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# Proposals and Observations

The second part of this report describes existing and potential legislative, judicial, and market-based responses to patent assertions and how they may be tailored to better meet the needs of startups and resource-poor defendants. According to survey responses, patents for novel inventions appear to be playing a generally positive and at times crucial role for startups, helping to transfer technology, enable investment, and improve exits, particularly in life sciences industries. But patent assertions at times hit startups when they are least able to fight them—on the eve of a funding or acquisition event, or, 40% of the time, in the context of its customer relations—and can have significant and at times devastating impacts on the company. Furthermore, many survey respondents don't find these to be socially productive assertions—but rather involving frivolous or overbroad patents, and frustrating rather than furthering competition.

Among the surveyed VCs, NPE experiences were both common, with nearly 90% of tech VCs reporting experience with NPE assertions, and also highly concerning: two-thirds of VC respondents strongly agreed with the assertion that NPEs/"trolls" were harming innovation in their industry, a sentiment shared even by those who monetized their patents. Though "the risk [associated with patents] feels unbounded," startups are routinely expected to absorb these risks in their dealings with acquirers, investors, and customers. As detailed in the comments and testimony, NPE assertions have added friction to technology transactions, reduced the value of pursued startups, and triggered large indemnities among the surveyed population.

Taken together, these responses make a strong case for patent reforms, but reforms that will work for startups and small companies and their distinct needs and vulnerabilities. Startups, with their fewer resources, less time, and greater focus on building the business, are at a relative disadvantage when patent processes are expensive, slow, and require deep patent expertise. These disadvantages make startups vulnerable to patent "bullies"—incumbents who are threatened by the success of upstarts, as well as "trolls" who bring patent nuisance claims.

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These findings have implications both for public actors who seek to improve the patent system and private actors who seek to reduce the business risks that patent assertions pose. The ideas discussed below reinforce existing and proposed efforts and suggest others for improving our patent system. To the extent possible, the recommendations leverage existing laws, programs, and initiatives, making them more tailored to the needs of startups and small companies, rather than creating new private causes of action, new regulatory infrastructure, or onerous compliance burdens for the PTO or courts.

## PUBLIC SECTOR PROPOSALS

***Recommendation 1: “Make patents on software only for truly innovative things.”***

**How:** Fully fund the PTO and its quality initiatives including tightening functional claiming and expand low-cost access to the PTO’s transitional program and other forms of post-grant review by reducing fees for small and micro entities and supporting and prioritizing collaborative challenges to patents asserted against large numbers of defendants, particularly by downstream users and small entities.

Overbroad and low-quality patents are responsible for a disproportionate amount of the discontent in the patent system, according to VC and startup respondents. To address the perception that bad patents are creating unmanageable patent risk, lawmakers and administrators should:

*1. Fully fund, adequately staff, and support the PTO in current and future initiatives to increase patent quality.*

The earlier its lifecycle that a low-quality patent can be weeded out, the less it will cost to society. Thus, the PTO must be empowered to act as a true gatekeeper and guardian of the public by preventing the patenting of non-novel inventions. Assuming that this will require a change to how the PTO is currently doing business,

however, support will be needed on several fronts.

First, the PTO must be fully funded, adequately staffed, and supported in its current and future patent quality initiatives. These programs include training, guideline development, prior art partnerships for example with Stack Exchange, its Software Patent partnership, and basic infrastructure improvements. Because of their high social return on investment, these sorts of initiatives should be prioritized. Second, and crucially, institutional pressures must not undermine improvement of patent quality. Examiners who reject large numbers of patent applications should not be penalized for doing so.<sup>64</sup> The PTO must be able to rigorously apply the law without jeopardizing its financial outlook. A more gradual process of ratcheting up the standards for granting a patent would give patentees and prosecutors the ability to write higher quality patent applications of narrower and more defined scope. The PTO should focus on quality levers like obviousness, functional claiming,<sup>65</sup> and the other disclosure doctrines, and apply them rigorously, transparently, and consistently.

As the PTO executes, for example, on President Obama’s mandate to provide new training to examiners on functional claiming and provide claim clarity,<sup>66</sup> it should have support to do what is necessary to apply the law, including educating patent prosecutors, phasing in guidelines, and adjusting count and incentive systems.<sup>67</sup> The PTO should engage the public through its Software Partnership and make it easy to track its progress and get involved at a patent level.

*2. Increase low-cost access to the PTO’s administrative review processes, including by giving special priority to “high-impact” patents that have been asserted against a large number of targets.*

Improvements in patent quality need to translate into reduced risk and cost, which can be in the millions when startups defend a case.<sup>68</sup> Thus, although improving the quality of patent applications is important, already

“[O]ne of the most critical problems is the issuance of so many invalid patents by the Patent Office. The PTO makes ten times as much money from granting patents as it does from denying patents, and examiners have a much easier time making their quota by granting patents, because no one objects, than from rejecting a patent and defending that rejection repeatedly. Until the incentives placed on the office and its employees to grant, rather than deny, patents are addressed, there will be too many invalid patents issued that can be strategically used by their holders to extract undeserved settlements from others.”

-Dan Ravicher, Executive Director of Public Patent Foundation  
For full testimony, see Appendix B.

issued patents are an equally urgent target of patent quality initiatives.

The America Invents Act has created promising mechanisms for challenging questionable patents, but there are limits to their usefulness for startups and small companies. The inter partes review (IPR) and the covered business method (CBM) review mechanisms are being used to a much greater extent than previous forms of post grant review.<sup>69</sup> The initiation of such reviews can be effective for slowing patent demands. For example, in the case of the scanner patent assertion entity MPHJ, the entity quieted its campaign following a licensing agreement and the initiation of two inter partes reviews on its patents.

However, two features significantly limit the usefulness of these mechanisms for startups and small companies: cost and scope of review. First, IPR and CBM are expensive and increase upfront costs—estimates of IPR costs range from \$200-300K and CBMs have been priced at \$350K. For example, to file an inter partes review (IPR) typically requires, according to a seasoned litigator, “a prior art search, detailed filing (akin to a summary judgment brief), and, typically, an accompanying expert declaration... The large upfront cost (e.g., \$75,000) discourages small companies from filing an IPR [which] is more expensive in the short term.” These costs will not be offset if any accompanying litigation is not stayed.<sup>70</sup> Second, not all procedures are available for all patents on all grounds. For example, the CBM program is limited to business method patents. However, CBM is currently the only post-grant review mechanism that allows challenges to be brought to

existing patents on the basis of overbroad functional claiming (Section 112) and related grounds of invalidity.

Low-cost access to administrative review of a patent should be expanded. Small and micro entity fee tiers should be available, and the PTO should support collaborative challenges to empower multiple small parties to take advantage of administrative review. The courts should prioritize those reviews to ensure that they translate into lower costs through stays or limitations on willfulness.

The PTO could also be given authority to prioritize reviews on the basis of public interest, in the same way that it prioritizes the review of patent applications that, for example, cover energy conservation or counter-terrorism inventions.<sup>71</sup> In the case of patent challenges, special treatment could be reserved for patents that are “high impact” because they are asserted, through letters or suit, against a large number of entities or more (e.g. 20 though the right number should be empirically derived), or because they are asserted against a certain number of small entities that have, for example, fewer than 500 employees or nonprofit status. This would likely encompass “en masse” campaigns that have been asserted against large numbers of customers<sup>72</sup> or campaigns that otherwise “blanket the industry.” Such treatment would recognize that not all patent campaigns are created equal. When a dispute impacts a large number of members of the public, or disproportionately impacts small entities, the social returns from clarification of the claim scope and patent’s validity are high.

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These gains would be realized whether the patent is confirmed, invalidated, or clarified. Rather than fighting over the patent's validity in court, the parties could move on and settle the case or focus the dispute. For these types of patents, all grounds of review could be available, and review could be provided on an expedited basis upon petition, as that review arguably impacts more people than an ordinary review. The PTO could also accept "petitions to review" from members of the public and initiate its own post-grant review if it feels like the public interest would be served.

In addition, the PTO should continue its excellent job thus far of bolstering confidence that its reviews are being handled in a timely manner. It should make the status of administrative proceedings transparent and accessible so a court feels confident that when it stays a case and waits for the PTO's review, it will not be delaying justice indefinitely. The PTO should publish target dates for the completion of its proceedings, as does the International Trade Commission (ITC), whose "investigations" proceed in parallel with district court cases.

***Recommendation 2: Make patent cases about merits, not about who can "play the patent game better...[or] outlast or outspend."***

**How:** Permit more discretion in awarding fees and costs for non-core discovery and promoting uniformity and early dispositive rulings, for example by requiring the Patent Pilot Program to implement and measure the impact of best practices.

If it is the case that "[e]xpensive, bureaucratic systems always favor those with deep pockets", three steps can reduce the costs and risks for small company patent plaintiffs and defendants.

***1. Promote fee-shifting and discovery cost-shifting.***

A number of comments reflect the perception that plaintiffs bring weak patent cases in part because they

will not be penalized for doing so: "the legal costs to running a business are significant. There is no penalty for suing a company even if the claims are completely fraudulent. Therefore, there is nothing to lose from suing any company that you think has money."

Fee-shifting would change this dynamic when the party with fewer resources has the stronger case: "[we] got a nuisance suit...we chose to settle rather than pay the expense to fight. [I]f we knew we'd get our expenses back if we won the suit, we would have continued"; "[e]ven if clearly not infringing, small companies (start-ups) are wasting time and capital defending or settling frivolous suits due to the way our legal system works (both sides pay for legal fees, so [it's] cheaper to settle than fight even if you know you'll likely win)." Commented one founder and CEO who tried to raise money from investors to ward off a patent suit, "the fact that fees are often sunk costs (no fee-shifting in place yet) also made it harder to raise money for this."<sup>73</sup> As discussed earlier, fee-shifting could also encourage small companies, despite their shallower pockets, to bring strong cases against larger competitors by penalizing the large company for resisting a meritorious demand. Fee-shifting is not a panacea, however—it has been the norm for centuries in other settings but its ability to deter frivolous litigation has not been well-documented.<sup>74</sup> In the context of patent litigation, indeterminacy in patent determinations and appeals, as well as the ability of parties to evade judgment without a bond requirement, present real obstacles to the recovery process. Still, two-way fee-shifting will increase the penalty for asserting weak claims, as well as the penalty for resisting meritorious claims, and empower those with strong cases to pursue them.

Courts should use existing and any expanded discretion they are given to shift fees in order to discourage wasteful litigation and litigation practices. Congress should also enable courts to shift fees prior to the resolution of a case as few small companies have the ability to "go all the way" in litigation. Requiring parties to pay for discovery beyond core documents, as has been proposed

“Right after this case, the judge changed his practice. Now he issues claim construction on the day of the ruling. That would have saved us a lot of pain.

“This should be a requirement, that you get it done right then. You’ll never have a better understanding of the case than on that day. The longer you wait, the more unfamiliar the material becomes. Even if we had lost, we would have written the check and settled, rather than spending another \$1.5M on discovery.”

-Laura Smith, Intellectual Property Manager  
For full testimony, see Appendix B.

by a number of Congressional bills, would reduce the staggering costs and inefficiencies that can accompany conventional patent litigation.

## *2. Promote Greater Uniformity Across Patent Courts.*

Another recurring theme among the comments was the problem of game-playing, particularly through venue-shopping. Commenters specifically called out particular venues. In one example, a VC respondent described his companies as being sued by three patent “trolls,” including one “filed in [the] Eastern District of Texas with Judge Ward [that] cost our company greatly in the cost of capital [and settlement]—a seven figure amount. The settlement was only agreed to once Judge Ward agreed to a change of venue to a court in Ohio. This whole ‘gaming strategy’ deployed by these trolls is quite disruptive and costly to early stage companies. I am a big supporter of restricting the unbridled activities of these patent trolls.” A number of others talked about the additional costs of being sued in venues that were inconvenient to them.<sup>75</sup>

Wide variations in how courts managed patent cases were also described in companion surveys of over 500 in-house and outside patent counsel.<sup>76</sup> “I still see a huge disparity among the courts’ e-discovery rules and standards,” said one plaintiff’s attorney. Asked to comment on the effectiveness of various interventions to increase the efficiency of patent litigation, another replied “ALL of the above depend on the judge.”

While discretion is a keystone of our judicial system,

Congress should promote greater uniformity across patent courts. This could take place in multiple ways, for example, by Congress mandating specific practices or principles, or by promoting uniform case management practices across initiatives like the Patent Pilot Program, with outcomes measured through different metrics such as cost or time to resolution as a proportion of case value, and party satisfaction. This would anchor the Patent Pilot Program with a deliverable that could be used as the basis for further policymaking.

## *3. Promote Early Rulings on Dispositive Issues.*

In the words of one VC survey respondent, patent litigation is a “war of attrition” that favors those with deeper pockets, more time, and greater expertise. These advantages can be undercut, and considerable savings captured, by focusing issues and promoting early rulings on “dispositive” issues, ones whose resolution would resolve the entire case. As one example of a dispositive issue, if a court ruled that a patent was invalid on any ground, it would moot—or dispose of—the entire case. If a court ruled that a patent should be interpreted in a particular way, the case could continue, making it a non-dispositive issue.

Among over 500 surveyed inside and outside counsel, the highest rated intervention to enhance the efficiency of patent litigation—over fee-shifting, over discovery reform, and over a host of legislative and judicial interventions—was a timely decision on summary judgment (SJ) motions, which provide a judgment for a party to litigation without a full trial. 75% of outside and inside counsel survey takers rated them as “very



“Our clients don’t have the financial ability to hire any patent attorneys to represent them, so proposals that merely create more legal mechanisms for challenging patents or deterring them through litigation won’t be of any help. Rather, my clients need a system that provides pro bono legal counsel or shelter from such risks, either through an exemption or immunity under patent law, or informally through some private risk sharing arrangement like insurance. Individuals, non-profits, and small businesses don’t have the money, or the time, to get involved in protracted patent litigation, so proposals like fee-shifting won’t help, because they will never get there.”

-Dan Ravicher, Executive Director of Public Patent Foundation  
For full testimony, see Appendix B.

effective” at increasing efficiency, far more than any other intervention.

For example, the Lodsys involves app developers who have implemented functionality provided by the iOS App Developer Toolkit. Stepping in on behalf of its implementers, Apple asserted an exhaustion defense that would shield them from liability. Deciding this issue early could dismiss scores of demands and litigants from the challenge or, if decided against Apple, encourage it to sign an additional license with Lodsys to cover its implementers. Other dispositive motions such as standing present low risk, high reward propositions for the court. If the motion is successful, the case goes away. If it is denied, a source of uncertainty is removed for the parties and settling becomes easier. To avoid waste, it makes sense to know whether or not the cases actually pass these basic screens. In cases where a large number of defendants are named, in particular customer or implementer suits, where common questions of fact provide the basis for liability, the savings potential is large.

The ITC’s recent innovation of ordering early dispositive motions within the first 100-days of a case is a great example of how such prioritization may align the parties’ and courts’ interests.<sup>77</sup> By setting aside a period of time to hear dispositive motions as the ITC has, unnecessary delays and abuse can be reduced. Furthermore, by channeling dispositive motions that do not require intensive fact discovery into an early, set period, courts can manage against the risk of endless serially filed dispositive motions, except for good cause.

Again, this intervention is something that could be promoted in a variety of ways, including by publicizing the results of the ITC’s pilot program and expanding some version of it to the Patent Pilot Program, with its outcomes measured and promoted, if successful.

Where possible, prompt rulings in general can provide relief to parties. To be fair, judges have heavy dockets with many pressing non-patent items. However, ruling from the bench as soon as practicable after a Markman hearing has taken place, rather than months later, can capture considerable savings for the court which does not have to refamiliarize itself with the details of the case, and by helping the parties structure subsequent actions and settlements based on an understanding of what the case is about.<sup>78</sup> Patent risk can also be managed not only through early disposition, but early disclosure, perhaps under seal, of financial information from which damages exposure can be cabined.<sup>79</sup> Companies should be able to tell their boards the exposure from suit they face.

### ***Recommendation 3: Make patent risks more manageable for startups.***

**How:** Require demand letters and complaints to disclose the real-party in interest, claim charts, related litigations and reviews, and licenses that could cover the target, and promoting transparency in demand letters.

### ***Heightened Pleading/Demand Standards***

Another source of unnecessary expense and perceived risk is generated when a startup receives a demand letter

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and cannot tell what claims of the patent form the basis of the demand, what particular product is being accused or the theory of infringement, what licenses the patent is already covered by, who the real party in interest behind the assertion is, whether the patent is in past or present litigation, or whether the patent is subject to an ongoing administrative review. If a company understands that the basis for infringement is another's technology, as survey respondents reported was the case 40% of the time, their set of options—e.g. demanding indemnity from the supplier or design around—changes. Or if they know that the patent is the subject of a patent review, or that the patent has been licensed to certain suppliers of a product, the accused company can use this information to assess its risk. If they know who the real party in interest is, the target can research the other holdings and activities of the party, and better estimate its exposure and its options.

These basic facts can be costly for members of the public, especially those with little experience with the patent system, to obtain. However, they are well within the knowledge and ability of the patent holder to communicate. With that additional information, a target can focus on assessing the risks of infringement on the merits, rather than on bridging the information asymmetry that frequently characterize patent assertions. Congress should consider requiring them.

Congressional proposals to increase the quality of litigation pleadings should apply to demand letters as well.<sup>80</sup> Congress should consider requiring, when a party makes a demand or files suit, the basic information described above. Failure to do so would be tantamount to failing to comply with other administrative requirements for keeping a patent in force, i.e. paying maintenance fees, with the same sort of administrative penalties available for non-compliance. These sorts of requirements would leverage existing regulatory infrastructure and apply narrowly to asserted patents, rather than all patents.

Alternatively or in addition, the PTO and other agencies

with patent information should also, in accordance with President Obama's directives, work to provide authoritative information about patents and options for responding that the many companies receiving demand letters can rely upon. Who the real party is behind the assertion, whether the patent is in past or present litigation, or whether the patent is subject to an ongoing administrative review is information that could be made more readily accessible. By promoting transparency in demand letters in partnership with private sector actors, this information can also be shared.<sup>81</sup>

#### ***Recommendation 4: Make startups less attractive targets.***

**How:** Limit the liability of small defendants and downstream users, and the precedential vale of the settlements signed by small companies.

Companies with shallow pockets are typically not the favored target of lawsuits. However, survey respondents identified two motives that may be present for pursuing startups and small companies for patent infringement, as users and suppliers: (1) nuisance value ("trolls know enough to peg [the] license fee just below [the] cost to fight"), and (2) precedential value ("[Patent holders] go after startup companies to establish case precedent. Startups quickly agree to settle for a low amount because they have no money with which to stand up against an expensive legal battle. [The patent holder] then attacks larger companies for money, using those previously established case precedents").

One thing that would make startups less attractive targets for nuisance demands is for Congress to provide some sort of statutory limitation of liability or immunity—for example that would apply to companies with revenue under a certain threshold<sup>82</sup> in general, or to companies that are pursued because they are downstream users of others' technology.<sup>83</sup> In the latter case, the small company usually has worse access to information, experts, and financial records regarding overall infringement than the supplier of the technology,

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who should bear the responsibility for their product. Determining the appropriate threshold would require additional analysis and evaluation, however.

A final idea would be for the precedential value of royalty agreements signed with small companies to be scrutinized and rejected by courts, when appropriate, as a fair indication of royalty rates to be set for larger companies.

## PRIVATE AND CIVIL SECTOR OBSERVATIONS

Because this report is primarily intended for policy audiences, it pays great attention to policy development. However, the private and civil sectors have historically played critical roles in curbing litigation abuses brought by “patent speculators,” predecessors to modern day patent “trolls.”<sup>84</sup> When western farmers in the 1870s found themselves the subject of visits by patent royalty collectors, agricultural publications and newspapers published articles to “educate the farmer so that he would not be so easily duped by the agents” and farmer alliances worked to lobby Congress and the public as a result of their members’ dilemmas.<sup>85</sup> After a sustained period of discontent among farmers, the standard for granting an agricultural design patent was changed.

When railroads found themselves under attack by patent sharks, they banded together through professional associations and, for an annual fee, mounted common defenses, received full legal services, shared information and patent references, helped each other avoid patents, and collectively agreed not to settle with patent holders.<sup>86</sup> They also lobbied various members of the government, resulting in public disapproval of patent shark practices and incremental changes in the law.<sup>87</sup> These tactics were successful, effectively ending much of the patent shark problem.

While times have changed, many current private and civil sector responses mirror those of the past. This

section of the report seeks to both document existing private and civil sector self-help tactics as well as to share information and disseminate best practices. To gather information about offerings, we consulted with as many providers of patent defense services, both non-profit and for profit, as we could find, and asked them to describe their offerings. The result is reflected in Appendix C-1. To gather information on what tactics are being used to defend against NPE assertions and how effective they are, we did extensive research and asked a host of experts. We provide those findings in Appendix C-2.

### *Private and Civil Sector Service Offerings Focused on Reducing Risk from NPE Demands*

Millions if not billions of dollars are spent on patent defense and assertion every year, and greater efficiencies certainly could be captured. Discrete private sector and civil sector offerings for reducing risk from NPE demands are largely new—most listed have been launched in the last year—and tend to offer discrete solutions to discrete aspects of the patent assertions as experienced by companies with particular profiles.<sup>88</sup> But questions about the scalability, reach, ability to execute, opportunity cost of experts, and lack of viable exits for investors caution against “leaving it to the private sector,” particularly when it comes to small companies and startups.

Short of a comprehensive market-based solution like insurance<sup>89</sup> or the dramatic reduction in the costs and inefficiencies of existing patent litigation, it is unlikely that private sector service solution providers will be able to reduce patent demand risks to a level at which companies will no longer demand change from federal lawmakers. As pointed out by one company, the government has an important role to play as patents are a creature of federal law, issued by a federal agency, and interpreted by federal courts.<sup>90</sup>

Among the solution providers listed, there is an even split between the private and civil sectors. A number



## Advice to small companies: Choose a more affordable counsel early on

"We made a huge mistake in choosing our counsel. We picked based on the personality of the lead trial lawyer. From day one, we were choosing based on the person that we wanted representing us at trial and the prestige of the law firm—and go to the board and say, "look we have a fancy lawyer." We should have done the reverse—chosen an unfancy lawyer from a much smaller firm, and [with a] fixed fee. If we got to the point where it looked like trial was likely, we could switch the lawyer 3 to 6 months ahead of time. We're a good example of how not to buy legal services."

"Given all the issues you have to deal with at the beginning, it would be my recommendation to go much cheaper, or even have one that is willing to go for a fixed fee. You don't need the most prestigious firm to handle discovery."

-Laura Smith, Intellectual Property Manager  
For full testimony, see Appendix B.

of services are offered by both types of providers—for example demand letter registry (EFF's Trolling Effects and ThatPatentTool), prior art searching (ArticleOne Partners and AskPatents), and defensive litigation counsel (PTLCN, Gerchen Keller Capital, and ipCM).

While these services tend to support or supplement traditional legal services, others offer significantly differentiated value propositions. One set of services aims to work with companies to prevent patents from being used in an "offensive" manner (IPA, DPL, LOT, OPN, OIN). The Open Invention Network (OIN) is the oldest, launched in 2005 and now including 600 licensees. It focuses on protecting Linux and other open source projects through the creation of a patent cross-license among community members. Of the others, two have been spearheaded by Google, one by Twitter, and the fourth by law professors Jennifer Urban and Jason Schultz. These "private ordering" initiatives, depending on the extent of their adoption, can significantly reduce risks for their members; indeed the "patent détente" and norm of non-enforcement that existed before the rise of patent assertion entities<sup>91</sup> did just that for large swaths of the technology industry.

RPX is the only public company focused on patent assertion. They "acquire and clear high-risk patents from the open markets and out of active litigations" but also have developed deep intelligence about the market and patent assertions. They have recently started

offering an insurance product for small to mid-sized companies; historically a lack of data on settlements, adverse selection problems, and the difficulty of predicting case outcomes has stymied the development of robust insurance offerings.<sup>92</sup> Unified Patents has also developed an offering to proactively deter risks in certain technology areas.

So far, no company or alliance has tried to offer the sort of "unified front" of companies systematically banding together to resist demands. One problem with that business model when it was practical in the past is that it became "too successful," deterring claims so effectively that it made itself obsolete. In addition, the diversity of actors and interests in patent defense makes unified collaborations more difficult. According to large company in-house counsel respondents to a survey (N=86), 23% had monetized their patents and 28% were thinking of doing so.<sup>93</sup> Defensive fronts covering discrete technologies or sectors are easier to accomplish and are contemplated or offered by a number of the services (e.g. OIN, Unified Patents).

### *Self-Help Tactics*

By far, the largest share of revenue going into defending against NPE demands is captured by law firms. While many firms do extensive amounts of patent defense work, none to our knowledge has identified itself as completely specialized in helping small companies deal

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with NPE demands. However, as the share of patent cases brought by NPEs has risen, so has the level of general experience with NPEs within the legal community.

In the popular media, tactics for responding to patent suits like “fighting,” “ignorance,” and “public shaming” are discussed. To disseminate information about the usefulness of these and other tactics and their ability to reduce costs and risks for startups, we researched different tactics and talked to seasoned litigators at companies, law firms, and nonprofits that have deep experience with patent litigation, often on both sides of assertions against small companies. The tactics, as well as in the collective comments we collected about using them, are summarized in Appendix C-2.

The tactics can be grouped into several different categories: 1) keeping a low profile in demands that are asserted against a large number of companies; 2) the opposite, being a “scorpion”—in other words so “poisonous” by being willing to bring ancillary attention and claims to the case that the plaintiff moves on to other targets; 3) getting help by joining with others, either with respect to the specific assertions or sharing experiences with lawmakers and others in a position to influence the patent system; 4) reducing costs, by carefully managing outside counsel and collaborating where it makes sense to do so.

One size does not fit all and each company needs to assess its own risk and situation; nevertheless the comments provide a window into what those who have tried have found works, and does not work.