

Who Feeds the Trolls?

Patent Trolls and the Patent Examination Process

Josh Feng (Harvard University)

Xavier Jaravel (Stanford University)

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*“It is critically important that the USPTO issue patents that are both **correct** and **clear**. [It] can help stimulate future innovation **without resorting to needless high-cost court proceedings.**”*

Blog by Under Secretary of Commerce for Intellectual Property and Director of the USPTO Michelle K. Lee, Friday, November 6 2015.

Motivation

- ▶ Large and growing costs of patent litigation, especially NPEs'
- ▶ Many initiatives related to examiners in ongoing *Enhanced Patent Quality Initiative* at USPTO
- ▶ Does examiner behavior actually matter for post-grant patent outcomes? How much?
- ▶ Why should we think that some high-cost court proceedings are “needless”?

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Our Findings

1. Examiners have a large effect on probability that granted patent is purchased by NPE or litigated

- ▶ Compare share of NPE patents and litigated patents across examiners in same artunit-year
- ▶ NPE purchase effect: 1 SD = 51% baseline rate
- ▶ Litigation effect: 1 SD = 62% baseline rate

2. Effect is driven by “lenient” examiners

- ▶ “lenient” = high allowance rates, low probability of examiner’s refusal to issue (RFE) and 12(b) refusals
- ▶ Suggests that most of variation in granted and NPE activity is due to variation in examiner’s propensity to grant patents

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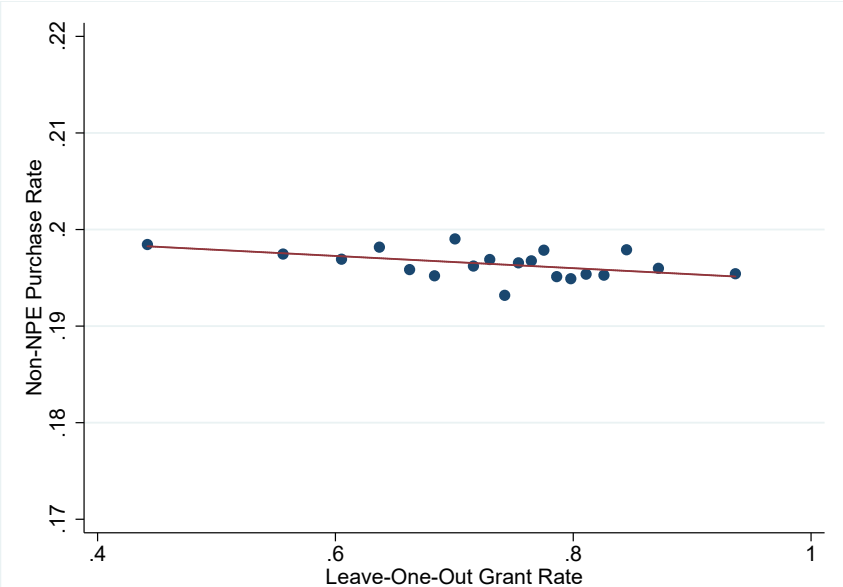
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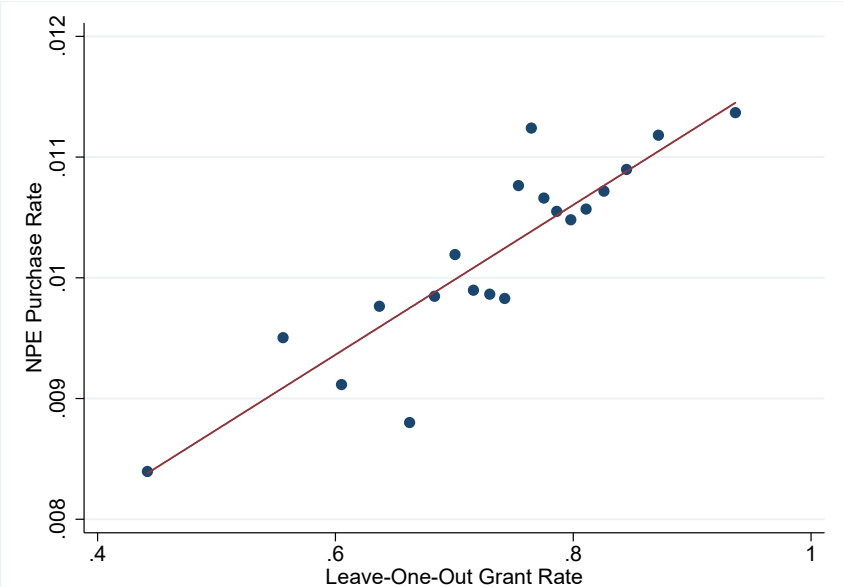
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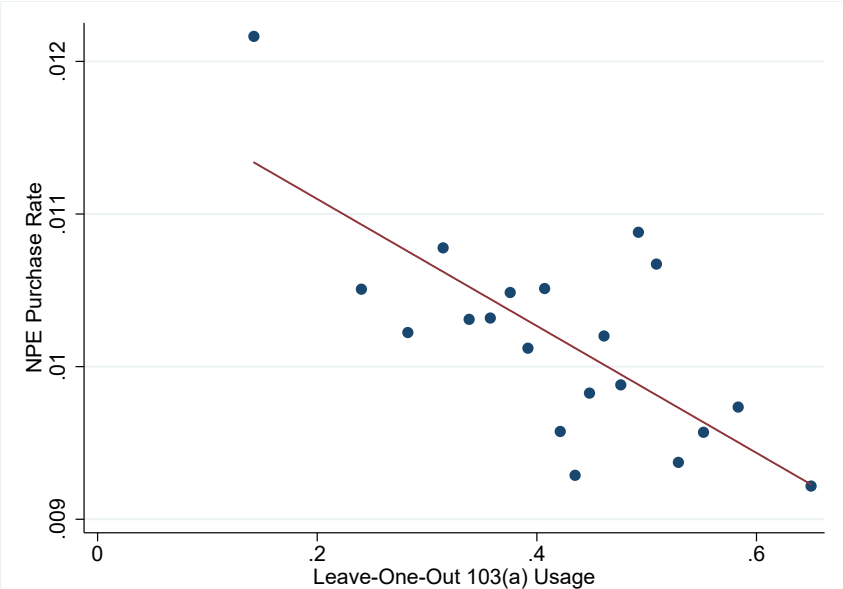
Patent Re-Assignment and Examiner Allowance Rate



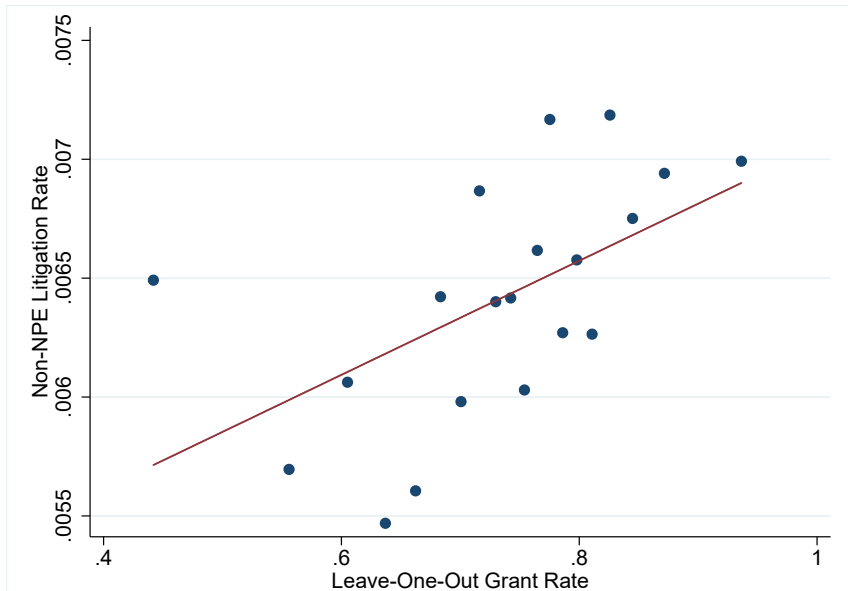
NPE Purchase and Examiner Allowance Rate



NPE Purchase and Examiner 103(a) Usage



Litigation and Examiner Allowance Rate



What Should We Do?

- ▶ Does problem lie with **examiner behavior** or with **statutes** in US Code Title 35?
 - ▶ Statutes may give examiners too much leeway
- ▶ We find that lenient examiners do not behave in accordance with patent law
 - ▶ PTAB reversal decisions
 - ▶ District court invalidity decisions
 - ▶ Board Patent Review institution
- ▶ Our calibration suggest very large returns to improving quality of examination process

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Second Part of Lecture

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Thanks!