

DOWNHILL PATENT LAW HARMONIZATION WITH WHAT?

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Presented at the Forum on

The Overhaul of U.S. Patent Law

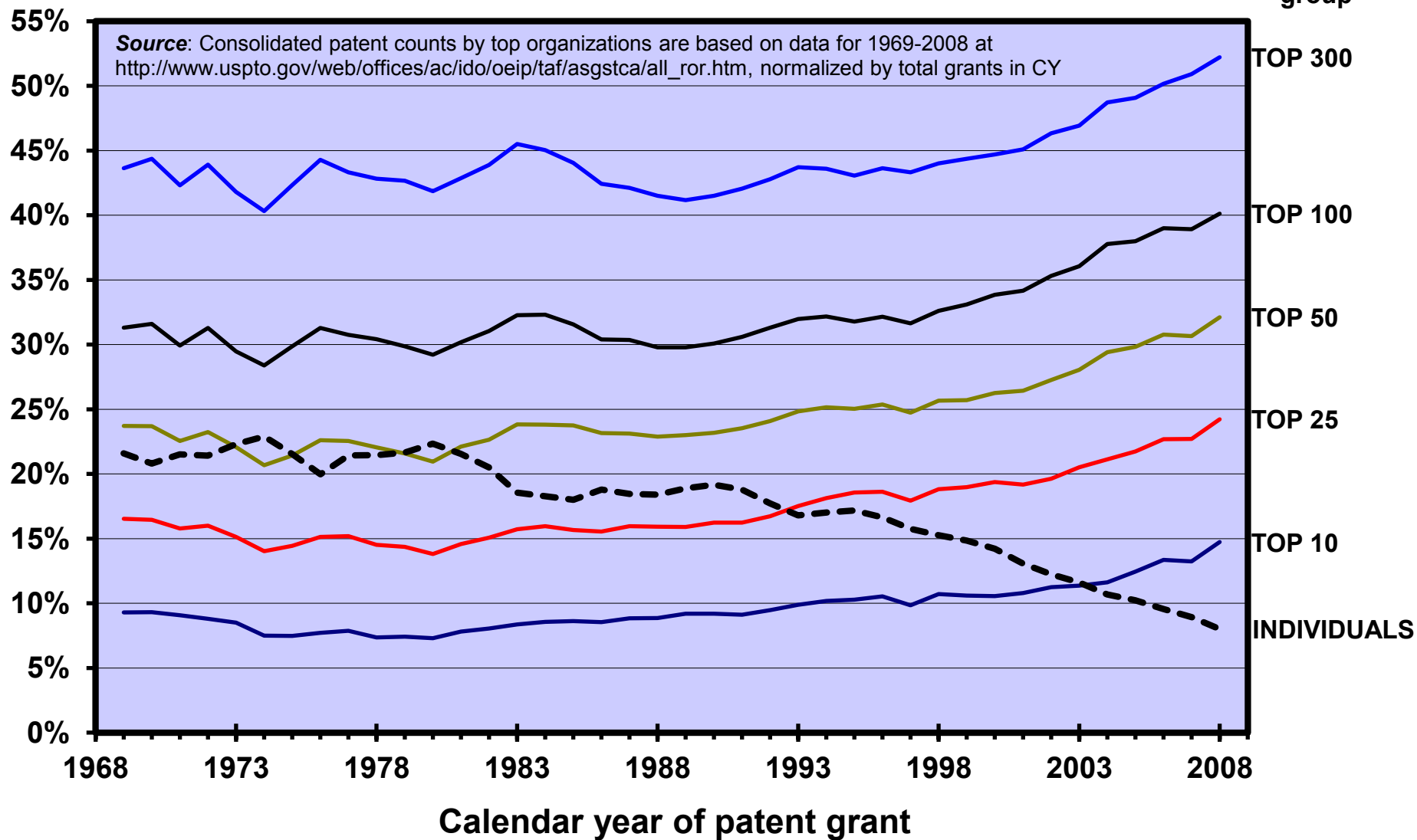
Washington D.C. August 30, 2011



Share of US patent grants to top patenting firms ranked by the number of patents awarded in the year shown

Share of all patents

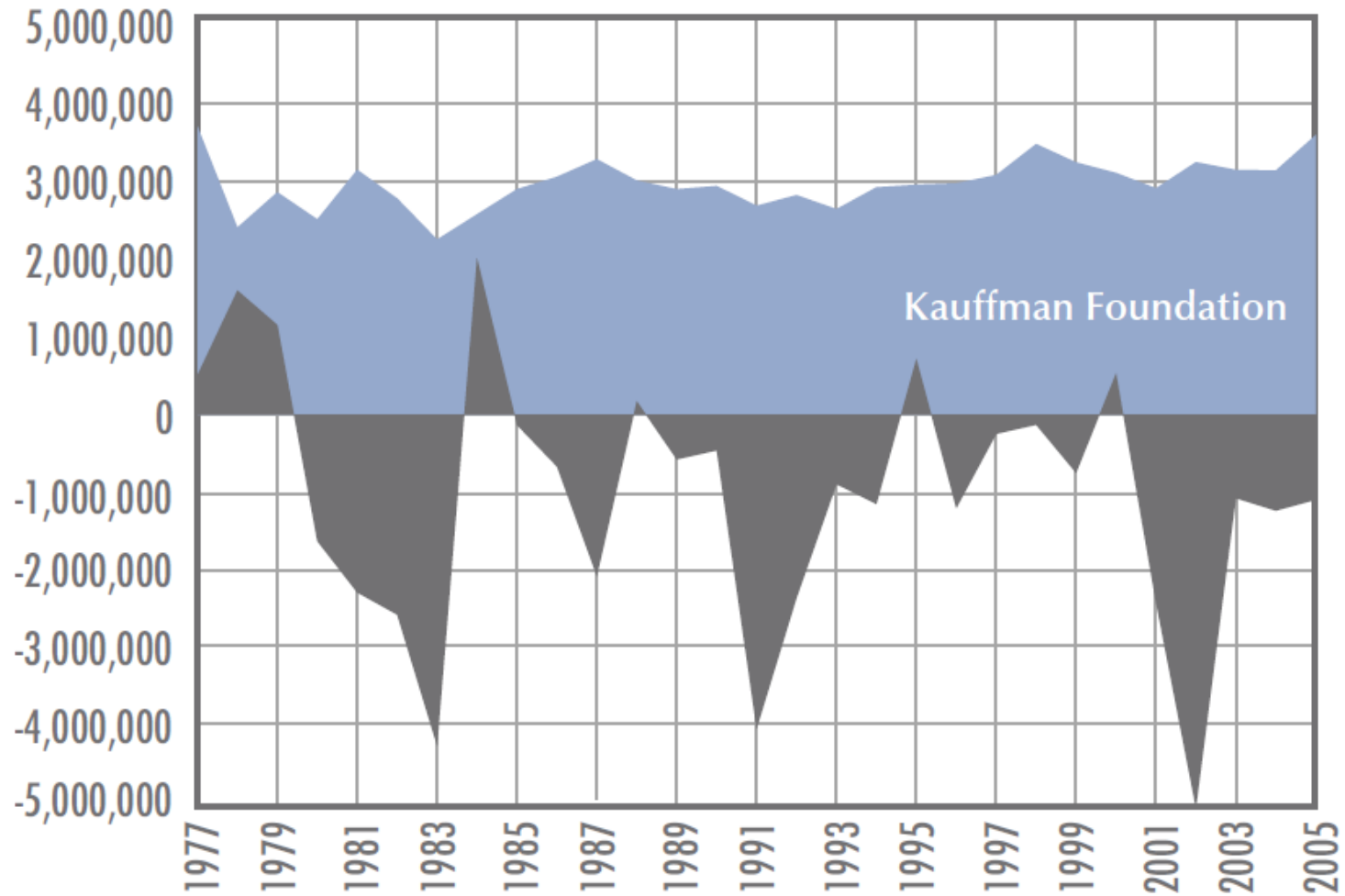
Patentees group



Is this a “Jobs bill”?

- NOT if one considers where most new jobs come from
- From startups and small business
 - They Oppose the bill
- Proponents of the bill are primarily large market incumbent multinational corporations
 - They contribute to net destruction of U.S. jobs
- These facts should be a clue as to the jobs effects of the bill.

Startups Create Most New Net Jobs in the United States

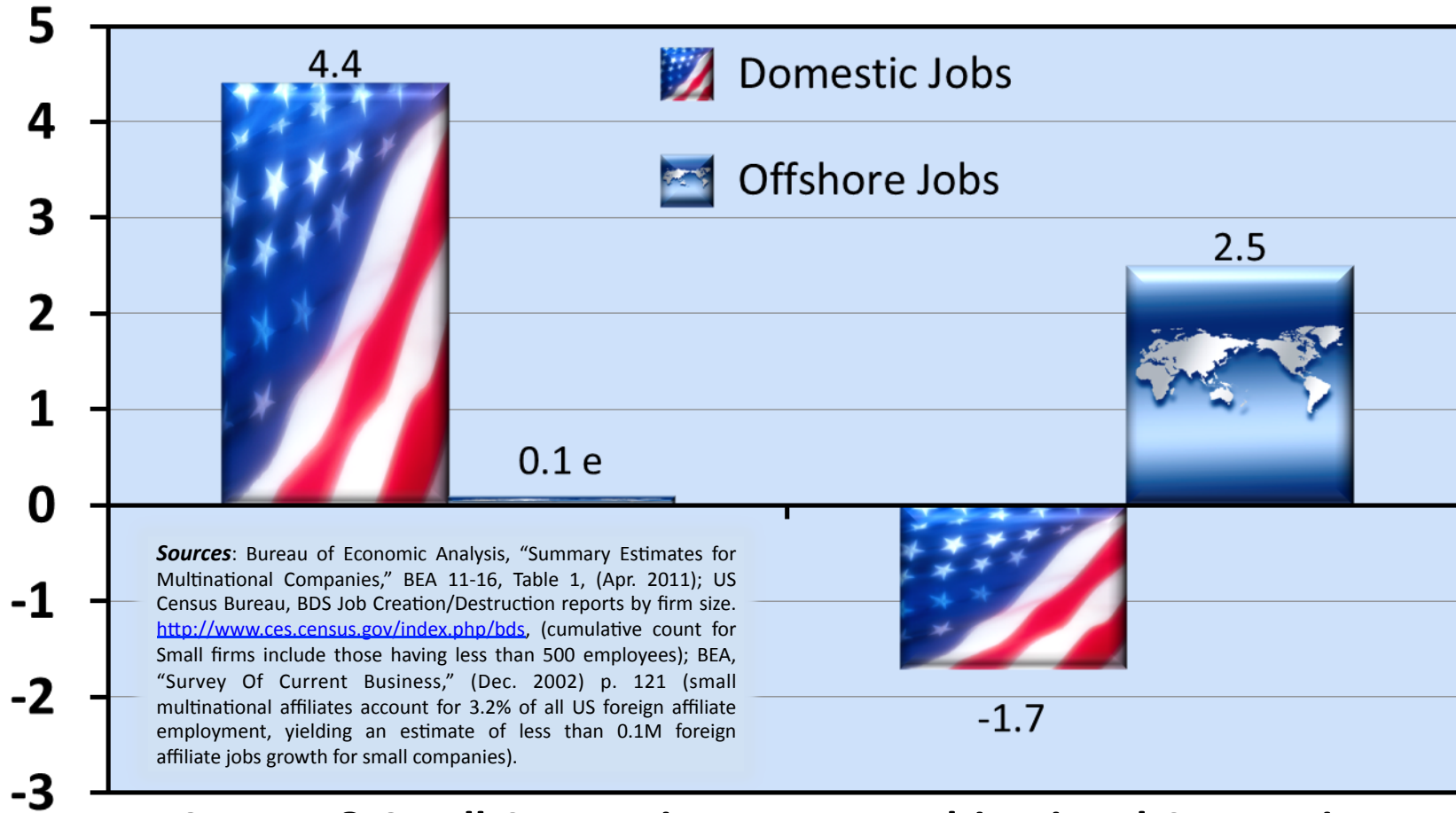


Source:
Kauffman Foundation
(July 2010)

■ Net Job Change - Startups
■ Net Job Change - Existing Firms

Domestic and offshore net job creation (or loss) by U.S. company types - 1999 to 2008

Jobs
(millions)



Sources: Bureau of Economic Analysis, "Summary Estimates for Multinational Companies," BEA 11-16, Table 1, (Apr. 2011); US Census Bureau, BDS Job Creation/Destruction reports by firm size. <http://www.ces.census.gov/index.php/bds>, (cumulative count for Small firms include those having less than 500 employees); BEA, "Survey Of Current Business," (Dec. 2002) p. 121 (small multinational affiliates account for 3.2% of all US foreign affiliate employment, yielding an estimate of less than 0.1M foreign affiliate jobs growth for small companies).

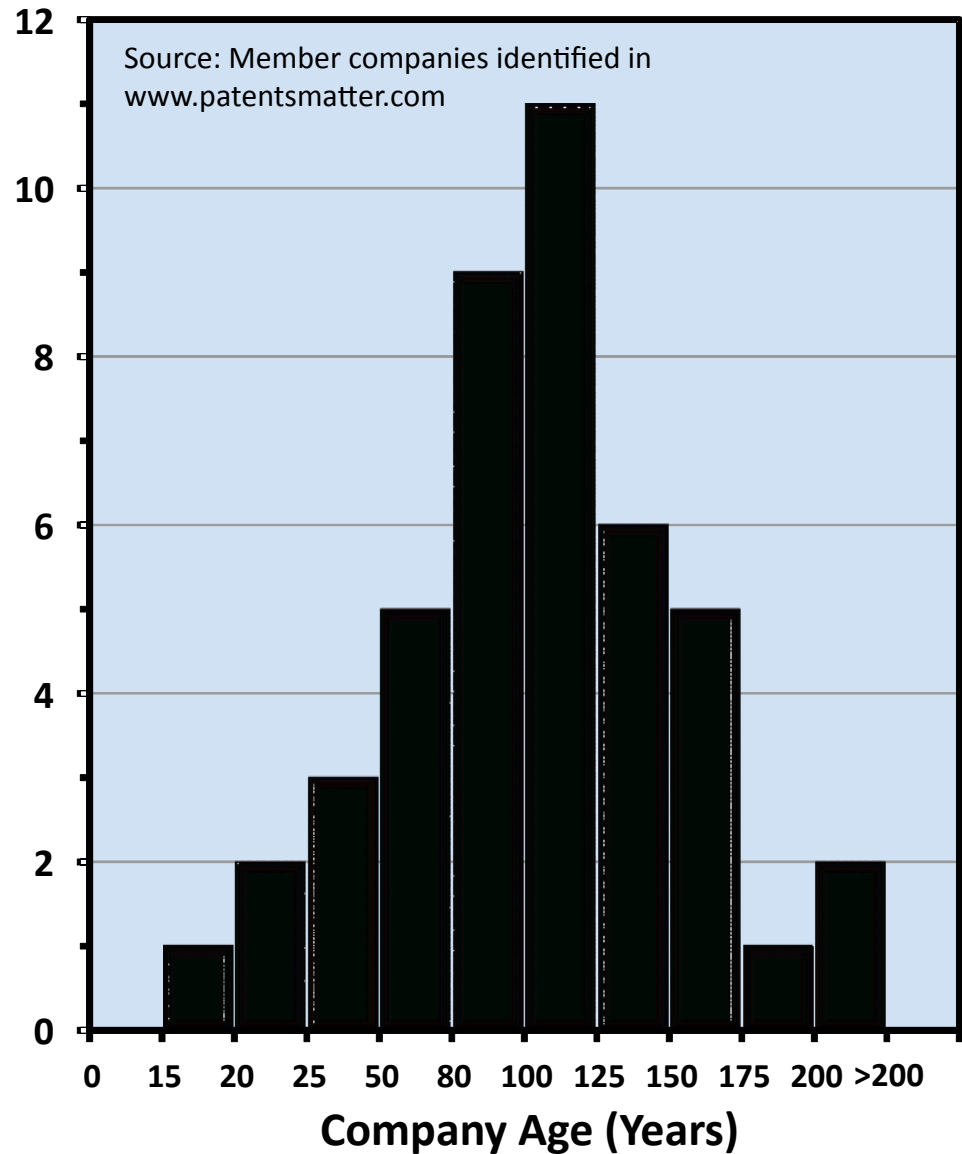
Startup & Small Companies
Primarily patent bill opponents

Multinational Companies
Primarily patent bill proponents

**21 CENTURY COALITION
IS AMONG THE MOST
ACTIVE PROPONENTS OF
HR 1249**

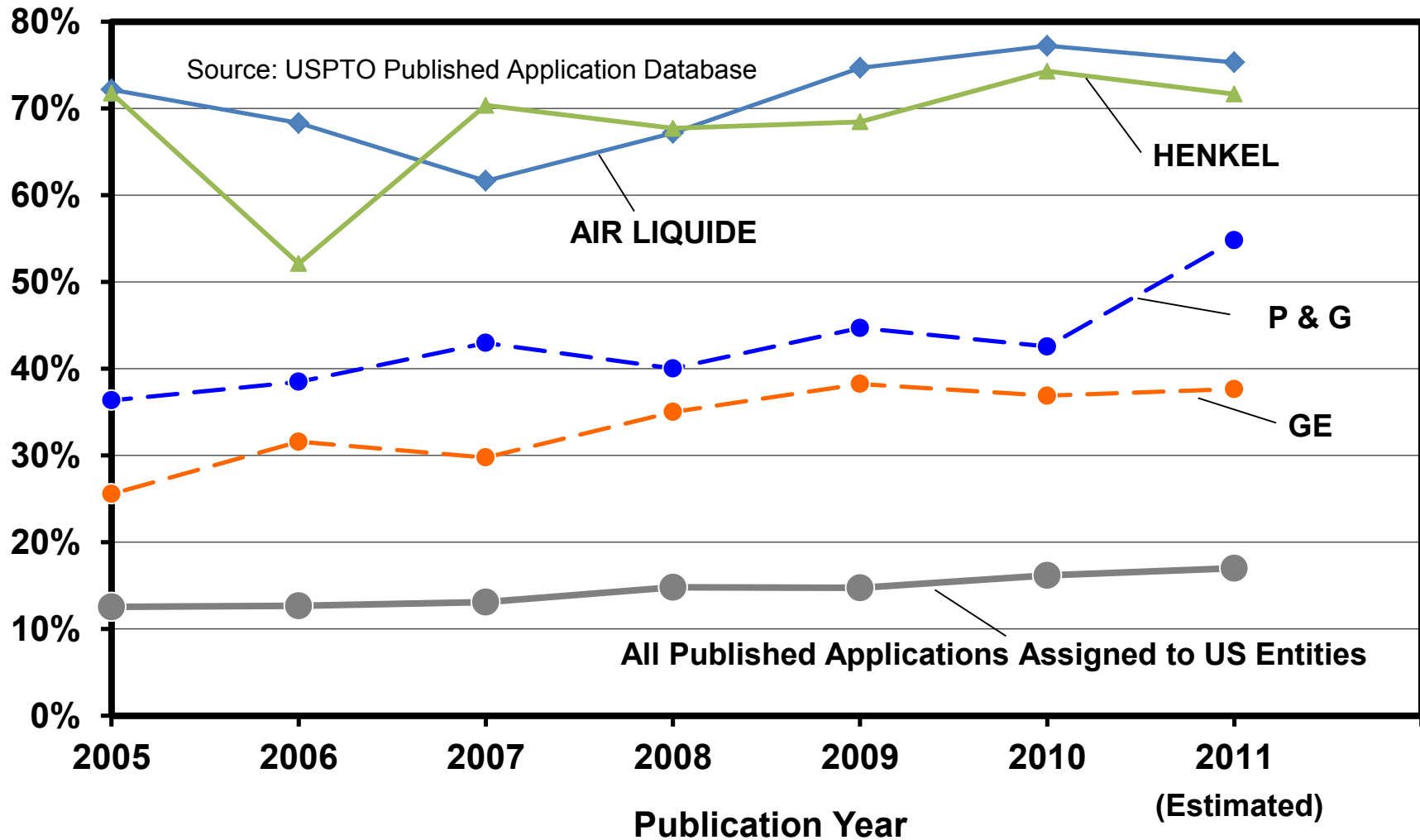
**- Member companies
have all of the
characteristics of entities
that have negative net
contribution to U.S. job
creation**

**Age of companies in the *Coalition*
for 21st Century Patent Reform**



THE TREND OF OFFSHORING INVENTION BY SAMPLE MEMBER COMPANIES OF THE 21C COALITION

Fraction of Published US Patent Applications of Selected Companies Having a Named Inventor Residing Abroad



Incentives for multinational firms to expand offshore R&D and testing which will be their defensive prior art

Current law:

35 U.S.C. § 102 *CONDITIONS FOR PATENTABILITY; NOVELTY AND LOSS OF RIGHT TO PATENT.*

A person shall be entitled to a patent unless —

(a)...

*(b) the invention was patented or described in a printed publication in this or a foreign country or in **public use or on sale in this country, more than one year prior to the date of the application** for patent in the United States.*

H.R. 1249 provides in pertinent part the following:

“102 (a) NOVELTY; PRIOR ART.—

A person shall be entitled to a patent unless—

*(1) the claimed invention was patented, described in a printed publication, or in **public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention;**”*

(Emphasis added)

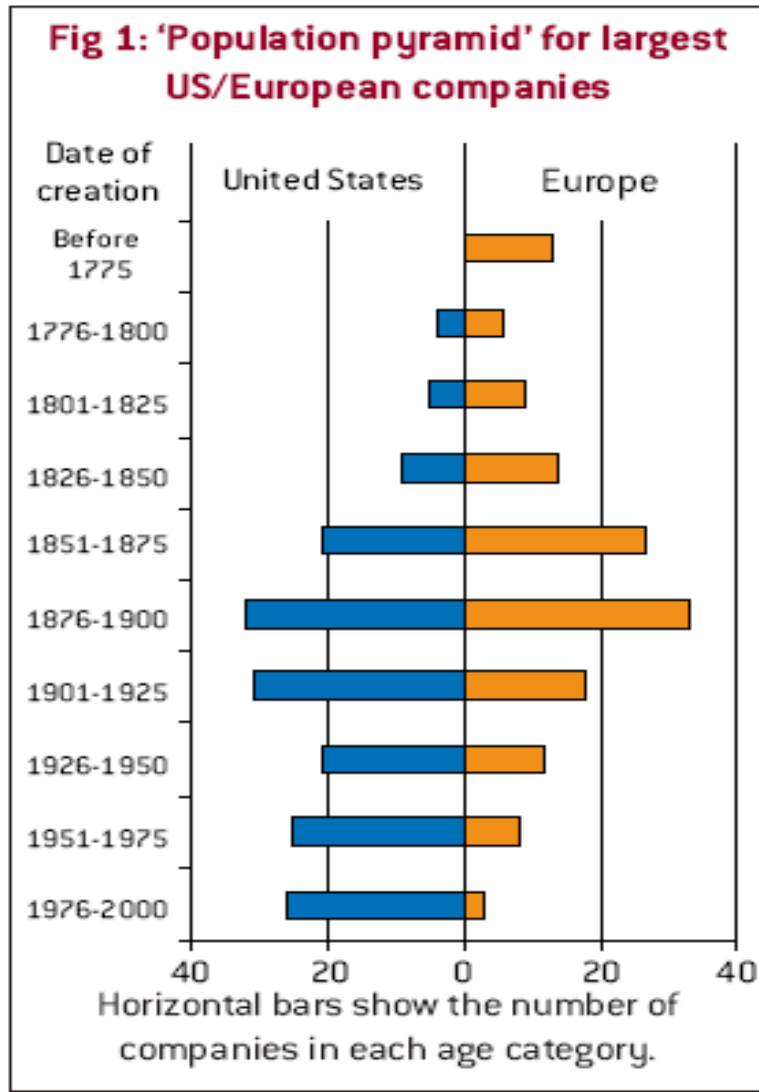
Supplemental Questions & Answers

- **Q:** The rest of the world (ROW) uses FTF; how can America go wrong by following their lead?
- **A:** Perhaps the ROW forgoes benefits by not following the proven American system with its inventor protections and Small Business orientation

Consider Europe, for example:

- Historical Lack of Substantial Small Business Protections
 - ❑ U.S. enacts Small Business Act in 1953 to encourage, develop, protect and assist small business growth. Europe discovers the need to do so only in 2008.
 - ❑ U.S. law provides for small-entity 50% patent fee structure. Americans understand that society *as a whole* benefits when *affordable* patent protections are extended broadly to all inventors – large or small. No European breaks to small patenting entities; governmental patent fees throughout its term in 13 EU states exceed \$100,000 (~ 10x that of U.S. costs)

Age distribution of top 500 firms



Source: Bruegel, based on FT Global 500 ranking of the world's largest listed companies, 30 September 2007.

- The Schumpeterian “creative destruction” is much more prevalent in the U.S.
- It has profound effects on the competitive dynamics that make patent protection essential for the startup innovators

Are Europeans 'blind' to Small Entity considerations?

- EC/EPO's considerations appear dominated by administrative conveniences
 - ❑ not wishing to verify or determine small-entity status, presuming abuse by applicants
 - ❑ High patent fees are admitted as tools to suppress purported "excessive" patent application filings
- Neither reasons appear consistent with the purpose of the patent system or with any accountability to constituencies that depend on patent protection

Are Europeans 'blind' to Small Entity considerations? (Contd.)

- While small businesses and startups in America complain about **threats** to the robust intellectual property system that has long protected them,
- European small businesses complain about **inability** to obtain such protection:
 - ❑ 82% of them indicated a need, or strong need, for improved IP protection. [see response to **Question 4.5** at http://ec.europa.eu/enterprise/newsroom/cf/document.cfm?action=display&doc_id=4072&userservice_id=1&request.id=0].

Are Europeans 'blind' to Small Entity considerations? (Contd.)

- Example: Estonia, Romania and Slovenia have had a grace period prior to joining the EPO after 2002. By such rules, have their original consideration for domestic constituencies been misplaced?
- How accountable are the EC and EPO to these countries' constituencies after they joined EPO?
- EC's grace period workshop had no participation of constituents most affected by eliminating the grace period. [see <http://ec.europa.eu/research/era/pdf/ipr-gp-report.pdf>. Of the 19 participants, **zero** participants were from a small business, a startup or an individual inventor].

Are Europeans 'blind' to Small Entity considerations? (Contd.)

- The fact that EC and EPO policy makers have not adopted certain patent policies originated in America, does not create a rebuttable presumption that such American policies are misplaced
- Rather, does it not mean that the EC and EPO policies are to be questioned, because they were made under ***a chain of accountability that is too long to trace to an affected constituencies?***

THANK YOU