

2012 NPE Cost Study: High-Level Findings

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Introduction

Although NPE assertions have become a regular cost of business for many companies, this cost has never been widely studied or quantified. Substantially all studies of NPE costs to-date have focused on damages awards, but fewer than five percent of NPE cases go that far. Indeed, the vast majority of direct NPE-related costs concern legal costs, settlements and license fees related to NPE assertions and litigation—costs that are generally not publicized or shared among operating companies.

This lack of data has important consequences. First, it increases the difficulty of quantifying risk exposure to NPEs. Second, companies can find themselves without market data on appropriate costs and settlements. Finally, serial NPEs can often leverage an information asymmetry into an information advantage in negotiation.

It was with this data deficit in mind that this study was undertaken. This study is the first to measure and analyze direct costs of NPEs to operating companies. Over 80 companies with experience in more than 1,500 NPE suits provided certain statistics on their costs to resolve NPE disputes.

The survey data provides a quantitative picture of the financial impact of NPEs on operating companies. For example, in the majority of NPE assertions, more than half the cost to operating companies is legal cost.

In the survey, certain industries reported markedly more NPE-related expenses than reported by other industries, though the cost to resolve “nuisance” suits appears to be very similar across all sectors. Some industries—such as semiconductors—reported a higher share of more sophisticated, long-lasting litigations that often have costly settlements.

Moreover, the data has helped inform the academic and policy debate around the costs and benefits of NPEs. As part of this study, RPX provided Professors James Bessen and Michael Meurer with certain aggregate statistics on NPE costs. Their working paper based on this data, “The Direct Costs from NPE Disputes” (available on SSRN), estimated that the direct accrued costs to operating companies for responding to NPE activity in 2011 totaled approximately \$29 billion (which includes the cost of non-litigated assertions, but not indirect costs such as product delays or loss of market share).

RPX did not have any input on the paper, nor do we necessarily endorse the conclusions or policy recommendations made by the authors; however, we do welcome their study (and subsequent responses) as part of a valuable growing public discussion about NPEs and the dynamics of the patent market.

What follows is an extract of a broader report that has been made available only to participants in this study.

Summary of Key Observations

The statistics aggregated in this survey provide a robust picture of the costs of resolving NPE disputes.

- Among participating companies, the combined legal, settlement, and judgment costs from litigation represent two-thirds of the costs of dealing with NPEs to-date. Disputes that did not result in litigation (i.e. non-litigation assertions) and other costs comprise the remainder.
- Companies experienced a wide range of costs to resolve NPE suits, ranging from low five figures to mid nine figures. The distribution is highly skewed, characterized by a high quantity of lower-cost cases and a smaller quantity of very high-cost cases.
- The median combined legal and settlement resolution costs for NPE suits is \$550 thousand, but the mean is \$7.6 million. The difference is driven by the small number of very expensive cases: often seven figures, eight figures, or even nine figures.
- In all but the most expensive cases reported legal costs made up more than half of the total cost of resolution.
- Suits in some technology/market segments appear to be more expensive to resolve than others, with the semiconductor industry exhibiting the highest reported costs. However, this difference appears to be driven by a small number of suits with very high settlements and/or damages. The median cost to resolve NPE suits is similar across technology-market segments.
- Larger companies have higher NPE expenses than smaller companies. They also pay more than smaller companies to resolve NPE suits.

The full version of this report—available only to participants—provides further breakouts by sector and size of company.

Charts and Highlights

The following pages feature charts and highlights of key report facts.

Patent litigation comprised two-thirds of direct NPE cost to-date

Although litigation is the most public evidence of NPE activity, it is not the only NPE-related cost. Chart 1 breaks down the costs of NPEs from litigation and non-litigation activity.

Roughly two thirds of the reported NPE costs to-date can be attributed to legal and settlement costs of patent litigation. Twenty-eight percent of NPE costs arise from NPE assertions that have not escalated to litigation. Only five percent stem from other NPE-related costs such as patent acquisition, re-exam (outside of litigation), or clearance searches.

Even if exceptionally expensive litigations and assertions are excluded, the cost distribution remains similar. When litigations and assertions greater than \$10 million are excluded, 67% of the costs are litigation related.

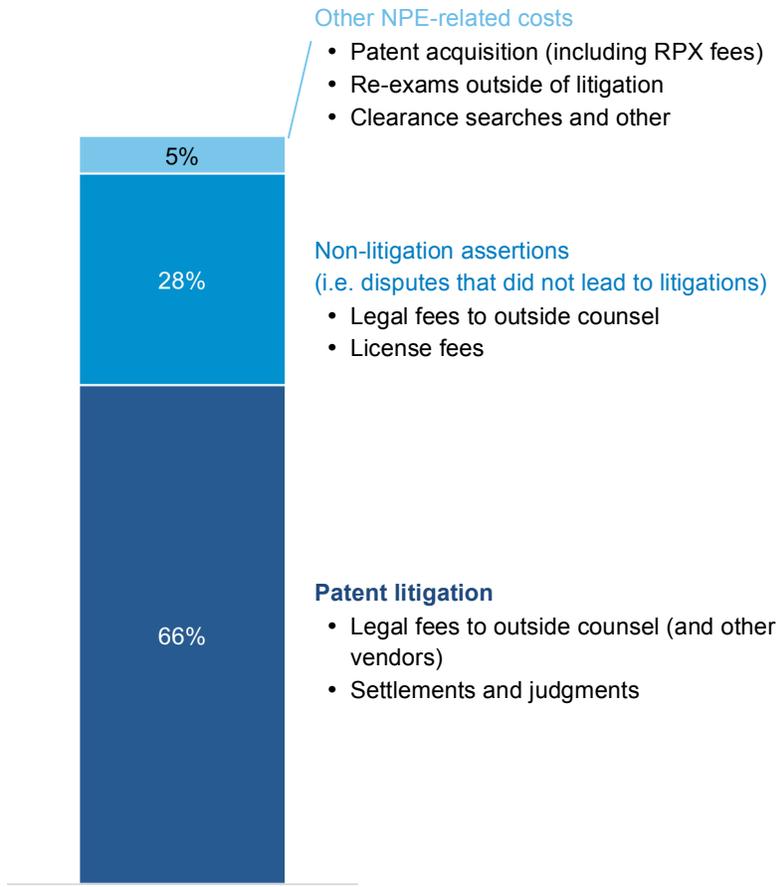
Soft costs such as employee distraction, customer uncertainty, and product workarounds are not quantified in this analysis.

Methodology Notes:

Based on statistics provided from 48 companies on their aggregate costs from both resolved and active NPE disputes.

N = 48 companies

Chart 1: Components of direct NPE costs to-date



In all but the most expensive cases, legal costs exceed settlements

One of the primary costs of NPE activity for operating companies is the legal cost of defending against NPE suits.

Chart 2 illustrates the distribution of total resolution costs between legal cost and settlement cost. For example, in suits that cost between \$100 thousand and \$1 million to resolve, 53% of that cost was legal and 47% was settlement payments to NPEs (including judgments).

Methodology Notes:

Based on statistics on the costs of resolving NPE litigations, excluding litigations with substantial indemnification or RPX involvement. In these statistics legal cost includes outside counsel (lead, local, and re-exam), experts, discovery, prior art searching, jury consultants, graphics, and other related costs. Excludes in-house legal costs.

N = 78 companies with experience in 900 resolved litigations

Chart 2: Distribution of legal and settlement resolution costs



Wide variance of reported costs to resolve NPE suits

Companies reported a wide range of costs to resolve NPE suits, ranging from low five figures to mid nine figures.

Chart 3 illustrates statistics on the total resolution cost (legal and settlement combined) as reported by 77 companies involved in 839 resolved litigations.

The distribution is skewed in that most reported cases cost under \$1 million to resolve, while a minority of reported cases cost millions to resolve. In particular, the median resolution cost for reported NPE suits is \$550 thousand, while the 95th percentile cost is \$19.1 million. The mean resolution cost of reported NPE suits is \$7.6 million.

The wide variance in resolution costs can be attributed to two primary factors. First, individual companies reported a wide range of costs. This wide range likely underpins the uncertainty that companies face when evaluating the financial risk presented by NPEs. Second, the data represents a wide range of companies of different sizes and market sectors.

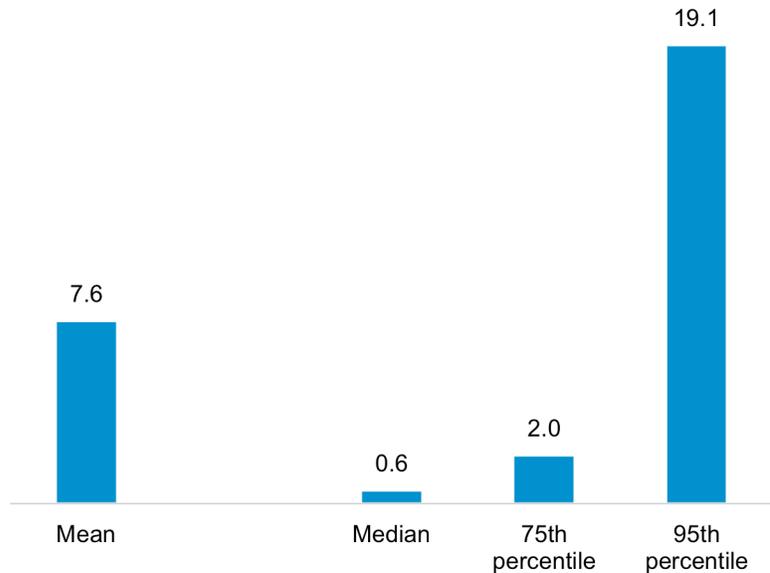
Methodology Notes:

Based on statistics on the costs of resolving NPE litigations, excluding litigations with substantial indemnification or RPX involvement or which were resolved at zero direct cost.

Resolution costs include legal and settlement costs. Legal cost includes outside counsel (lead, local, and re-exam), experts, discovery, prior art searching, jury consultants, graphics, and other related costs. Excludes in-house legal costs. Settlement and judgment costs include the estimated present value of running royalties.

N = 77 companies, 839 resolved litigations

Chart 3: Total resolution cost for completed NPE suits (\$USD M)



Certain technology areas reported more expensive suits

NPE suits in some market sectors appear to result in higher total costs than in other sectors; however, the difference can be attributed largely to a few high-cost suits in those market sectors.

Chart 4a illustrates the mean total cost of resolution for reported NPE suits, segmented by market sector. The product categories refer to the accused product, not necessarily the company's primary market sector.

Because of the large variance of costs, a small number of very expensive suits skew the mean total costs upward.

To adjust for this upward skewness, Chart 4b illustrates the mean cost of resolution for reported NPE suits, excluding those cases having total costs greater than \$10 million. Similarly, Chart 4c shows the median cost of resolution for reported NPE suits.

Methodology Notes:

Based on statistics on the costs of resolving NPE litigations, excluding litigations with substantial indemnification or RPX involvement. In these statistics legal cost includes outside counsel (lead, local, and re-exam), experts, discovery, prior art searching, jury consultants, graphics, and other related costs. Excludes in-house legal costs. Median costs were not split between legal and settlement.

N = 77 companies, 839 resolved litigations

Chart 4a: Mean resolution cost for reported NPE suits (\$USD M)

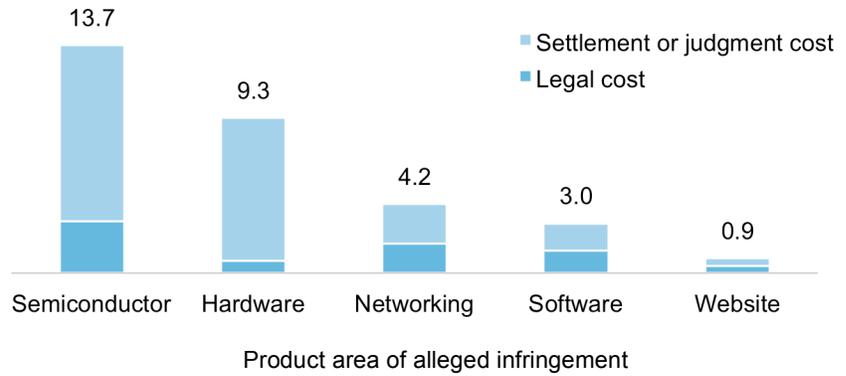


Chart 4b: Mean resolution cost for reported NPE suits, excluding cases > \$10M (\$USD M)

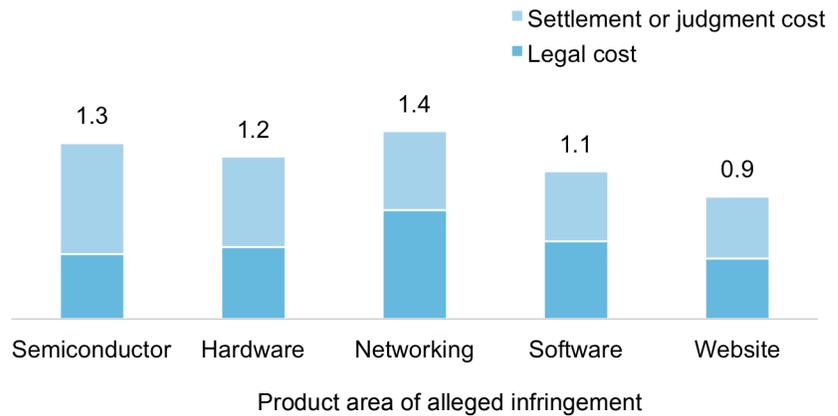
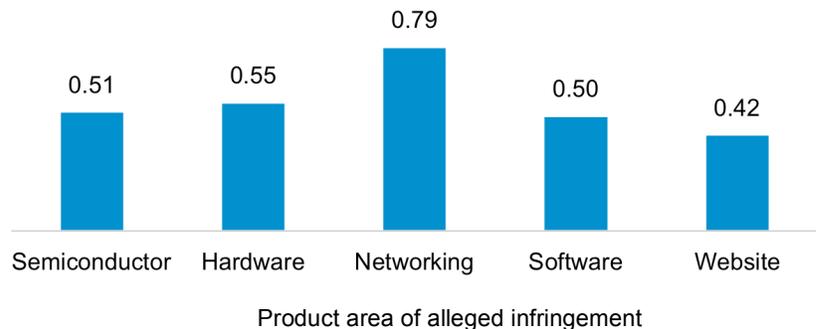


Chart 4c: Median resolution costs for reported NPE suits (\$USD M)



Larger companies pay more to resolve suits

Participating companies with larger revenues reported paying more to resolve NPE suits than smaller companies.

Chart 5a illustrates the mean resolution costs for NPE suits, segmented by the defendant's total revenues.

Because of the large variance in reported costs, a small number of very expensive suits skew the mean total costs upward.

To adjust for this skewness, Chart 5b illustrates the mean resolution cost for reported NPE suits, excluding those cases having total costs greater than \$10 million. Similarly, Chart 5c illustrates the median resolution cost of reported NPE suits.

Methodology notes:

Based on statistics on the costs of resolving NPE litigations, excluding litigations with substantial indemnification or RPX involvement. In these statistics legal cost includes outside counsel (lead, local, and re-exam), experts, discovery, prior art searching, jury consultants, graphics, and other related costs. Excludes in-house legal costs. Median costs were not split between legal and settlement.

N = 78 companies, 900 resolved litigations

Chart 5a: Mean resolution cost for reported NPE suits (\$USD M)

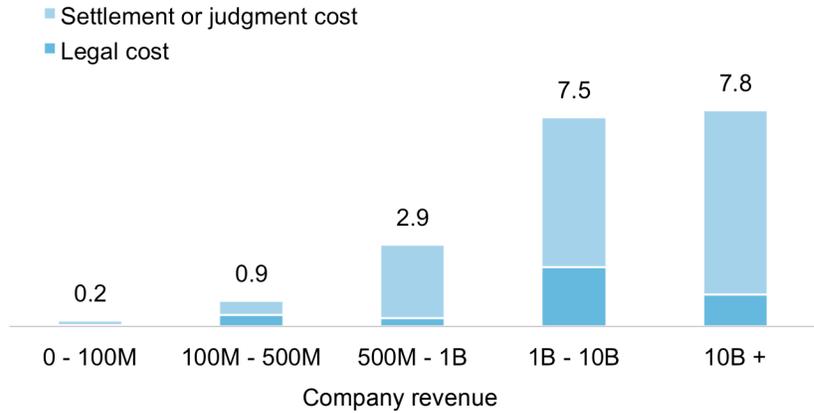


Chart 5b: Mean resolution cost, excluding cases > \$10M (\$USD M)

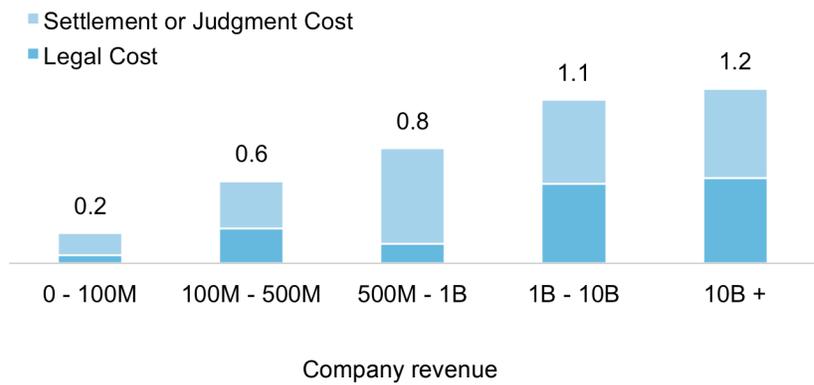
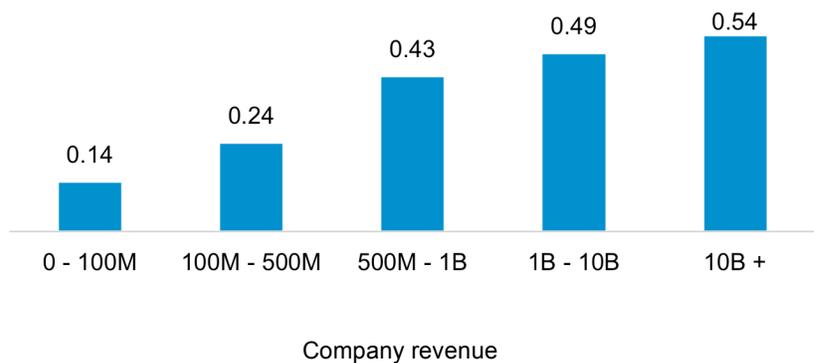


Chart 5c: Median resolution cost of reported NPE suits (\$USD M)



Methodology

Timeline

Between January and May 2012, RPX invited companies to participate in a survey of NPE-related costs. Eighty-four companies participated in the survey and submitted statistics in time for publication of the full version of this report. Participants include both RPX members and non-members. Participants provided various statistics pertaining to NPE-related costs, from 2005 through at least 2011.

Definition of NPE

For the purposes of this report the following are considered NPEs:

1. Patent assertion entities (PAEs): entities believed to earn revenue predominantly through licensing of patents
2. Universities and research institutions
3. Individual inventors
4. Non-competing entities (NCEs): operating companies asserting patents well outside their area of product or services

This broad definition covers the class of asserting entities from which operating companies have asymmetrical risk (i.e. the asserting company is generally immune to counter claims). The vast majority of reported costs concerned assertions by PAEs.

Cost characterization

In this report, all direct costs of resolving NPE disputes are referred to as “costs”. We recognize that license fees to NPEs may properly be characterized as “transfers”, particularly when examined from a public policy perspective. But CFOs managing risk tend to view both NPE-induced legal fees and settlements as the costs of NPEs for their business. For this reason, and for the sake of simplicity, we use the “cost” label in this report.

Cost statistics

To preserve anonymity, statistics were collected and presented in ways that avoided identifying specific companies or plaintiffs.

“Clean” resolved litigations

To provide a more accurate picture of NPE costs, most statistics on litigation resolution cost are limited to “clean” resolved litigations. “Clean” resolved litigations exclude active litigations, litigations with indemnification, and litigations wherein RPX was involved.

About RPX

RPX Corporation (NASDAQ: RPXC) provides patent risk solutions, helping corporations reduce and manage the costs of patent risk. We provide a more rational and efficient alternative to the traditional litigation approach to patent assertion defense, offering defensive buying, acquisition syndication, patent intelligence, insurance services, and advisory services.

Defensive buying and acquisition syndication leverages the combined strength of companies facing NPE assertion. RPX acquires high-risk patents and rights in the open market and out of litigation—patents and rights that would otherwise be used against our members. For a set annual fee, each member in our network receives a license to all patents we have aggregated in the growing RPX portfolio. RPX also organizes syndicated acquisitions in which members cooperate to acquire high-value portfolios and rights at an attractive price.

In addition to risk reduction through patent acquisitions, RPX provides industry-leading market intelligence covering NPEs, litigation, and the patent marketplace. Through our analysis, members gain visibility into company-specific patent risk, enabling them to make informed, strategic decisions on patent matters.

By year-end 2012, the RPX network had grown to 140 companies in under five years. The RPX membership consists of companies across a broad range of industries including consumer electronics and personal computing, E-commerce and software, media content and distribution, mobile communications and handsets, networking, semiconductors, and financial services. Our buying power, capacity for gathering and disseminating market intelligence, and expertise in valuing and acquiring patent assets continues to grow as our client network expands.

RPX is transforming how operating companies mitigate and manage NPE patent risk. Because we will never assert or litigate patents, our interests are 100% aligned with those of our clients. Our success depends entirely on our ability to provide our clients with high-value service that reduces their cost and risk of patent assertion.

As of year-end 2012, RPX had:

- Reviewed more than 4,100 patent portfolios
- Completed 120 acquisitions, deploying over \$620 million in capital, of which approximately \$400 million was RPX capital
- Achieved over 300 dismissals from over 40 litigations for members
- Mitigated an estimated \$1.2 billion in patent assertion defense cost for members
- Acquired or sub-licensed rights to over 3,300 patents

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