

Thompson & Knight

ATTORNEYS AND COUNSELORS



35 U.S.C. §273

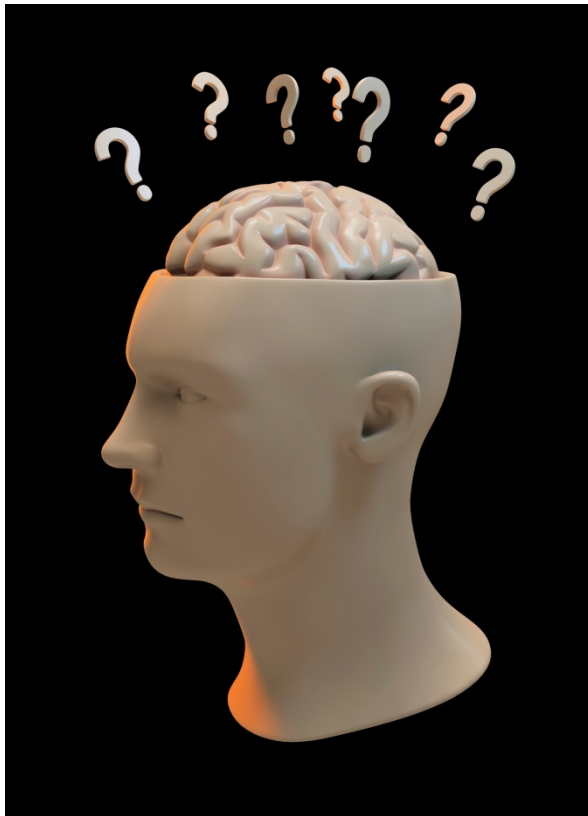
Software, Litigation, and NPEs

Overview

1. §273 Defense
2. Summary of Professor Vetter's Thoughts
3. Use in Litigation
4. Application to NPEs

§273

Defense based on doing it before the patentee



AIA moves to a first-to-file system

§273 - Pre AIA vs. Post AIA

Pre AIA	Post AIA
<ul style="list-style-type: none">• Business methods only• 1 year before effective filing date	<ul style="list-style-type: none">• Process, machine, manufacture, or composition of matter• 1 year before earlier of:<ul style="list-style-type: none">i. effective filing date; orii. public disclosure• Additional “commercial uses”• Limitations and exceptions

§273 - Limitations

- Use in the United States
- Commercial use
(Internal or Sale of Useful End Result)
- Specific to subject matter
- > 1 year
- Establish by clear and convincing evidence
- Personal defense
- Transferability
- Subject to abandonment
- Exceptional case if unreasonable

§273 - Advantages

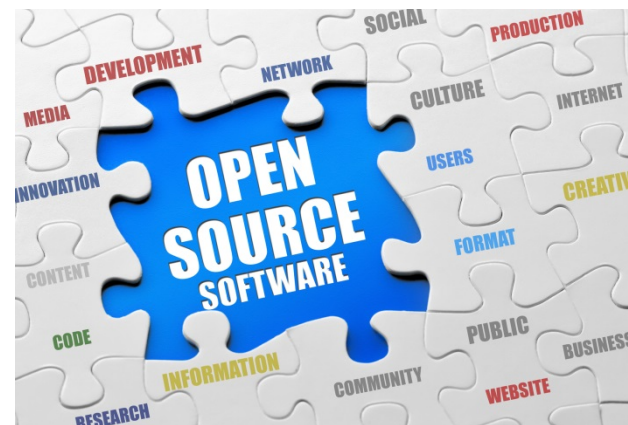
- Exhaustion
- Applies to variations in quantity or volume of use
- May also cover improvements

Professor Vetter's Thoughts

1. §273 requires interpretation for software



2. Impact of §273 on IP protection for software



Using the Defense

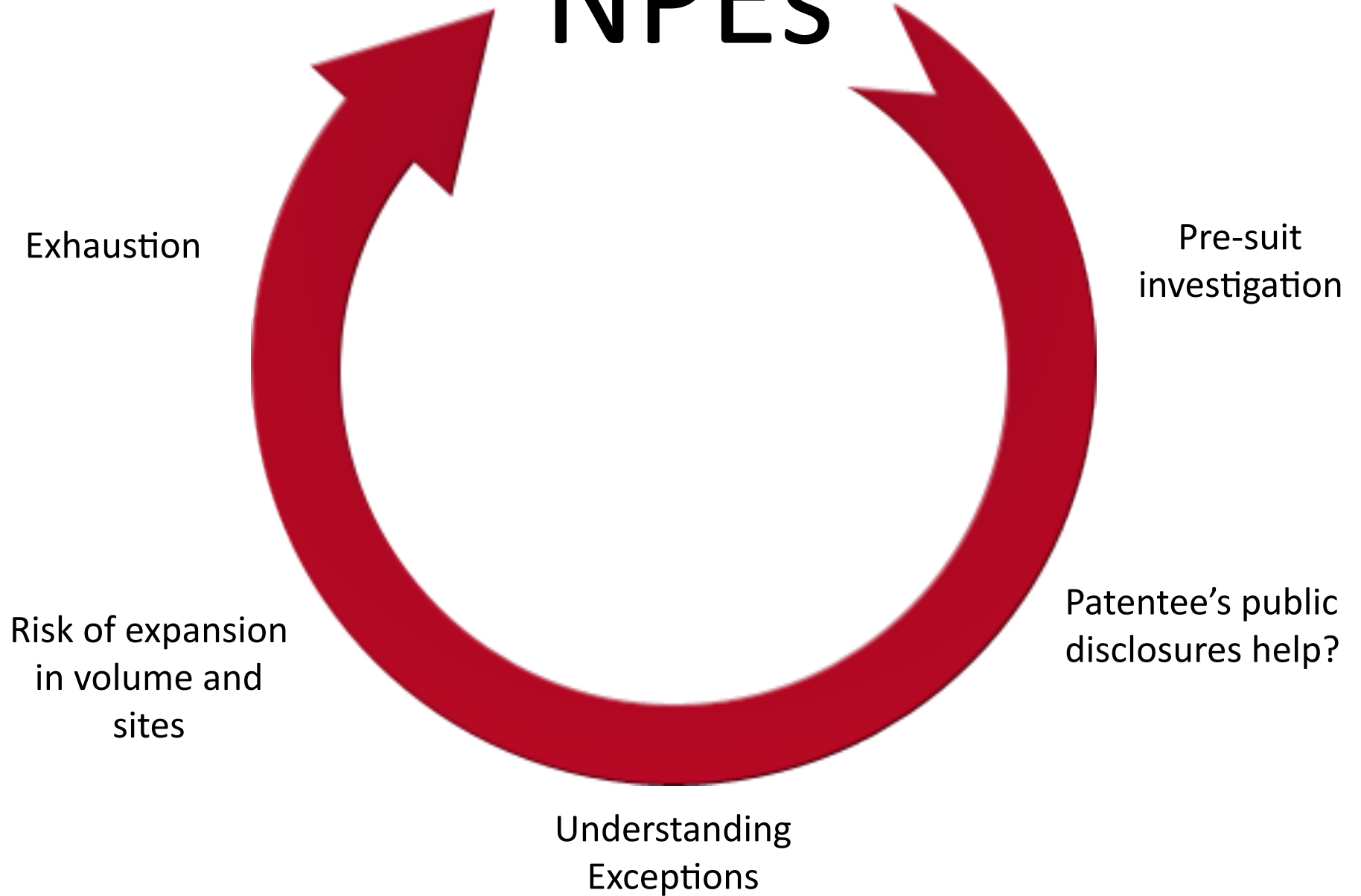
Aware of the Limitations and Exceptions

Clear and Convincing Evidence

- Accused product or method is subject of prior use
 - *Evans Cooling Sys., Inc. v. General Motors*
- Accused product or method not the subject of prior use
 - Keep detailed records?
 - Require vendors to keep detailed records?
 - Allow automatic updating of software?

Reasonable assertion of defense

NPEs





Thank you!

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