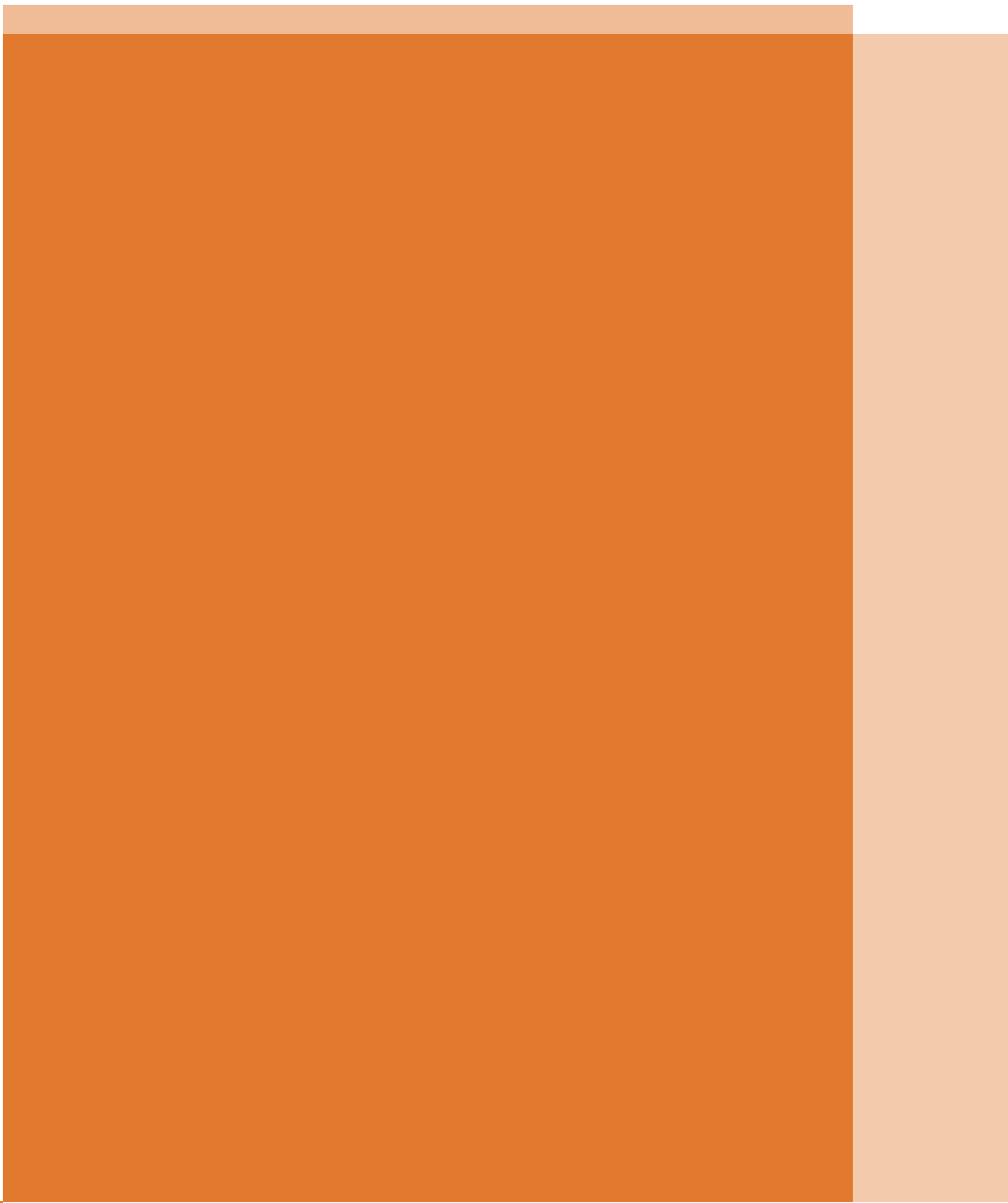


## ***2011 Patent Litigation Study***

Patent litigation trends as the  
“America Invents Act” becomes law

1995 – 2010





---

## Table of contents

---

<i>Recapping a busy year in patent reform</i>	<i>4</i>
---	----------

---

<i>Summary of key observations</i>	<i>6</i>
Patent actions on the rise in 2010	8
Median damages award hits 16-year low	9
NPE awards outpace practicing entities	9
The largest trial awards can be staggering	10
Jury use has risen since the 1980s	11
Jury trials hover near 60% since 2000	11
Patent holders winning with juries	12
NPEs look to juries more often	13
Median jury awards have grown substantially	13
Juries generous with damages	14
Reasonable royalties are most prevalent damages	14
Success rates vary considerably	16
Exploring success rate fluctuations	17
Trial success rates: Bench versus jury	18
More NPE cases decided at summary judgment	18
Consumer products industry leads in decisions	19
The information age takes hold	20
Median damages vary widely by industry	21
Median damages by industry: Practicing entity versus NPE	22
Success rates by industry	23
Practicing entity versus NPE success rates by industry	24
Jury trial use varies by industry	25
Most patent cases heard within three years	26
Average time-to-trial still stands at about two+ years	27
Median damages rise with time-to-trial	28
Virginia Eastern, Wisconsin Western speediest in time-to-trial	28
Certain districts are more favorable to patent holders	29
Success rates: Top and bottom five districts	30
High concentration of NPE decisions in five districts	31
Practicing and nonpracticing entities by the numbers	32
Median damages vary by NPE type	33
Individual NPEs experience lower success rates	33
Vast majority of NPE litigation involves company, individual NPEs	33

---

<i>Our methodology</i>	<i>34</i>
------------------------	-----------

---

## ***Recapping a busy year in patent reform***

2011 has been a busy year in patent reform. More than a decade of discussion and debate over patent reform culminated on September 16, with President Obama signing the “America Invents Act” into law. While a few aspects of the bill were hotly debated within Congress, the bill ultimately passed both chambers with overwhelming support (304 to 117 in the House of Representatives and 89 to 9 in the Senate).

The America Invents Act is not just another bill. It represents the most significant changes to the US patent system in nearly 60 years. Among them: the conversion to a first-inventor-to-file system that alters the current patent system’s approach to priority of inventorship and effective filing date. Specifically, it awards a patent to the first person to file a patent application on an invention with the US Patent and Trademark Office (“USPTO”), even if the filer was not the first to invent.

Significantly, the America Invents Act does not contain any language regarding the calculation of damages in patent infringement matters.

This represents a shift from prior drafts, which incorporated substantial language addressing damages. The absence of any reform guidance in this area suggests that Congress believes the subject of patent damages is best left for the courts to address and regulate (or, perhaps, that it’s viewed as too contentious an issue to enable consensus).

The most recent example of a court decision that fundamentally changed how patent damages are calculated was issued by the US Court of Appeals for the Federal Circuit (“CAFC”) in early 2011. In *Uniloc USA, Inc. v. Microsoft Corp.* (Fed. Cir. 2011), the CAFC held that the widely used and recognized 25 percent rule<sup>1</sup> “is a fundamentally flawed tool for determining a baseline royalty rate in a hypothetical negotiation.” This ruling led industry observers to refer to the rule as officially ‘dead’ for purposes of establishing a hypothetical royalty rate in patent infringement cases. Despite the CAFC’s ruling, some parties engaging in patent licensing continue to reference the 25 percent rule in their royalty negotiations.

Additionally, the US Supreme Court recently issued rulings in two patent cases. It upheld the current “clear and convincing evidence” standard for invalidating a patent in *Microsoft Corp. v. i4i Limited Partners* (Supreme Court 2011), sustaining a roughly \$300 million patent infringement verdict against Microsoft. Further, in *Global-Tech Appliances, Inc. v. SEB SA* (Supreme Court 2011), the Court held that “willful blindness” to the existence of a patent cannot serve as a defense to charges of inducing infringement.

In summary, while passage of patent reform legislation represents a significant change to the US patent system, the elimination of the 25 percent rule, as well as rulings in a variety of other recent court decisions, demonstrates that the courts will continue to shape the future of patent law and play the primary role in how patent damages are calculated.

---

<sup>1</sup> Under the 25 percent rule, a licensee pays a royalty rate equivalent to 25% of its expected operating profits for the product that incorporates the intellectual property at issue.

---

## ***Summary of key observations***

Reflecting these developments, PricewaterhouseCoopers (“PwC”) maintains a database of patent damages awards (from 1980 through 2010), collecting with specificity information about patent holder success rates, time-to-trial statistics, and practicing versus nonpracticing entity (“NPE”) statistics (all from 1995 through 2010). This year’s study adds industry classification and expanded NPE segmentation analyses. Based on this study, several observations can be made to help executives, legislators, and litigators assess their patent enforcement—or defense—strategies, as well as the impact of NPEs.

- Annual median damages awards (in 2010 dollars) ranged from \$1.8 million to \$15.6 million between 1995 and 2010.
- Damages awards for NPEs averaged more than double those for practicing entities over the last five years.
- The disparity between jury and bench awards continues to widen and is likely the contributing factor in the significant increase in use of juries since 1995.
- Reasonable royalties remain the predominant measure of patent damages awards.
- NPEs have been successful 23% of the time overall versus 33% for practicing entities, due to the relative lack of success for NPEs at summary judgment. However, both have about a two-thirds success rate at trial.
- Technology associated with the consumer products industry led the way in the percentage of identified decisions from 1995 through 2010. However, median damages awarded in this industry were relatively low in comparison to the other top ten most active industries, particularly telecommunications, medical devices, computer hardware/electronics, and biotechnology/pharma.
- While the median time-to-trial has remained fairly constant in recent years (averaging 2.28 years), we see significant variations among jurisdictions.
- Certain federal district courts (particularly Virginia Eastern, Delaware, and Texas Eastern) continue to be more favorable to patent holders, with shorter time-to-trial, higher success rates, and higher median damages awards.
- The top five federal district courts (of 94 total) accounted for 37% of all identified decisions involving an NPE as the patent holder. The Eastern District of Texas accounted for 11% of NPE decisions.
- Not all NPEs are created equal: While University/Non-profit NPEs have the highest success rate among NPE litigants, their median damages award is considerably lower than the median award of Company NPEs.

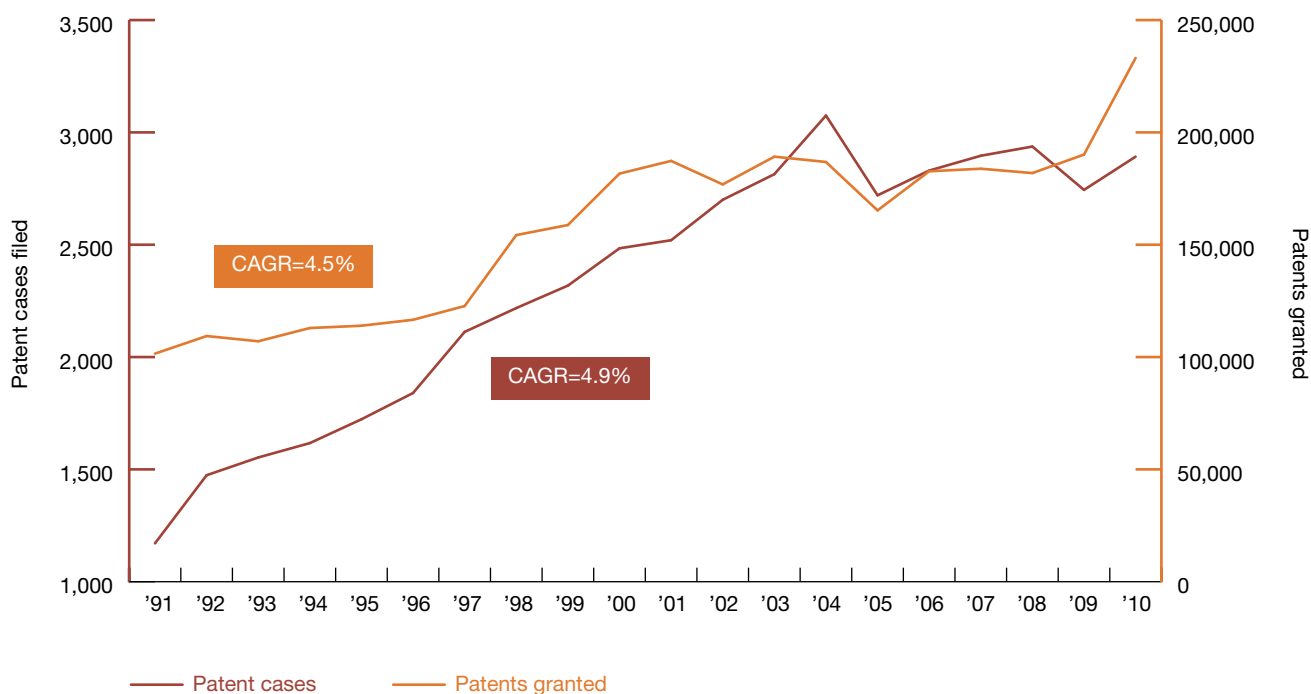
## Patent actions on the rise in 2010

Chart 1

As Chart 1 illustrates, the annual number of patent actions filed has increased at an overall compound annual growth rate (“CAGR”) of 4.9% since 1991. Meanwhile, the number of patents granted by the USPTO has also grown steadily, increasing at a CAGR of 4.5%.

The number of patents granted by the USPTO increased significantly from 2009 to 2010, growing by 23% to 233,127 patents. However, the number of patent actions filed increased only slightly in 2010 to 2,892 cases, and has yet to return to the most recent peak of 2,937 cases in 2008 or the highest historical level of 3,075 cases in 2004.

Chart 1. Patent case filings and grants



Years are based on June year-end

Sources: US Patent and Trademark Office: Performance & Accountability Report and US Courts: Judicial Facts & Figures

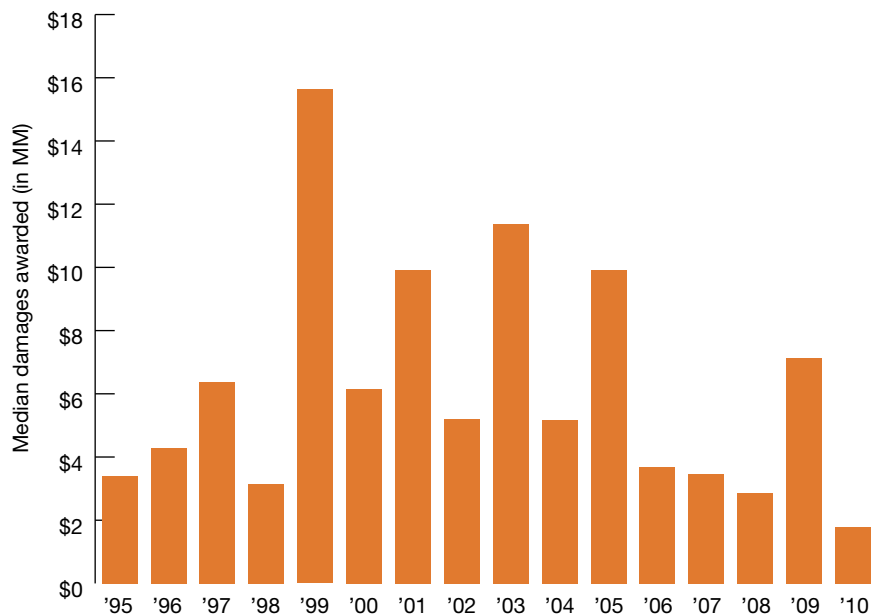


## Median damages award hits 16-year low

Chart 2a

Adjusting for inflation using the Consumer Price Index (“CPI”), the annual median damages award has ranged from \$1.8 million to \$15.6 million between 1995 and 2010, with an overall median award of \$5.1 million over the last 16 years. In the aggregate, there seems to be a slight downward trend over the total time period, particularly since 1999. Notably, the 2010 median damages award of \$1.8 million represents the lowest median over the observed time period (Note: median damages are adjusted for inflation and represented in 2010 US dollars).

Chart 2a. Patent holder median damages awarded: 1995 to 2010

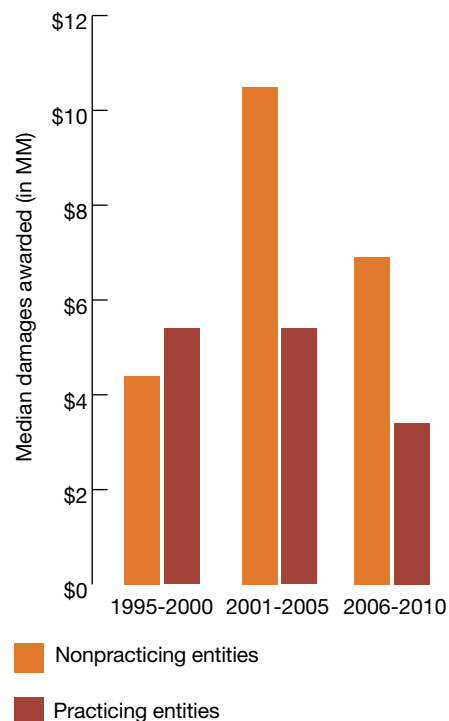


## NPE awards outpace practicing entities

Chart 2b

As shown in Chart 2b, we see a wide variance in the damages awarded to NPEs as compared to practicing entities, especially since 2001. The median damages award for NPE patent holders was more than double the award for practicing entities over the last five years. Between 2006 and 2010, the median was \$6.9 million for NPEs and \$3.4 million for practicing entities. In contrast, from 1995 to 2000, the median damages award was 23% higher for practicing entities than NPEs.

Chart 2b. Patent holder median damages awarded: Nonpracticing entities vs. practicing entities



## The largest initial trial awards can be staggering

### Chart 2c

While the 2010 median damages award represented the lowest median in the last 16 years, enormous damages awards continue to garner headlines and keep corporate management keenly aware of the risks of potential infringement, as well as the rewards of enforcing patent rights. Chart 2c displays the top ten damages awards in federal district court since 1995. In 2010, one decision cracked the top ten list: a \$626 million damages jury verdict against Apple Inc., which has since been reversed by the district court. It's important to note that the awards reflected in Chart 2c are those identified during initial adjudication; most of these awards have since been vacated, remanded, or reduced, and some are still in the appellate process.

**Chart 2c. Top ten largest initial adjudicated damages awards: 1995 to 2010**

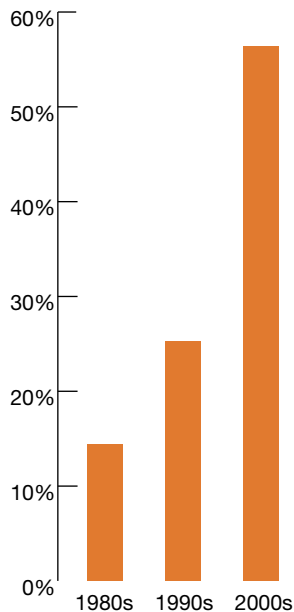
Year	Plaintiff	Defendant	Technology	Award (in MM)
2009	Centocor Ortho Biotech Inc.	Abbott Laboratories	Arthritis drugs	\$1,848
2007	Lucent Technologies Inc.	Microsoft Corp.	MP3 technology	1,538
2010	Mirror Worlds LLC	Apple Inc.	Operating system	626
2003	Eolas Technologies Inc.	Microsoft Corp.	Internet browser	521
2008	Bruce N. Saffran M.D.	Boston Scientific Corp.	Drug-eluting stents	432
2009	Uniloc USA Inc.	Microsoft Corp.	Software activation technology	388
2008	Lucent Technologies Inc.	Microsoft Corp.	Data entry technology	368
2006	Rambus Inc.	Hynix Semiconductor Inc.	Memory chips	307
2009	i4i Limited Partnership	Microsoft Corp.	Electronic document manipulation technology	277
2008	Medtronic Vascular Inc.	Boston Scientific Corp.	Balloon-dilation catheters	250

## ***Jury use has risen since the 1980s***

### ***Chart 3a***

The disparity between jury and bench awards has widened and is likely a contributing factor to the significant increase in the use of juries over the last decade. A significant trend toward jury trials has emerged since the 1980s, with the shift becoming more evident in the last decade. As shown in Chart 3a, juries decided only 14% of cases during the 1980s and 25% during the 1990s. Since 2000, juries have decided 56% of patent cases.

**Chart 3a. Use of jury trials by decade**

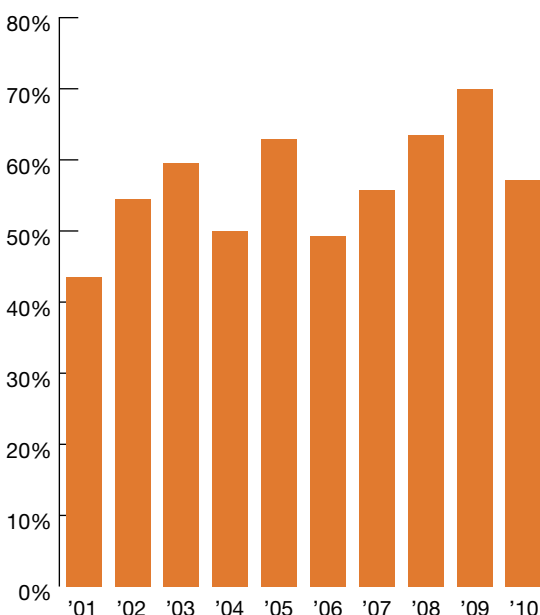


## ***Jury trials hover near 60% since 2000***

### ***Chart 3b***

As reflected in Chart 3b, jury trials represented approximately 57% of total identified decisions in 2010. Interestingly, while juries have become the preferred trier of fact by a wide margin in recent years, 2010 experienced a decline compared to 2008 and 2009 in the percentage of cases tried before a jury. Overall, however, the percentage of jury trials in 2010 (57%) was consistent with the overall average since 2000 (56%—see Chart 3a).

**Chart 3b. Use of jury trials by year: 2001 to 2010**



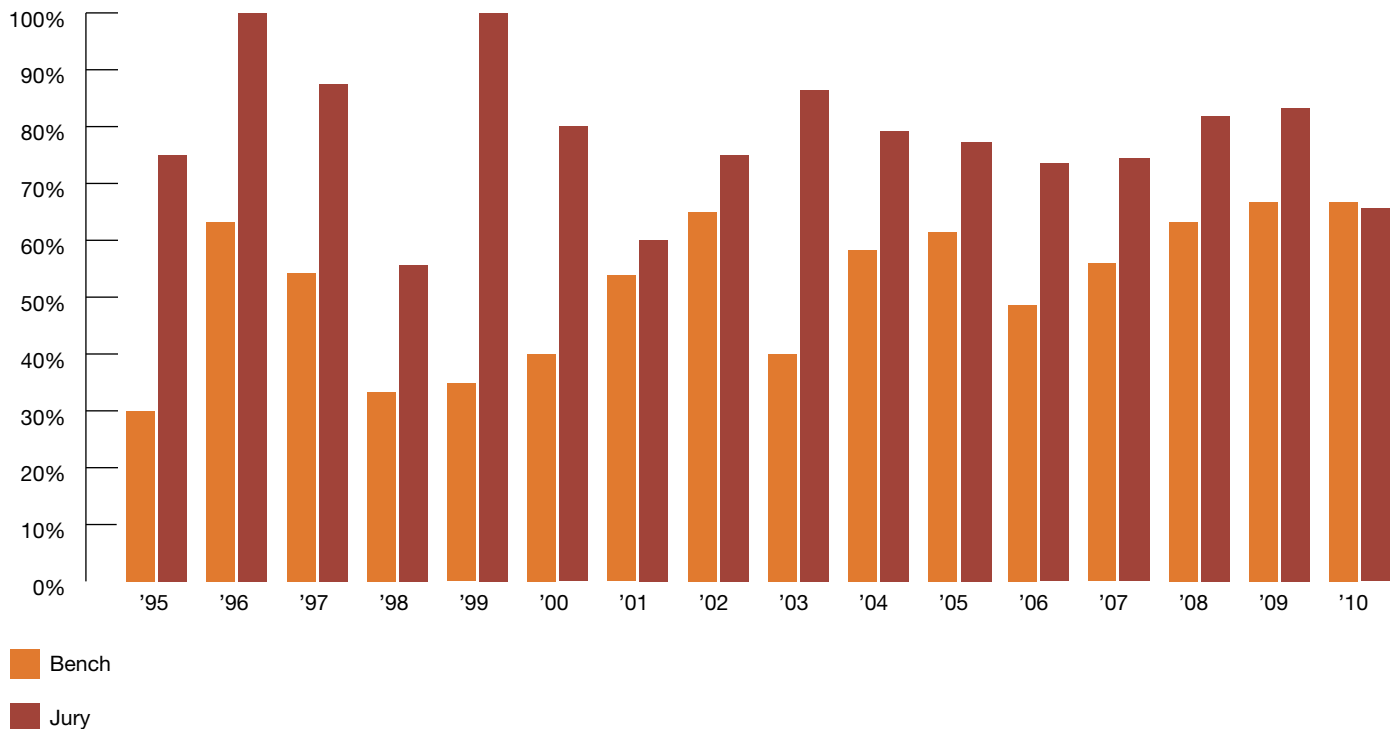
## Patent holders winning with juries

### Chart 3c

A number of factors contribute to the increased use of juries as the preferred forum for patent cases. In general over the last 16 years, trial success rates for patent holders are much higher when decided by juries. As shown in Chart 3c, until 2010,

jury success rates had outperformed their bench counterparts every year since 1995, usually by wide margins. 2010 breaks the historical trend, with patent holders experiencing similar success rates during bench and jury trials (67% and 66%, respectively).

**Chart 3c. Bench vs. jury trials: Success rates 1995 to 2010**

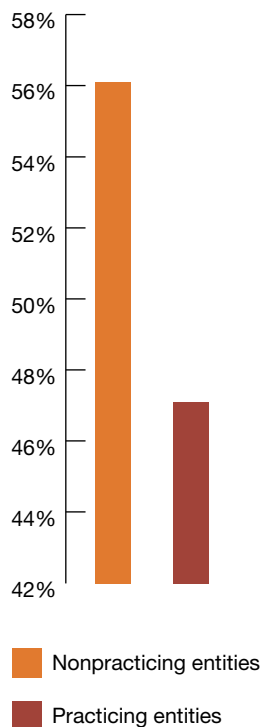


## NPEs look to juries more often

**Chart 3d**

As shown in Chart 3d, the increase in litigation involving NPEs over the last 16 years is most likely affecting the increased use of juries. Since 1995, 56% of trials involving NPEs have been jury trials, as compared to only 47% of trials involving practicing entities.

**Chart 3d. Use of jury trials by type of entity: 1995 to 2010**



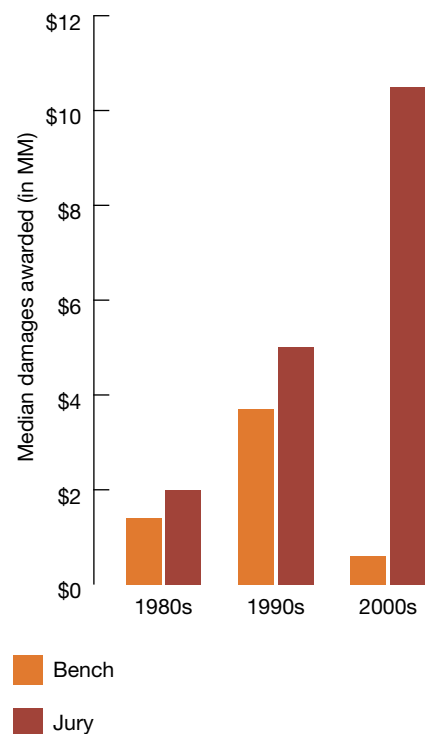
## Median jury awards have grown substantially

**Chart 3e**

Furthermore, median jury awards have increased significantly, running several multiples of the amounts awarded by judges over the last decade. Chart 3e shows the discrepancy in median damages awards over the last three decades. The spread between bench and jury median awards has grown significantly as a result of a sharp increase in the median jury award combined with a decline in the median bench award since the beginning of 2000.

The increase in damages awarded by juries in patent cases may be due to juries' reduced sensitivity to large dollar awards, particularly given public disclosures of larger profits and net worth from major company defendants. Greater outrage at a finding of liability and a resulting desire to punish the infringer rather than merely compensate the patent holder may also be a factor in increased damages awards. Self-selection bias might also play a part in the disparate results, as plaintiffs may believe juries will look more favorably upon them than judges, especially when seeking large monetary awards.

**Chart 3e. Bench vs. jury trials: Median damages awarded by decade**

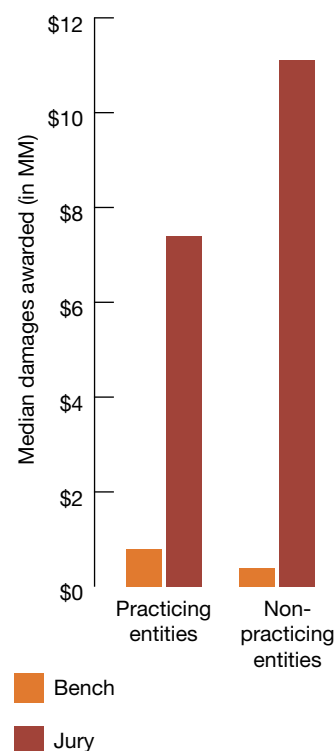


## Juries generous with damages

### Chart 3f

Chart 3f indicates that regardless of whether an entity practices its patent(s), damages awarded by juries are much greater than those awarded in bench trials. The premiums in jury awards for NPEs are even higher than those for practicing entities.

**Chart 3f. Bench vs. jury trials: Median damages by entity type: 1995 to 2010**



## Reasonable royalties are most prevalent damages

### Chart 4

As shown in Chart 4, reasonable royalties are the most frequent kind of damages awards in patent cases and comprise a greater share with each passing year; because some litigants receive mixed damages, for example, lost profits and royalties, the totals exceed 100%. Section 284 of the Federal Code governing equitable compensation sets a reasonable royalty as the minimum level of compensation due to the patent holder from an infringer. While Chart 4 includes all identified decisions with damages, NPEs are generally not entitled to lost profits. Consequently, if NPE results are excluded from Chart 4, the proportion of damages awarded through reasonable royalties would decrease by about 6%.

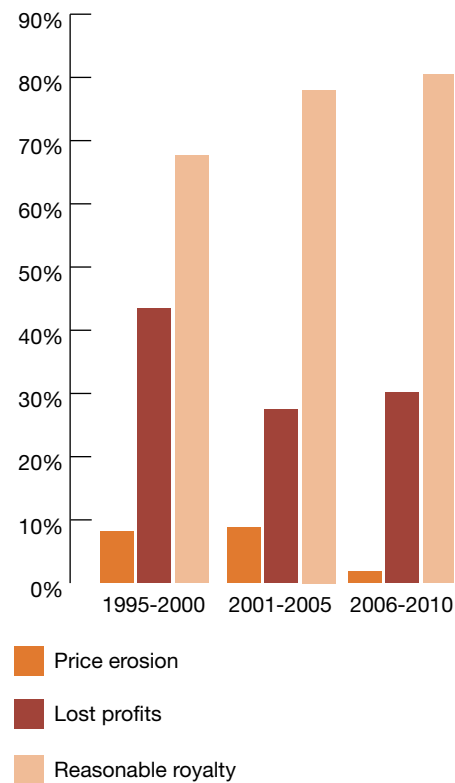
Lost profits damages are not as prevalent a measure of damages as reasonable royalties for several reasons:

- There is an increased proportion of patent actions brought by NPEs, which are generally ineligible for lost profits damages because they don't manufacture or offer products and services embodying their patents.
- Even in circumstances where the patentee may be eligible for lost profits awards, it may elect to seek recovery through the reasonable royalty approach. The complexity and cost of the analysis for determining lost profits is usually greater than for reasonable royalties. Lost profits may be quantified based upon specific sales taken by the infringer from the patent holder or upon an assessment of particular facts and circumstances in a 'but for' situation. This assessment examines whether: there is demand for the product tied to the patent's claims; there is an absence of acceptable alternate substitutes; the patent holder has adequate manufacturing and marketing capabilities; and there is sufficient financial information to complete the quantification. Also, market share data is often required to allocate the infringer's sales if the market consists of more than two participants. Patent holders often find the process of supporting such analysis distracting to their core operations, or they don't want to risk disclosing proprietary cost and profit information.
- Lost profits entitlement can be more difficult to establish. The proliferation of competition in each US market sector from US

and foreign-based businesses provides greater access to substitute products. The presence of these alternatives means that even without an alleged infringer's products in the market, consumers may not automatically buy the patent holder's products. Furthermore, the growing use of specialized distribution channels for reaching a specific consumer demographic increasingly supports an alleged infringer's contention that its customers are separate and distinct from those of the patent holder.

Additionally, damages awards for price erosion claims have become almost nonexistent over the last five years. Globalized competition, turbulent economic conditions, and the cost and complexity of price erosion analyses have reduced the recovery (and most likely pursuit) of price erosions claims.

**Chart 4. Composition of damages awards to all entities: 1995 to 2001**



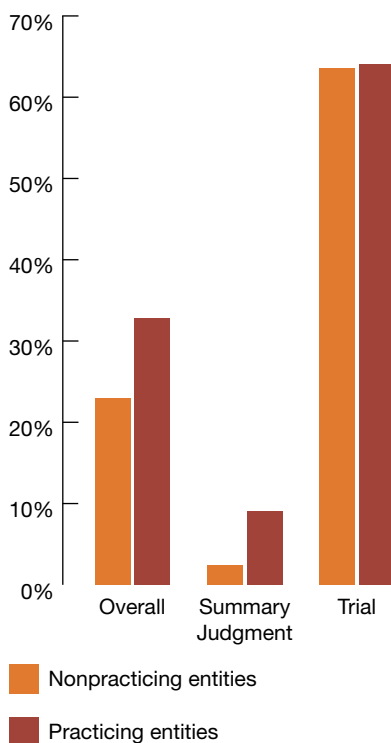
## Success rates vary considerably

Chart 5a

To understand patent holder success rates for NPEs versus practicing entities since 1995, PwC studied 1,617 final decisions issued at two stages of the litigation process: summary judgment (880 decisions) and trial (674 decisions). Dismissals that didn't occur at trial or summary judgment are not included in this breakdown.

Chart 5a demonstrates that the overall success rate for practicing entities is almost 10% higher than that of NPEs over the last 16 years. As compared to practicing entities, NPEs are much less successful at the summary judgment stage. In instances when a final decision is reached at summary judgment, NPEs are successful only 2% of the time, as opposed to 9% for practicing entities. Meanwhile, trial success rates are nearly identical for NPEs and practicing entities.

**Chart 5a. Patent holder success rates: 1995 to 2010**



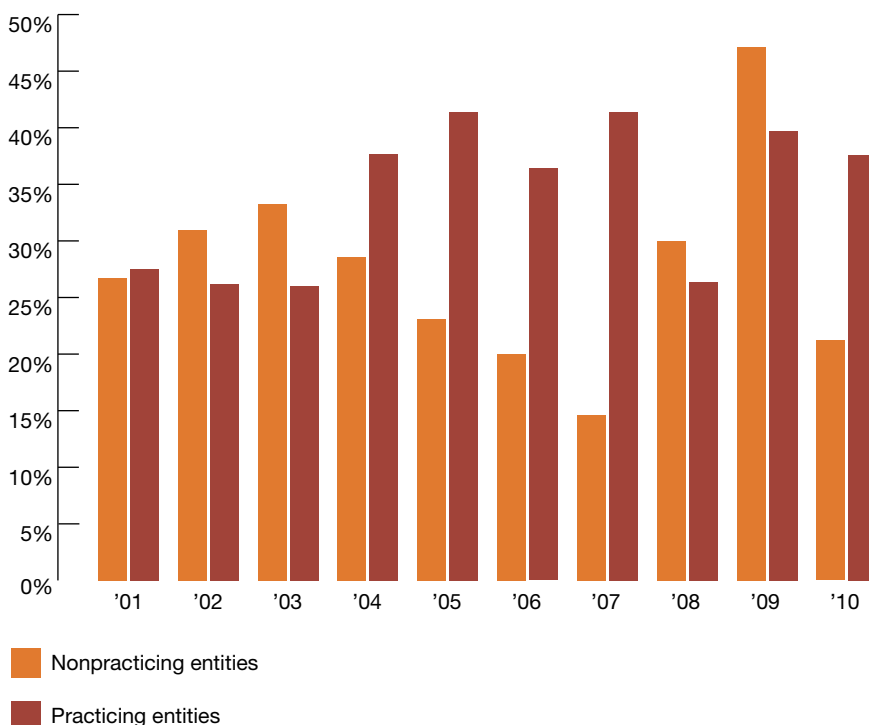


## Exploring success rate fluctuations

Chart 5b

While practicing entities seem to have a higher **overall** historical success rate since 1995 when compared to NPEs, Chart 5b depicts an interesting trend in success rates. NPEs had experienced declining success rates from 2003 through 2007; however, in 2008 and 2009, NPEs were actually more successful than practicing entities. The 2010 success rates reverted back to the trend in the years prior to 2008 and 2009 and saw practicing entities' success exceed NPE success by a significant margin. Notably, NPEs were successful 47% of the time in 2009 and only 21% of the time in 2010. Over the last 10 years, practicing entities have generally experienced less volatility in success rates, which have ranged from 26% to 41% (38% in 2010).

Chart 5b. Patent holder success rates: 2001 to 2010



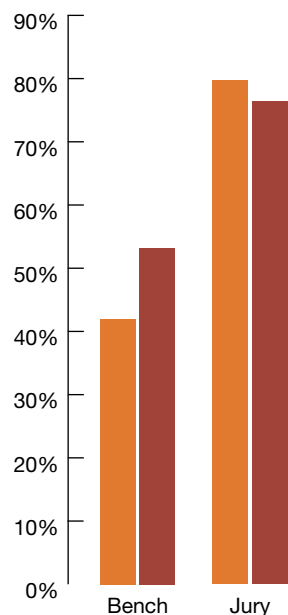
## Trial success rates: Bench versus jury

Chart 5c

Studying trial success rates for bench versus jury trials sheds further light. Chart 5c illustrates that since 1995, practicing entities and NPEs have been significantly more successful with jury than bench trials. This disparity can be attributed in part to pharmaceutical Abbreviated New Drug Application (“ANDA”) cases, where trial success rates are lower than 50% and are primarily heard by the bench.<sup>2</sup>

Chart 5c also illustrates that practicing entities enjoy an 11% *higher* success rate than NPEs with the bench, and a 3% *lower* success rate with juries.

**Chart 5c. Patent holder success rates at trial: 1995 to 2010**

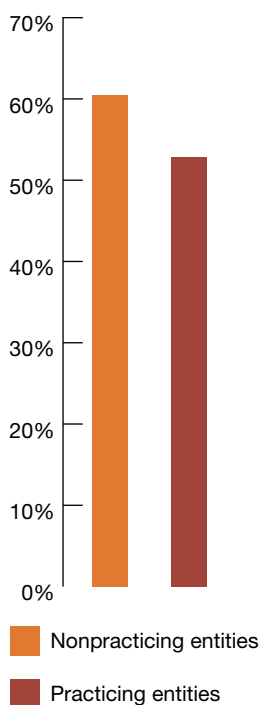


## More NPE cases decided at summary judgment

Chart 5d

Another interesting finding: a greater percentage of NPE cases are decided or concluded at summary judgment than cases involving practicing entities. Chart 5d shows that 60% of NPE final decisions occur at summary judgment versus 53% for practicing entities. Because success rates at summary judgment are much lower than at trial, NPEs tend to experience a lower overall success rate than practicing entities when the total mix of summary judgment and trial decisions are considered.

**Chart 5d. Percent of decisions at summary judgment: 1995 to 2010**



<sup>2</sup> According to a January 15, 2010 study by RBC Capital Markets® on patentee success rates in ANDA litigation.

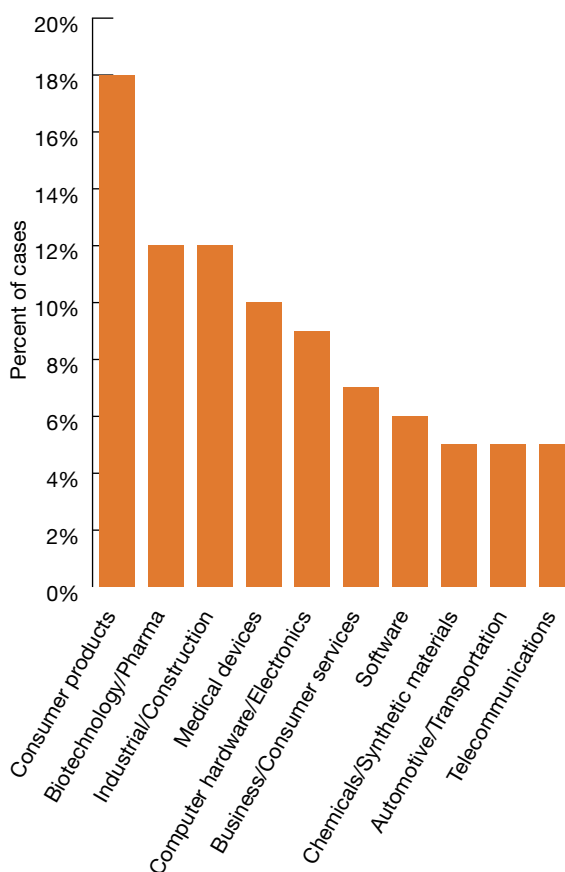
## Consumer products industry leads in decisions

Chart 6a

To understand how damages awards have varied by industry over time, PwC mapped each decision to a particular industry based on the nature of the technology embodied by the patent(s) at issue.

Chart 6a reflects the percentage of total identified decisions for the top ten most active industry classifications. As the chart demonstrates, technology associated with the consumer products industry led in terms of the percentage of identified decisions from 1995 through 2010, representing 18% of the total decisions during the period.

**Chart 6a. Distribution of cases: Top ten industries, 1995 to 2010**



## The information age takes hold

### Chart 6b

Chart 6b provides additional insight into the number of identified decisions by industry from 1995 through 2010. While Chart 6a considers the entire period of 1995 through 2010, Chart 6b segments it into three time periods to identify trends in the percentage of decisions by industry. Interestingly, even when trifurcating the 1995 through 2010 time period, the consumer products

industry ranks first in the percentage of decisions in each of the three time segments. This demonstrates that throughout the period, patent cases involving consumer products technology has dominated other industries.

Chart 6b demonstrates that most other industries have experienced a fairly consistent number of decisions

throughout the first two time periods, followed by an increase in the most recent time period. The computer hardware/electronics, software, and internet/online services industries experienced significant increases in identified decisions during the 2006 through 2010 time period, reflecting the impact of the 'Information Age' and the internet on patent litigation.

**Chart 6b. Number of cases by industry: 1995 to 2010**

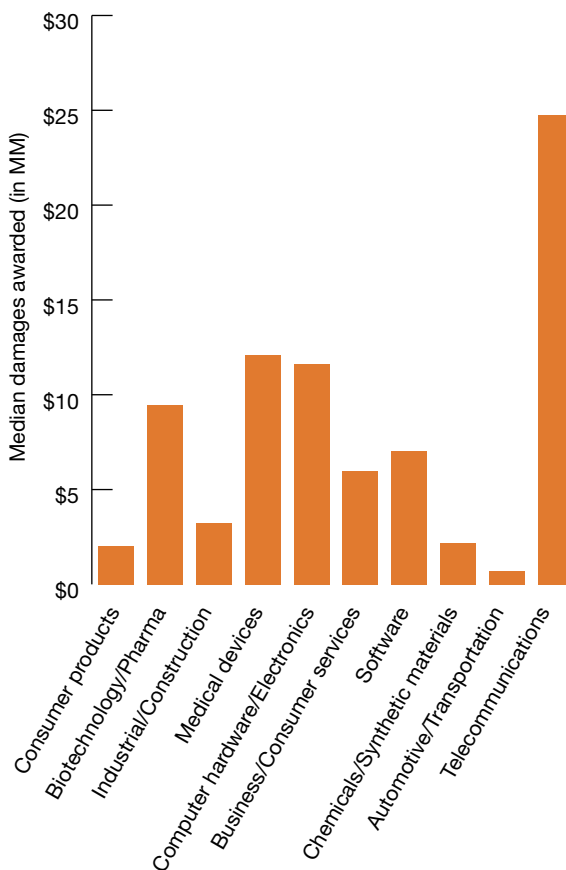
Overall rank	Industry	1995 to 2000		2001 to 2005		2006 to 2010		Total cases
		Cases	Rank	Cases	Rank	Cases	Rank	
1	Consumer Products	82	1	80	1	121	1	283
2	Biotechnology/Pharma	40	4	71	2	89	3	200
3	Industrial/Construction	66	2	57	3	70	4	193
4	Medical Devices	42	3	45	4	67	5	154
5	Computer Hardware/Electronics	24	6	32	6	92	2	148
6	Business/Consumer Services	19	8	33	5	58	6	110
7	Software	15	9	23	8	52	7	90
8	Chemicals/Synthetic Materials	31	5	16	10	32	9	79
9	Automotive/Transportation	24	7	25	7	29	10	78
10	Telecommunications	14	11	22	9	38	8	74
11	Food/Beverages/Tobacco	15	10	9	12	14	12	38
12	Clothing/Textiles	11	13	8	13	12	14	31
13	Metals/Mining	12	12	10	11	8	16	30
14	Energy	7	14	7	15	9	15	23
15	Agriculture	5	15	8	14	8	17	21
16	Financial Institutions/Investment Management/Insurance	1	18	3	17	14	13	18
17	Internet/Online Services	0	20	0	20	17	11	17
18	Media	5	16	4	16	4	19	13
19	Environment/Waste Management	1	19	2	18	6	18	9
20	Aerospace/Defense	3	17	2	19	3	20	8
<b>Total</b>		<b>417</b>		<b>457</b>		<b>743</b>		<b>1,617</b>

## Median damages vary widely by industry

Chart 6c

Chart 6c reflects that while technology associated with the consumer products industry represented the largest percentage of identified decisions, the median damages awarded were relatively low in comparison to the other top ten most active industries. Technology associated with the biotechnology/pharma, computer hardware/electronics, medical devices, and telecommunications industries, while making up a smaller percentage of total decisions, experienced median damages awards significantly higher than other industries.

**Chart 6c. Patent holder median damages awarded: Top ten industries, 1995 to 2010**

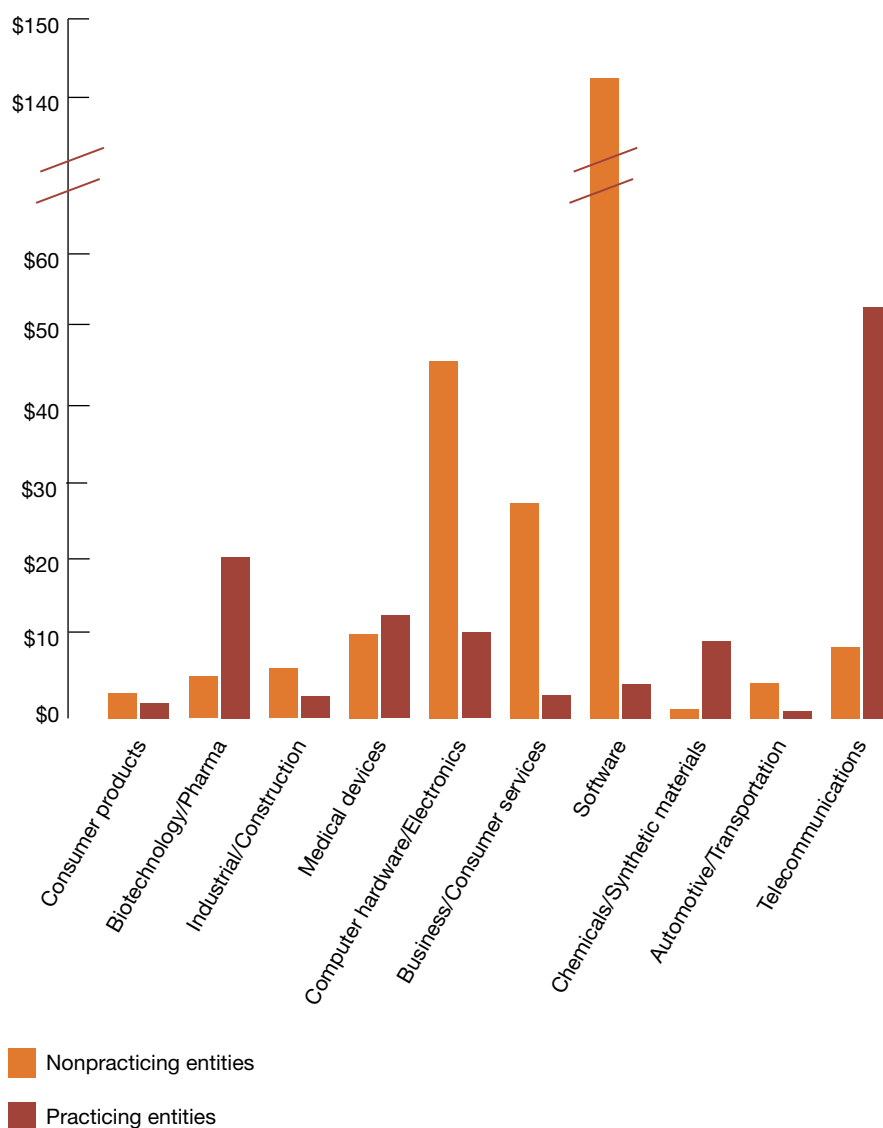


## Median damages by industry: Practicing entity versus NPE

Chart 6d

Chart 6d separates the median damages awards for each of the top ten industries into practicing entity and NPE median damages, providing further insight into median damages awards by industry. In some industries, such as biotechnology/pharma, chemicals/synthetic materials, and telecommunications, median damages awards were significantly higher for practicing entities than for NPEs. However, in other industries, such as computer hardware/electronics and particularly software, the opposite was true: NPE median damages were significantly higher than practicing entity median damages.

**Chart 6d. Patent holder median damages awarded: Top ten industries, 1995 to 2010**

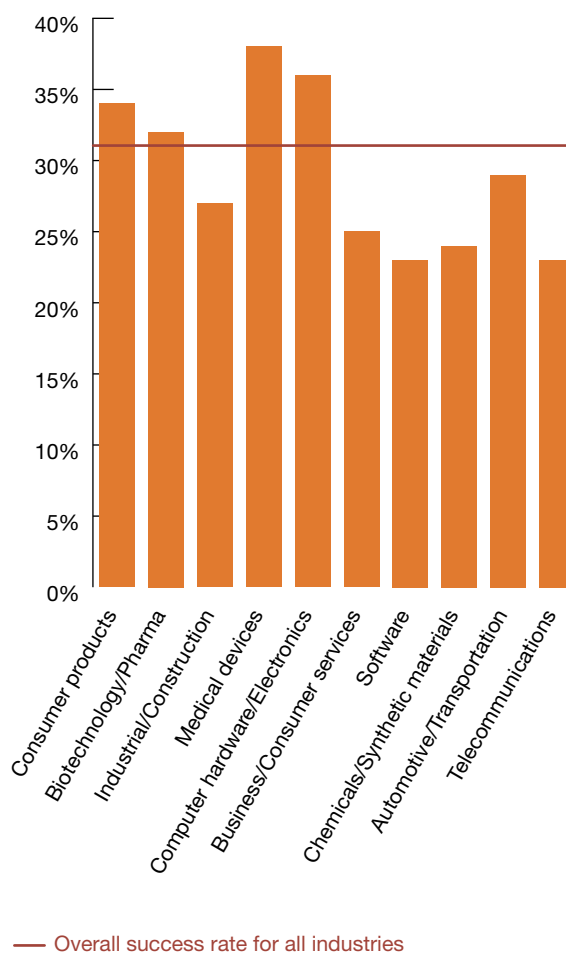


## Success rates by industry

Chart 6e

While the overall success rate (combined trial and summary judgment) for all industries during the period was approximately 31%, patent holders with technology associated with the consumer products, biotechnology/pharma, medical devices, and computer hardware/electronics industries achieved success rates higher than the overall average, as illustrated by Chart 6e. In contrast, patent holders with technology associated with the software, telecommunications, and chemicals/synthetic materials industries, in particular, experienced significantly lower success rates than the overall rate for all industries.

Chart 6e. Patent holder success rate: Top ten industries, 1995 to 2010

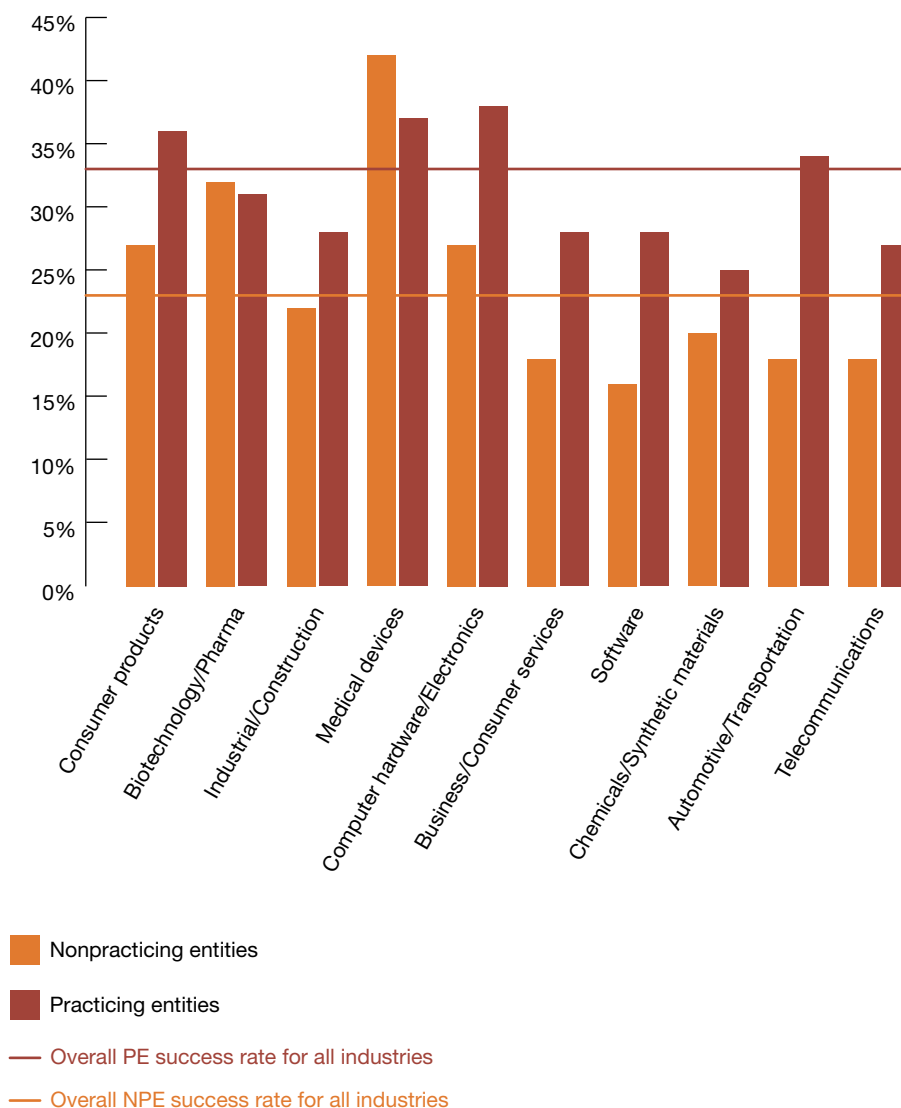


## Practicing entity versus NPE success rates by industry

Chart 6f

Chart 6f expands on the analysis provided in Chart 6e by reflecting practicing entity versus NPE success rates by industry. The chart illustrates that within the practicing entity population, very few patent holders experienced success rates significantly greater than the overall practicing entity success rate for all industries, while a number (particularly chemicals/synthetic materials) achieved success rates well below the overall practicing entity success rate. In contrast, within the NPE population, patent holders with technology associated with the medical devices and biotechnology/pharma industries enjoyed success rates that were far greater than the overall NPE success rate for all industries.

Chart 6f. Patent holder success rate: Top ten industries, 1995 to 2010



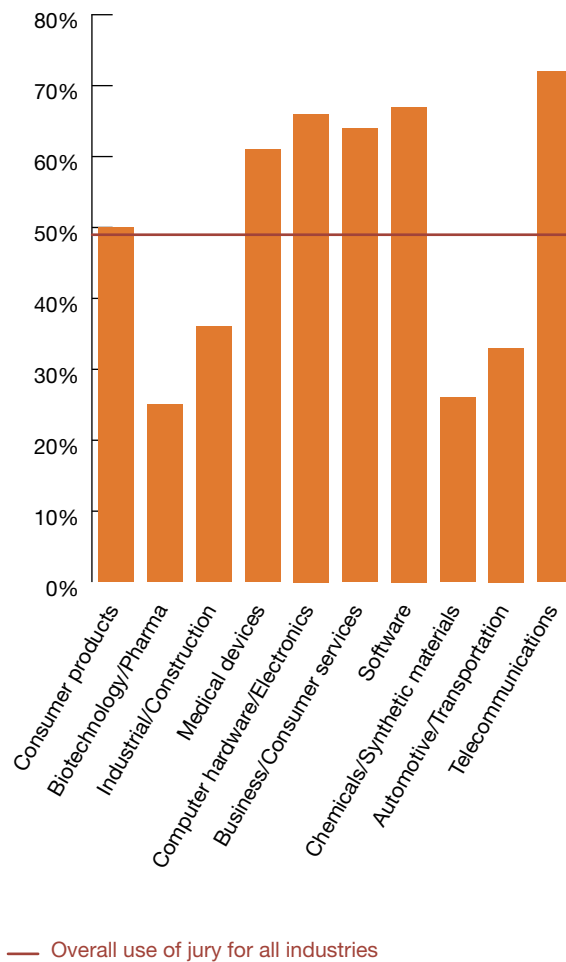


## Jury trial use varies by industry

Chart 6g

Use of jury trials varied widely by industry, as illustrated in Chart 6g. Highlighting the wide disparity of jury trials by industry are the telecommunications and chemicals/synthetic materials industries. While the telecommunications industry's use of jury trials exceeded 70%, the chemicals/synthetic materials industry used jury trials in less than 30% of cases. Not surprisingly, the biotechnology/pharma industry also had a considerably lower use of jury trials than most of the other top ten industries, resulting from the frequent incidence of ANDA-related litigation, which are tried primarily by the bench.

Chart 6g. Use of jury trials: Top ten industries, 1995 to 2010

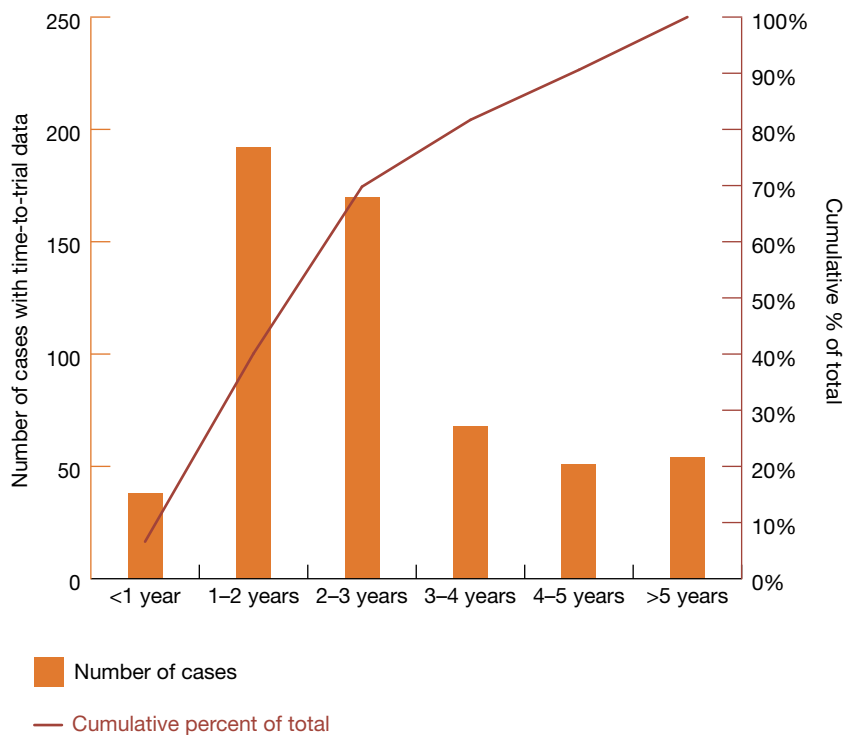


## Most patent cases heard within three years

Chart 7a

We captured time-to-trial data for 573 trials in 68 districts, using the court dockets for each matter. Time-to-trial was calculated from the complaint date to the first day of trial for each case. In Chart 7a, the distribution of overall time-to-trial indicates that 70% of cases reached trial within three years from the filing date of the initial complaint. This percentage has remained relatively consistent across prior years' studies.

Chart 7a. Time-to-trial distribution of cases: 1995 to 2010

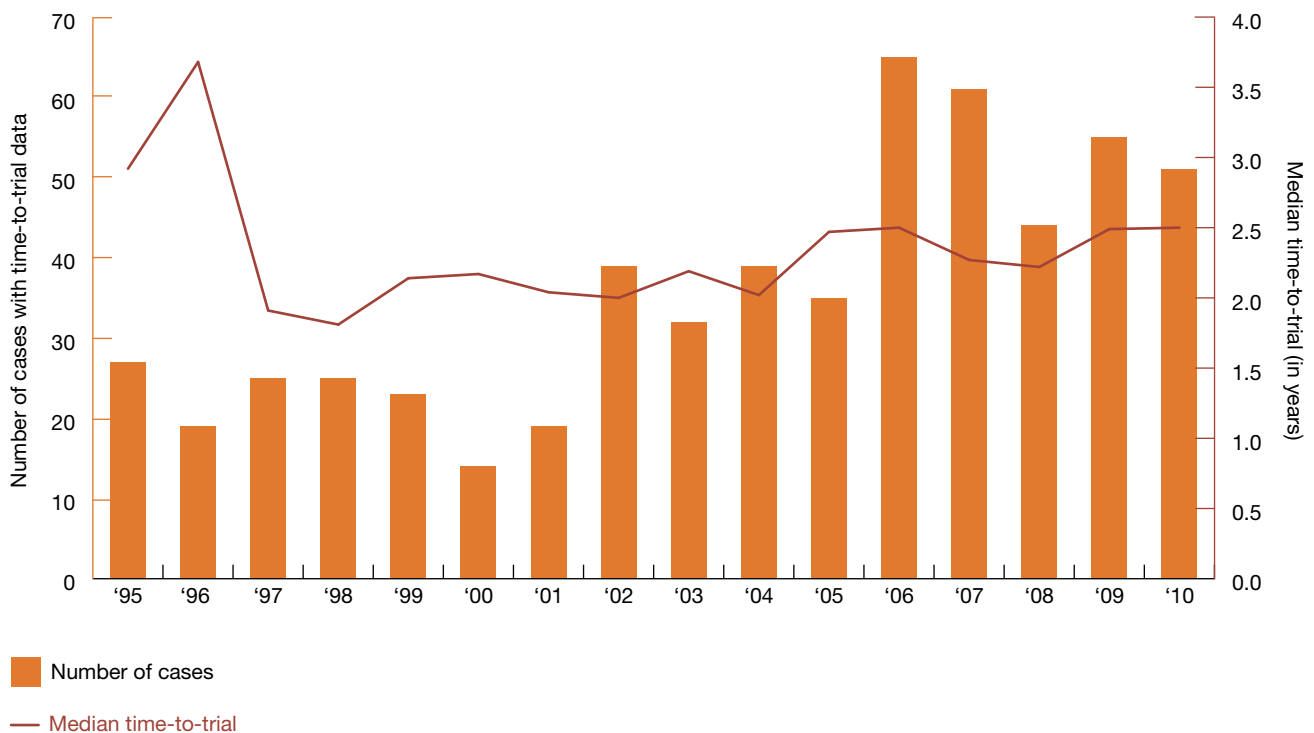


## Average time-to-trial still stands at about two+ years

Chart 7b

Overall, no major changes in time-to-trial are noted since 1997. Chart 7b shows that after a decline from 1995 to 1998, median time-to-trial has maintained a fairly steady duration of two to two-and-a-half years from the complaint date to trial, even as the volume of cases has increased substantially over the same period. The number of cases going to trial has been around 45 to 65 per year in the last five years, up from about 15 to 25 per year from 1995 through 2001. That said, the number of patent cases going to trial in the last five years has been on a gradual decline.

Chart 7b. Median time-to-trial: 1995 to 2010

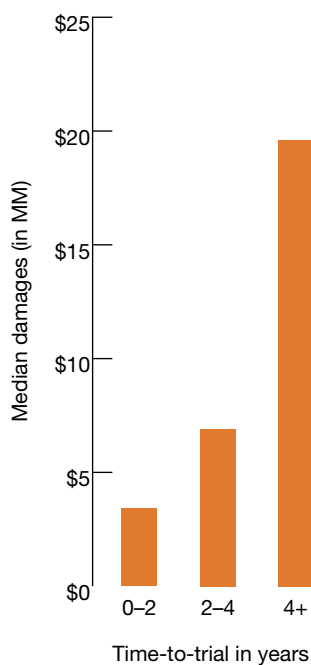


## Median damages rise with time-to-trial

**Chart 7c**

Not surprisingly, the median damages award increases as time-to-trial grows. Chart 7c reflects the median damages award depending on the number of years to trial. Several factors may be responsible for this relationship. Cases involving higher potential damages awards are more complex and thus take longer to reach trial. And the longer time-to-trial provides a longer period over which accused sales occur, thereby increasing the potential damages base.

**Chart 7c. Median damages based on time-to-trial: 1995 to 2010**



## Virginia Eastern, Wisconsin Western speediest in time-to-trial

**Chart 7d**

Since 1995, significant variations have occurred in the median time-to-trial across jurisdictions. To assess the lead time, we focused on the most active districts. Among these courts, Chart 7d summarizes the median time-to-trial from 1995 to 2010. As indicated, Virginia Eastern and Wisconsin Western districts have the shortest time-to-trial. Interestingly, the top five districts and overall median time-to-trial have remained consistent from our prior study, with the overall time-to-trial experiencing little change.

**Chart 7d. Median time-to-trial by district from 1995 to 2010**

Rank	District	Total # of identified decisions with time-to-trial data	In years
1	Virginia Eastern District Court	14	0.93
2	Wisconsin Western District Court	10	1.07
3	Florida Middle District Court	12	1.71
4	Delaware District Court	88	1.87
5	Texas Southern District/Bankruptcy Courts	10	1.99
6	Texas Eastern District Court	71	2.14
7	California Central District Court	25	2.34
8	New York Southern District Court	35	2.41
9	Texas Northern District Court	17	2.42
10	Minnesota District Court	10	2.45
11	Florida Southern District Court	12	2.52
12	New Jersey District Court	17	2.70
13	California Northern District Court	32	2.79
14	Illinois Northern District Court	33	3.34
15	Massachusetts District Court	23	3.63
<b>Overall (all decisions identified)</b>		<b>573</b>	<b>2.28</b>

Only includes the 15 most active districts for which time-to-trial data was available

## Certain districts are more favorable to patent holders

### Chart 8a

Considering median time-to-trial, median damages awarded, and overall success rates, certain jurisdictions (particularly Virginia Eastern, Delaware, and Texas Eastern) emerge as more favorable venues for patent holders, with shorter time-to-trial, higher success rates, and higher median damages awards. Chart 8a presents the top 15 districts based on an average of their respective categorical rankings for each of the three statistical measures mentioned above for decisions from 1995 to 2010.

**Chart 8a. District court rankings: 1995 to 2010**

Overall Rank	District	Median time-to-trial (in years)	Rank	Overall success rate	Rank	Median damages awarded	Rank
1	Virginia Eastern District Court	0.93	1	33.3%	6	\$30,816,721	1
2	Delaware District Court	1.87	4	38.9%	3	\$18,158,547	2
3	Texas Eastern District Court	2.14	6	55.4%	2	\$10,734,645	4
4	Wisconsin Western District Court	1.07	2	31.4%	8	\$4,583,360	9
5	Florida Middle District Court	1.71	3	60.9%	1	\$457,200	15
6	California Central District Court	2.34	7	35.3%	5	\$6,519,747	7
7	Texas Southern District/Bankruptcy Courts	1.99	5	19.5%	15	\$10,700,468	5
8	Texas Northern District Court	2.42	9	38.7%	4	\$1,702,277	13
9	New Jersey District Court	2.70	12	28.8%	11	\$16,867,050	3
10	New York Southern District Court	2.41	8	29.2%	10	\$3,167,882	11
11	Massachusetts District Court	3.63	15	31.8%	7	\$3,962,158	10
12	Minnesota District Court	2.45	10	29.3%	9	\$968,267	14
13	California Northern District Court	2.79	13	22.2%	14	\$7,605,043	6
14	Illinois Northern District Court	3.34	14	24.8%	12	\$5,590,012	8
15	Florida Southern District Court	2.52	11	22.2%	13	\$2,748,103	12
<b>Overall (all decisions identified)</b>		<b>2.28</b>		<b>30.7%</b>		<b>\$5,110,043</b>	

The ranking for these courts are based on their relative ranking for each of the remaining statistical measures

## Success rates: Top and bottom five districts

### Charts 8b and 8c

Considering the 15 most active districts identified in Chart 8a, Charts 8b and 8c rank the top and bottom five districts, respectively, in terms of overall success rate.

**Chart 8b. Top five districts by overall success ranking: 1995 to 2010**

Top five districts		Overall success rate	Trial success rate
1	Florida Middle District Court	60.9%	81.3%
2	Texas Eastern District Court	55.4%	69.6%
3	Delaware District Court	38.9%	60.0%
4	Texas Northern District Court	38.7%	63.2%
5	California Central District Court	35.3%	71.4%
Overall (all decisions identified)		30.7%	63.9%

**Chart 8c. Bottom five districts by overall success ranking: 1995 to 2010**

Bottom five districts		Overall success rate	Trial success rate
1	Texas Southern District/Bankruptcy Courts	19.5%	66.7%
2	Florida Southern District Court	22.2%	50.0%
3	California Northern District Court	22.2%	63.2%
4	Illinois Northern District Court	24.8%	66.7%
5	New Jersey District Court	28.8%	56.5%
Overall (all decisions identified)		30.7%	63.9%

## High concentration of NPE decisions in five districts

Chart 9a

As depicted in Chart 9a, cases with an NPE as the patent holder were concentrated in a relatively small number of key districts. The top five districts with the most identified decisions accounted for 37% of all identified NPE cases. The top ten districts accounted for 55% of all identified

NPE decisions. Of particular interest is that the two districts with the most identified NPE decisions, Illinois Northern and Texas Eastern, present a dichotomy in relative NPE success rates. As seen in Chart 9a, Texas Eastern ranks second-highest (48.6%), whereas Illinois Northern

ranks fourteenth (13.3%) in terms of overall NPE success rates. Meanwhile, Delaware, which has the lowest percentage of identified decisions where the patent holder is an NPE, has an overall success rate for NPEs of 44%, among the highest and well above the average.

**Chart 9a. District courts with most identified decisions with NPE patent holder: 1995 to 2010**

District	Decisions involving NPEs	Total identified decisions	NPE % of total decisions	NPE success rate
Texas Eastern District Court	35	101	34.7%	48.6%
Illinois Northern District Court	30	125	24.0%	13.3%
New York Southern District Court	26	113	23.0%	15.4%
California Northern District Court	20	117	17.1%	15.0%
Delaware District Court	16	144	11.1%	43.8%
Florida Southern District Court	14	36	38.9%	14.3%
Massachusetts District Court	14	66	21.2%	35.7%
California Central District Court	12	68	17.6%	25.0%
Pennsylvania Eastern District Court	11	33	33.3%	18.2%
Minnesota District Court	9	41	22.0%	44.4%
Texas Southern District/Bankruptcy Courts	9	41	22.0%	11.1%
US Court of Federal Claims	8	21	38.1%	12.5%
Colorado District Court	7	19	36.8%	28.6%
DC District Court	7	17	41.2%	0.0%
Florida Middle District Court	6	23	26.1%	50.0%
Kansas District Court	6	13	46.2%	0.0%
Michigan Eastern District Court	6	32	18.8%	0.0%
Texas Northern District Court	6	31	19.4%	33.3%
Virginia Eastern District Court	6	36	16.7%	33.3%
<b>All identified decisions</b>	<b>339</b>	<b>1,617</b>	<b>21.0%</b>	<b>23.0%</b>

Only includes districts with more than 5 identified decisions involving an NPE as the patent holder

## Practicing and nonpracticing entities by the numbers

### Charts 9b and 9c

Chart 9b reflects a summary of key patent litigation statistics for practicing and nonpracticing entities. Chart 9c focuses on the same statistics, but for only the top five districts in terms of the number of identified decisions (Texas Eastern, Illinois Northern, New York Southern, California Northern, and Delaware). As reflected in the two charts, while median time-to-trial for the top five districts is similar to the overall averages for practicing and nonpracticing entities, success rates and median damages awards are higher in the most active districts. Moreover, the most sizeable increases in success rates and median damages awards relate to NPE litigation in the top five districts.

Interestingly, even when removing the Eastern District of Texas from the analysis of the top five districts' statistics (and solely focusing on the remaining four most active districts), median damages awards remain significantly higher than the overall average. However, success rates in the four most active districts drop below the overall averages when the Eastern District of Texas is excluded.

**Chart 9b. Key statistics for practicing and nonpracticing entities: 1995 to 2010**

	Median time-to-trial (in years)	Overall success rate	Median damages awarded
Nonpracticing entity	2.53	23.0%	\$8,799,102
Practicing entity	2.27	32.8%	\$4,696,967

**Chart 9c. Key statistics for practicing and nonpracticing entities for top five districts: 1995 to 2010**

	Median time-to-trial (in years)	Overall success rate	Median damages awarded
Nonpracticing entity	2.55	29.2%	\$20,282,270
Practicing entity	2.09	35.8%	\$6,886,723

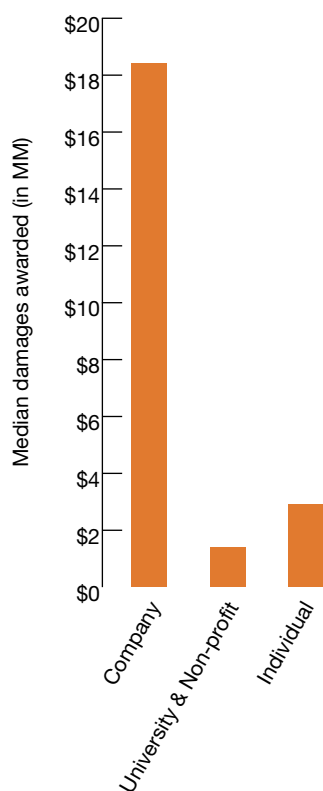


## Median damages vary by NPE type

**Chart 10a**

New to this year's study is an analysis of NPE litigation by: (1) companies/for-profit organizations, (2) universities/non-profit organizations, and (3) individuals/inventors. Chart 10a illustrates that the median damages award for Company NPEs is significantly higher than that of university/non-profit and individual NPEs.

**Chart 10a. Patent holder median damages awarded by NPE type: 1995 to 2010**

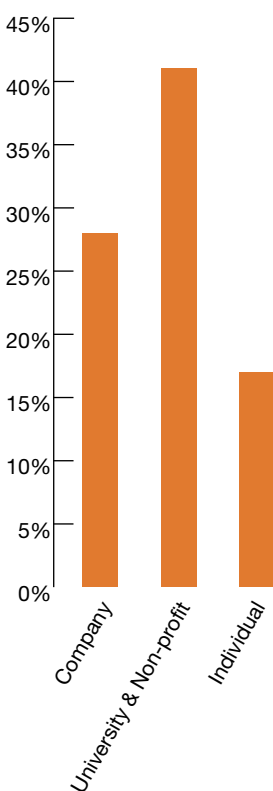


## Individual NPEs experience lower success rates

**Chart 10b**

While Company NPEs are awarded higher damages, university/non-profit NPEs have by far the highest success rate among NPEs, with individual NPEs lagging far behind, as shown in Chart 10b.

**Chart 10b. Patent holder success rate by NPE type: 1995 to 2010**

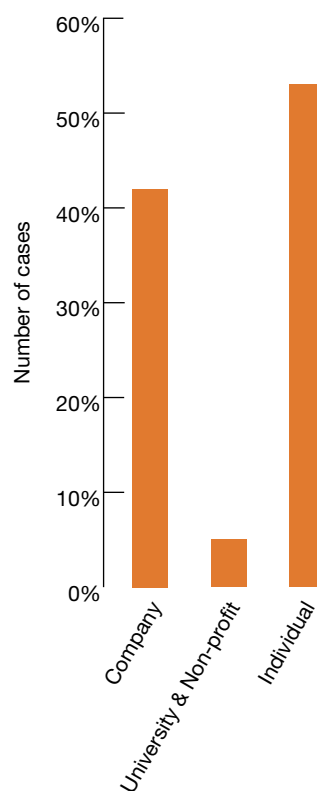


## Vast majority of NPE litigation involves company, individual NPEs

**Chart 10c**

Chart 10c outlines the distribution of NPE litigation over the last 16 years. The vast majority of NPE litigation, or about 95%, involves company and individual NPEs. While individual NPEs have the lowest median damages award and success rate, they represent the most frequent type of NPE litigant, accounting for more than half of all identified NPE decisions.

**Chart 10c. Distribution of cases by NPE type: 1995 to 2010**



## Our methodology

To study the trends related to patent decisions, PwC identified final decisions at summary judgment and trial recorded in two WestLaw databases, Federal Intellectual Property – District Court Cases (FIP-DCT) and Combined Jury Verdicts and Settlements (JV-ALL), and supplemented our data using PACER (Public Access to Court Electronic Records). The study focuses on 1,617 district court patent decisions issued since 1995. Key definitions for certain terms used throughout the study are listed here.

### *Term definitions*

- Cases decided at summary judgment include those district court patent infringement cases where a judge has issued a dispositive opinion regarding invalidity and/or infringement.
- Cases decided at trial include those district court patent infringement cases where an opinion was rendered by a judge or jury at trial.
- A ‘success’ includes instances where a liability and damages/permanent injunction (if included) decision was made in favor of the patent holder.
- ‘Time-to-trial’ is calculated from the complaint date to the first day of either the bench or jury trial for each case.
- A nonpracticing entity (“NPE”) is defined as an entity that does not have the capability to design, manufacture, or distribute products with features protected by the patent.

---

## Our authors

**Chris Barry** is a Partner in the Forensic Services practice of PwC, located in Boston, where he has worked for over 27 years. Before joining PwC, he gained several years' auditing experience with other major CPA firms. Mr. Barry earned a BA in accounting from Franklin & Marshall College and an MBA from the University of California at Berkeley, and is a CPA, holding the AICPA credential of Certified in Financial Forensics. Mr. Barry has worked extensively in the intellectual property field, including damage quantification and testimony in infringement actions, determining reasonable royalty rates, valuing IP for transaction purposes, and performing royalty audits for licensors with running rate agreements. He was listed as one of the world's top IP strategists in the 2009 iam250 publication, and is a member of the Licensing Executives Society. He has testified at trial roughly 50 times as an expert witness.

**Alex Johnston** is a Director in the Forensic Services practice of PwC in Atlanta. He has been involved in many aspects of economic damages analysis in commercial disputes. His experience includes providing discovery assistance, developing financial models, preparing financial analysis, analyzing opposing expert damage claims and providing expert testimony in federal court through deposition and trial. Mr. Johnston received his BA degree in Economics from Rollins College and holds an MBA and JD from the University of Florida.

**Ronen Arad** is a Director in the Forensic Services practice of PwC, in the Atlanta office. He has been involved in many aspects of economic damages analysis in intellectual property disputes, including providing expert witness services, preparing damages assessments, and analyzing opposing expert claims. Mr. Arad has also assisted with various financial consulting engagements, including licensing examinations of reported royalties, business valuations, and return on investment analyses. Mr. Arad is a Chartered Financial Analyst (CFA) charter-holder and holds a BS degree in Commerce with concentrations in Finance and Accounting from the University of Virginia.

**David Stainback** is a Director in the Forensic Services practice of PwC in Atlanta. He has experience providing economic and monetary damages analysis in areas including patent infringement, breach of contract, trademark infringement, and consumer litigation. Mr. Stainback also has significant experience in other areas of financial consulting, including valuation analysis, business analytics and financial modeling for decision-making purposes and enterprise-wide transformation. Mr. Stainback received his AB in Economics from Princeton University and holds an MBA from Duke University–The Fuqua School of Business.

**Landan Ansell** is a Senior Associate in the Forensic Services practice in Atlanta. He specializes in financial analysis and modeling and focuses on the valuation of economic damages for commercial disputes. Mr. Ansell earned a BBA with a concentration in accounting from Emory University and is a CPA.

**Mike Arnold** is a Senior Associate in the Forensic Services practice based in Boston. He focuses on dispute analysis in commercial litigation, including performing IP valuation and damage quantification services in patent matters. He holds a degree in Accounting from Oregon State University and is a CPA and a Certified Licensing Professional.

***To have a deeper conversation  
about how this subject may affect  
your business, please contact:***

**Chris Barry**

Partner  
PricewaterhouseCoopers  
(617) 530-6304  
christopher.c.barry@us.pwc.com

**Ted Martens**

Partner  
PricewaterhouseCoopers  
(646) 471-7340  
ted.martens@us.pwc.com

**Larry Ranallo**

Partner  
PricewaterhouseCoopers  
(214) 754-5298  
lawrence.f.ranallo@us.pwc.com

**Chel Tanger**

Principal  
PricewaterhouseCoopers  
(678) 419-8464  
chelton.d.tanger@us.pwc.com