

Santa Clara  
University

**The Patent Remedy  
Dynamic  
Georgetown-Stanford  
Conference**

Professor Colleen Chien

[colleenchien@gmail.com](mailto:colleenchien@gmail.com)



**Just as technology evolves, so do patent remedies  
evolve**

- 1. Damages**
- 2. Injunctions**

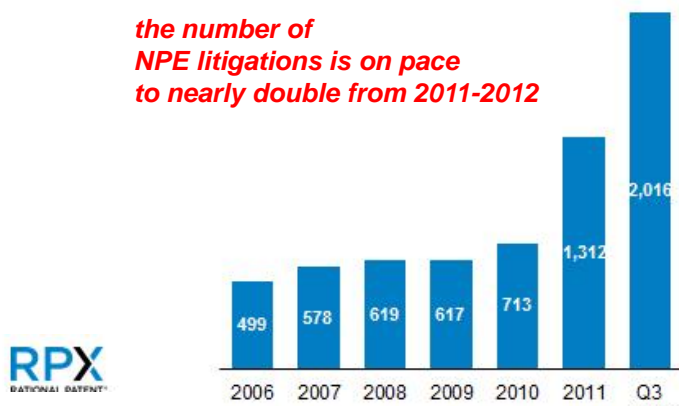
## Just as technology evolves, so do patent remedies evolve

### 1. Damages

## Upward Pressure on Patent Litigation – RPX

### NPE Suits Filed

*the number of NPE litigations is on pace to nearly double from 2011-2012*



Source: RPX Corporation Investor Presentation @ 2012 RPX Corp.



## Upward Pressure on Patent Enforcement – Privateering (Rockstar Bidco)



## Downward Pressure on Patent Damages

### Damages

*Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292  
(Fed. Cir. 2011)

*ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir.  
2010)

*Oracle v. Google* (N.D. Cal 2012)

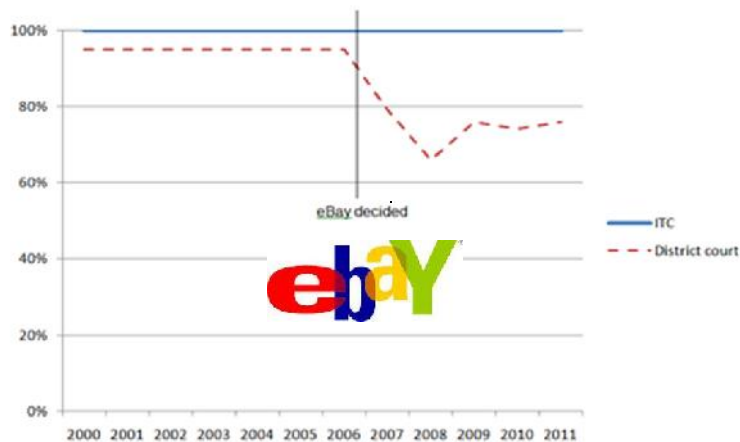
*Apple v. Motorola* (N.D. Ill 2012)

## Downward Pressure on Patent Damages

*Reaction from investor-interviewee:* “[G]reater judicial scrutiny of damages and the increasingly difficult climate for enforcement “has caused big ticket litigation funders to flee patents,” (in particular, the rejection of the entire market value rule and increased need for damages experts and surveys to prove damages) – Chien, Startups and Patent Trolls (2012)

## 2. Injunctions

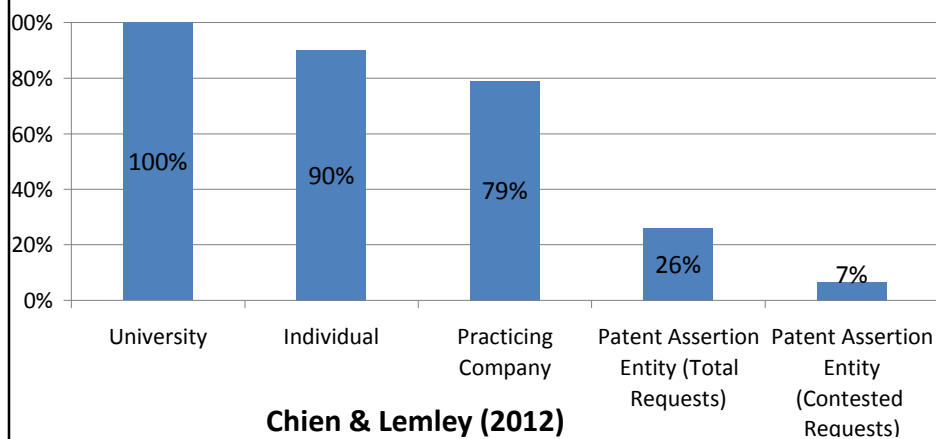
## Downward pressure on injunctions at the district court



Chien & Lemley (2012)

## Downward pressure on injunctions

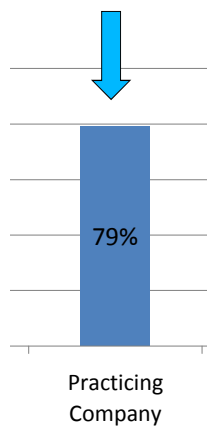
### Post-Ebay District Court Injunction Rate



Chien & Lemley (2012)

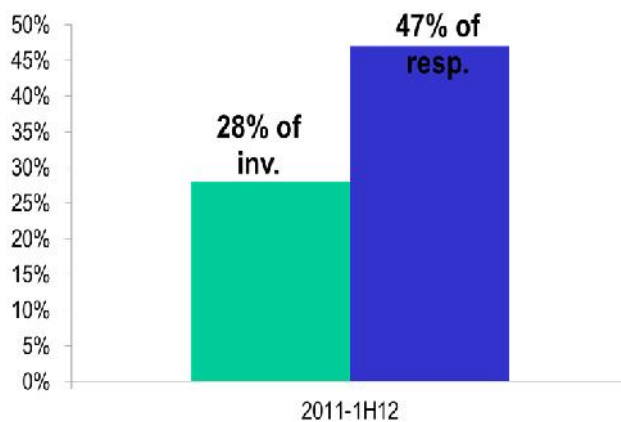
## Downward pressure on injunctions at the district court

eBay “5<sup>th</sup> factor” Causal Nexus (Apple Samsung)  
RAND Injunction Jurisprudence



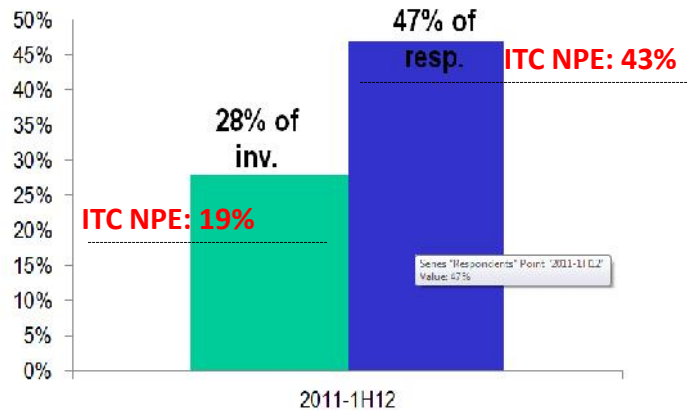
## Upward Pressure on ITC Litigation – Chien Testimony 2012

Patent Assertion Entities

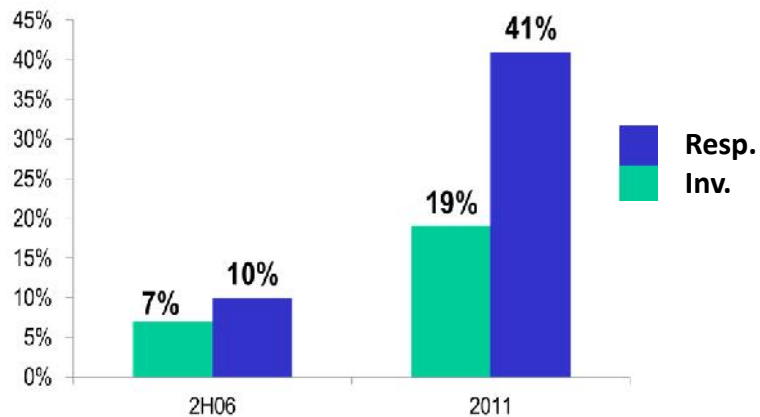


## Upward Pressure on ITC Litigation from PAEs— Chien Testimony + **Facts and Trends Report, ITC 2012**

### Patent Assertion Entities/NPEs



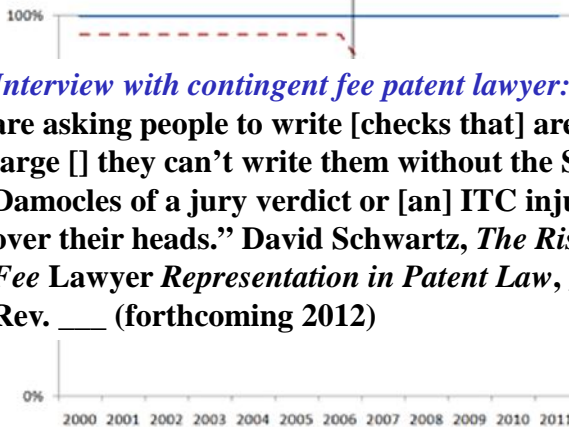
## NPE Time Trends, ITC: Facts and Trends Report, 2012



Percentage of Investigations/Respondents brought by NPEs



## Downward pressure on injunction at the district court **but not the ITC**



*Interview with contingent fee patent lawyer:* “[when] you are asking people to write [checks that] are sufficiently large [] they can’t write them without the Sword of Damocles of a jury verdict or [an] ITC injunction hanging over their heads.” David Schwartz, *The Rise of Contingent Fee Lawyer Representation in Patent Law*, \_\_ Ala. Law Rev. \_\_ (forthcoming 2012)

Chien & Lemley (2012)

## Section 337, not eBay, governs whether the ITC should grant an exclusion order



**“May grant”**  
**4 Equitable Factors**  
**(eBay)**



**“Shall direct...unless”**  
**4 Public Interest**  
**Factors ( § 1337(d)(1))**

## Downward pressure on exclusion orders at the ITC

DOJ/Others: Use the public interest factors!



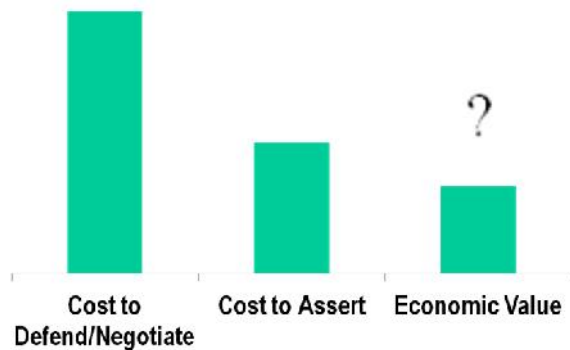
## Patent remedies drive the economic value of the patent



## But transaction costs also matter

### Nuisance Value Model

Settlement?

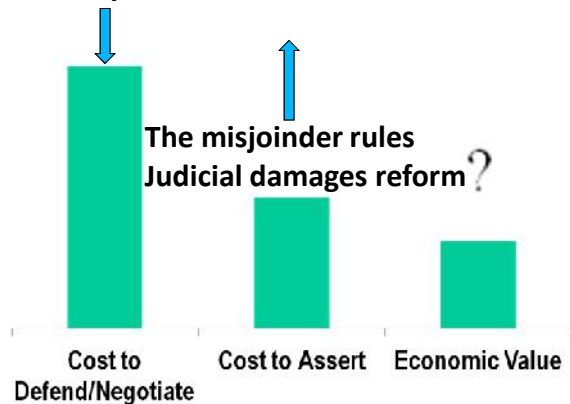


Assertion Makes Sense Because the Cost To Defend or Negotiate, and therefore the Likely Settlement Fees, Exceed the Cost To Assert  
(Adapted from Shavell and Rosenberg)

## Downward pressure on cost of defense and upward pressure on cost of offense

### eDiscovery Reform

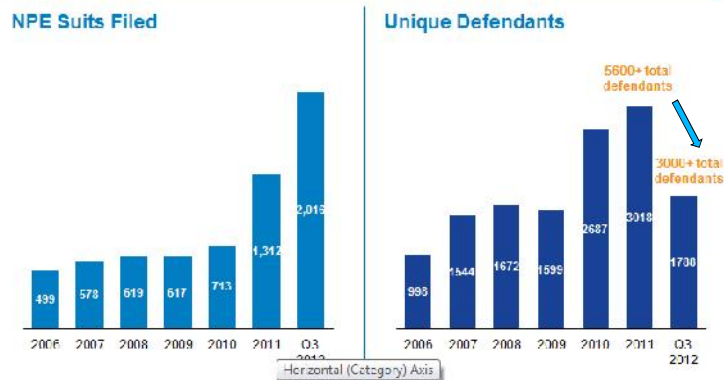
Settlement?



Assertion Makes Sense Because the Cost To Defend or Negotiate, and therefore the Likely Settlement Fees, Exceed the Cost To Assert  
(Adapted from Shavell and Rosenberg)

## May be working ... with fewer total defendants named in suits

### Growing Frequency of NPE Assertions



Source: RPX Research and PACER. Includes suits filed through Q3 2012.

RPX  
RESEARCH & ANALYTICS

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## Thank You!

**Some of the Papers/Data Referenced in This Presentation  
(available on SSRN)**

***The ITC and Patent Disputes, July 18, 2012 Congressional  
Testimony to the House Subcommittee to the Judiciary***

***Reforming Software Patents, 2012 Houston Law Review***

***Startups and Patent Trolls, 2012 Working Paper***

**(with Mark A. Lemley) *Patent Holdup, the ITC, and the  
Public Interest, 98 Cornell Law Rev. \_\_\_\_ (2012)***