

# Santa Clara University

## Could a Patent Term Reduction Solve the Software Patent Problem?

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# Software Patents and Trolls

- Not two separate problems
- Rather, two factors exacerbating one fundamental problem:
  - Patent rights too often persist long after the useful lifetime of the invention they were originally drafted to protect
- Problem is not that these patents exist . . .
- . . . But that they exist in a system with 20 year patent term

# Software Patents and Trolls

- **Software patents, troll patents might have benefits early in term . . .**
  - Some software inventions are (probably) worthy of a modicum of protection
  - NPEs can (in theory) serve as
    - Disseminators of heretofore unappreciated technology
    - Champions of wronged inventors who lack resources, savvy to sue
- **. . . but not when enforced almost two decades after filing**
  - Computing power doubles roughly every 2 years
    - 20 years after filing date, contemporaneous tech is 100,000% more powerful
  - Trolls licensing almost-expired patents aren't
    - Spreading the word about new technology
    - Vindicating rights against inventor's would-be competitors

# Software Patents and Trolls

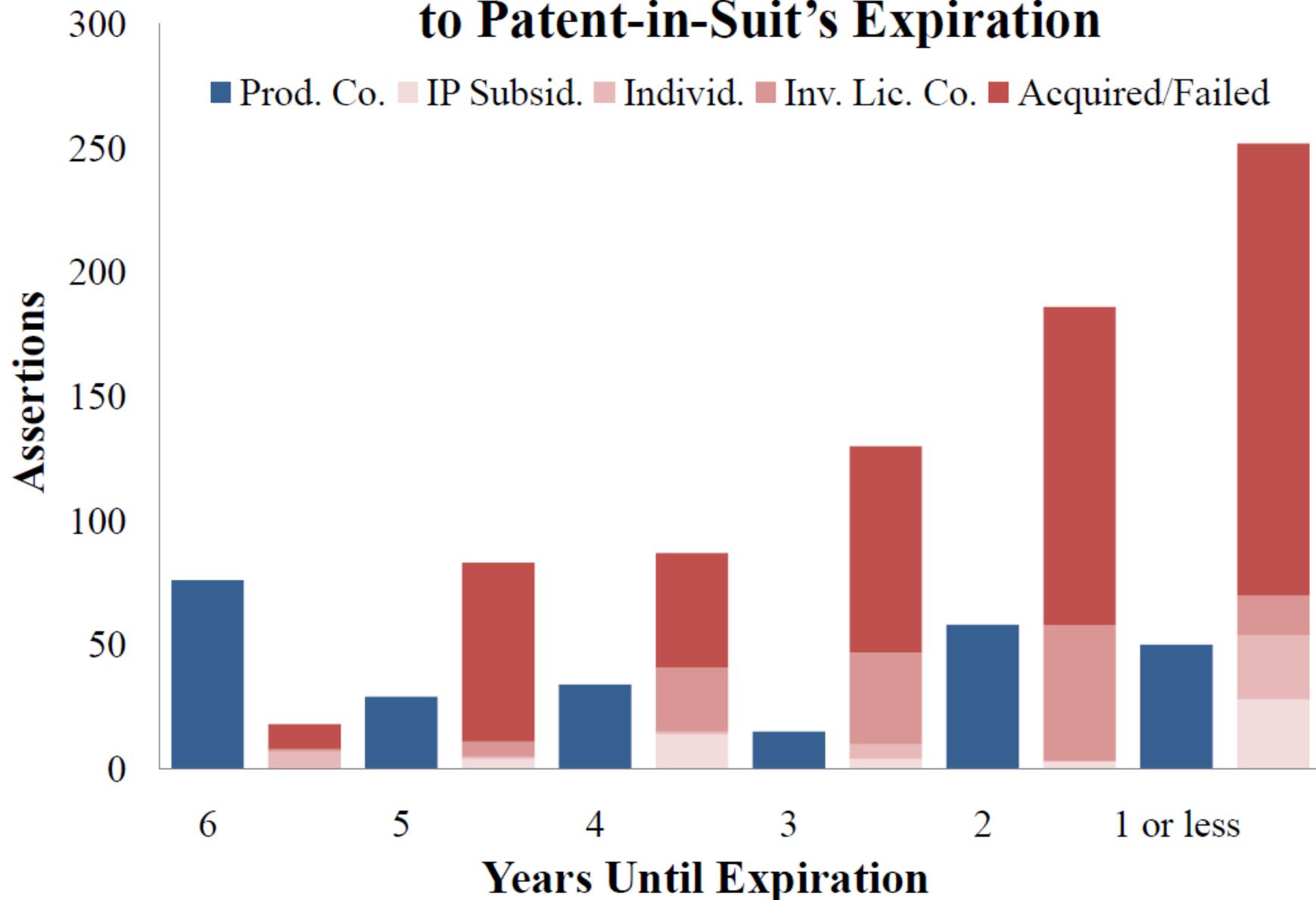
**Bad News: 17 to 20 years down the road is precisely when troll-owned, software patents are most often asserted . . .**

# Empirical Findings

***An Empirical Study of Patent Litigation Timing: Could a Patent Term Reduction Decimate Trolls without Harming Innovators?*, 161 University of Pennsylvania L Rev (forthcoming 2013) [\[link\]](#)**

- **All litigation filed during the term of 421 (randomly-selected) litigated patents issued between May 1993 and May 1994**
- **NPEs asserted just 21% of all litigated patents, but responsible for . . .**
  - 67% of all suits filed in last 5 years of patent's term
  - 70% of all suits resolved in last 3 years of patent's term
  - 83% of all assertions (i.e., per D) filed in last 5 years of patent's term
  - 83% of all assertions resolved in last 3 years of patent's term

# Years from Each Assertion's Resolution to Patent-in-Suit's Expiration



# Empirical Findings

- **Product Co's and NPEs generally enforce patents at opposite ends of the term**
- **In fact, most NPEs don't acquire patents until their terms more than half expired**
- **The average NPE-owned patent**
  - Changed hands twice (post-issue)
  - Over 12 years
  - Before asserted for the first time

# Empirical Findings

- **NPEs overwhelmingly assert aging high-tech patents**
  - NPE problem is largely a software patent problem, and vice versa
- **Of all infringement claims filed by NPEs in the last 3 years of asserted patent's term**
  - 88% allege infringement of patents related to computers or electronics
  - 65% allege infringement of software patents

# Implications

- **Last 3-5 years of patent term overwhelmingly benefit . . .**
  - . . . not product-producing companies enforcing patents covering products on the market . . .
  - . . . instead, NPEs asserting outdated high-tech/software patents
- **Maybe we should eliminate these last few years?**

# Solution: Term Reduction

- 3 year term reduction would impact 60% of infringement claims filed by NPEs
- What kind of prod-co claims affected? Mostly . . .
  - Filed by product companies acting like trolls
    - Struggling/bankrupt companies asserting high-tech/sw patents (e.g., Kodak and Encyclopaedia Britannica)
    - No great loss
  - Filed by biotech and pharmaceutical companies
    - Easily shielded by liberal use of term extensions for patents covering FDA-approved products

# Solution: Term Reduction via Maintenance Fees

- **Impediments to enacting term reduction?**
  - TRIPS obligations / ire of WTO members
  - Congressional gridlock
  
- **Alternative Solution?**
  - PTO maintenance fees

# Solution: Term Reduction Via Maintenance Fees

- **Current fee regime:**
  - Renewal at 3.5, 7.5, and 11.5 years post issue
  - ~50% of patents expire for failure to pay as is
- **How many more might expire if additional payments required?**
- **Why should patentee's renewal obligations end < 12 years after issue?**
  - That's before many wind up in the hands of NPEs!

# Solution: Term Reduction Via Maintenance Fees

- **Post AIA, PTO has fee-setting authority**
- **Could require annual renewal payments in the latter half of the term**
  - Fees could increase from year to year
  - Many countries, including the UK and Canada, already do this
- **Additional revenue could help prevent so many bad patents from issuing in the first place**