is on file with the author.

his activities were concluded some time ago.⁵⁷ Once the recently active top-ten list was identified, however, litigation data was gathered for all years available, dating back to 1986 and ending on December 31, 2009.

We did not independently verify that these were, in fact, the most litigious NPEs, but there is no reason to doubt this assertion, and there are some reasons to believe it. First, the list includes names of well-known and high-profile NPEs, such as Acacia Research, General Patent, and Ronald A. Katz. Second, the list includes several patents that have been identified as the most litigated patents;⁵⁸ it stands to reason that the most litigious NPEs would have the most litigated patents.⁵⁹ Third, PatentFreedom's entire business is based on accuracy, so that it is unlikely that the company would misreport data so grossly as to change the rankings. Ironically, if this were not, in fact, an accurate list but instead a randomly dispersed group of NPEs, then the data might be even more representative of NPEs generally.

After identification of the most litigious NPEs, we identified the litigations in which they or their related business entities were involved; this was a non-trivial exercise. Some NPEs sued using a single party name, while others used various subsidiaries—in one case more than 150. We identified as many subsidiaries as possible for each NPE using press releases, informal reports, litigation tracker websites, news services, and, in one case, SEC filings.

Because no single dataset reported all cases for each subsidiary, we comprehensively searched several sources for litigation involving these parties, including the Stanford IP Litigation Clearinghouse (IPLC), PACER dockets, Lexis and Westlaw docket reports, and the U.S. Patent and Trademark Office's (USPTO) and Lexis's databases of patent litigation notices.⁶⁰ Additionally, PatentFreedom generously agreed to provide its litigation data for the studied entities. We also kept track of transferred cases to ensure that there was no double counting.⁶¹ Though a few cases were undoubtedly missed, the data includes the most complete and accurate list of cases available; we

⁵⁷ It is not clear that Lemelson would make the list in any event. Data provided by PatentFreedom indicates that Lemelson filed thirty-eight cases, fewer than the least litigious NPE studied here.

⁵⁸ See Allison, Lemley & Walker, *supra* note 41, at 33–37.

⁵⁹ The findings discussed below support this.

⁶⁰ The Patent Act requires district court clerks to notify the PTO when any patent litigation is initiated. 35 U.S.C. § 290 (2006).

⁶¹ We noted the source and destination case numbers so that movement of cases could be studied in the future.

found mistakes and typos in many of the databases and even in some of the source documents filed by the parties themselves!

The litigation data was coded to include case name, location, filing date, and number of parties.⁶² Later, we gathered data about outcomes of litigation.⁶³ Table 1 lists the top ten NPEs and the number of unique cases in which each NPE is a party.

TABLE 1

| <i>Troll Name</i> | <i># Cases</i> | <i>Cumulative %</i> | <i>Cases / Year</i> ⁶⁴ | <i>Total Defendants</i> ⁶⁵ |
|----------------------|----------------|---------------------|-----------------------------------|---------------------------------------|
| Acacia Technologies | 293 | 30.18% | 21.7 | 1143 |
| Rates Technology | 137 | 44.28% | 6.1 | 233.4 |
| Millennium LP | 105 | 55.10% | 8.3 | 111.1 |
| Plutus IP | 78 | 63.13% | 12.0 | 807.18 |
| Catch Curve Inc | 71 | 70.44% | 4.6 | 160.3 |
| General Patent Corp | 68 | 77.45% | 5.6 | 114.4 |
| Ronald A Katz | 66 | 84.24% | 6.3 | 976.8 |
| F&G Research Inc | 58 | 90.22% | 5.3 | 65.8 |
| Papst Licensing GmbH | 52 | 95.57% | 2.3 | 82.6 |
| Cygnus Telecom. | 43 | 100% | 4.5 | 84.9 |
| Total | 971 | | | |

B. Phase II: Patents

The next phase of the study identified the patents at issue in each of the cases identified in Phase I. To do this, we read the complaints, answers, motions, and other documents accessible in docketing databases. We again searched the USPTO and Lexis databases of litigation notices.

⁶² Defendant names were not recorded; some cases had more than 100 defendants. Additionally, we kept track of whether the NPE had filed the case or was a declaratory-relief defendant.

⁶³ Case dispositions change on a daily basis given the large number of recent cases and are best gathered in a short period of time after the remainder of the data set is complete. Other studies have also tracked outcomes. See John R. Allison, Mark A. Lemley & Joshua Walker, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO. L.J. 677, 678–81 (2011); Ball & Kesan, *supra* note 29, at 9–10; Chien, *supra* note 40, at 1605–06; Shrestha, *supra* note 5, at 114.

⁶⁴ This measure considers all years in which each NPE has been active. Many of the plaintiffs, however, were more active recently than in prior years (or vice versa), so that the average may appear incongruent with current activity.

⁶⁵ Because the number of defendants was not available for all cases, this is a weighted calculation for those NPEs that had missing data (all but Acacia). The average number of defendants was calculated for the litigation data available, and that average was then multiplied by the total number of litigations. This assumes, of course, that each NPE was consistent in the number of defendants sued in each case.

The ten NPEs were involved in 971 unique litigations. These litigations involved 347 patents. In turn, the 347 patents resulted from 208 initial patent applications, many of which spawned multiple patents.

Many litigated cases involved multiple patents, emphasizing the repeated use of a relatively small number of inventions. The average number of litigations for each patent was 8.27 (maximum sixty-four), and the average number of patents per litigation was 3.62 (maximum forty-seven).

Phase II revealed a significant limitation of the study; prior to the introduction of electronic filing in the late 1990s, PACER did not contain litigation documents. Indeed, because complaints were always filed in paper form to open a case, many districts did not make complaints available online until approximately 2002 even if they had adopted electronic filing rules. As a result, there are a few cases with missing patents in the 2000s,⁶⁶ and almost all cases filed prior to 1999 are missing patent data. The result is that the 347 patents identified came from 812 of the 971 litigations.

This should not affect the results tremendously, as only one NPE, Rates Technologies, had most of its litigation activity before 1999. Further, because NPEs typically litigated the same patents multiple times, it is likely that many of the cases for which data is unavailable involved the same patents already included in the study.

Also, given that many commentators associate the rise of particular NPE behavior with the 2000s, a data set covering post-1999 activity will still provide useful information.⁶⁷

Phase II patent data included the patent number, patent filing and issue dates, technology classifications, total number of claims, inventors and assignees, and number of continuations.⁶⁸ We also determined the earliest claimed priority date for each patent. Patent citation data was gathered, including references cited (backward cites) and citing patents (forward cites). Finally, we retrieved assignment history from the USPTO assignments database.

⁶⁶ Many gaps were filled using litigation notices, but not all court clerks follow the statute in every case.

⁶⁷ Of course, there might be a difference in the types of patents litigated now and those litigated before 2003. Most of the patents litigated after 2003, however, were issued before 2003 and were certainly filed before 2003, which makes this a minor concern. Future studies might obtain paper court filings to determine the patents at issue in pre-1999 cases.

⁶⁸ No distinction was made between continuations and continuations-in-part, and divisionals were not recorded.

C. Phase III: Initial Assignees

Understanding the role of NPEs depends not only on the attributes of the patents, but also on the source of those patents. While some NPEs, usually inventor-founded companies, enforce their own patents, most arrive at the NPE from somewhere else. Just where they are coming from has yet to be studied and could provide information to evaluate how one might think about NPEs.

In Phase III, we gathered data about the parties who obtained each patent—the initial assignees. Inventors must always apply for patents in their own names.⁶⁹ They can, however, assign their patent to a company or another person at any time.⁷⁰ If an inventor does so before a deadline set by the USPTO, that assignee is shown on the face of the patent, and is called an “initial assignee.”⁷¹ This study includes data about inventors and initial assignees. Some patents may have been assigned to other parties shortly after their issuance, but such conveyances are not considered initial assignments here.

We collected information about the initial assignees of patents. First, we gathered objective data available in Hoovers and in Dun & Bradstreet’s Million Dollar Database.⁷² Objective data includes founding date, number of employees, revenues, and industry codes. Data was not available for all companies across all fields, and missing data was dropped from relevant analytical analysis.⁷³

Second, we gathered publicly available information about companies from a variety of sources, including the SEC, press releases, financial web sites, and Wharton’s WRDS database. This data includes date of initial public offerings, market value at the time of patent filing and grant, and various dummy variables relating to the relationship of the company’s public status and the patent.

Third, we gathered venture investment data using Thomson’s VentureXpert database. The analysis here assumes that absence from that database indicates no venture funding for the company. This, of course, may not be true, but Thomson tracks millions of venture-

⁶⁹ 35 U.S.C. § 111(a)(1) (2006).

⁷⁰ *Id.* § 261.

⁷¹ *Id.* § 152.

⁷² These databases track private and public company information. The Million Dollar Database tracks companies with sales over one million dollars. See *D&B’s Million Dollar Databases*, DUN & BRADSTREET, <http://www.dnbmdd.com/mddi> (last visited Feb. 21, 2012).

⁷³ For a variety of reasons, one would expect missing data in Dun & Bradstreet to skew toward operating companies. For example, companies that operate are more likely to have sales that can be tracked and employees who can be counted than nonoperating companies.

backed companies and virtually all of the largest venture funds, so that most venture-backed companies would appear in the database.⁷⁴ Missing venture funding information is, however, a limitation of the data. The VentureXpert data includes the number of investment rounds, the amount invested, the date of first investment, and public offering/acquisition data.

Fourth, we gathered whatever subjective and objective data we could from other sources, including the internet. This includes press releases, company name changes, self-reported revenues and employee counts, industry focus, and mergers and acquisitions.

Finally, we tracked whether any sole inventors were licensed attorneys in the home state reported on the patent.⁷⁵ The intuition is that a lawyer-inventor is less likely to use the patent in a productive company. Joint inventors were not included: having an attorney as an inventor is less probative when multiple inventors are on the patent. For example, a patent attorney might contribute to an engineer's invention at the drafting stage.

IV. TESTING NPE CRITICISM

The data collected provides insight into how long NPEs have been active and what types of patents they assert. This Part presents some evidence relating to the criticism of NPEs and concludes that most of the criticism is based on a few, perhaps anecdotal, cases.

A. *Are Litigious NPEs a Recent Phenomenon?*

The studied NPEs are recently active, but on the whole they did not originate in this decade. Acacia Technologies is by far the most active litigant, comprising about one-third of the total cases filed. Rates Technology is a party in approximately 13% of the cases, but many of these were prior to 1999; it has been far less active in the last decade. Millennium LP is a party in about 10% of the cases.

Half of the cases were initiated before July 2005, with an average of June 2004. This implies that the cases skew earlier, not later. This is not a surprise, given that the time before 2005 is unbounded, while the sample included only four years after 2005. The mean initiation

⁷⁴ There is no reason to believe that there is selection bias, though it is theoretically possible that the types of venture capital companies that would invest in the types of assignees here are the same types that would be excluded from VentureXpert. For further discussion of VentureXpert, see Mann & Sager, *supra* note 31, at 195.

⁷⁵ We included all lawyers, not just patent lawyers.

date will likely become later than the median date as time goes by and the number of cases filed grows.

Two NPEs, Papst Licensing and Rates Technology, filed their first cases in 1986. All but one of the NPEs filed their first cases before 2000: Plutus IP first filed in 2003. As of the last date examined, two NPEs, F&G Research and Cygnus Telecommunications, had not filed a case since 2008, and one, Ronald A. Katz, had not filed since late 2007.

The data thus tells a story not often advanced by conventional wisdom. For some of these NPEs, litigiousness is due to longevity, not newness and aggressiveness. Papst Licensing, for example, has averaged two cases per year for nearly twenty-five years, far fewer than many practicing companies today. Due to its long-term patent enforcement strategy, however, its cumulative activity is significant.

Indeed, when aggressiveness in suing defendants is considered, NPEs lower on the list look more litigious. Ronald Katz is the best example; while seventh in the number of cases filed, he is second in the number of defendants sued. Katz has sued nearly fifteen defendants per case on average, compared to 3.9 for Acacia, with F&G suing only 1.1 defendants per litigation.⁷⁶

B. Are All NPE Patents Business Methods?

The patents were related to a variety of different technologies. It is always difficult to classify technology, especially without detailed analysis of each patent. Patent classification codes, however, provide some general information about the variety of patents litigated by NPEs.

The patent classifications are varied. In the interest of completeness, each patent class—rather than just the first or primary listed class—was counted. As a result, the number of classes reported exceeds the number of patents because some patents list multiple classes.⁷⁷

Most of the patents are classified in the USPTO's communications and computers (Group II), but some are in the mechanical arts (Group III). A small minority was in the chemical arts (Group I).

Table 2 shows the top eleven subclasses for the studied patents. Because patents were listed under multiple classes, the top eleven do

⁷⁶ For a discussion of different NPE patent assertion models, see Chien, *supra* note 2, at 328–31.

⁷⁷ The mean number of classes listed for each patent is 1.8 (619 classes on 347 patents).

not necessarily constitute 95% of the patents, as the total percentage implies.

TABLE 2

| <i>U.S. patent class #</i> | <i>U.S. Classification Description</i> | <i>Patents Categorized</i> | <i>Percent (347 Total)</i> |
|----------------------------|--|----------------------------|----------------------------|
| 379 | Telephonic Communications | 73 | 21.04% |
| 348 | Television | 54 | 15.56% |
| 705 | Data Processing: Financial, Business Practice, Management, or Cost / Price Determination | 33 | 9.51% |
| 360 | Dynamic Magnetic Information Storage or Retrieval | 29 | 8.36% |
| 709 | Electrical Computers and Digital Processing Systems: Multiple Computer or Process Coordinating | 24 | 6.67% |
| 707 | Data Processing: Database and File Management, Data Structures, or Document Processing | 23 | 6.92% |
| 358 | Facsimile and Static Presentation Processing | 22 | 6.34% |
| 715 | Data Processing: Presentation Processing of Document, Operator Interface Processing, and Screen Saver Display Processing | 21 | 6.05% |
| G9B | Information Storage Based on Relative Movement Between Record Carrier and Transducer | 21 | 6.05% |
| 725 | Interactive Video Distribution Systems | 20 | 5.76% |
| 340 | Communications: Electrical | 13 | 3.75% |

Of particular interest is Class 705—data processing: financial, business practice, management, or price / cost determination—more commonly known as the catch-all classification of business methods patents. While a patent may be a business method without falling under Class 705, any patent listing in Class 705 is almost surely a business method.⁷⁸ Thirty-three patents, or 9.5%, include Class 705 as

⁷⁸ See Gene Quinn, *Business Methods by the Numbers: A Look Inside PTO Class 705*, IPWATCHDOG BLOG (Jan. 22, 2012, 7:15 AM),

one of their technology classes, though not necessarily the first. This suggests that pure business methods are a relatively small part of NPE litigation, perhaps smaller than conventional wisdom might assume.

Many of the patents, however, were related to software and data processing even if they were not “pure” business-method or internet patents. Interestingly, only two of the assignees were incorporated in California. One might have expected more California companies to contribute patents if they were internet companies (i.e., business-method patents) or if the patents were assigned by failed startups.

Another way to determine whether the patents were business methods is to consider whether the patents were “high technology” patents. Professor Colleen Chien identifies a variety of patent classes that she considers to be high-technology hardware, software, or financial inventions.⁷⁹ Using those definitions, 40% of the NPE patents are high technology, including twenty-one hardware patents, eighty-four software patents, and thirty-three financial inventions. This means that the other 61% do not fall into this definition of high technology.

While the patents are not dominated by business methods, the distribution of technologies represented by NPE patents statistically differs from technologies litigated by non-NPEs. The National Bureau of Economic Research (NBER)⁸⁰ database classifies patents into six coarse groupings.⁸¹ The six classes are: chemical, computers, drugs/medical, electrical, mechanical, and others.⁸² These classes convey little information in themselves, but they are helpful for comparison. Quite simply, the distribution of NBER classes of NPE patents is different⁸³ than the classification of all patents involved in litigation filed in 2000 and 2002.⁸⁴ The primary differences are the relatively infrequent patents in chemical and drugs/medicine cate-

<http://www.ipwatchdog.com/2012/01/22/business-methods-by-the-numbers-a-look-inside-pto-class-705/id=21892>.

⁷⁹ Chien, *supra* note 40, at 1593. See generally Stuart J.H. Graham & David C. Mowery, *Software Patents: Good News or Bad News?*, in *INTELLECTUAL PROPERTY RIGHTS IN FRONTIER INDUSTRIES: SOFTWARE AND BIOTECHNOLOGY* 45 (Robert W. Hahn ed., 2005).

⁸⁰ NAT'L BUREAU OF ECON. RESEARCH, <http://www.nber.org> (last visited Feb. 21, 2012).

⁸¹ Bronwyn H. Hall et al., *The NBER Patent Citation Data File: Lessons, Insights, and Methodological Tools* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 8498, 2001), available at <http://www.nber.org/papers/w8498.pdf>. NBER includes an analysis of all patents from 1976 to 2006. *PDP Home*, PAT. DATA PROJECT, <https://sites.google.com/site/patentdataprotect/Home> (last visited April 1, 2012).

⁸² Hall et al., *supra* note 81, at 3.

⁸³ And statistically so, with $p=0$ in a chi-squared test.

⁸⁴ Ball & Kesan, *supra* note 29, at 18, 36–37.

gories enforced by NPEs as compared to the number of such patents enforced by all patent plaintiffs.

The lack of chemical and pharmaceutical patents is corroborated by NBER's slightly more detailed technology sub-classifications. NBER classifies ninety-three of the NPE patents as "communications," sixty-one as "computer hardware and software," thirty as "information storage," thirty as "electronic business methods and software," and twenty-four as "miscellaneous electrical & electronic."⁸⁵ Notably missing are biochemistry and pharmaceuticals.

C. *Are NPE Patents and Infringement Claims Low Quality?*

Patent quality is notoriously difficult to measure, but the evidence found here and in other studies⁸⁶ implies that those criticizing patent quality need more proof to show NPE patents are weaker than other litigated patents.

Quality can be measured in three ways. The first is to look at indicia of the patents themselves, such as numbers of citations and claims. This method, though often used, may not correlate with win rates,⁸⁷ and thus many consider the indicia to be poor indicators of patent quality. The second method is to look at whether such patents are affirmed in court. The third method is to look simply at whether NPEs win infringement judgments.

1. Quality Indicia

With respect to patent indicia, the results of this study are consistent with other studies to consider the quality indicia of NPE enforced patents. Table 3 shows the mean, median, and standard deviation of a variety of traditional patent quality measures associated with the 347 patents studied here.

⁸⁵ Data was only available for 319 patents because the NBER data does not include the most recent patents. For the patent data and classification definitions, see *Patn Data Description*, NAT'L BUREAU OF ECON. RESEARCH, <https://sites.google.com/site/patentdatapoint/Home/downloads/patn-data-description> (last visited Feb. 21, 2012).

⁸⁶ This Article will not probe patent quality of NPE patents in detail; other articles have done so. See, e.g., Allison, Lemley & Walker, *supra* note 41; Allison, Lemley & Walker, *supra* note 63; Shrestha, *supra* note 5; Fischer & Henkel, *supra* note 20.

⁸⁷ Allison, Lemley & Walker, *supra* note 63, at 711.

TABLE 3

| | <i>Mean</i> | <i>Median</i> | <i>Standard Deviation</i> | <i>Minimum</i> | <i>Maximum</i> |
|-------------------------------------|-------------|---------------|---------------------------|----------------|----------------|
| <i>Number of References Cited</i> | 80.57 | 20 | 199.63 | 0 | 1557 |
| <i>Number of Citations Received</i> | 50.16 | 25 | 82.33 | 0 | 1034 |
| <i>Number of Continuations</i> | 2.48 | 1 | 3.65 | 0 | 23 |
| <i>Number of Claims</i> | 33.58 | 24 | 33.16 | 1 | 254 |
| <i>Number of Inventors</i> | 1.90 | 1 | 1.41 | 1 | 11 |
| <i>Number of Patent Classes</i> | 4.71 | 4 | 2.88 | 1 | 24 |

Table 4 considers several recent studies of patent quality, including random samples of patents litigated by non-NPEs. The comparison is helpful for two primary reasons. First, it shows how NPE patents compare to other litigated patents, regardless of whether one believes that these measures indicate quality. Second, it helps determine whether the results here generalize to other groups of NPEs.

TABLE 4

| <i>Study</i> | <i>Number of References Cited</i> | <i>Number of Citations Received</i> | <i>Number of Continuations</i> | <i>Number of Claims</i> |
|--|-----------------------------------|-------------------------------------|--------------------------------|---------------------------------|
| <i>NPE (this study)</i> | 78.12 | 49.14 | 2.40 | 33.09 |
| <i>Non-NPE Litigated</i> ⁸⁸ | 34.64 [†] (p=0.01) | N/A | ~1.32 | 25.46 [†] (p=0.013) |
| <i>Non-NPE Non-Litigated</i> ⁸⁹ | 15.16 [†] (p=0.00) | N/A | ~.42 | 14.87 ^{††} (p=0.00) |

⁸⁸ John R. Allison et al., *Valuable Patents*, 92 GEO. L.J. 435, 454 tbl.1 (2004) (random sample of litigated patents).

⁸⁹ *Id.* (random sample of unlitigated patents).

| Study | Number of References Cited | Number of Citations Received | Number of Continuations | Number of Claims |
|---------------------------------------|----------------------------|--------------------------------|-------------------------|---------------------------------|
| Most Litigated Patents ⁹⁰ | ~122 | 32.25 (p=0.14) | 4.32 | 39.29 (p=0.01) |
| Patents Litigated Once ⁹¹ | ~31 | 14.07 [#] (p=0.00) | 1.4 | 24.46 (p=0.14) |
| Litigated by Trolls ⁹² | N/A | 36 (p=0.31) | N/A | 41 (p=0.006) |
| Litigated by Non-Trolls ⁹³ | N/A | 15.8* (p=0.00) | N/A | 23.5 (p=0.00) |

Where the data allowed a statistical comparison, the results are reported as follows, using different tests based on the available data:
[†]significant at 99% (log transformed, one sample t)
[‡]significant at 95% (one sample t)
^{††}significant at 99% (one sample t)
^{||}significant at 99% (two sample t)
[#]significant at 99% (age adjusted, log transformed, two sample t)
^{*}significant at 99% (age adjusted, two sample t)
Note that tests on the number of claims are difficult, as the number of claims is skewed and data was unavailable to perform a log transformation. Thus, the tests are more illustrative than statistically certain.

Some attributes of the patents studied here look much like other litigated patents. For example, the number of claims is greater than but within a practically similar range as other litigated patents.⁹⁴ Even the number of references cited is close to other litigated patents once outliers are excluded.⁹⁵ There is one measure where NPE patents dif-

⁹⁰ Allison, Lemley & Walker, *supra* note 41, at 13 tbl.2 (sample of the most-litigated patents).

⁹¹ *Id.* (random sample of patents litigated once).

⁹² Shrestha, *supra* note 5, at 151 tbl.2 (sample of patents identified as being litigated by “trolls”). Some of the litigating entities overlap with this study and some do not.

⁹³ *Id.* (random sample of litigated patents).

⁹⁴ Fischer and Henkel find that patents acquired by “trolls” have more claims than those acquired by non-trolls, which this study corroborates. Fischer & Henkel, *supra* note 20, at 17. If one expects trolls to always enforce patents, while others to acquire patents for a variety of reasons, such as defensive patenting, then this finding is consistent with prior comparisons between litigated and unlitigated patents. *See, e.g.,* Allison et al., *supra* note 88, at 438 (finding litigated patents to have more claims and backward references).

⁹⁵ Fischer and Henkel find even fewer references cited (mean of 13.47) in their sample of patents acquired by trolls. Fischer & Henkel, *supra* note 20, at 31 tbl.4. This implies that patents litigated in this study have significantly (meaning statistical-

fer both statistically and substantially from other litigated patents: number of citations received. The 50.16 citations received by patents studied here are high compared to the non-NPE counts of 14.07 and 15.8 but statistically similar to the 32.25 and 36 citations received by the most litigated and troll-litigated patents examined in other studies.⁹⁶

This is a potentially important difference. It implies that those who choose to litigate patents obtained by others attempt to select important or influential patents, to the extent that the number of other inventions the patent relates to measures importance and influence. Such highly cited patents might reflect importance for two reasons. First, such patents might have a better chance at being found valid, though references cited by the patent have more of an effect on its validity than forward references by others do. Second, such patents likely have a larger population of potential infringers from which to seek royalties or litigation damages. Large numbers of citations received by such patents imply that they are more than trivial patents, as suggested by some scholars.⁹⁷

Thus, traditional patent quality measures imply at the very least that NPE patents look a lot like other litigated patents. If one believes that these measures indicate patent quality, then NPE patents would appear to be of equal or higher quality. They certainly do not appear to be worse than other patents.

2. Litigation Outcome

Studies of litigation outcomes may be a better way to determine patent quality. Here, too, the evidence indicates that NPE patents are not demonstrably worse than other litigated patents.⁹⁸ Of the patents studied here, forty-three resulted in merits rulings.⁹⁹ Only four were found completely valid; that is, no claim was held invalid. Another twenty-three patents (53.5%) were found completely invalid; every asserted claim was found invalid. Additionally, nineteen patents (44.2%) were found partially invalid; some of the asserted claims

ly and substantively) more backward citations than patents acquired by trolls generally.

⁹⁶ The large standard deviation accounts for the non-significant differences. Fischer and Henkel find similar results in unlitigated patents acquired by their definition of patent trolls. *Id.*

⁹⁷ See, e.g., Magliocca, *supra* note 14, at 1827.

⁹⁸ The findings discussed are not limited to the most litigious patentees, as other studies used different criteria to select data.

⁹⁹ Because many cases were consolidated, a single judicial opinion might apply to many different cases.

were valid and some were invalid.¹⁰⁰ One patent was found unenforceable, but it was also found invalid.¹⁰¹ The validity of the remaining 314 patents was untested.¹⁰²

These validity results are reasonably close to the results of other studies. For example, Shrestha found that, of eighteen studied NPE cases resulting in a judgment on the merits, only three cases (or 16%) invalidated patents.¹⁰³ When grouped by final (consolidated) case, the results in this study show a greater invalidity rate than the Shrestha study—thirteen cases invalidated patents out of forty-six cases with any merits ruling (or 28.2%). It is unclear why there is a difference in the results. One explanation may be that Shrestha selected cases by NPEs that were discussed on the internet, and those NPEs and their cases may have had higher win rates. Another difference is that this study counted merits rulings even if there was no final judgment on the merits with respect to that patent (for example, if other patents in the case were appealed).

The NPE invalidity rate reported here is higher than that reported in a study of all patent cases filed in 1995, 1997, and 2000.¹⁰⁴ There, of 584 summary judgment and trial verdicts, only 118 (19.8%) resulted in an invalidity judgment.¹⁰⁵ Here too, the numbers do not directly compare because the current study only recorded merits rulings rather than all summary judgment and trial verdicts. There were many summary judgment rulings that did not result in a merits ruling (that is, where summary judgment was denied). If we counted all summary judgment rulings, the percentage of rulings invalidating a patent would have been much lower. Further, the current study looks at appellate rulings, which may yield different outcomes than summary judgment and trial verdicts. Even with different bases for comparison, the 28% invalidation rate here is not so much greater

¹⁰⁰ This totals more than forty-four patents because some patents resulted in different rulings in different cases.

¹⁰¹ An unenforceable patent may still have valid claims, but the entire patent may not be asserted against one or more parties. Invalidity, however, is based only on patent claims; while one claim may be invalid, others may be valid and asserted.

¹⁰² A future paper will analyze case outcomes studied here in detail, including timing, type of invalidity, infringement results, and the relationship between quality indicia and outcome.

¹⁰³ Shrestha, *supra* note 5, at 158 tbl.5 (finding that, of eighteen studied cases resulting in judgment on the merits, seven cases were won by plaintiff, and only three cases invalidated patents).

¹⁰⁴ See Jay P. Kesan & Gwendolyn G. Ball, *How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes*, 84 WASH. U. L. REV. 237, 275–76 (2006).

¹⁰⁵ *Id.* at 276 tbl.8. The difference was not statistically significant in a t-test.

than the 20% rate for other litigated patents to justify a conclusion that NPE patent quality is *bad*. At most, the conclusion is that the patent quality is a bit worse than the quality of patents enforced generally.

There is one data point to the contrary—for the most litigated patents, the patents were invalidated in sixty of eighty-six cases decided on the merits, or about 69% of the time.¹⁰⁶ Even here, the inferences that NPE patents are weaker are not clear. Many of the most litigated patents were not enforced by NPEs, which implies that after multiple litigations, a large number of patents will be invalidated, whether NPE-owned or not. Second, most of the invalidations related to written description and on-sale bars, not obviousness.¹⁰⁷ These are still invalid patents but a different kind of weakness. Third, many of these outcomes are still pending; for example, invalidity findings on many of Katz's patents were recently reversed by the Federal Circuit but not taken into account in the most-litigated study.¹⁰⁸ Thus, appellate outcomes and district court outcomes may not be comparable.¹⁰⁹

In any event, the most litigated patents in this study fare slightly better than the most litigated patents examined in the Allison, Lemley, and Walker study (“ALW Study”).¹¹⁰ For all patents in this study litigated seven or more times, there were fifty-two merits rulings. All patent claims were invalidated in thirteen of those rulings—about 25%. This is far less than the 69% invalidation rate reported in the ALW Study.¹¹¹ That is not the end of the analysis, however. Some (rather than all) of the claims were invalidated in twenty-one other cases in this study. Thus, the combined percentage of rulings invalidating at least part of a patent in this study (65%) is nearly equal to the invalidation rate reported by the ALW Study (69%).¹¹² This implies that the ALW Study's count may include not only cases in which the entire patent is invalidated, but also cases in which only part of

¹⁰⁶ Allison, Lemley & Walker, *supra* note 63, at 706.

¹⁰⁷ *Id.*

¹⁰⁸ *In re Katz Interactive Call Processing Patent Litig.*, 639 F.3d 1303, 1308 (Fed. Cir. 2011), *reh'g and reh'g en banc denied*, No. 2009-1450, 2011 U.S. App. LEXIS 9473 (Fed. Cir. Apr. 22, 2011).

¹⁰⁹ See Matthew D. Henry & John L. Turner, *The Court of Appeals for the Federal Circuit's Impact on Patent Litigation*, 35 J. LEGAL STUD. 85, 99–100 (2006) (discussing affirmance rates of invalidity decisions).

¹¹⁰ Allison, Lemley & Walker, *supra* note 63.

¹¹¹ See *id.* at 706.

¹¹² See *id.*

the patent is invalidated. Consequently, the results of this study are comparable with the results of the ALW Study.

3. Do NPEs Bring Quality Cases?

While the patents may not be poor quality in terms of validity, they are rarely infringed. Of the forty-six cases with merits rulings (forty of which directly ruled on infringement), only two cases resulted in a finding of literal infringement, and no case found infringement by the doctrine of equivalents. Further, in one of the cases that found literal infringement, twenty-five other patent/defendant combinations were found not to infringe. This is consistent with other studies.¹¹³

The infringement results may be connected to the invalidity results. For example, many patents may be construed very narrowly, so that they are valid (or more likely partially valid) but not infringed. Interestingly, NPEs likely have more information about infringement than they do about validity *ex ante*. Thus, NPEs could be acting strategically to extract rents with non-infringed patents, *or* NPEs could believe that their patents are broader than they really are. The data does not answer this question.

One important caveat is that most cases settle. Indeed, most of the cases studied here settled or were otherwise disposed of without a merits ruling. This can affect the findings in a couple of ways. First, it reduces the sample size. Second, it is unclear why cases settle. It may be that only the weakest patents are litigated because defendants refuse to pay. It could also be, however, that the strongest patents are litigated because plaintiffs refuse to settle for a nuisance payment. Third, many cases are litigated to judgment because NPEs are asserting infringement when there is none.

D. Do NPE Patents Come from Nonproductive Endeavors?

Initial owners of NPE-litigated patents are similar not only to owners of other litigated patents, but also to owners of patents generally. While some of the attributes of NPE-litigated patents might differ from other patents, the initial assignees of these patents are similar to a cross-section of inventive society.

Those who believe that NPEs present a net cost to society will at least have to consider the provenance of these patents; if the sources

¹¹³ See *id.* at 688 (noting that highly litigated patents, many belonging to NPEs, are often found non-infringed). But see Shrestha, *supra* note 5, at 158 (explaining that seven of eighteen cases found non-infringement for NPE litigants, compared to seventeen of twenty-three for non-NPE litigants).

of patents are pursuing the course intended by the patent system, then the fact that such patents are alienable should not affect the calculus. As discussed further below, many large, productive companies associated with positive aspects of the patent system also allowed NPEs to enforce their patents. Of course, it would be optimal for companies to pursue research and development to obtain patents and then never enforce them, but that is an unlikely scenario.

1. Who Obtained NPE Patents?

A smaller group originally owned the 347 patents in litigation. There were 150 unique initial assignee/inventor combinations. This number is deceptively high—several patents were initially owned by inventors who later formed companies or by various combinations of the same two or three inventors. As a result, there are fewer than 150, and perhaps fewer than 125, unrelated sources of patents involved in the thousand cases filed by the ten most litigious NPEs.

These NPEs appear to obtain patents from a small group for two reasons. First, some NPEs obtain all their patents from one or two sources; this is especially true for inventor operated NPEs. Second, some NPEs acquire patent families, whereby a single inventor receives several patents stemming from a single application. The patent family effect is not fully reflected in this study's data because some patents stemming from the same original application were initially assigned to different entities. For example, one application yielded three patents that were initially assigned to three different entities. All three entities are counted separately here.

Of the 347 patents, 243 were initially assigned to a company; there were a total of ninety-one unique companies listed as initial assignees on these 243 patents.¹¹⁴ More than 75% of these companies were corporations while the remainder were LLCs and limited partnerships. Another four patents were initially assigned to two other entities: a hospital and a university.

The original inventors assigned seven of the patents to four different individuals. In most cases, one of two inventors assigned the patent to the other inventor, though some patents were assigned to a non-inventor. The remaining ninety-three patents were unassigned and initially owned by fifty-three different inventor combinations.

¹¹⁴ Companies that changed from an LLC to a corporation were considered different assignees.

2. Corporate Patent Owners Were Productive Companies

Most corporate owners of patents now enforced by NPEs had business models other than patent licensing. We reviewed the data available for each assignee, including web sites, press releases, product offerings, corporate structure, and sales data, to classify initial assignees as pure licensing/enforcement entities. Of the ninety-three entities classified, only twenty, or 21.5%, were non-practicing entities at the time of patenting, representing 32% of the patents initially assigned to a company.¹¹⁵

Instead, it appears that the remaining assignees either had or were attempting to build product or service-based businesses. For example, seventy-four of the entities were corporations while only eight were LLCs and seven were limited partnerships. One might expect more LLCs in the assignees' group if the purpose of patenting was licensing.¹¹⁶ One surprising finding is just how few university patents were enforced by the most litigious NPEs—only one.

Other information further implies that these sources of NPE patents were productive companies.

i. Small/Large Entity Status

Small entities—those with 500 or fewer employees—pay lower fees for patent applications and maintenance;¹¹⁷ as such, small applicants have a monetary incentive to identify themselves. Small entity status data were available from the USPTO for 343 of the 347 patents. Of those, 191 assignees (55.5%) claimed small entity status. This is similar to the percentage found for once-litigated non-NPE patents (53.7%).¹¹⁸

¹¹⁵ Subjective categorization of patentee business models may potentially limit the findings, as it inherently would in any study of this type. While at least two people (in addition to the author) examined each company, this particular subjectivity may not be solved by using multiple coders because the categorizations require judgment calls about an assignee's motives. The author resolved all disagreements.

¹¹⁶ The first LLC statute was adopted in 1977, and the last was adopted in 1997. David K. Staub, *Your Information Center for Organizing and Operating an LLC*, LTD. LIAB. CO. CTR., <http://www.limitedliabilitycompanycenter.com> (last visited Feb. 21, 2012).

¹¹⁷ 37 C.F.R. § 1.27(a)(2) (2011); 13 C.F.R. § 121.802(a) (2011).

¹¹⁸ Allison, Lemley & Walker, *supra* note 41, at 10. Interestingly, the percentage is much larger than the representation of small businesses among the most litigated patents (37.7%). While the most litigated patents included many patents asserted by NPEs, many were asserted by large companies. The ALW Study argues that Katz skews the small entity count downward for the most litigated patents because the Katz patents were not filed with small entity status. *Id.* at 20–21. This study does not make such a distinction; many initial assignees of Katz's patents were, in fact, produc-

The USPTO could identify ninety-three of these as individuals, forty-six as small businesses, and three as non-profits; the remaining forty-nine were uncategorized small entities. This means that, at most, ninety-five of the 243 patents originally assigned to companies were small entities. Logic dictates that the remaining 148—42.6% of the total 347 patents—were assigned to large firms. Compare this to a study of litigated non-NPE patents, which showed that 37% of the sampled litigated patents were initially issued to large firms.¹¹⁹ The percentage of large entities alone implies that there were many productive companies providing NPE patents.

ii. Industry Groups

Industry group data was available for forty-five or about half of the companies. Among those, there were twenty-six North American Industry Classification System (NAICS)¹²⁰ industry groups represented.¹²¹ No single category dominated the types of companies. The top five categories (using four-digit NAICS codes) were Computer Systems Design and Related Services (six companies, 13.3% of the total); Navigational, Measuring, Electromedical, and Control Instruments Manufacturing (four companies, 8.8%); and Semiconductor and Other Electronic Component Manufacturing, Other Financial Investment Activities, Electronics and Appliance Stores (three companies, 6.7% each). And while computer systems, controls, semiconductors, and communications were the best represented industries, a university, a hospital, a doctor, a construction manufacturer, and a cleaning compound manufacturer were also included.

iii. Financing

Nineteen initial assignees (20%) were publicly traded at some point, and additional twelve were subsidiaries whose ultimate parent is publicly traded. Also, twenty-six of the companies were incorporated in Delaware, which is consistent with the number of public companies and their subsidiaries.

For those companies that were public at the time of patenting (either eight at the time of filing or nine at the time of issuance),

tive companies and as such are fairly counted as large entities if they did not seek small entity status.

¹¹⁹ Allison et al., *supra* note 88, at 466.

¹²⁰ *North American Industry Classification System*, U.S. CENSUS BUREAU, <http://www.census.gov/eos/www/naics> (last updated Jan. 11, 2012).

¹²¹ This classification was based on four digits of NAICS. At five digits, there were also twenty-six, and at six digits, there were thirty-two.

market value ranged from \$100 million to over \$122 billion. Companies' market value for both the date of filing and the date of issuance was available in the case of fourteen patents assigned to seven public companies. The median change in market value between filing and issuance was a gain of \$93 million (the largest gain was \$60 billion, skewing the mean). The largest loss in value, however, was \$1.6 billion, and companies that lost market value between patent filing and issuance held six patents.

Venture funding also implies a non-licensing business model. Sixteen of the assignees, about 17.6%, appeared in the VentureXpert database, with a mean total investment of \$22.25 million and a median investment of \$10.12 million. Investment varied from much less than \$500,000 to \$72.49 million, with a standard deviation of \$23.44 million. Seven of these companies went public and another five were acquired by non-NPE¹²² public companies. In sum, thirty-five—more than a third—of the companies were public, a public subsidiary or venture-backed. Similarly, forty-two of the companies were listed in the public records of Hoovers or Dun & Bradstreet.¹²³

iv. Sales and Employees

Finally, sales and employee numbers ranged widely. Sales data was available for forty-one companies and employee data was available for fifty-one companies. Sales ranged from less than \$1 million to \$79 billion (median of \$6.3 million). Number of employees ranged from four to 172,438 (median of twenty-nine).

3. The Role of Individuals

While there were many business entities that obtained patents, a large portion of the patents were initially held by individuals. Perhaps these individuals were not patenting for productive reasons. Unfortunately, little is discernible about individual patentees. Some are related to companies that eventually became NPEs, but this is not necessarily probative. For example, Henry Von Kohorn did not assign every patent to his company, Response Reward Systems; two of the patents in the study are listed as individually owned. Response Reward Systems, in turn, appears to have been an inventor-owned company, but General Patent Corporation, an acquisition-based NPE, now enforces its patents.

¹²² Acacia Research is publicly traded, but it was not the acquirer of these venture-funded companies.

¹²³ More companies were likely listed in the private credit databases of Dun & Bradstreet.

In another example, Joseph Weinberger held five patents individually, assigned four patents to companies that were not licensing entities, and assigned two other patents to Rates Technologies, a licensing NPE.¹²⁴ All of his patents are now enforced by Rates Technologies.

Indeed, even if an inventor enforces his or her own patents, it may not mean that they were initially non-productive. Ronald Katz, one of the more famous individual NPEs (though an LLC technically enforces his patents), initially assigned most of his patents to First Data Resources, a going concern affiliated with American Express that eventually went public.

There are a few individual inventors, however, who did not assign their patents to any entity. It is difficult to know what efforts such inventors made to commercialize or enforce their patents before allowing an NPE to do so.

In an effort to shed light on the role of individuals, we tested whether the inventor was a lawyer in his or her home state. The intuition is that lawyer-inventors are more likely to have a licensing business model; that is, lawyers are likely NPEs rather than commercial companies. We considered 183 of the patents. Of the patents with one inventor, eleven were invented by lawyers, with another ten possibly claimed by lawyers, for a total of 5.8% of all patents, and 11.4% of single-inventor patents. Thus, it appears that at least some NPE patents come from lawyers themselves.

E. Do NPEs Get Their Patents from Fire Sales?

A surprisingly small number of companies were demonstrably defunct—only nine of ninety-one, or 9.9%. We could not find the status of nine companies. Five of them are licensing entities, so information is expectedly scarce. It stands to reason that the other four companies are non-operational, bringing the total to thirteen, or 14.3%. The remaining seventy-eight (85.7%), in addition to the university and the hospital, appear to be operating today, even if only as a recipient of licensing revenues.

Whether a company is out of business is only one data point. Companies may license their patents when under distress even if they do not fail. Acquisitions may shed some light on the question. A total of twenty-five (27.4%) of the companies have been acquired at some point, four by NPEs. The implications of these data are a bit

¹²⁴ Some of the patents Weinberger held individually were assigned to him by co-inventors.

ambiguous, as some companies might be acquired if successful, while others might be acquired in a fire sale. In any event, any characterization that all, or even most, patents were acquired in a fire sale is unsupported by the evidence.

F. Do NPEs Really Wait for an Industry to Develop?

We examined the timing of issuance, filing, and assignments to test how long NPEs wait before filing suit. The longer they waited, the more like mythical trolls their behavior might appear, even if there are other explanations for delay.¹²⁵ If wait times are short, however, that might imply that NPEs are vindicating the rights of contemporaneous competitors or, alternatively, that they are rushing to file suit after patents issue.

The average number of days between patent issuance and the filing of a complaint was 3021 days (about 8.3 years) with a standard deviation of 1864 days (5.1 years). The median was 2900 days (8.1 years), suggesting that the data is not skewed.¹²⁶ When the time to *first* filing of a complaint for each patent is considered,¹²⁷ the mean delay is still 2559 days (7.0 years). One would expect that the time to file suit would grow shorter as the issue date gets closer to the present, given that the date of filing a complaint is bounded by December 31, 2009. This appears to be true, based on a correlation value of .22 between the date of issue and shelf time, but there are clearly other factors that lead to the timing of suits.

Finally, it appears that many of these patents sat on the shelf not only before suit was filed, but also before assignment to the NPEs. The mean time between patent issuance and the last assignment recorded¹²⁸ was 2566 days (7.0 years) with a median of 2197 days (6.0 years) and standard deviation of 1842 days (5.1 years).

The assignment records do not lead to a clear conclusion because the last assignment might not be to the NPE, and other assignments may not be recorded in the database. Nonetheless, it ap-

¹²⁵ See, e.g., Allison, Walker & Lemley, *supra* note 63, at 706 (arguing that long continuation chains imply that patent applications were filed before industry developed); John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 237 (1998) (noting that litigated patents took, on average, 12.3 years from filing of the application to resolution of the case).

¹²⁶ The dates are obviously truncated at zero.

¹²⁷ All future complaints seeking to enforce a patent will only increase the average delay.

¹²⁸ This count excludes assignments recorded before the issuance of a patent, though some of such assignments might have been to an NPE. The total number of patents considered was 130.

pears that a good portion of any delay is attributable to the inventor/initial assignee as opposed to the NPEs.¹²⁹

V. TESTING NPE JUSTIFICATIONS

The data allows for analysis of three different normative justifications of NPEs: 1) NPEs create a patent market that enhances investment, 2) NPEs provide enforcement for small companies crushed by large competitors that infringe with impunity, and 3) NPEs vindicate the rights of individual inventors.

A. *Do NPEs Promote Investment in Startups?*

A primary justification of NPEs is that they provide an aftermarket for patents of failed (and even going) companies, providing a new liquidity option that enhances investment in startups.¹³⁰ There is no doubt that NPEs help create markets for patents, but the social benefits of this are questionable if the market does not promote innovation and investment in research and development. Investment in startups is one proxy for such social benefits.

Examining this question involves two components: 1) the rate of venture capital investment among companies and 2) how often failed companies contribute patents. While the data show that companies contributing NPE patents have a slightly higher rate of venture capital investment than other patent holding companies, the small number of failed companies contributing patents and the small percentage of firms receiving venture funding implies that NPEs may have minimal investment-inducing benefits even if they marginally increase the likelihood of investment.

The first component is the rate of venture capitalization among firms with and without patents. The Kauffman Firm Survey (KFS) of startups provides a control data set. The KFS is a panel survey of nearly 5000 companies founded in 2004.¹³¹ The survey tracks companies in several categories, including whether they hold patents and receive venture funding.¹³² This data provides some areas of comparison.

¹²⁹ It was impossible to test delay directly by the NPE because the last assignment often occurred after lawsuits were instigated. Thus, deciphering which assignments applied to which lawsuits yielded little information.

¹³⁰ Shrestha, *supra* note 5, at 130.

¹³¹ *About the Kauffman Firm Survey*, EWING MARION KAUFFMAN FOUND., <http://www.kauffman.org/kfs/About-the-KFS.aspx> (last visited Feb. 22, 2012).

¹³² ALICIA ROBB & DAVID DESROCHES, KAUFFMAN FIRM SURVEY: BASELINE/FIRST FOLLOW-UP/SECOND FOLLOW-UP/THIRD FOLLOW-UP/FOURTH/FIFTH FOLLOW-UP

Table 5 shows venture capital investment rates for firms with and without patents. The last column is the p-value for the hypothesis that the observed rate of venture capital (VC) funding among the KFS firms is the same as that observed in this study.

TABLE 5

| <i>Study</i> | <i>N Companies</i> | <i>N VC Financed</i> | <i>% Financed</i> | <i>p-value (one-tailed)</i> |
|------------------------------------|--------------------|----------------------|-------------------|---------------------------------|
| <i>NPE contributors</i> | 91 | 16 | 17.6% | N/A |
| <i>KFS (firms having patents)</i> | 263 | 28 | 10.6% | .06 |
| <i>KFS (firms without patents)</i> | 4665 | 41 | .9% | 0.00 |

The data show a slightly higher, but statistically significant, venture capital investment rate for NPE-contributor companies than for other firms with patents. Further, the difference in venture funding between companies with patents and those without patents is both statistically significant and economically striking.

One might conclude, therefore, that the existence of NPEs may well improve investment opportunities for all companies that hold patents. This conclusion, however, is tenuous. First, the timing of investments might explain the difference. The median date of venture funding for NPE contributors was in 1997 with only one after March 2001, whereas all of the KFS firms were started in 2004. Differential investments between the boom during the late 1990s and the post-recession period in the middle of the last decade could explain the entire difference.

Second, as discussed above,¹³³ patents might be used—whether rationally or not—as indicia of technological value unrelated to an aftermarket for those patents.

Third, the number of patent-holding companies dwarfs the number of NPEs, and only a small fraction of firms with patents received venture funding.¹³⁴ The odds of any one firm convincing investors to gamble because they both have patents and might be able to license to an NPE are long indeed.

350–51, 1242–43 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934895.

¹³³ See *supra* note 32 and accompanying text.

¹³⁴ The same is true of all start-ups—not just those related to NPEs. Mann & Sager, *supra* note 31, at 197. But see Graham et al., *supra* note 32, at 1280–81.

As a result, venture capital reliance on potential aftermarket activity cannot be considered a large part of the equation unless there was strong evidence that venture capitalists examined patent quality as carefully as NPEs do. Survey evidence shows the contrary.¹³⁵

Thus, while the differential rate of venture funding implies that patenting is at least correlated with investment,¹³⁶ the conventional story that NPEs provide investment incentive by creating an aftermarket appears to be consistent with the evidence but still somewhat questionable.

The second component is how many of the patents were contributed by failed startups. As noted above, around 14.2% of the companies that originally obtained the NPE patents are defunct. More telling, however, is the fact that only three of the thirteen failed companies received venture funding. Further, only two of the sixteen venture-backed companies were acquired by NPEs, and those companies were already publicly traded at the time of the acquisition. In other words, if NPEs are supposed to be a source of post-failure liquidity in order to encourage venture funding, then they are doing a seemingly poor job of it in practice.

Nonetheless, this finding does not rule out some role of NPEs in aiding venture capital investment. The availability of an additional enforcement option may unmeasurably attract venture capital as one of many signals,¹³⁷ especially for risk seeking investors or those that have a relationship with an NPE. This effect may be one of the reasons why NPE contributors were more likely to have venture capital investments than the Kauffman panel sample. Support for this theory, however, will likely require more data, including a better understanding of the ex ante motives of venture capitalists. The data here could be combined with other data on venture financing to perform regressions to capture the effect of NPEs, but that is left for future research.

¹³⁵ Graham et al., *supra* note 32, at 1281–83; Stuart J.H. Graham & Ted Sichelman, *Why Do Start-Ups Patent?*, 23 BERKELEY TECH. L.J. 1063, 1077–78 (2008).

¹³⁶ See Mann & Sager, *supra* note 31, at 199–201 (finding a correlation between patenting and financing).

¹³⁷ See Graham & Sichelman, *supra* note 135, at 1079 (“If a patent can be sold to others who are well-positioned to demand royalties or file infringement suits, it may have value quite apart from its utility to the business model of the start-up venture.”).

B. Are Small Companies Crushed by Larger Infringers?

Some justify NPEs by arguing that they aid small businesses harmed by large infringers.¹³⁸ Patents of small companies driven out of business by their larger competitors do not dominate NPE litigated patents. First, small firms are likely able to bring their own lawsuits. More than 35% of all patent plaintiffs are small firms.¹³⁹ Second, as noted above, small entities according to the USPTO—which at 500 employees may be much bigger than “small firms”—represent the same percentage of both NPE patents and litigated non-NPE patents—about 50%. Third, only 14% of these companies were out of business. Fourth, the long average time between patent issuance and litigation initiation implies that many patents were obtained well before any head-to-head competition might have occurred.

Undoubtedly, some of the patents enforced by NPEs were created by companies driven out of business by large competitors, but the data does not support a view that many patents fit this description. Instead, it appears that these patents were very early attempts to patent in a field of technology and had little relevance until asserted much later—one reason why they are so maddening to defendants.

C. Do NPEs Provide Better Enforcement Avenues for Individuals?

A third justification of NPEs is that they provide better opportunities for individual inventors to enforce their patents.¹⁴⁰ There are two reasons NPEs might do so. First, they may provide cost, money, and other resources to continue litigation in cases when contingent-fee lawyers may not provide such resources.¹⁴¹ Second, they may provide better credibility for settlement purposes. Each of these reasons explains why NPEs might serve the needs of individuals in ways unnecessary for small companies. The evidence here supports an individual-inventor theory more than any other theory.

It is certainly true that NPEs enforce patents assigned to individuals; individuals initially owned about 27% of the patents in this study, and inventor-owned companies, like Von Kohorn’s Response

¹³⁸ See, e.g., Shrestha, *supra* note 5, at 127.

¹³⁹ Ball & Kesan, *supra* note 29, at 31.

¹⁴⁰ Shrestha, *supra* note 5, at 126–29.

¹⁴¹ See *id.* at 147 (noting that NPEs settle cases less often than individuals enforcing their own patents); Ball & Kesan, *supra* note 29, at 17–18 (finding that small parties are active in the legal system, but that “just under 20%” of pairings are small plaintiff/large defendant). Individuals are only approximately one-fifth of the small defendants, meaning that only 4% of cases involved an individual versus a large defendant.

Reward patents, held several others. Still more, like the Katz and Papst patents, were initially owned by productive companies, but have since been assigned back to companies run by the initial inventors or their families. This does not necessarily mean, however, that NPEs provide new or better opportunities as compared with business assignees of patents.

One tool to test the role of NPEs is the Lemley and Myhrvold categorization of patent plaintiffs.¹⁴² This categorization is helpful because it allows for analytical analysis of each type of NPE rather than simply calling them all “trolls.” Of the twelve categories, only one category, “product company,” includes practicing entities.¹⁴³ Each of the other categories describes some type of NPE, from those entities that merely acquire patents to enforce, to inventor-owned companies,¹⁴⁴ to inventors themselves.¹⁴⁵

Table 6 compares categorizations for this study with the ALW Study’s categorizations for the most-litigated patents (many of which are now owned by NPEs) as well as with a random sample of once-litigated patents. The ALW Study categorized the current owners, while this study categorizes initial owners, whether or not they are currently the plaintiffs. This leads to some key differences discussed after the table.

TABLE 6

| | <i>This study</i> | <i>%</i> | <i>Most Liti-gated</i> | <i>%</i> | <i>Once Liti-gated</i> | <i>%</i> |
|--|-------------------|----------|------------------------|----------|------------------------|----------|
| <i>1 (Acquired Patents)</i> | 31 | 8.93% | 12 | 11.21% | 3 | 2.83% |
| <i>2 (University Heritage)</i> | 0 | 0.00% | 0 | 0.00% | 1 | 0.94% |
| <i>3 (Failed Startup)</i> | 7 | 2.02% | 0 | 0.00% | 3 | 2.83% |
| <i>4 (Corporate Heritage)</i> | 0 | 0.00% | 0 | 0.00% | 1 | 0.94% |
| <i>5 (Individual-inventor-started Company)</i> | 51 | 14.70% | 43 | 40.19% | 7 | 6.60% |
| <i>6 (University/Government/NGO)</i> | 4 | 1.15% | 0 | 0.00% | 1 | 0.94% |

¹⁴² Allison, Lemley & Walker, *supra* note 41, at 10.

¹⁴³ *Id.* Service companies are included in the product company category.

¹⁴⁴ We categorized companies that sell something as product companies, even if they were founded by the inventor. After all, such companies are not NPEs.

¹⁴⁵ Allison, Lemley & Walker, *supra* note 41, at 10.

| | <i>This study</i> | <i>%</i> | <i>Most Litigated</i> | <i>%</i> | <i>Once Litigated</i> | <i>%</i> |
|--|-------------------|----------|-----------------------|----------|-----------------------|----------|
| <i>7 (Startup, Pre-product)</i> ¹⁴⁶ | 5 | 1.44% | 0 | 0.00% | 0 | 0.00% |
| <i>8 (Product Company)</i> | 144 | 41.50% | 47 | 43.93% | 85 | 80.19% |
| <i>9 (Individual)</i> | 103 | 29.68% | 2 | 1.87% | 0 | 0.00% |
| <i>10 (Undetermined)</i> | 0 | 0.00% | 3 | 2.80% | 4 | 3.77% |
| <i>11 (Industry Consortium)</i> | 0 | 0.00% | 0 | 0.00% | 1 | 0.94% |
| <i>12 (IP Subsidiary of Product Company)</i> | 2 | 0.58% | 0 | 0.00% | 0 | 0.00% |

With the notable exception of category nine, individual inventors, the categorizations of initial assignees in this study fall somewhere between the categorizations of plaintiffs enforcing patents only once and plaintiffs enforcing patents many times.¹⁴⁷ This table supports the finding above that a significant percentage of NPE patents—nearly half—came from productive companies.

The biggest difference is the large percentage of product companies that enforced once-litigated patents, compared to zero individuals. In contrast, individual inventors contributed 29% of the patents to the NPEs in this study. An extension of this is the doubled percentage difference between NPE patents in this study and random once-litigated patents for category five, inventor-founded companies, from approximately 6% to 14%.

This implies that individuals are more likely to be represented in NPE litigation than in the general population of patent plaintiffs. It is notable that a large percentage of NPE enforced patents were originally held by individuals and their companies, while not a single individual owned a patent litigated in the ALW Study sample.

Of course, the ALW Study sample is quite small, and there are surely individual-patentee plaintiffs. For example, another study—the much-cited *Valuable Patents* analysis—found that while individuals obtain 18% of all patents, 27% of the litigated patents observed in

¹⁴⁶ *Id.* This study's categorizations are a bit arbitrary with respect to categories seven and eight. The categorizations were usually based on the company's status during the time between filing and patent issuance, but in many cases it was difficult to tell when a product was released. Thus, a company that later shipped a product might have been in category eight when it perhaps should have been in category seven. The differences do not affect the conclusions.

¹⁴⁷ Fisher's Exact for each of these was 0.00, implying that the categories were statistically significantly different.

that study were unassigned at time of issue.¹⁴⁸ The study did not report who brought suit.¹⁴⁹

A comparison to the provenance of NPE patents here leads to potentially ambiguous results. On the one hand, the 27% from *Valuable Patents* is close to the 28% found here, which might imply that the same proportion of patents initially owned by the inventor get litigated regardless of who litigates them. On the other hand, it is unclear what proportion of patents in *Valuable Patents* was enforced by the original inventors as opposed to later assignees.

Comparison with a different study of all patent lawsuits filed in 2000 and 2002 might shed more light on this question. That study showed that 14% and 12% of patent plaintiffs, in 2000 and 2002 respectively, were individuals.¹⁵⁰ Given that individuals initially owned 28% (or 40% if inventor-founded companies are included) of the patents enforced by NPEs, NPEs appear to be an important outlet for the enforcement of inventor-owned patents. Even excluding inventor-owned NPEs, NPEs enforce around twice the percentage of patents that inventor plaintiffs enforce in a random population of litigated patents.¹⁵¹

Of course, just because NPEs allow inventors to enforce their patents does not mean that NPEs are normatively justified. The answer to that question depends on whether one believes that it is better for inventors to enforce their patents or for the patents to remain dormant, or even whether unaffiliated inventors should be entitled to patents at all.

VI. CONCLUSIONS

NPE enforcement is more complex than any of the traditional stories about patent trolls indicate, and the conventional wisdom appears to be based on periodic anecdotal accounts that are true only some of the time.

¹⁴⁸ Allison et al., *supra* note 88, at 465 n.131.

¹⁴⁹ *Id.*

¹⁵⁰ Ball & Kesan, *supra* note 29, at 31.

¹⁵¹ Individuals obtained 28% of the patents enforced by NPEs. Individuals obtained patents in 14% of all patent cases. Here too, the data is not iron clad because this study counted by patent, but the general litigation data counted by case, not by patent. It may be that individuals enforce more patents per case than other types of plaintiffs, though there is no basis to think so.

There is no uniform story about NPE patents or where they come from.¹⁵² While some are business-method patents, most are not. While some litigated patents come from failed start-ups, most do not. While some patents were initially assigned to licensing NPEs, most were not. Indeed, some extremely large companies—and even the federal government—have turned to the very same NPEs to enforce some patents.

Some patents enforced by NPEs are invalid, while most are not. NPEs litigate patents with objective indicia that are similar to other litigated patents and appear to be invalidated about as often as other litigated patents, so long as they are not repeatedly asserted.¹⁵³

To be sure, not every patent is valid and most have at least one invalid claim, but NPEs choose to litigate patents that look like the patents that productive entities enforce. Nonetheless, the social effects of this practice are unknown. Corporate defendants surely dislike defending against patents that are more difficult to invalidate. If NPEs are to bring any value to their constituents, however, they can best do so by litigating strong patents and leaving weak patents on the shelf.

Even a finding of average patent quality refutes the conventional wisdom that NPEs seek to extract rents with weak patents. It may be that parties settle weak patent claims for a nuisance fee before litigation is filed, but even if true, it is telling that defendants would be willing to litigate only the strongest patents. Perhaps more is at stake, and thus there is a selection bias in the data.

These findings imply that patenting activity that leads to NPE litigation is a microcosm of patenting in general. NPE patents come from individuals, start-ups, established companies, failed companies, licensing companies, and public companies, and, with the notable exception of biotech/pharma, the patents look similar to others.

There is, however, one marked difference. Individuals may face a significant disadvantage in high-stakes patent litigation unless they allow NPEs to enforce their patents. This means that NPE litigation may be the best way for garage inventors to capitalize on their patents if infringers refuse to license.

¹⁵² Because this is a population study, the primary source of bias is uncollectable data. For the most part, there is no reason to believe that uncollectable data is sufficiently different from the available data to create a uniform story.

¹⁵³ And when the NPE patents are repeatedly asserted, they are invalidated just as often as patents that are repeatedly asserted by productive companies.

These observations suggest that how one feels about NPEs depends on how one feels about patenting in general. After all, any patent may be alienated and enforced by another.

Those who favor strong patent rights should be equally happy whether a large public company, a startup, or an NPE enforces the patent for them. Those who believe that patents impede innovation should be equally unhappy regardless of the suing entity.

The same is true for different technologies. Because NPEs enforce a variety of patents that reflect a variety of different commercial fields, normative judgment of NPE enforcement should be based on judgment of the underlying technology. An NPE enforcing a business method is little different than an operating company enforcing a business method.

To be sure, the NPE is not currently producing a consumer benefit in exchange for the method, but that has never been the quid pro quo for patents.¹⁵⁴ Based on the data here, it can be concluded that the initial inventor of a business method disclosed the patent and most likely attempted to commercialize it. Of course, if one believes in working requirements that force inventors to practice patents before enforcing them, then one should still be indifferent between a non-operating startup and an NPE.

Similarly, one's beliefs about individual inventors should inform one's beliefs about NPEs. Strong believers in individual inventing¹⁵⁵ will favor NPEs because they provide a remedy to such inventors. On the other hand, those who believe individual inventors contribute little to innovation and growth¹⁵⁶ will not favor NPEs.

As patenting society goes, so go NPEs. While it is useful to study their benefits and costs, scholars, courts, and policy-makers should not lose sight of the fact that an NPE bringing a lawsuit could just as well be the entity that sought the patent initially in the first place.

¹⁵⁴ Patentees need not practice their invention to enforce a patent. *Cf.* 35 U.S.C. § 271 (2006) (omitting right to practice patent from exclusive rights).

¹⁵⁵ *See generally* Cotropia, *supra* note 29.

¹⁵⁶ *See, e.g.*, BESSEN & MEURER, *supra* note 46, at 169.