

**Public Comments of Mallun Yen, Executive Vice President of RPX Corporation,
Regarding the FTC and DOJ's Investigation of Patent Assertion Entities**

I. Background of RPX Corporation

RPX Corporation ("RPX") was founded a little over four years ago to help operating companies work together to reduce risk from Non-Practicing Entities ("NPEs") and Patent Assertion Entities ("PAEs").

The core service RPX provides is defensive patent aggregation. Through a subscription-based service, we combine the resources and interests of a broad group of member companies, which now numbers around 140, to significantly reduce the problem of PAE litigation.

In short, RPX proactively buys patents before they are acquired and enforced by PAEs as a way to avoid the problem before it starts. By preemptively licensing our members before they are sued for patent infringement, our clients can avoid the high transaction costs of litigation-based licensing. Since RPX cannot buy all the patents being offered on the open market by inventors, brokers and operating companies, some patents inevitably are acquired by PAEs and are subsequently litigated. When that happens, RPX can resolve cases on a "wholesale" basis on behalf of our clients far more efficiently than can be done on a defendant-by-defendant basis.

To date, RPX has spent more than \$625M on rights to about 3,300 patents, resulting in more than 300 PAE litigation dismissals for our clients and preventing an estimated 1300 other litigations. Our clients range from the largest public companies to small, privately held start-ups. Alignment of interests is essential to the RPX business model. RPX studies our clients' technology areas and proactively identifies and acquires patents that could become a problem in the hands of a PAE. Our approach is purely defensive; every RPX client receives a license to the patents we acquire, and we never assert these patents. Last year, RPX launched a service that insures companies for PAE litigation costs. All of our efforts are designed to reduce patent risk and drive down patent litigation costs.

A key part of being able to effectively reduce PAE risk and costs as much as possible for our clients, RPX continuously monitors, collects, generates and analyzes a tremendous amount of information. We monitor all the key markers of PAE activity including patent litigation, open market transactions and patents being marketed, sold or assigned. As a result, we have amassed an unprecedented amount of data, which we share with our clients who use it to better manage their patent strategy and costs and also to support their patent reform efforts. We have also shared our data with academics and governmental entities.

RPX's success is the direct result of companies recognizing that it is difficult for one company working alone to make a significant difference. It takes an industry working together to shift the uneven playing field and drive change, whether it is through legislative reform, case law evolution or market-based solutions like RPX. Ultimately, our goal is to make patents a predictable, manageable risk for operating companies by using typical market-based mechanisms: access to information; efficiency; low transaction costs; and transparency.

II. RPX Research and Data

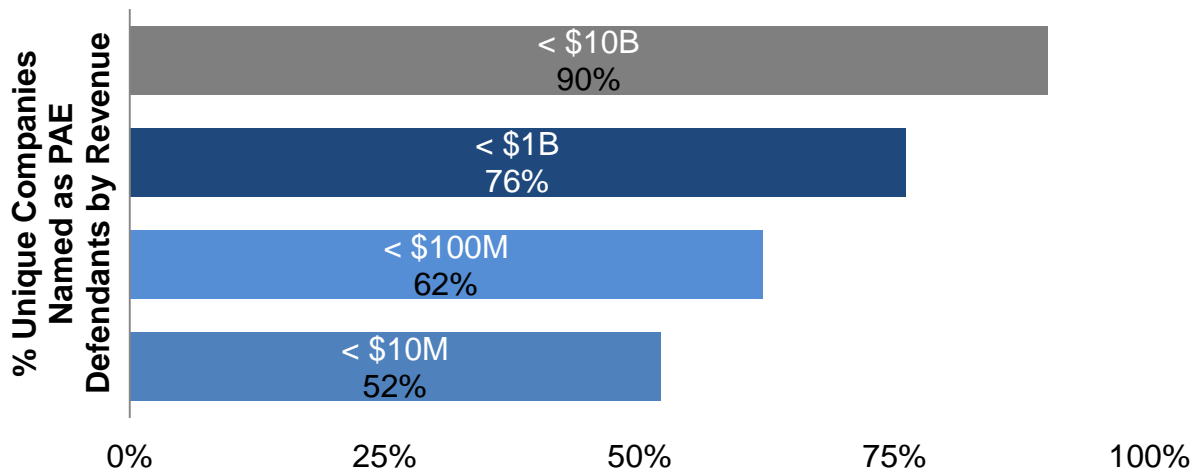
It is evident to all in our industry that there is little transparency and indeed no public “marketplace” where one can go for patent transactions or data. RPX addresses this need by meticulously tracking every patent litigation, PAE plaintiff, litigated patent, portfolio for sale and assignment. Much of this data is either not otherwise accessible to the public or is very difficult to assemble and analyze. Because this information is integral to the success of our business, our analyst teams are constantly collecting, vetting, refining and analyzing incoming data to ensure its accuracy and timeliness as well as to identify trends. We also use the data extensively on a daily basis to help us identify areas of potential risk for our clients and to inform our decisions on how to effectively reduce that risk. As a result, we believe our data is the most comprehensive and accurate in the industry.

From our data and analysis, we note the following trends:

1. PAEs remain a significant threat to large numbers of companies: In 2012, RPX tracked 2,947 PAE cases against 2,407 separate companies in US district courts. Those numbers have drastically increased from 448 cases against 881 separate companies in 2005. That is a 173% increase in the number of companies sued in the past seven years. There has also been a 258% increase in total defendant instances (1,181 up to 4,223), a number that captures the total times companies were named as defendants by a PAE.

	Number of PAE Suits Filed	Number of Unique PAE Defendants
2005	448	881
2006	475	952
2007	560	1441
2008	603	1634
2009	618	1518
2010	734	2575
2011	1520	2933
2012	2947	2407

2. Not just big technology companies are feeling the pain: While large technology companies feel the most pain, company sector and size is no barrier for PAEs. For example, Apple was sued 50 times by PAEs last year alone (almost once a week) and currently has 78 direct PAE cases pending. However, a surprising number of smaller companies and non-technology companies are also impacted. Companies with under \$10M in annual revenue accounted for approximately 50% of the unique PAE defendants in 2012. Private companies accounted for approximately 75%. Companies that are simply users of technology, including Build-a-Bear, Dunkin Donuts, Best Western and Burberry, have been targets as well.



3. The majority of PAE activity is initiated by a handful of prolific PAEs: PAEs that are considered to be serial or programmatic account for more than 74% of the defendants in 2012. Twenty-seven percent of all PAEs have named 15 or more defendants in more than one suit. RPX is currently tracking a PAE that has already named 1,603 defendants in various actions, and another that has named 1,849 defendants.
4. The marketplace for patents remains vibrant: RPX sees nearly every brokered patent transaction in the market and has tracked more than 3,500 brokered portfolios since 2008. On average, we see 70 such portfolios for sale every month. Each portfolio can include dozens and sometimes hundreds of patents. When they transact, we estimate that 50-60% of them are sold to PAEs. This rate of market activity and the types of portfolios offered have remained fairly constant over the last four years.
5. The costs of resolving a PAE case are highly variable but significant: As part of a larger cost study administered by RPX, we surveyed more than 80 companies both large and small with experience in over 800 resolved PAE cases. In this sample, the median cost to resolve a PAE case was approximately \$550K in legal and settlement combined. However, if you ranked the cases in order of their resolution cost, the 75th percentile PAE case would cost approximately \$2M. The top 5 to 10% of cases cost tens and even hundreds of millions to resolve. So for operating companies, PAEs pose both a cost and a significant uncertainty risk that can be hard to predict and therefore manage.
6. Legal costs are a significant portion of the costs of resolving PAE disputes: In our survey, in all but the most expensive cases, more than 50% of the costs of resolving a PAE dispute came from defendants' attorneys' costs and fees.

7. PAE defendants tend to settle: Fewer than 5% of PAE defendants make it to trial. The median PAE defendant stays in the case about one year before settling or being dismissed. The average PAE defendant remains in the case for about 18 months.

III. The Inefficiencies of the PAE Business Model

Based on our proprietary research, data and analysis, RPX estimates that in most cases, less than 10 to 30% of what operating companies spend resolving PAE matters actually flows into the hands of the inventors. The rest goes to cover litigation costs, attorneys' fees and the PAE.

The following is an example of a PAE pitch circulated last year: A prominent serial PAE firm was raising money for a patent assertion campaign. In the "pitch" materials, these were the economics advertised by the PAE, which RPX has found to be consistent with what we are seeing across the industry:

- The PAE estimated that they would bring in \$40M of revenue by suing 40 operating companies and collecting \$1M in average settlement from each.
- Of that \$40M, approximately \$5M was budgeted to go to the plaintiff's attorneys, approximately \$27M was projected to go to the PAE, investors and other costs. Only \$8M was expected to go to the inventor.

Given that defendants in cases of this size on average spend \$1M each on defense counsel, in addition to their \$1M settlement modeled by the firm, the total cost to the 40 operating companies would not be \$40M, but \$80M. As a result, of that \$80M of cost churn to the operating companies, only \$8M would go the actual inventor; penciling out to 90% in transaction costs.

Let's for a minute accept that the \$8M paid to the inventor roughly represents the value of the patents to the industry. Consider how much better off those operating companies would be if that \$72M was available to be spent on innovation, R&D and bringing new products to market. And even those numbers understate the total cost to the economy. There are significant additional *indirect* costs:

- Distractions to senior management
- Engineering staff time lost to meetings with attorneys and discovery
- Case preparation and court appearances by senior executives and key engineers in faraway jurisdictions
- Suspended or abandoned product development projects
- Delayed market launches and lost market share
- Misallocation of corporate resources due to the uncertainty surrounding the litigation¹

¹ Based on "Start Ups and Patent Trolls", Colleen Chien, Santa Clara Law Digital Commons, Sept. 13, 2013, <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1554&context=facpubs>

Here is another case illustrative of the inefficiencies in the market: In 2008, a single inventor owned four patents, reading mainly on encryption technology. He approached dozens of operating companies whose products he felt fell within the claims, offering a \$2.5M asking price. After months passed without a buyer, he created a limited liability corporation, engaged contingency counsel and filed suits against 117 defendants. Ultimately, the patent holder received an estimated \$20M in settlements, and cost operating companies an estimated \$60M in legal fees defending the cases. The patent holder had to pay his legal costs and contingency fees, which we estimate were likely at or around 50%. In our estimate, he in all probability walked away with less than \$10M of the \$80M in costs.

The problem with these patents could have been that no single company felt it had \$2.5M in risk, and if they did consider paying that amount, they did not want to pay the full amount to own the patents, which would have resulted in clearing risk for its competitors. The patent went unsold and became an \$80M problem. Of that \$80M, however, the inventor finished only marginally better (ignoring the time value of money, given that the result took years) than he would have if he had sold the patents at the outset.

This occurred when RPX was in its infancy, but is specifically the market need we were created to address — an efficient, fair and transparent mechanism by which companies can clear a common risk, instead of bearing costs alone.

IV. Conclusion

The PAE/NPE problem within the US remains a costly burden on operating companies. No other market has such high transaction costs and lack of transparency. RPX believes that while legislative and judicial reform are a fundamental and critical part of our legal system, a collaborative, market-based approach to clearing patent risk can help drive fairer and more predictable patent transactions with lower transaction costs for operating companies and patent owners alike. If operating companies are able to dramatically reduce the enormous transaction costs they are now paying in the form of legal fees, those savings will be better spent on innovation, not litigation.

Respectfully submitted,

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April 5, 2013