



March 1, 2013

U.S. Government Accountability Office
1244 Speer Boulevard, Suite 800
Denver, CO 80204-3581
Attn: Jacqueline Wade

**Re: Study of Litigation for Non-Practicing Entities Under Section 34 of the
America Invents Act – Comments of the Innovation Alliance**

Dear Sir or Madam:

The Innovation Alliance (“IA”) appreciates the opportunity to submit these additional comments for consideration by the U.S. Government Accountability Office (“GAO”) in connection with its study of patent litigation by so-called non-practicing entities (“NPEs”) under Section 34 of the America Invents Act (“AIA”).

The Innovation Alliance represents innovators, patent owners, and stakeholders from diverse industries. Innovation Alliance members believe in the critical importance of maintaining a strong patent system that supports innovative enterprises across the country, helps fuel the innovation pipeline, creates high-wage, high-skill technology jobs, and ultimately drives the 21st century U.S. economy.

The IA sought to submit these additional comments because of our concern that the GAO may be relying for its own report on certain recently-published studies that IA members believe to be empirically flawed or easily misinterpreted. We urge the GAO to be mindful that these studies have been used to skew the patent policy debates away from objective, verified and properly acquired data and toward pre-existing biases and conclusions.

For example, in “The Direct Costs from NPE Disputes” by James Bessen and Michael J. Meurer,¹ the authors conclude that the direct costs of NPE patent assertions totaled \$29 billion in 2011. That \$29 billion figure has been widely repeated in the press, almost certainly the IA believes because the study – funded at least in part by companies long highly critical of the role

¹ James Bessen and Michael J. Meurer, “The Direct Costs from NPE Disputes,” (June 28, 2012), Boston University School of Law Working Paper 12-34, available at http://www.bu.edu/law/faculty/scholarship/workingpapers/documents/BessenJ_MeurerM062512rev062812.pdf.

of NPEs in the patent system² – was heavily publicized by those companies, and that the study was performed for the express purpose of garnering precisely such publicity in the hopes of influencing the GAO and others.

But that sensational figure has been criticized as being the result of a flawed analysis. As Professors David L. Schwartz and Jay P. Kesan explain in their paper, “Analyzing the Role of Non-Practicing Entities in the Patent System,”³ the Bessen-Meurer study is fundamentally flawed in many respects in both substance and methodology. In terms of its substantive flaws, the study relies upon a secret survey done by RPX – a publicly traded corporation – which informed its subjects that their answers would be used to lobby for changes in the patent laws. That would both encourage exaggeration and increase bias in the sample by motivating participation among those who support changes to the law, an unfortunately common infirmity in academic studies on patents.⁴ The concern about self-selection is especially acute given that the data set is extremely small and thus not generalizable to all firms working in the innovation economy.⁵

To date, RPX has refused to disclose publicly the actual survey or its data, which means that the data is unverifiable. Bessen and Meurer’s reliance on this data in their study is counter to longstanding norms in economic and scientific research that data is always made available for testing and verification by third parties. In short, the Bessen-Meurer study is based on data that was likely collected in a manner that created biases, and it is impossible to verify its veracity. No peer-reviewed economic or statistics journal would publish a systemic litigation study based on an extremely small data set that was secretly acquired, was possibly biased, and remains unverified by independent authorities. National innovation policy should not be based on such data.

² The authors explicitly credit research “supported by funds from the Coalition for Patent Fairness,” a group of companies highly critical of NPEs that is currently actively lobbying Congress and the administration on measures to restrict the patent rights and remedies available for NPEs. *Id.* at 1.

³ David L. Schwartz and Jay P. Kesan, “Analyzing the Role of Non-Practicing Entities in the Patent System,” (July 25, 2012), Illinois Program in Law, Behavior and Social Science Paper No. LBSS13-03; Illinois Public Law Research Paper No. 13-01; Chicago-Kent College of Law Research Paper No. 2012-03, available at <http://ssrn.com/abstract=2117421> [hereinafter “Schwartz & Kesan”].

⁴ *Id.* at 11-12. As an example of this non-random selection bias common in patent studies, see this solicitation on a popular patent-skeptic website to provide data for a study being performed by Professor Colleen Chien of Santa Clara University School of Law, which, among points, argues: “This is an opportunity to be heard (no, I can’t guarantee results, but at least it’s an opportunity to help, if anyone chooses to act), so if you’ve ever complained that no one is listening to developers, this is a good time to speak and tell what you know.” “Can You Please Help With a Patent Demand Survey?” July 17, 2012, available at <http://www.groklaw.net/articlebasic.php?story=2012071411103955>. See also “Patent Demand Survey – Last Call. Please Help If You Can.” Aug. 15, 2012, available at <http://newsle.com/article/0/27376558/> (“Last Month, I mentioned a survey on patent demands that law professor Colleen Chien of Santa Clara University is asking folks to fill out, asking for experiences with patent trolls um... nonpracticing entities. . . . And if you know someone else who has had to deal with this kind of issue or who would be interested in participating, let them know about the survey too.”) (emphasis added).

⁵ Schwartz & Kesan, at 3-6.

In addition to the substantive concerns about the veracity and quality of the data, there are also basic methodological flaws in the Bessen-Meurer study. Again, as Professors Schwartz and Kesan explain, the study asserts that patent litigation costs are “too high” without providing any comparative baseline for this normative conclusion. They also assume that *all* litigation transaction costs are deadweight losses, which would imply that the entire U.S. court system is a social deadweight loss.

In addition, the methodology for calculating this \$29 billion figure relies on an “event study” methodology, widely used in the finance literature. The Bessen-Meurer study borrows this methodology to compare the change in stock market price of firms in the window of time after the “event,” i.e., filing of the lawsuit, compared to the price before the lawsuit. However, such use of an event is highly criticized by experts, for example in “On the Continuing Misuse of Event Studies: The Example of Bessen and Meurer,”⁶ author Glynn S. Lunney Jr. points out that the Bessen-Meurer idea of using a temporary loss of stock market value to measure loss of a firm’s market value is misguided. This is because a loss in stock market price due to bad news, such as filing of a lawsuit, is known to exceed any reasonable estimate of the expected future earnings of firms. In other words, the net-present-value of firms is not reflected in the stock market price after temporary events perceived as “bad news.”

Lastly, Bessen and Meurer employ an overly broad definition of NPE. As we argued in our original submission on April 20, 2012, there is no generally recognized definition for “NPE,” but Bessen and Meurer use this term in an expansive way to refer to every individual inventor, firm, organization, or university that may not manufacture a single invention within a larger patent portfolio. This is a usage of “NPE” that is quite more expansive than in many other studies on the subject. But those studies, like Bessen and Meurer, often count individual inventors and startups enforcing their own patents as “NPEs,” although presumably most policymakers would not consider individual inventors or startups to be bad-acting patent “trolls” who are abusing the patent system, underscoring the precarious nature of defining “NPE.”

In “Startups and Patent Trolls,”⁷ Professor Colleen Chien argues that most “unique defendants” in patent litigation cases brought by PAEs [patent assertion entities] are “small companies.” Specifically, the author concludes that 66% of “unique defendants” in cases brought by PAEs are companies with annual revenues less than \$100 million and 55% of “unique defendants” are companies with annual revenues less than \$10 million.

This study has been widely misreported as concluding that most patent cases are against “small companies.”⁸ In fact, the study concludes nothing of the sort, as most patent cases are not

⁶ Journal of Intellectual Property Law, Volume 16, Number 1, Fall 2008, 35.

⁷ Santa Clara Univ. Legal Studies Research Paper No. 09-12 (Sept. 13, 2012), available at <http://digitalcommons.law.scu.edu/facpubs/553>.

⁸ See, e.g., Cromwell Schubarth, “Small business pain from patent trolls hits beyond tech startups,” Silicon Valley Business Journal (Sept. 14, 2012), available at <http://www.bizjournals.com/sanjose/blog/2012/09/small-business-pain-from-patent-trolls.html?page=all>; Eric Savitz, “Are Patent Trolls Now Zeroed In On Start-Ups?” Forbes (Jan. 17, 2013), available at <http://www.forbes.com/sites/ciocentral/2013/01/17/are-patent-trolls-now-zeroed-in-on-start-ups/>.

against “small companies.” Professor Chien’s paper focuses only on the identity of “unique defendants” and counts them equally irrespective of the total number of lawsuits in which they are named as defendants. As the IA understands Professor Chien’s model, if her data show that Large Company, Inc. was sued 100 times in different cases by PAEs and that Small Company, Inc. was sued once by a PAE, the model concludes that 50% of “unique defendants” in cases brought by PAEs are “small companies.” It is hard to say what the significance of that conclusion would be, but it assuredly does not mean that 50% of defendants in all cases brought by PAEs are small companies.

Yet, this is exactly how the popular media has interpreted Chien’s paper, which is a gross mischaracterization that easily inflames opinion and could mislead policymakers. We urge the GAO to review the article on its own, rather than accept what the popular media says that it concludes.⁹ In addition, these conclusions are based primarily on a survey of 223 start-up firms that were not randomly chosen. Therefore, apart from the biases a survey may include, this is a small sample set to draw any sweeping conclusions.

Perhaps most concerning is the study submitted to the GAO by Professors Sara Jeruss, Robin Feldman, and Joshua Walker, “The America Invents Act 500: Effects of Patent Monetization Entities on US Litigation.”¹⁰ The authors claim that their research was performed “at the request of the GAO” and carried out with data from Lex Machina, a company that provides IP data and analytics. The use of raw data gathered by another entity perhaps would be unobjectionable, but the data gathered by Lex Machina is not raw data. It is data coded using Lex Machina’s proprietary algorithm which assigns subjective conclusions to the outcomes of patent litigations. This is especially concerning given Lex Machina’s close association with several well-known and vocal academic critics of patent litigation. We would hope that the GAO has gathered its own data and not relied on what many perceive to be an interested third-party to gather its data. The IA is concerned that any conclusions based on this data, rather than on raw data, may be subject to criticism as empirically unsound.

The IA has carefully reviewed these three studies, as well as others published since the IA first submitted its comments to the GAO in April 2012. We continue to believe that all such studies suffer from the fatal fundamental flaw that there is no widely-accepted definition of either an “NPE” or “PAE,” a point illustrated in the opening presentations by Professors Chien and Carl Shapiro at the Federal Trade Commission Workshop on PAEs last December 10, 2012.¹¹ As a result, even assuming a study has valid data that has been obtained using standard

⁹ In a similar vein, press reports sensationalize an increase in the numbers of lawsuits brought by “NPEs” in the last few years without mentioning that the passage of the AIA in September 2011 changed the joinder rules, legally *requiring* separate lawsuits against defendants who previously could be joined into one lawsuit. *See, e.g.*, Sarah McBride, “Patent Lawsuits Now Dominated by ‘Trolls’: Study,” Reuters (Dec. 10, 2012), available at <http://www.reuters.com/article/2012/12/10/patents-usa-lawsuits-idUSL1E8NA55M20121210>. Other commentators have noted this explanation for the increase in cases. *See, e.g.*, Savitz, *supra* note 8 (“The passage of the AIA drove down the number of defendants named in patent suits, but also drove up the number of suits filed by trolls. This makes sense, since the trolls were forced to file separate suits, rather than a single, combined lawsuit.”)

¹⁰ 11 Duke Law & Technology Review 357 (2012).

¹¹ Available at <http://www.ftc.gov/opp/workshops/pae/docs/cchien.pdf>, and <http://www.ftc.gov/opp/workshops/pae/docs/cshapiro.pdf>.

methodologies in economics or statistics, any conclusions it draws about an “NPE” or “PAE” suffers from the basic infirmity of an inconsistent and potentially subjective definition. But we also continue to believe that there are no credible studies – none performed analyzing raw data with generally accepted research methodologies – that present a compelling analysis showing that litigation involving NPEs or PAEs is any more costly than litigation involving other entities seeking to enforce or defend their patent rights.

The IA urges the GAO to examine the evidence fairly, and always with the understanding that its examination of these issues occurs in a context in which entities with strongly-held views have a stake in encouraging the GAO report to adopt one conclusion or another. The IA is confident that any clear-eyed, fair-minded review of the available evidence will show that there is no data to suggest that litigation by NPEs has resulted in meaningful increases in patent litigation or excessive litigation costs – regardless of how such terms are defined; that NPEs are no more litigious than practicing entities, succeed in court at about the same rate as practicing entities, and typically sue to enforce valuable patents; and that patent litigation rates have remained relatively constant over time, despite periodic surges during periods of intense technological development.¹²

Thank you for your continued consideration of the views of the Innovation Alliance.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian Pomper". The signature is fluid and cursive, with the first name "Brian" and last name "Pomper" clearly distinguishable.

Brian Pomper
Executive Director
The Innovation Alliance

¹² One data point of interest – as the “smartphone wars” have run their course, filings of Section 337 patent cases at the International Trade Commission have declined from a high of 69 cases in 2011 to 40 cases in 2012, a precipitous decline of 42 percent. See <http://info.usitc.gov/ouii/public/337inv.nsf/All?OpenView>.