

Putting a Price Tag on 'Patent Troll' Litigation

By Catherine Dunn

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For many members of the legal community, the question surrounding so-called “patent trolls” isn’t whether they do damage to business, but understanding the extent to which they do. Put another way: how much do patent assertions by “non-practicing entities,” or NPEs (a much nicer term than “troll”), actually cost companies?

A pair of professors at the Boston University School of Law have managed to calculate a price tag for the direct costs stemming from patent troll activity: about \$29 billion.

That dollar figure—more than a third of which is shouldered by small- and medium-sized companies—speaks to the scope and harm caused by patent trolls, according to James Bessen, who, along with Michael Meurer, co-authored the study “The Direct Costs from NPE Disputes [<http://ssrn.com/abstract=2091210>].” “It fills in another piece of the puzzle,” Bessen says.

By Bessen and Meurer’s definition, NPEs own patents on technologies that they don’t actually use to produce goods and/or services. But meanwhile, the litigation they pursue against companies that do produce those goods and services has soared in recent years. In 2011, companies mounted 5,842 defenses in response to actions initiated by NPEs, up from 4,445 defenses in 2010. By comparison, companies mounted 1,401 such defenses in 2005.

Bessen and Meurer have a running interest in the troubles with the U.S. patent system. Together they also co-authored the book *Patent Failure: How Judges, Bureaucrats, and Lawyers Put Innovators at Risk* (Princeton University Press, 2008) and last year they published a paper on how the filing of lawsuits by NPEs against publicly listed companies affected the stock price of those companies. They found that such litigation took an \$80 billion toll per year, on average, on the market capitalization of the defendants they studied.

This time around, they wanted to fill in a few more blanks, including how assertions made by NPEs impact small companies, how much defendants spend on direct legal costs and licensing costs, and how much it costs companies when assertions are settled before ever making it to the courtroom. They analyzed a database of NPE-related lawsuits developed by RPX Corporation, which specializes in patent risk solutions, as well as a survey of defendant companies about their costs.

Bessen and Meurer were indeed surprised that these assertions cost companies as much as they did. “We expected that the direct costs in terms of legal fees and settlement costs would be much, much less,” says Bessen. The \$29 billion figure excludes a host of indirect costs to the

defendants' business, "such as diversion of resources, delays in new products, and loss of market share," the study states.

The profs were also struck by the burden on smaller companies. "The second surprise was just how many small companies were being sued," Bessen says.

Annual revenues for the median company being sued totaled just \$10.8 million, and 82 percent of the defendants that were analyzed earned less than \$100 million in revenue. "Small and medium-sized companies account for 37 percent of the accrued direct costs," the authors write. "Moreover, compared to revenues, the direct costs of NPE-patent assertions are relatively larger for small companies."

One thing that's tricky about this kind of research is that while many NPE suits settle for a few hundred thousand dollars, some garner settlements worth tens or hundreds of millions of dollars, skewing averages. Nevertheless, the authors determined that the average legal costs per defense "range from \$420,000 for small/medium companies to \$1.52 million for large companies."

When companies paid to settle, the mean settlement costs reached \$1.33 million for small and medium companies, and \$7.27 million for large companies. "Legal costs are about a third as large as settlement costs, or about one quarter of total litigation costs," the authors write. "This implies that a substantial part of direct costs of NPE litigation is a deadweight loss to society."

Bessen and Meurer conclude that the growth and cost of NPE litigation should sound an alarm for policy makers to improve notice and transparency in the patent system.