



# NPEs: Trolls and/or Champs?

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Comparative Analysis of Korean, Chinese and U.S. Approaches to NPEs  
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# NPEs: Trolls and/or Champs?

- NPEs and PAEs
- What we know
- Questions
- U.S. developments
- Potential paths

# NPEs and PAEs

## ■ NPEs

- Patent owners develop & transfer technology
  - Research universities
  - Semi-conductor design houses

## □ PAEs

## ■ PAEs

- Purchase & assert patents
- Ex ante licenses
- Ex post licenses

# What we know

- 2011-13 - suits brought by PAEs rose from 29% of all infringement suits to 62% of all infringement suits
- 2012-13 - filed patent cases ↑12.4%
  - More against non-technology businesses than technology businesses
  - Most non-technology defendants are retailers/small businesses
- Last ~12 years, median damage awards for NPEs (which includes PAEs) nearly double the median damages awarded to practicing entities.
- Patent litigation expensive

# Questions

- What have PAEs been doing
  - How do PAEs organize their corporate legal structure, including parent & subsidiary entities?
  - What types of patents do PAEs hold & how do they organize their holdings?
  - How do PAEs acquire patents & how do they compensate prior patent owners?
  - How do PAEs engage in assertion activity (i.e. demand, litigation, and licensing behavior)?
  - What does assertion activity cost PAEs?
  - What do PAEs earn through assertion activity?
- Impact of PAEs on innovation
- What should be policy towards PAEs

# U.S. Developments

- Congress
- White House
- Courts
- Agencies
- States

# Congress

- Leahy-Smith America Invents Act – 2011
  - Joinder rules
- $\geq 11$  bills addressing PAEs in some way
- 2012-13 – 7 PAE-focused hearings
- H.R. 3309, Innovation Act
  - Pleading requirements
  - Discovery
  - Fee shifting
- S. 1720, Patent Transparency & Improvements Act
  - PAE demand letters
- GAO, Intellectual Property Report (Aug. 22, 2013)

# White House

- Executive Actions & Legislative Recommendations - June 4, 2013
- National Economic Council & Council of Economic Advisors report “Patent Assertion and U.S. Innovation” – June 2013



# Courts

- Alice Corporation Pty. Ltd. v. CLS Bank International, 573 U. S. \_\_\_\_ (June 19, 2014)
- Nautilus, Inc. v. Biosig Instruments, Inc., 572 U.S. \_\_\_\_ (June 2, 2014)
- Octane Fitness, LLC v. Icon Health & Fitness, Inc., 572 U.S. \_\_\_\_ (April 29, 2014)
- Highmark Inc. v. Allcare Health Management Systems, Inc., 572 U.S. \_\_\_\_ (April 29, 2014)

# Agencies

## ■ FTC/DOJ

- 2002 FTC/DOJ IP Hearings
- 2003 FTC IP Report
- 2007 FTC/DOJ Report on IP & Antitrust
- 2008 FTC N-Data Decision
- 2011 FTC IP Marketplace Report
- 2012 FTC/DOJ PAE Workshop
- 2013, 2014 FTC Public Consultations for PAE study
- 2014 FTC proposed MPHJ settlement

## ■ ITC

- 2013 pilot expedited fact finding program
- 2014 Technology Properties decision

# States

- Vermont Anti-PAE law
  - Prohibits bad faith assertion of patent infringement
  - Bond against bad faith assertion of patent infringement
- Missouri Anti-PAE law
  - Prohibits bad faith assertion of patent infringement
  - Private cause of action
- Vermont sues PAE under Consumer Protection Act – MPHJ Technology Investments, LLC
- New York Assurance of Discontinuance - MPHJ
- Nebraska AG cease & desist letter against law firm

# Potential paths

- Patent law
- Consumer protection law
  - FTC civil penalty authority on bad faith demand letters
- Antitrust law

# Antitrust

- 9 No-no's
- 1995 IP Guidelines
- Antitrust standards
  - Market power
  - Abuse of monopoly power
  - Collusive anti-competitive conduct
  - Acquisitions tending to monopoly



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