OF TROLLS, DAVIDS, GOLIATHS, AND KINGS: NARRATIVES AND EVIDENCE IN THE LITIGATION OF HIGH-TECH PATENTS

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OF TROLLS, DAVIDS, GOLIATHS, AND KINGS: NARRATIVES AND EVIDENCE IN THE LITIGATION OF HIGH-TECH PATENTS *

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While each patent dispute is unique, most fit the profile of one of a limited number of patent litigation stories. A dispute between an independent inventor and a large company, for instance, is often cast in “David v. Goliath” terms. When two large companies fight over patents, in contrast, they are said to be playing the “sport of kings.” Some corporations engage in “defensive patenting” in order to deter others from suing them. Patent licensing and enforcement entities who sue have been labeled “trolls.” Finally, observers of the patent system call the use of patent litigation to impose or exploit financial distress “patent predation.”

These stories, routinely invoked by the press, advocates, and academics, shape public understanding of the patent system. In this Article, I describe, then match, these stories to data on patent litigations to determine which types of suits are most prevalent. I focus exclusively on the litigation of high-tech patents, covering hardware, software, and financial inventions, using data from the Stanford Intellectual Property Clearinghouse for cases initiated in U.S. District Courts from January 2000 through March 2008.

The data shows that the reality is more complicated than the rhetoric regarding patent litigation. For instance, many blame non-practicing entities (“NPEs”) for a majority of the problems with the patent system. But they bring only a minority of patent suits: 17% of high-tech patent suits in the last eight years. However, NPEs

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often name multiple defendants and sometimes, rather than sue, are sued, for declaratory judgment (DJ). Counting suits based on the number of defendants and including DJ cases, the NPE share rises to 28% of all high-tech patent suits. This average reflects an increase in NPE suits as a proportion of all suits over an eight-year period, from 22% in 2000-2001 to 36% from 2006 to March 2008, counting defendants, or from 10% to 20%, counting cases. I also report the variation by industry based on the absolute number of suits—the share of financial patent NPE suits (26%) was nearly triple that of hardware patent NPE suits (9%). These numbers provide a richer context for understanding the NPE phenomenon.

Another widespread perception of the patent system is that large companies are reluctant litigants, carefully constructing portfolios of patents to avoid going to court. The practice of “defensive patenting” has been well-documented and theorized. Yet, I found that public and large private companies initiated 42% of all lawsuits studied, 28% of the time against other large companies—the largest single category. They also defend against many other suits, brought by NPEs, small inventors, and individuals. These data suggest that defensive patenting, which is supposed to keep large firms out of court, is at least an incomplete—and perhaps a failing—strategy.

This Article also reports on the other major narratives of patent litigation. 4% of the suits were initiated by individual inventors (David v. Goliath), 18% of the suits were brought by small private companies against public or large private ones (small v. large), 16% pit one small- or medium-sized company against another (limited stakes), and in 8% a large firm sued a small one (predation profile). These and other findings provide a snapshot of patent litigation that should both inform current efforts to reform the patent system and serve as a basis for further investigation into its functioning.
INTRODUCTION

Patent litigation has alternatively been called the sport of kings and the business of sharks. Some observers of the patent system are troubled by patent wars, like the multi-patent, multi-venue, multi-million dollar dispute between wireless kings Qualcomm and Broadcom. Others see the


3. In just one of its suits, for example, Qualcomm was ordered to pay Broadcom over $8.5 million for discovery abuses. Jerold S. Solovy & Robert L. Byman, Qualcomm Case Sends Tremors Nationwide, LAW.COM, Jan. 31, 2008, http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1201687552037. Yet that number pales in comparison to the reported $11.1
rise of aggressive and opportunistic enforcement of patents by non-practicing entities ("NPEs") against established businesses to be the real bane of the patent system. Still others lament the so-called "explosion" of patent litigation across the board and in different industries, because it may discourage, rather than encourage, innovation.

Stories like this shape public understanding of the patent system. Commentators note, for instance, that popular sentiment has turned against NPEs to such a degree that "the epithet [patent troll] is now commonly bandied about in courts and the halls of Congress." In the popular media, in contrast, independent invention and independent inventors are widely celebrated. The reality TV show, "American Inventor" and movie "Flash of Genius" put a positive face on innovation and its protection, through the patent system. Indeed, many believe that protection of the small inventor provides the best yardstick of how well the patent system is working.

Which account of the patent system is correct? Or, to be more precise, to what extent does each story describe the patent litigation landscape? Surprisingly few, if any, studies answer this question. Although each type of patent litigation has been studied independently, no systematic attempt has been made to place the various types within the context of all patent litigations.

billion revenue that Qualcomm received in the 2008 fiscal year in royalty payments from patent licenses. Press Release, Qualcomm, Inc., Qualcomm Announces Fourth Quarter and Fiscal 2008 Results (Nov. 6, 2008), available at http://files.shareholder.com/downloads/QCOM/407452927x0x247758/4797c963-2646-43de-be64-391b3752ea2b/QCOM_Q408ERFINAL.pdf.


7. American Inventor (ABC television broadcast); FLASH OF GENIUS (Intermittent Productions 2008).


9. See infra Parts I.A.1—6 (describing research on each of these patent stories).

10. See Bessen & Meurer, supra note 1, at 27 (stating that more research on patent litigation is needed).
This gap in understanding is problematic. Even if many think that NPEs are a problem, no one really knows the size of the problem. Similarly, when a new patent war is started, it is difficult to know whether it represents the occasional, large patent fight or instead demonstrates the routine use and, some would argue, abuse of the patent system. More importantly, by focusing on problems associated with one or two types of patent litigation, other problems may be overlooked. Although the “squeakiest wheel”—that is, the patent story that gets the most attention—may deserve the grease, without data it’s hard to be sure.

Yet understanding the prevalence of each patent litigation story is important as each has its own culprit and call to action. Those who bemoan the rise of NPEs, for instance, have called for limits to the ability of patent holders to sue in inconvenient venues. However, such a change would be made at the expense of patentees who benefit from patent law’s broad jurisdiction rules. Proponents of damages reform, on the other hand, argue that the current law does not properly account for the increasingly complex and overlapping nature of rights in technology products. They complain that this has allowed patentees to command disproportionately large royalties, which are passed on to consumers. Those who oppose change, in contrast, believe that such cases are rare, and that the system should be left alone.

This Article puts these concerns into context by identifying the major stories of patent litigation and then matching actual suits, based on party profile, to these stories. Using data from the Stanford Intellectual Property

15. See generally id. (examining the phenomenon of royalty stacking, which occurs when a single product is subject to multiple patents, and its effect on consumers).
Litigation Clearinghouse (“IPLC”), launched publicly in December 2008, and drawing upon related empirical research, it attempts to answer two questions: who initiates patent lawsuits, and what types of suits are the most common? Unlike earlier studies of patent litigation, it tracks not only the number of cases filed, but also the number of defendants sued. It also takes into account declaratory judgment cases where the positions of patentee and infringer are reversed. In so doing, this Article presents a snapshot of patent litigation that should both inform current efforts to reform the patent system and serve as a basis for further investigation into its functioning.

This Article focuses on the litigation of high-tech (also referred to as computer-related) patents, covering hardware, software, and financial inventions. The high-tech community has been one of the most active in pushing for congressional patent reform and the source of many important innovations. Patenting behavior in each high-tech industry has been the subject of considerable academic study, providing a rich background to the current effort. Part I reviews this background, identifying the dominant patent litigation narratives. Part II describes the data and methods I analyzed to develop a patent litigation landscape based on these narratives. Part III reports my results, summarizing who brings computer-related patent lawsuits and which types of patent litigation narratives are most prevalent. Part IV discusses the implications of my empirical findings.

I. BACKGROUND

While each patent dispute is unique, most fit the profile of one of a limited number of patent litigation stories. When an independent inventor sues a large company, for instance, a David v. Goliath match-up results.  

17. Stanford IP Litigation Clearinghouse, http://www.law.stanford.edu/program/centers/iplc/ (last visited Apr. 3, 2009). The Stanford IP Litigation Clearinghouse data is derived from PACER, Public Access to Court Electronic Records, http://pacer.psc.uscourts.gov/ (last visited Apr. 3, 2009), an electronic service that allows users to obtain case and docket information from federal courts. After downloading all available cases from more than ninety courts (and by hand-collecting and scanning documents from others), raw data sets are parsed by a computer program into specific motions, objections, and decisions. The data is then hand-checked by research assistants to ensure integrity. Access to the IPLC database can be requested by emailing jwalker@law.stanford.edu.

18. See Coalition for Patent Fairness, http://www.patentfairness.org/learn/about/ (last visited Apr. 9, 2009). The Coalition, which describes itself as “committed to the passage of patent legislation that will foster innovation and economic growth,” includes high-tech companies such as Apple, Cisco Systems, Dell, Google, HP, Intel, Micron Technology, Inc., Microsoft, Oracle, Palm Inc., RIM, SAP, and Symantec. Id.

19. See infra Part I.A

In contrast, if the parties are more evenly matched, comprising two large private or publicly traded corporations, the result can be patent warfare, potentially of global dimensions. To avoid such wars, many companies defensively build their patent portfolios in an attempt to reach patent détente. Notwithstanding these efforts, many find themselves in court, across the courtroom from an NPE. Finally, the strategic use of patent litigation by well-established large companies against their smaller, less-established rivals has been called predatory.

A. Different Types of Narratives

1. NPE Suits

Since the term was coined in 1991, trolls, or NPEs, have become perhaps the most controversial and least popular group of patent plaintiffs. NPE generally refers to a patentee that does not make products or “practice” its inventions. Over time, the definition has been narrowed to exclude actors in the innovation enterprise that also engage in significant research and development activities and individual inventors who seek to


commercialize their inventions. While definitions vary, the term NPE in this Article refers to a corporate patent enforcement entity that neither practices nor seeks to commercialize its inventions. This definition excludes certain inventors whom others have called trolls, in particular, individual inventors who initiate suits. Part II.E, infra, describes the differences between individual inventors and trolls, and why I did not include all such plaintiffs in the NPE category.

In support of the NPE business model, companies have been formed to engage in diverse activities such as organizing patent auctions, acquiring patent assets, asserting patent portfolios, and underwriting enforcement activities. Proponents of the patent licensing community emphasize the “central role [licensing plays] in helping commercial entities obtain the rights to use valuable technologies that produce new and beneficial products.” For some individual inventors and small companies, NPEs have served as “guardian angels,” providing a path to liquidity previously unavailable.

28. See McDonough, supra note 26, at 189 (“A patent troll is a person or entity who acquires ownership of a patent without the intention of actually using it to produce a product.”).

29. For example, one Tobi Kay Gellman apparently brought a patent suit against a number of security companies in Marshall, Texas. Gellman v. ADT Sec. Serv., Inc., No. 2:07-CV-0282, 2008 WL 4280351, at *1 (E.D. Tex. Sept. 10, 2008). My definition does not include this as a troll patent suit, though at least one blogger has, stating:

Toby Kay Gellman of Dallas, Texas is the trustee of the Mayer Michael Lebowitz patent trust. No injunction is sought—just money for a patent involving using cellular technology in alarm systems. I guess if your love [sic] one dies and leaves you just a handful of patents, that could be more valuable than you think.


Who do NPEs sue and what form do their suits take? NPEs have a reputation for surprising their targets, typically mature companies that have already developed and sold allegedly infringing products. NPEs also typically target multiple defendants and seek settlements. For every defendant that is actually sued, many more demands are made. Because NPEs have no products of their own, they cannot be countersued for patent infringement. NPEs do not risk disruption to their core business—patent enforcement is their core business.

Some accuse NPEs of asserting weak patents, the validity of which is unlikely to be decided by a court. This follows from a business model based on generating licensing revenue rather than getting an injunction to prevent defendants from making or selling their products. Patent holding company Intellectual Ventures, for instance, holds and has attempted to license large numbers of patents. If a fraction of these attempts succeed, a revenue stream can be developed without resort to litigation. It is unknown how many NPEs use such a portfolio approach, however. Research company Patent Freedom believes that the majority of NPEs are more selective and strategic, acquiring relatively smaller numbers of strong, not weak, patents that can withstand invalidity challenges.

34. Reitzig et al., supra note 2 (describing “troll surprise”).
35. See McCurdy, supra note 12, at 80; infra Part IV.A.
36. See, e.g., Lerer, supra note 32 (describing one NPE as sending “hundreds of nearly identical letters to allegedly infringing companies,” then “su[ing] 50 companies for patent infringement”); Michael J. Meurer, Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation, 44 B.C. L. REV. 509, 516–17 (describing the example of E-Data, that allegedly sent 75,000 demand letters resulting in several licenses and a suit against forty-one companies).
37. McCurdy, supra note 12, at 81.
38. Lemley, supra note 27, at 8 (asserting that trolls do “not contribut[e] anything to society, but rather obtain[] and assert[] patents covering technology independently developed by” others).
42. Id.
43. Id.
NPEs have focused on high-tech inventions for several reasons. First, they have historically acquired their patents from distressed or bankrupt companies, principally casualties of the Internet bubble. Second, products in computer and semiconductor-related industries tend to be covered by many patents, increasing the likelihood of infringement. Finally, in high-tech or “predictable arts,” it is arguably easier to file a paper patent that can be bought and sold free of the underlying technology. In contrast, biotechnology inventions have more stringent enablement and written description standards which are more difficult to meet without having actually made the invention.

However, the role of NPEs in other industries is poised to expand. As the patent marketplace evolves, so likely will business models to support the enforcement or licensing of biotech and other inventions. In addition, in an economic downturn, startups and companies in all industries are more likely to attempt to cash in their patents, by selling them to patent enforcement entities, rather than letting them sit on the shelf.

A few attempts have been made to quantify the size of the NPE phenomenon. In 2007 and 2008, a website, Patent Troll Tracker, tracked...
newly-filed troll litigations across the country. Unfortunately, this effort was discontinued when the site was the subject of a defamation lawsuit. Kesvan and Ball released a study in 2008 estimating that 5% of suits in 2000 and 2002 were brought by patent licensing firms. Patent Freedom has placed the share of NPE suits higher, at approximately 12% in 2008. Others claim that the number is much lower, closer to 2%. Without a shared understanding, it is not clear which of the following claims is true: that NPEs “represent the most significant and destabilizing change in the patent environment since 2003,” or that, based on “the statistics, it’s not obvious that there’s a problem at all.”

2. Litigation-Avoidance/Patent Détente

Others who watch the patent system tell another story, that companies are engaged in defensive patenting. By building portfolios of patents, companies can discourage or neutralize threats of suits brought by their
competitors. This strategy compels firms to patent now in order to avoid litigation later. Instead, the hope is that companies in both industries, well-armed, will reach a patent standoff, or détente. As a Sun Microsystems executive put it in 2005, “[i]f you build up your patent portfolio, I build up mine—nukes pointing at each other . . . . That has exactly the right outcome. We sit here and exchange patents with each other.”

Scholars have documented the defensive patenting phenomenon in the semiconductor industry. They have also noted the accumulation of large patent portfolios in industries that obtain mostly software patents, namely the computer, electronics, and instrument industries. Financial industries have also witnessed a patent flood, or rush to patenting, observers claim, in order to avoid damaging litigation. The desire to avoid patent litigation may explain why companies in the semiconductor industry obtain patents even while rating them as ineffective relative to other ways of gaining advantage. The companies that engage in defensive patenting tend to be large. This makes them vulnerable to patent litigation but also gives them the ability to underwrite large patent portfolios.

Despite the importance of defensive patenting strategies among high-tech companies, the share of suits involving hardware and software inventions has actually risen, not declined. According to Hall and Ziedonis, the probability that semiconductor firms will be involved in lawsuits as targets of litigation grew from close to 0% in 1973 to close to 10% in 2001. Bessen and Meurer likewise note that the percentage of suits involving software patents as compared to overall suits has risen, from

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59. See Parchomovsky & Wagner, supra note 22, at 36.
65. Allison et al., supra note 60 at 468–69.
less than 5% in 1984 to 26% in 2002. These observations raise the question: why do companies who acquire patents in order to avoid being in court nevertheless end up there? It is unclear whether greater activity by NPEs, a failure of defensive patenting, growth trends in the industry, or something else is to blame.

3. Sport of Kings

When large corporations sue each other, the result can be patent warfare, involving competing claims, multiple patents, and teams of lawyers. Patent litigation is complicated, risky, and expensive. In cases in which $1 million to $25 million is at stake, the cost of litigation averages between $2 and $3 million. When more than $25 million is at stake, the average costs jump to $5.5 million. Given such price tags, it is no wonder that patent litigation among large companies has been called the sport of kings.

The patent battles between Creative and Apple, as well as Qualcomm and Broadcom, provide two examples. At the time of trial, the litigants were competitors in the marketplace: Creative and Apple sell rival mp3 players while Qualcomm and Broadcom both make chipsets for cellphones that can operate on 3rd generation, or “3G” networks. In both cases, numerous litigations were filed in district court and at the International Trade Commission and involved claims and counter-claims. While the

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68. Id.
70. Id.
71. Kline, supra note 1.
74. For example, in the dispute between Apple and Creative, Creative initiated an investigation against Apple for the alleged infringement of U.S. Patent No. 6,928,433. See Certain Portable Digital Media Players, 71 Fed. Reg. 34,390 (June 8, 2006) (notice).
Apple suit was settled for $100 million, 75 the Qualcomm and Broadcom dispute has continued now for several years and is still ongoing. 76 Yet suits between large firms may not be strictly competitive in nature. Hall and Ziedonis describe a case in which a large, ailing company mounted an aggressive patent enforcement against other firms just prior to filing for bankruptcy, 77 well after the company had ceased to be a viable competitor. 78

Though impressive in its size and complexity, litigation between large firms is not perceived to be the norm. 79 Relatively few companies can afford to engage in such all out patent wars, and many who end up in court disclaim any desire to be there. 80 One would therefore expect patent battles between large companies to be the exception, rather than the rule.

4. David v. Goliath

A David v. Goliath suit pits individual inventors against large corporations accused of profiting from the inventors’ technology. Such suits are portrayed as countering the attempt of corporations to “fight down


76. Hall & Ziedonis, supra note 61, at 17.
77. Id. 78.
78. Id.
79. Kline, supra note 1 (noting patent owners fear legal fees).
the inventor and rob him of all the benefits of his invention.\textsuperscript{81} They build upon America’s love of entrepreneurs\textsuperscript{82} and the iconization of American inventors: men and women idealized for their “ingenuity, productivity, and creativity.”\textsuperscript{83}

The 2008 movie “Flash of Genius” popularized one archetypal David, independent inventor Robert Kearns, who accused Ford Motor Company and others of stealing his idea for the intermittent windshield wiper.\textsuperscript{84} Kearns ultimately received millions of dollars in royalty payments.\textsuperscript{85} The David v. Goliath story is compelling, not only to moviegoers, but to juries as well, who favor individual inventors at a rate of three to one over the corporations they sue for patent infringement.\textsuperscript{86}

According to several studies, individuals and small companies are more likely than large companies to sue on their patents.\textsuperscript{87} This is particularly true in the financial industry, where patents assigned to individuals are an estimated five times more likely to be litigated than those held by public corporations.\textsuperscript{88} The intermediary market for patent enforcement discussed above supports this litigiousness by underwriting litigation that might otherwise be unaffordable for individual inventors.\textsuperscript{89} It also further blurs the distinction between small company or underdog inventor and troll.

Take, for example, the case of tech startup turned patent enforcement company Burst.com, founded by individual inventor Richard Lang.\textsuperscript{90}

\textsuperscript{81} 13 CONG. REC. 3952 (1882).
\textsuperscript{85} Seabrook, supra note 84, at 38.
\textsuperscript{86} Moore, supra note 83, at 85 n.50 (2007) (stating that in such match-ups juries rule in favor of independent inventors 74% of the time and defendant corporations only 26% of the time).
\textsuperscript{87} Allison et al., supra note 60, at 439 (“[P]atents issued to individual inventors and small companies are more likely to be litigated.”); Josh Lerner, The Litigation of Financial Innovations 15 (Harvard Univ. & Nat’l Bureau of Econ. Research, Working Paper No. 09-027, 2008), available at http://www.hbs.edu/research/pdf/09-027.pdf (“Patents assigned to individuals are five times more likely to be litigated than those held by public corporations, and about 50% more likely to be so than those held by private firms (which include both smaller operating firms and patent holding companies).”).
\textsuperscript{88} Lerner, supra note 87, at 15.
\textsuperscript{89} See supra Part I.A.1.
\textsuperscript{90} Peter Burrows, Underdog or Patent Troll?, BUS. WK., Apr. 24, 2006, at 58; see also Niro & Greenspoon, supra note 6, at 14–16 (describing how International Meta Systems, Inc.’s
According to one account, though the company initially tried to commercialize and market Lang’s network transmission technology, it ran into competitive obstacles. After obtaining a $60 million settlement from Microsoft for infringement of its patents, Burst.com decided to turn to patent enforcement full-time, trimming its staff from 110 employees down to two. Should Burst.com be characterized as a troll or an underdog? I would argue that when the company stopped trying to commercialize its technology and started focusing on enforcement, it went from being an underdog to being an NPE. A tougher case is presented by an individual inventor who is represented by a contingent fee lawyer. Though the individual inventor may present the face of the litigation, the underwriter may in fact control the litigation.

While such cases do make it difficult to distinguish between NPEs and underdogs, NPE suits and individual inventor suits differ in important ways. First, some independent inventors are perceived as seeking not only money, the main objective of licensing shops, but also justice or vindication by a court. In addition, an independent inventor is likely to present a more compelling plaintiff to a court than a licensing shop assignee. Finally, an individual with fewer resources is likely to be more selective, both about its targets and the patents it asserts, as compared to an NPE with relatively deeper pockets and a large portfolio.

The number of David v. Goliath type suits is unknown. Individual inventors, once a dominant source of new inventions, now only generate only 12% of patents. Once obtained, these patents may be harder to enforce by an individual who lacks the financing and resources to monitor for infringement. Still, along with the classic story of the American inventor, the David v. Goliath narrative remains an important part of the patent litigation landscape.

5. Predation

The strategic use of patent litigation by established companies to impose distress on their financially disadvantaged rivals has been called

failure in the marketplace, due to the allegedly predatory practices of Intel, resulted in the sale of the patent to licensing company TechSearch); Reisman, supra note 33 (blogging about the demise of his company leading to enforcement of his patents).

91. Burrows, supra note 90, at 61.
92. Id.
93. Seabrook, supra note 84, at 38.
94. Bessen & Meurer, supra note 8, at 169.
95. Meurer, supra note 82, at 1233–34 (describing the obstacles faced by small firms in enforcing patents, which also extend to independent inventors).
96. Moore, supra note 83, at 69.
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patent predation.97 Such litigation can damage a defendant’s credit rating, its relationship with customers, and its reputation with investors, regardless of how the suit ultimately resolves. By suing less-established firms, critics say, predatory plaintiffs can use litigation to threaten their survival.98 Observers call companies who assert weak patents in such a context patent bullies.99

Verizon’s suit against Vonage provides a case study.100 Vonage, a pioneering internet telephone company, presented a competitive threat to Verizon, a telecommunications giant.101 When Verizon sued Vonage for patent infringement, it was described as the attempt of a “deep-pocketed incumbent to drive an innovative competitor out of business.”102 The court ruled that Vonage’s products were infringing three of Verizon’s patents and ordered Vonage to pay $58 million, a significant setback to its attempt to turn a profit.103 The court also enjoined Vonage from signing new customers,104 which Vonage was quoted as saying would amount to its “slow death.”105 Ultimately, the injunction was stayed by the Federal Circuit106 and did not succeed in driving Vonage out of business, as was feared.107 Still, it and suits by other incumbents have continued to burden Vonage.108

98. Meurer, supra note 36, at 523–24.
108. See Graham & Sichelman, supra note 99, at 1080–81 (describing litigation brought by AT&T and Sprint, in addition to Verizon).
While some call this type of suit “opportunistic,” there’s another side to the story. Verizon invests heavily in research and development with a laboratory of reportedly 350 to 400 researchers. Verizon’s suit could fairly be characterized as a way for it to secure a return on its investments in innovation. In addition, some might argue predatory suits simply represent an exercise by large companies of their competitive advantages in intellectual property.

Although patent predation has received relatively little scholarly attention, several aspects of the Vonage case reinforce what others have observed. First, predation strategies appear to be more common in high-tech industries like internet telephony. This may be because innovation in those industries is incremental, thereby increasing the risk that a new entrant will tread upon previous advances. Second, injunctions appear to provide a particularly potent weapon for carrying out predatory strategies. Their potency is one reason that predatory patent litigation is regarded as “more likely to succeed” than other predatory tactics.

6. Limited Stakes, Small Company v. Large Company, and University Suits

The above stories represent what I consider to be the dominant categories of high-tech patent litigation. But many suits do not match any of them. In this Section, I describe three additional types of litigation: limited stakes, small v. large company, and university suits. We tracked such suits as well.

Some patent suits represent garden variety business disputes between small- and medium-sized companies. While many companies are small- or medium-sized, they have less revenue than large companies. This sets a relatively lower limit on the value at stake in patent disputes between them, making them limited stakes.

Other patent suits take the form of a small company suing a large company. Small company plaintiffs resemble individual and NPE plaintiffs insofar as their exposure to counterclaims is limited. In addition, because of

109. Meurer, supra note 36, at 509.
111. Meurer, supra note 36, at 523.
112. Lee, supra note 102; Lemley & Shapiro, supra note 14, at 1994—96.
113. Lanjouw & Lerner, supra note 97, at 573.
114. Meurer, supra note 36, at 516.
115. Of the private company plaintiffs profiled by revenue in this dataset, for example, we classified approximately 60% as small (annual revenue of less than $10 million), 26% as medium-sized (annual revenue from $10 million—$100 million) with 22% of the 26% having revenues of less than $50 million, and only 14% as large (annual revenue of over $100 million).
the difficulties of identifying NPEs described infra in Part IV, some small company plaintiffs may in fact be NPEs, and by extension small company v. large company suits may represent NPE suits.

Finally, some suits involve university patentees suing various defendants. While scholars have carried out a number of studies on university patenting, less academic attention has been paid to university patent litigation. The important university patents seem to be in biotechnology areas. Though universities are generally large entities, like NPEs, they have limited exposure because they do not make products. In addition, public universities can assert a sovereign immunity defense.

B. Comparing the Narratives

These narratives can be matched to actual litigations based on party profile (Fig. 1). Together with a team of research assistants, I analyzed each dispute in two different ways—with respect to who brought each suit, and also with respect to each suit’s plaintiff-defendant pair, or case-pairing. The first analysis, was accomplished by placing each party into one of a limited number of categories: individual, NPE, nonprofit (university and other nonprofits), private non-NPE company, and public non-NPE company. Many of the plaintiffs or defendants in our sample were private companies, with a wide range of company profiles. Thus, we further classified each private company as small, medium, or large based on available revenue information as reported on the Hoovers.com website.

117. For a review of the studies analyzing university patenting, see generally Nicola Baldini, University Patenting and Licensing Activity: A Review of the Literature, RES. EVALUATION, Dec. 2006, at 197, 197.
118. See, e.g., supra note 116.
120. For a detailed description of the party categories, see infra Appendix A.
121. For instance, Freescale Semiconductor is privately held and, according to its website, employs 24,000 people with FY2007 worldwide revenues of $5.7 billion. See Freescale, About Freescale, http://www.freescale.com/webapp/sps/site/homepage (last visited Apr. 9, 2009). In contrast, the private company Adesso Technology is estimated to have twenty employees and annual revenues of $3.7 million. See Adesso Technology Inc., Company Overview, Hoover’s, http://www.hoovers.com/adesso-technology-inc.--HD__xcktxtjsj,src__dbi--/free-co-dnb_factsheet.xhtml (last visited Apr. 9, 2009).
In order to carry out the second analysis, matching the suits to the stories, we profiled each suit based on plaintiff-defendant pair and then matched each suit profile to the narrative that best matched it. We also recorded duration data for completed suits.

As noted before, previous discussions of patent litigation tend to focus on one or a few litigation stories in isolation. The present analysis, in contrast, analyzes different types of suits together and attempts to provide an empirical context for comparing them. Figure 1 presents a stylized framework for thinking of these types of suits.

**Figure 1: Narratives of Patent Litigation**

![Figure 1: Narratives of Patent Litigation](image)

**Small plaintiff-large defendant**

Several litigation stories fit within the case pairing of small plaintiff-large defendant. David v. Goliath suits, for instance, feature an individual inventor suing a corporation, for instance. Most NPE suits, which pit small licensing shops against mature, well-established companies, also fit the small plaintiff-large defendant profile. Not all NPEs are small, however, well-known NPE Acacia Research Corporation\(^\text{122}\) is publicly traded with a multi-million dollar market capitalizations.\(^\text{123}\) In the present analysis, suits brought by an NPE, as well as suits for declaratory judgment brought against NPEs, were characterized as NPE suits regardless of the size of the parties. Finally, cases brought by small private companies against public or large private ones, or so-called small v. large suits, also fit this case pairing.

**Large plaintiff-large defendant**

\(^{122}\) Acacia Research Corporation (NASDAQ: ACTG).

\(^{123}\) Acacia’s 2009 market cap on April 27, 2009 was $134M. http://finance.yahoo.com/q?s=ACTG (last visited Apr. 27, 2009).
This Article has described two ways in which large plaintiff-large defendant disputes may resolve. If defensive patenting is successful, most suits between such players should be avoided and instead result at most in cross-licensing. However, in some cases, companies may also choose to follow an offensive strategy of suing other large companies who may or may not also be competitors. Such sport of kings suits are more likely to be complex and potentially protracted, with claims of infringement on both sides.

**Large plaintiff-small defendant**

Predatory plaintiffs target less financially-established defendants. The typical predatory suit, therefore, features a large firm suing a small one. Cases with this profile are identified in this Article as having a “predation profile.” This coding has limitations, however. Predatory suits are hard to identify based on profile alone, since they require the plaintiff’s intent to impose financial distress on the defendant. In addition, a company does not necessarily need to be large to engage in predation. One account describes a “company of modest size using a high-profile . . . law firm . . . to go after [seventeen] tiny companies and individuals” in an attempt to “extract settlements from little guys with the threat of astronomical legal costs.”\(^\text{124}\) This suit may be predatory though it doesn’t fit the classic large v. small company profile.\(^\text{125}\)

**Small/medium plaintiff-small/medium defendant**

Limited stakes litigation, brought by small- or medium-sized plaintiffs against small- or medium-sized defendants, fit in the lower left hand quadrant. Even in cases where stakes are low, the costs of litigation remain high—for suits in which less than $1 million is at risk, the average price tag is $461,000 per suit to the end of discovery, and $767,000 to conclusion of the suit.\(^\text{126}\)

What does the empirical data tell us about the relative prevalence of these different types of suits? Part II describes how we obtained the data to classify suits into different categories to address this question, and Part III sets out the answers the data provides.

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125. *Id.*

II. DATA AND METHODS

To develop a profile of litigation behavior in various computer-related industries, I used data from the Stanford IPLC. The IPLC includes all patent infringement lawsuits, including declaratory judgment suits for non-infringement filed from January 1, 2000 to the present. The underlying data is derived from Public Access to Court Electronic Records ("PACER"), an electronic reporting service of the United States court system. Based on a manual checking process, the IPLC excludes false positive cases (e.g., miscoded cases, patent licensing cases, etc.) and includes false negative cases (infringement cases never before coded as such).

I selected cases filed between January 1, 2000 and March 21, 2008 involving hardware, software, and financial invention patents based on the United States Patent and Trademark Office ("USPTO") patent classification of the litigated patents, as coded by the IPLC. Scholars have used a variety of different criteria to select patents belonging to various industries, each with its own shortcomings. Selecting patent and litigation cases based on company, for instance, can blur the distinction between industry sectors as large companies often have multiple lines of business. For example, General Electric has diversified beyond power generation into fields ranging from medical imaging to media content to financial services, defying attempts to classify it into a single industry. Meta classifications that aggregate USPTO classifications such as those offered by the National Bureau of Economic Research are generally too large to facilitate in-depth study of particular industries. However, on the
opposite extreme, studies based on manually reading and classifying each patent yields a classification scheme that cannot be replicated, thereby making comparisons with other analyses difficult. Selecting patent and litigation cases based on keyword searching of the claim language is likely to be more precise but is prone to produce under- or over-inclusive results depending on the keywords selected.

Table 1: Data—Description of High-Tech Patents by Industry and Year

<table>
<thead>
<tr>
<th>Industry Category</th>
<th>Suits$^{137}$</th>
<th>Year of Suit</th>
<th>Number of Suits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial</td>
<td>513</td>
<td>2000–2001</td>
<td>205</td>
</tr>
<tr>
<td>Hardware</td>
<td>589</td>
<td>2002–2003</td>
<td>444</td>
</tr>
<tr>
<td>Software</td>
<td>1512</td>
<td>2004–2005</td>
<td>690</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2006–2008</td>
<td>961</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Total</td>
<td>2,300</td>
</tr>
</tbody>
</table>

For this analysis, I applied a compromise approach of selecting a limited number of USPTO classes that describe computer-related hardware, software, and financial inventions. The hardware category includes patents classified by the USPTO as covering semiconductor technologies, memory, and digital processing (chip) architectures and design. The

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$^{134}$ E.g., Allison et al., supra note 60, at 472.

$^{135}$ See, e.g., Bessen & Hunt, supra note 62, at 8–10.

$^{136}$ See infra notes 143–45 for the specific USPTO classifications for each category.

$^{137}$ A number of suits fit into more than one industry category, but the total number of unique cases in the dataset was 2,300.

$^{138}$ This decision was informed by my experiences prosecuting patents in these fields while a patent practitioner at a California-based technology law firm.

$^{139}$ Included in the hardware category are the following USPTO classifications: 716 (Data Processing: Design and Analysis of Circuit or Semiconductor Mask), 385 (Optical Waveguides), 712 (Electrical Computers and Digital Processing Systems: Processing Architectures and
software category includes patents covering user interfaces, database technology, software development, computer graphics, and cryptography.\(^{140}\) The financial inventions category includes patents classified by the USPTO as financial process, business practice, management or cost/price determination data processing inventions.\(^{141}\) Though USPTO classification schemes have also been criticized for misclassifying cases into one class rather than another,\(^{142}\) I limited the impact of any misclassification by aggregating related classes.

This approach yielded a total of 2,300 unique high-tech patent litigation cases (Table 1). Around 300 of the cases were classified by the IPLC into more than one class, yielding some duplicates between each of the three industry categories. Thus, I created two databases: one of unique cases, which I used to generate the summary statistics found in this Article, and a database containing cases associated with each reported class, including duplicates, which I used to calculate the industry category statistics reported in this Article.

A team of research assistants and I profiled each litigation based on the plaintiffs and defendants named in each case. Each party was placed into one of a limited number of categories: public company, NPE, individual, non-profit, and private company. Private companies were
further coded as small, medium, or large based on revenue data, where available, as described supra in Part I.B.

The definitions and methods of identification are described in detail in Appendix B. Generally, however, we identified public companies, including their subsidiaries, based on the profile information provided by the Edgar database of the Securities and Exchange Commission.\footnote{143. U.S. Securities and Exchange Commission, Filings & Forms, http://www.sec.gov/edgar.shtml (last visited Apr. 9, 2009).} We identified universities and governments by name and placed them together with nonprofits identified by their websites in the category of nonprofit. We coded parties as individuals if the first named party was an individual, including individuals listed as “dba” (doing business as) a corporate entity.

We identified parties as NPEs if the entity was described by a court description, industry code, news article, entity website, or blog post as a non-practicing enforcement/licensing entity, NPE, or troll. When a company described as an NPE also fit into another category, it was placed in the NPE category. This methodology is conservative for several reasons. First, many licensing shops do not advertise, making it difficult to verify what they do.\footnote{144. For example, NTP, the licensing entity that sued Research in Motion, does not have a website.} We coded as private companies entities for which we found no information about the company’s operations when in fact some may be licensing companies. Second, when an individual’s name comprised the first named party, we coded the party as an individual. Yet as described earlier, some of these suits are likely funded by non-practicing enforcement entities.

We classified companies that did not fit into any of the aforementioned categories as private corporations. We generally confirmed the private company status of these companies by reference to the company website, complaints posted to the IPLC or PACER, or other Internet description. We classified companies with revenues less than $10 million as small, companies with annual revenues between $10 million and $100 million as medium, and companies that made more than $100 million annually as large.\footnote{145. Ball & Kesan use a similar set of ranges to define companies as small, medium and large, except that their “large” category only includes companies with annual revenue of $500 million or more. Ball & Kesan, supra note 54, at 11.} The $10 million threshold is based on values published by the Small Business Administration and previous empirical research,\footnote{146. Id.; see also Small Business Administration, Size Standards, http://www.sba.gov/contractingopportunities/officials/size/SUMM_SIZE_STANDARDS_INDUSTRY.html (last visited Apr. 9, 2009) (describing a wide range of revenue thresholds for a variety of industries but...
performed on high-tech Russell 3000® companies. After the initial coding was complete, we performed quality checks to ensure accuracy.

Where an individual party belonged to several classes, we used a hierarchy to place it into the most specific applicable category. Thus, NPEs and universities/nonprofits were identified and coded first. Public companies and individuals were coded next. If the party fell into none of these categories, it was classified as a private company.

In a subset of cases, there were multiple plaintiffs or defendants. This information was captured in two ways. First, we counted and recorded the number of defendants. In doing so, we attempted to determine the number of distinct rather than individual defendants. This mattered most in cases where individuals were named in addition to their corporate identity or alter ego or where multiple corporate entities all belonging to the same parent entity were named. I used this information to generate statistics based on the number of defendants in cases filed and to supplement the data on the absolute number of cases filed. This was done to give another view of the litigation burden associated with each dispute as a single suit may impose costs on many defendants.

Second, the analysis assumed that among multiple co-parties to a suit, the largest entity was the real target or promulgator (or at least the deep pocket) of the suit. For example, when a suit was brought against an individual person and corporate or university defendant, the defendant group was profiled according to the corporate or university defendant. I used the party profiles to generate case pairings, for example, individual v. public company or nonprofit v. private company. Duration information for each suit was also captured based on IPLC coding of the start and end dates of litigation. Non-terminated cases were not included in the duration analysis.

147. 90% of high-technology companies in the Russell 3000® index had trailing twelve month revenues of $100 million and above based on data retrieved in February 2009. I defined high-tech companies as those included in the following industry groups as defined by the Russell 3000®: Computers, Telecommunications, Electric, Electronics, Semiconductors, Internet, Software, & Diversified Financial Services industries. The Russell 3000® index measures the performance of the largest 3,000 public companies. Russell 3000® Index, http://www.russell.com/Indexes/characteristics_fact_sheets/us/Russell_3000_Index.asp (last visited Apr. 9, 2009).

148. For example, Stephen Conner and The Conner Group were counted as a single defendant.

149. For example, Daimler Benz AG and Mercedes-Benz USA, LLC were coded as a single defendant.
Based on this data, we generated statistics to present a snapshot of (1) who brings lawsuits, and (2) the prevalence of various litigation stories or narratives. To determine the prevalence of each narrative, I matched each case pairing to the narrative that best approximated it. The definitions we applied to the cases are summarized in Table 2 and described in greater detail in Appendix B.
Table 2: Case Pairing Definitions

<table>
<thead>
<tr>
<th>Narrative/ Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>NPE</td>
<td>Suit brought by an NPE, or DJ suit brought against an NPE</td>
</tr>
<tr>
<td>Sport of Kings</td>
<td>Suit brought by a public or large private company against a public company</td>
</tr>
<tr>
<td>David v. Goliath</td>
<td>Suit brought by an individual against a public or large private company, or DJ suit brought by a public or large private company against an individual</td>
</tr>
<tr>
<td>University/ Nonprofit suits</td>
<td>Suit brought by a university or nonprofit</td>
</tr>
<tr>
<td>Predation Profile</td>
<td>Non-DJ suit brought by a public or large private company against a small private company, or a DJ suit brought by a small private company against a public or large private company</td>
</tr>
<tr>
<td>Small v. Large</td>
<td>Non-DJ suit brought by a small private company against a public or large private company, or a DJ suit brought by a public or large private company against a small private company</td>
</tr>
<tr>
<td>Limited Stakes</td>
<td>Suit brought by small or medium-sized private company</td>
</tr>
<tr>
<td>Other</td>
<td>Suit that does not fall into the above categories</td>
</tr>
</tbody>
</table>

Some suits were for declaratory relief, reversing the normal posture of parties. Suits that name NPEs as defendants, for instance, commonly seek a declaration of non-infringement. To ensure that cases were placed in the correct category, we checked the declaratory judgment (“DJ”) status of cases that presented potential coding errors. To do so, we read the complaints of a sample of cases that fell into each category (based on a 95% confidence rate with a 5% confidence interval) and classified them as non-DJ or DJ cases.\textsuperscript{150}

\textsuperscript{150} For a number of categories, the declaratory judgment status of a case did not impact its profile coding. Sport of kings suits, for instance, involve large companies suing each other, and limited stakes suits involve small- and medium-sized parties suing each other; thus declaratory
III. RESULTS

A. Who Brings High-Tech Patent Lawsuits?

Despite the scrutiny computer-related patents have received, attention has generally been focused elsewhere than on the simple question: who brings high-tech patent suits? Table 3 reports the answer to this question: by and large, non-NPE corporations do. 76% of all suits were brought by a public or private corporation, and among industries, the range was 71–84%. Individuals initiated 5% of suits and nonprofits 1%.\(^\text{151}\) That left the NPE share at 17%, including 8% of all hardware suits and 23% of all financial suits.

<table>
<thead>
<tr>
<th>Plaintiff Category</th>
<th>Hardware</th>
<th>Software</th>
<th>Financial</th>
<th>All Suits</th>
</tr>
</thead>
<tbody>
<tr>
<td>NPE</td>
<td>8%</td>
<td>20%</td>
<td>23%</td>
<td>17%</td>
</tr>
<tr>
<td>Non-NPE Public Corporation</td>
<td>50%</td>
<td>41%</td>
<td>30%</td>
<td>39%</td>
</tr>
<tr>
<td>Non-NPE Private Corporation(^\text{152})</td>
<td>34%</td>
<td>34%</td>
<td>41%</td>
<td>37%</td>
</tr>
<tr>
<td>▪ Large ($100 million+)</td>
<td>4%</td>
<td>3%</td>
<td>3%</td>
<td>3%</td>
</tr>
<tr>
<td>▪ Medium ($10–$100 million)</td>
<td>6%</td>
<td>4%</td>
<td>6%</td>
<td>5%</td>
</tr>
<tr>
<td>▪ Small ($10 million)</td>
<td>13%</td>
<td>11%</td>
<td>10%</td>
<td>12%</td>
</tr>
<tr>
<td>Individual</td>
<td>6%</td>
<td>4%</td>
<td>5%</td>
<td>5%</td>
</tr>
<tr>
<td>Nonprofit</td>
<td>2%</td>
<td>1%</td>
<td>1%</td>
<td>1%</td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>

Given the amount of attention NPEs have received, one might expect NPE suits to comprise a greater share of high-tech patent disputes. Instead,

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\(^{151}\) *Accord* Ball & Kesan, *supra* note 54, at 12 (explaining that “universities were not highly active in litigation” and that universities never pursued litigation without a co-plaintiff).

\(^{152}\) Private companies for whom no revenue data was available were not placed into any category, representing about 17% of plaintiffs.
the statistics in Table 3 seem to confirm what others have found: that NPEs have brought less than one-fifth of the patent suits studied.

However, a closer look at the suits themselves tells a different story. When they sue, NPEs typically name multiple defendants, each of whom faces the prospect of being part of an ongoing litigation. Past studies of patent litigation have failed to take this into account, focusing solely on the absolute number of suits. Yet, every suit brought against multiple defendants takes its toll on each defendant. To account for this, we also calculated the number of cases brought based on the number of defendants named. Accordingly, a suit against three defendants was counted three times, while a suit against one defendant was counted once. As described earlier, we attempted to count only distinct defendants, for instance counting multiple named corporate entities all belonging to the same parent entity as a single defendant.

Table 4: Cases by Plaintiff

Calculated based on number of defendants sued

<table>
<thead>
<tr>
<th>Plaintiff Category</th>
<th>Hardware</th>
<th>Software</th>
<th>Financial</th>
<th>All Suits</th>
</tr>
</thead>
<tbody>
<tr>
<td>NPE</td>
<td>13%</td>
<td>30%</td>
<td>40%</td>
<td>26%</td>
</tr>
<tr>
<td>Non-NPE Public Corporation</td>
<td>44%</td>
<td>31%</td>
<td>17%</td>
<td>30%</td>
</tr>
<tr>
<td>Non-NPE Private Corporation</td>
<td>31%</td>
<td>31%</td>
<td>36%</td>
<td>35%</td>
</tr>
<tr>
<td>Individual</td>
<td>9%</td>
<td>7%</td>
<td>6%</td>
<td>8%</td>
</tr>
<tr>
<td>Nonprofit</td>
<td>3%</td>
<td>0%</td>
<td>0%</td>
<td>1%</td>
</tr>
<tr>
<td>Grand Total</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>

Based on this methodology, the average share of cases brought by NPEs grew to 26%, putting it on par with public and private corporations. More strikingly, of all suits involving financial patents, trolls initiated 40%, the largest single share. In software, NPEs brought 30% of suits, and in hardware, 13% of suits.

153. See, i.e. Ball & Kesan (5%) and Patent Freedom (12%). See supra text accompanying notes 54–55. Note, however, that these figures are not industry specific.
154. See supra Table 2.
155. See supra notes 151–52.
156. See supra Table 4.
157. The mean number of defendants in NPE cases was 3.4, and the median was 2.0.
The percentage of suits brought by individuals also grew when the number of defendants was counted.\footnote{158} This indicates that individuals are naming more than the average number of defendants in each lawsuit. In this way, individuals are behaving more like NPEs, and less like corporations (whose shares dropped) in terms of the number of defendants they name.

B. What Types of Suits Are Most Prevalent?

We looked at plaintiff-defendant pairs, matched them to the suits stories described earlier, and considered what types of suits were most prevalent. As described earlier,\footnote{159} where we suspected that the DJ status of a case would impact its classification (for instance, cases brought against trolls and individuals), we used a sample to place suits into the correct category.

In addition, about 20\% of the suits were brought by or against parties for which no revenue information was available through Hoovers. For the purposes of classifying suits into a case category only, we adopted the assumption of Ball and Kesan that such companies were small due to their limited footprint.\footnote{160} This assumption is supported in our study by the predominance of small companies among the private companies we studied for which revenue information was available—82\% had less than $50 million in annual revenue.\footnote{161} This assumption influenced the outcomes principally by increasing the share of limited stakes, predation profile, and small v. large suits, and decreasing the share of sport of kings suits.\footnote{162} The data are reported in Table 5.

\footnote{158} The mean number of defendants in suits brought by individuals was 3.3, and the median was 1.0.  
\footnote{159} See supra note 150 and accompanying text.  
\footnote{160} Ball & Kesan, supra note 54, at 11.  
\footnote{161} See supra note 115.  
\footnote{162} If cases where no revenue was available for a private party were removed from the dataset, rather than assumed to be small, the values would be: 24\% NPE, 5\% David v. Goliath, 10\% small v. large, 41\% sport of kings, 7\% limited stakes, 4\% predation profile, 2\% nonprofit, and 6\% other.
Table 5: Lawsuits by Category  
Calculated based on absolute numbers of suits\textsuperscript{163}

<table>
<thead>
<tr>
<th>Suit Category</th>
<th>Hardware</th>
<th>Software</th>
<th>Financial</th>
<th>All Suits</th>
</tr>
</thead>
<tbody>
<tr>
<td>NPE</td>
<td>9%</td>
<td>21%</td>
<td>26%</td>
<td>19%</td>
</tr>
<tr>
<td>David v. Goliath</td>
<td>5%</td>
<td>3%</td>
<td>3%</td>
<td>4%</td>
</tr>
<tr>
<td>Small v. Large</td>
<td>15%</td>
<td>17%</td>
<td>18%</td>
<td>18%</td>
</tr>
<tr>
<td>Sport of Kings</td>
<td>38%</td>
<td>36%</td>
<td>19%</td>
<td>28%</td>
</tr>
<tr>
<td>Limited Stakes</td>
<td>17%</td>
<td>11%</td>
<td>19%</td>
<td>16%</td>
</tr>
<tr>
<td>Predation Profile</td>
<td>10%</td>
<td>7%</td>
<td>7%</td>
<td>8%</td>
</tr>
<tr>
<td>Nonprofit</td>
<td>2%</td>
<td>1%</td>
<td>3%</td>
<td>2%</td>
</tr>
<tr>
<td>Other</td>
<td>4%</td>
<td>5%</td>
<td>5%</td>
<td>5%</td>
</tr>
</tbody>
</table>

Among the results, a few are striking. It appears that many disputes initiated by large companies, that is, public companies and large private companies in the dataset, are brought against other large companies. 28% of all suits, the largest share, fit this sport of kings profile. This in itself may not seem surprising; the bulk of software patents are owned by corporations,\textsuperscript{164} many of them large corporations, and the same is likely true of hardware patents. But when the various litigation narratives are compared,\textsuperscript{165} the contrast between perception and reality becomes more pronounced.

NPEs are known as willing, if not eager, litigants, having built a business around patent enforcement.\textsuperscript{166} In contrast, public high-tech companies are generally portrayed as reluctant litigants, carefully constructing portfolios of patents to avoid going to court. One might therefore expect to see relatively fewer suits in the sport of kings category and more suits in the NPE category. As reported in Table 5, however, the opposite is true—overall, NPE suits comprised only 19% of the total, as compared to the 28% share of sport of kings suits. This difference is statistically significant.\textsuperscript{167} This means that when a suit was brought naming

\textsuperscript{163} When calculated based on numbers of defendants sued, the results were, for NPE, David v. Goliath, small v. large, sport of kings, limited stakes, predation profile, nonprofit, and other categories, respectively, 28%, 5%, 19%, 21%, 16%, 7%, 1%, and 4%, respectively.

\textsuperscript{164} Bessen & Hunt, supra note 62, at 3–4.

\textsuperscript{165} See supra Table 3.

\textsuperscript{166} Lerer, supra note 32 (citing an NPE’s reputation as an aggressive litigator who is “quick on the trigger” as responsible for bringing in settlements). For conflicting opinions regarding whether this is really the case, see discussion supra Part II.A.I.

\textsuperscript{167} I used a standard chi-square test to examine the null hypothesis that NPE and sport of king suits were equally likely to be filed, yielding a p-value of 6.1 x e-13. A p-value of less than 0.05 is generally interpreted as an indication that the null hypothesis can be rejected (making it
a public or large private company defendant, the plaintiff-patentee was much more likely to be another large company than an NPE. Notably, the trend was exaggerated in the case of hardware patents (38% sport of kings v. 9% NPE), and reversed in the case of financial patents (19% sport of kings v. 26% NPE).

The share of NPE suits over the eight year period (19%) was greater than the share of suits in which NPEs were plaintiffs (17%) reported in Table 3. This difference is attributable to DJ cases brought against NPEs, which comprised some 2% of the total. Yet other figures are also relevant. Based on a methodology that counts the number of defendants (not shown), for instance, the share of NPE suits jumps to 28%. In addition, as shown in Figure 2, the share of NPE suits appears to be rising over time. During the 2000–2001 period, NPE suits accounted for 10% of the total, but double that, 20% of suits brought in 2006–2008 based on absolute count. Counting defendants, the NPE suit share was 22% in 2000–2001 and 36% in 2006–2008. As observed before, the NPE phenomenon seems to be most pronounced in the financial industry, followed by the software industry, and least important in the hardware industry.
The remaining suits took various forms. 18% of suits were brought by small companies against large, comparable to the share of NPE suits (19%). As discussed earlier, due to the difficulties of identifying NPEs, some of these suits may actually be NPE suits.169 16% of the suits were limited stakes contests between small and medium sized parties. In addition, suits by large companies against small ones—so called predatory profile suits—comprised 8% of all suits. This is a not insignificant share, and double the share of David v. Goliath suits (4%). Nonprofit/university suits represented a small share of the total (2%).

C. How Long Do High-Tech Patent Lawsuits Last?

Beyond the initial point of filing, what happened once suits were filed? The burdens associated with a lawsuit can vary tremendously, depending on how far the dispute continues before it terminates, either through court adjudication, settlement, or other resolution.

168. Data points shown: 10%, 16%, 16%, 20% (based on number of suits); 22%, 25%, 21%, 36% (based on number of defendants).

169. However, given the very different distribution of these suits across industries as compared to NPE suits and our confirmation that many of these small companies were operating, it’s unlikely most of them are.
Table 6: Average Suit Duration

<table>
<thead>
<tr>
<th>Category</th>
<th>Months</th>
</tr>
</thead>
<tbody>
<tr>
<td>NPE Suit</td>
<td>9.1</td>
</tr>
<tr>
<td>David v. Goliath</td>
<td>14.6</td>
</tr>
<tr>
<td>Small v. Large</td>
<td>11.4</td>
</tr>
<tr>
<td>Sport of Kings</td>
<td>14.0</td>
</tr>
<tr>
<td>Limited Stakes</td>
<td>11.2</td>
</tr>
<tr>
<td>Predation Profile</td>
<td>13.3</td>
</tr>
</tbody>
</table>

In order to estimate the fates of different types of suits, we calculated how long they lasted. There was wide variation. Sport of king suits lasted 14.0 months on average while NPE suits tended to be resolved more quickly, lasting only 9.1 months. Suits brought by individual inventors lasted around 14.6 months on average, longer than suits brought by public companies against each other.

On the surface, this data seems to support some of the stories of litigation that are told. That NPE suits resolve the most quickly of any category is broadly consistent with the objective of obtaining a settlement, rather than winning. In contrast, the relatively long duration of David v. Goliath suits seems consistent with a motivation of vindication, not just financial gain. Yet it could be something much simpler—merely that NPEs file in faster jurisdictions. Still, it is likely that some NPE suits are settling early, according to one of several dynamics. In cases where an NPE abandons its case or reduces its target settlement to avoid substantial litigation after filing, an NPE’s bark may prove to be worse than its bite. In other cases, however, an NPE may drive settlement through aggressive litigation tactics that are meant to intimidate its opponents. Thus, the duration figures reported here would seem to provide a starting point and some clues for further research, rather than the basis for any strong conclusions.

IV. DISCUSSION AND FUTURE RESEARCH

This Article presents a snapshot of the litigation of computer-related patents. It reports relative trends and does not address what may comprise an “optimal” level of overall patent litigation. While patent defendants in general would prefer less litigation, at least filed against them, most would probably agree that a meaningful court remedy is an essential part of a functioning patent system.

170. See supra Table 4.
With these caveats in mind, four findings are worth further discussion and possible research.

A. The Limits of Defensive Patenting

Large private and public corporations initiated 42% of all lawsuits studied. These suits were against other large private and public corporations 28% of the time. If large companies are amassing portfolios of patents with the objective of avoiding litigation, why are they included in so many lawsuits?

One obvious reason large companies are in court is that individuals, NPEs, and small companies are suing them. Defensive patenting is not intended to, nor does it, guard against lawsuits brought by plaintiffs with little, if any, product revenue. Such suits are explored further below in the discussion of asymmetric stakes.

Several other factors may explain the relatively large number of suits between large corporations. First, it may be that the number of suits, though seeming large when compared to the number of suits overall, is not that large, relative to the size of the industries, the amount of money at stake, and the levels of innovation. This study does not measure the number of “avoided” suits or control for any of these variables.

In addition, defensive patenting is most effective when the companies suing each other have overlapping patent and product coverage. However, it may be that plaintiffs are suing in areas in which they don’t operate. The plaintiff may have acquired the patent at suit from another company or may be in the practice of filing patents over inventions that never mature into products. Under such conditions, the plaintiff’s exposure would remain low, even in the face of a portfolio of defendant patents.

The empirical findings of Bessen and Meurer seem to support this hypothesis. They find that, in general, a substantial number of suits between public companies involve firms that are not market competitors or even technologically close.\(^{171}\) According to their research, 29% of the public company v. public company suits they studied involved “true competitors” in the same industry, 43% had overlapping product lines, and 28% had no industry overlap—not one business segment in common at the three-digit SIC level.\(^{172}\) Related, companies may be suing those with whom they have one-off interactions as opposed to those with whom they have repeated interactions.\(^{173}\)

\(^{171}\) Bessen & Meurer, supra note 1, at 19.
\(^{172}\) Id. at 18; see also supra Table 3.
\(^{173}\) Bessen & Meurer, supra note 1, at 18.
To some extent, these and NPE suits represent failures of the defensive patenting strategy, which is unable to deter against these unexpected threats by companies with limited interaction in the marketplace.

Finally, the relatively high levels of large company-initiated litigation may reflect that many companies are not strictly following a defensive patenting strategy. Companies that patent primarily for defensive reasons may also engage in selective enforcement to build a reputation for toughness that deters others from copying. Or they may occasionally engage in strategic or predatory litigation. Finally, companies’ intentions with respect to patents may change over time. As public companies in the sample, such as Rambus, turned from operating to non-operating companies, for instance, their motives for acquiring patents likely also shifted from defensive to offensive.

For all of these reasons, it does not appear that defensive patenting is succeeding at preventing many companies with high-technology patents from bringing or defending against patent suits. An inquiry at the company level would likely lend further insights.

B. Counting NPEs

NPE plaintiffs initiate 17% of all suits (Table 2), yet, when defendants are counted, the share was 26% (Table 3). Factoring in declaratory judgments, the share rose to 28% (Table 4). In the 2006–2008 period, this figure was 36%, counting defendants, and 20% counting suits (Fig. 2). These numbers demonstrate that, when trying to measure the NPE phenomenon, it matters how you count them. While this study, unlike others, counts defendants, this methodology is not necessarily better than counting cases. Counting defendants arguably better captures the point of view of defendants who are named in NPE suits. However, multi-defendant litigation differs in many ways from single-defendant litigation, and in many cases, reduces the pressure on a single defendant to, for instance, devise theories for why the asserted patent is invalid.

Several other issues complicate the task of assigning a single, definitive number to NPEs. Defining and identifying trolls is an inexact science, making it difficult to compare this Article’s estimates to others. Patent Freedom, for instance, reports that NPE suits comprised around 12% of the total in 2006–2008 in comparison with this Article’s 20% figure for the 2006–March 2008 period. Because this 20% includes only high-technology patents.

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technology suits, whereas Patent Freedom’s 12% is calculated across industries, these numbers seem to confirm that NPEs have focused more on high-technology than other inventions. But Patent Freedom also uses a different, proprietary approach to counting NPEs which it describes as “necessarily incomplete”;176 also accounting for some of the difference. Finally, because both of these numbers focus somely on litigation, they ignore threats that do not mature into lawsuits.177 If it’s true that the proportion of patent threats to patent suits is higher for NPEs than for other patentees, these and other studies that focus solely on litigation understate the NPE phenomenon.

C. Patterns of Litigation by Industry

The data highlight the significant differences in patterns of litigation between industries. NPEs appear to be relatively more active in the litigation of financial inventions, bringing 26% (Table 5) of suits studied. This figure rose to around 42% of the total when suits were counted according to the number of defendants.178 This suggests that NPEs are an important driver of the much higher rates of litigation of financial inventions relative to other patents.179

NPEs accounted for a relatively smaller share of software patent suits (21%),180 and an even smaller share of hardware suits (9%).181 Why are NPEs more active in the litigation of financial patents? Lerner speculates that the high rate of litigation of financial inventions may be due, in part, to the substantial uncertainty associated with financial patents.182 NPEs may be more willing to exploit this uncertainty than corporations, leading to their share. Or, perhaps corporations holding software and hardware patents are more litigious than those holding software patents. The State Street decision,183 which allowed companies to patent business methods, was handed down in 1998, whereas hardware and certain software inventions have been patentable at least since the early 1980s.184 Thus, financial services companies have had a shorter period of time in which to

176. Id.
177. See infra note 185.
178. This figure is based on the author’s calculation.
179. Lerner, supra note 87, at 2 (reporting that financial patents are twenty-seven to thirty-nine times more likely to be litigated than patents are generally).
180. Counting cases, not defendants.
181. Id.
182. Lerner, supra note 87, at 25.
become familiar and comfortable with patent litigation than their hardware and software counterparts.

Also notable was the significant share of sport of kings hardware and software suits (38% and 36%, respectively). This suggests that the objective of defensive patenting in these industries, as noted above, is not being served.

Figure 3: Narratives of Patent Litigation—Match to Evidence

D. Asymmetric Stakes

Finally, while much attention has been focused on NPEs, several other categories of suits—David v. Goliath, and small v. large—also feature a small plaintiff, with limited exposure, suing a large defendant with greater exposure. 41% of all cases fell into one of these “asymmetric stakes” categories—the single largest quadrant share. Large companies may lump these types of suits together, given their similarities. If that’s the case, NPEs may be getting more blame for opportunistic litigation than they are owed, for cases brought by small operating companies and independent inventor plaintiffs. However, why this number is so large is worth further study. Whether it reflects the opportunism of small plaintiffs and an exploitation of the asymmetries between parties, technology transfer between small patentees and large operating companies, or something else, is unclear.

CONCLUSION

These theories suggest directions for future research. This Article

185. Not shown: Nonprofit suits (2%) and Other Suits (5%). See supra Table 5.
provides a high-level snapshot of litigation behavior but leaves much to be explored at the company level. In addition, while providing a robust discussion of different patent litigation narratives, this study says little about the reported 99% patents that are never litigated or the 95% that are never licensed. Still, the snapshot discussed here provides one way to talk about the different ways in which the patent litigation system is being used, with reference to its roles of incenting innovation and facilitating its development. Deepening our understanding of patent litigation will provide a perspective on whether or not the system is working, and based on that, how it may be improved.

186. It is estimated that only 5% of patents are the subject of licensing and 1% of litigation. Mark A. Lemley, Rational Ignorance at the Patent Office 95 NW. U. L. REV. 1495, 1507 n.55 (2001).
APPENDIX A: PARTY CATEGORIES, DEFINITIONS, AND METHODS OF IDENTIFICATION

<table>
<thead>
<tr>
<th>Party Category</th>
<th>Definition</th>
<th>Methods of Identification(^{187})</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Company</td>
<td>Non-NPE, publicly-traded company (including foreign exchanges) or subsidiary of same; also includes joint ventures owned by public companies.</td>
<td>Checked internet sites tracking public company status primarily via <a href="http://www.sec.gov">www.sec.gov</a>; and in some cases, <a href="http://www.hoovers.com">www.hoovers.com</a> (premium edition) and <a href="http://www.finance.yahoo.com">www.finance.yahoo.com</a>.</td>
</tr>
<tr>
<td>NPE</td>
<td>Non-NPE corporate patent enforcement entity that neither practices nor seeks to develop its inventions.</td>
<td>Looked for descriptions on the internet of the entity’s activities; coded NPE where the entity was described as a non-practicing enforcement/licensing entity, NPE, or troll. Main sources included entity website, court pleading or order, SEC disclosure/description, Hoover’s line or description of business, or press account. Could be owned by a corporation or nonprofit.</td>
</tr>
</tbody>
</table>

Examples:

2) Industry coding: Synchrome Technology Inc’s. industry identified as “6794: Patent owners and lessors” (http://0-premium.hoovers.com.sculib.scu.edu/s

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187. Based on company name as listed by IPLC, and where needed, primary place of business as identified in the complaint.
3) News article: List of IP Court cases involving select non-practicing entities, including F & G Research Inc (www.scienceprogress.org/wp-content/uploads/2009/01/issue2/mccurdy.pdf, p.81)).


5) Blog post: “ST Sales Tech Holdings LLC v. Chrysler…(Tyler, 7/24/07). Another entity apparently related to the Constellation companies. Although this one isn’t a child of Plutus (see earlier entries) - it appears to be directly owned by Erich Spangenberg. [ ]. And now a handful of companies have yet another patent troll case to contend with.”(http://agoracom.com/ir/patriot/forums/discussion/topics/147635-troll-cases-pouring-into-eastern-texas/messages/569392 - Troll Tracker)

<table>
<thead>
<tr>
<th>Individual</th>
<th>Individual person</th>
<th>First named plaintiff is an individual (including individuals described as “doing business as” as a corporate entity)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nonprofit</td>
<td>Non-NPE Nonprofit entity</td>
<td>Entity represents a college, university, government, or recognized nonprofit engaging in operating activity, confirmed at entity website.</td>
</tr>
<tr>
<td>Private Company</td>
<td>Non-NPE, privately held company or subsidiary of same; default category for companies that do not fit into any other category.</td>
<td>No confirmation that the company was public, an NPE, an individual, or a non-profit based on the methods described above. In most cases, private company status confirmed via company websites and press accounts that company was selling products. Private companies were further split into the following size categories based</td>
</tr>
</tbody>
</table>
on estimated revenue figures provided by Hoovers.com (premium edition):
- Small private company (annual revenues of less than $10 million)
- Medium private company (annual revenues of from $10 million-$100 million)
- Large private company (annual revenues of more than $100 million)
- Unknown (revenue information not available)
### APPENDIX B: SUIT CATEGORIES AND CASE-PAIRING DEFINITIONS

<table>
<thead>
<tr>
<th>Narrative</th>
<th>Definition</th>
<th>Case Pairing Definitions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>NPE</strong></td>
<td>Suit brought by an NPE, or DJ suit brought against an NPE</td>
<td>Cases where plaintiff is NPE + DJ cases where defendant is NPE</td>
</tr>
<tr>
<td><strong>Sport of Kings</strong></td>
<td>Suit between a public or large private company and a public or large private company</td>
<td>Cases where both plaintiff and defendant are public or large private company</td>
</tr>
<tr>
<td><strong>David v. Goliath</strong></td>
<td>Suit brought by an individual against a public or large private company, or DJ suit brought by a public or large private company against an individual</td>
<td>Non-DJ cases where plaintiff is an individual and defendant is a public/large private company + DJ cases where plaintiff is a public/large private company and defendant is an individual</td>
</tr>
<tr>
<td><strong>University/Nonprofit suits</strong></td>
<td>Suit brought by a nonprofit Nonprofit plaintiff</td>
<td>Nonprofit plaintiff</td>
</tr>
<tr>
<td><strong>Predation</strong></td>
<td>Non-DJ suit brought by a public or large private company against a small private company, or a DJ suit brought by a small private company against a public or large private company</td>
<td>Non-DJ cases where plaintiff is public or large private company and defendant is small private company + DJ cases where plaintiff is small private company and defendant is public or large private company</td>
</tr>
<tr>
<td><strong>Small v. Large</strong></td>
<td>Non-DJ suit brought by a small private company against a public or large private company, or a DJ suit brought by a public or large private company against a small private company</td>
<td>Non-DJ cases where plaintiff is small private company and defendant is public or large private company + DJ cases where plaintiff is public or large private company and defendant is small private company</td>
</tr>
<tr>
<td><strong>Limited Stakes</strong></td>
<td>Suit brought by a small or medium-sized private company against a small or medium-sized private company.</td>
<td>Cases where both plaintiff and defendant are individuals, small, or medium-sized private companies</td>
</tr>
<tr>
<td><strong>Other</strong></td>
<td>Suit that does not fall into the above categories</td>
<td>Medium- or large-sized private companies v. medium- or large-sized private companies</td>
</tr>
</tbody>
</table>
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