PAE Reports: Paperwork Comment; Project No. P131203

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November 27, 2013

These comments are provided in support of the Federal Trade Commission's detailed proposal to obtain information from 25 patent assertion entities under the authority of Section 6(b). As an academic who has researched in this area, I believe that the proposed requests are necessary and appropriately tailored.

The proliferation of activity by patent assertion entities, both through lawsuits and pre-litigation, is a growing problem in the United States. Although undoubtedly a variety of assertion activity is legitimate and reasonable, much of the current business model appears to be based on exploiting fears of the costs and risks of litigation.

The sheer amount of modern patent assertion activity by patent assertion entities is noteworthy. Using the publicly filed information, my co-authors and I have been able to document that the percentage of lawsuits filed by those whose core business involves licensing and litigating patents has risen from roughly 25%

in 2007 to almost 60% in 2012.[1] That analysis has been confirmed by two other studies as well.[2] Similarly, in a study that looked at a narrower slice of the picture, the General Accounting Office (GAO) noted a significant but smaller rise over the same period.[3] The GAO sample included only patent assertion entities organized as corporations or partnerships but not those organized as trusts or operating as individuals.[4]

The data was reinforced by an examination not just of the number of lawsuits filed, but also of the number of defendants sued by those whose core activity involves licensing and litigating patents. This figure also grew substantially over the same 5-year period. I addition, detailed analysis of the monthly filing data shows that, while changes in the joinder rules brought about by the America Invents Act in 2011 reduced the number of defendants to some extent, the number is still far above the levels five years ago, and any disciplining effects from the Act appear to be waning. [5]

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[1] *See* Robin Feldman, Tom Ewing, & Sara Jeruss, *The America Invents Act 500 Expanded: The Effects of Patent Monetization Entities*, UCLA J. OF L, & TECH. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2247195

[2] *See* Colleen V. Chien, Patent Assertion Entities, Presentation to the DOJ/FTC Hearing on PAEs (December 10, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2187314 (using data from RPX Corporation and concluding that the percentage of litigation by non-practicing entities in 2012 has reached 62%); *See All About NPEs*, Patent Freedom, https://www.patentfreedom.com/about-npes/litigations (last visited Feb. 20, 2013).

[3] *See* United States Government Accountability Office Report, Intellectual Property: Assessing Factors that Affect Patent Infringement Litigation Could Help Improve Patent Quality, at 17 (August 2013). Excluding trusts and individuals can lead to an underestimate of related activity. For example, in the GAO's own sample of 500 cases, the party filing the largest number of cases over the period was a trust that is well known in patent assertion circles. *See* Sara Jeruss, Robin Feldman & Joshua Walker, *The America Invents Act 500: Effects of Patent Monetization Entities on US Litigation*, 11 DUKE TECH. L. REV. 357, 382 (analyzing the data that the authors provided to the GAO). For additional analysis of ways to categorize litigants, see Robin Feldman, *Patent Demands & Startups: The View from the Venture Capital Community, at* pp. 9-20, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346338

[4] *See id.* at p. 17, n. 35.

[5] *See* Feldman, Ewing & Jeruss, *supra* note 1, at pp. 55-73.

Other studies have tried to look, not only at publicly filed litigation data, but also at the pre-litigation activity. According to the White House Report on Patent Assertion & Innovation, estimates suggest that 90% of patent assertion activity never reaches the phase at which a lawsuit is filed.[6] Using samples and surveys, scholars have tried to examine this vast amount of activity. For example separate studies have documented the effects of patent demands on startup companies.[7] Other studies have estimated the billions of dollars companies spend on patent assertion each year and have concluded that very little of the vast amount of money changing hands ever flows back to the original patent holders or to research and development by the assertion entities.[8]

Documenting and understanding the extent and the nature of the problem, however, is tremendously difficult for lawmakers and regulators with the information that is currently available. Lack of information is particularly problematic for the 90% of patent demand activity that occurs outside the courthouse, for which there is no public record at all. Much of this activity is shrouded in non-disclosure agreements or hidden behind layers of shell companies. As I have described in detail in the past, the veil of secrecy means that government regulators in general, and the Federal Trade Commission's Section 6(b) power in

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[6] *See* 2013 White House Report on Patent Assertion & U.S. Innovation at p.6 (noting that conservative estimates place the number of patent threats last year at a minimum of 60,000 and more likely over 100,000). Approximately 3,500 patent infringement lawsuits were filed in 2011. *See* Feldman, Ewing, Jeruss, *America Invents Act 500 Expanded: Effects of Patent Monetization Entities,* (forthcoming UCLA J.L. & TECH. 2014).

[7] *See* Robin Feldman, *Patent Demands & Startup Companies: The View from the Venture Capital Community, supra* note 3; Colleen Chien, *Startups and Patent Trolls*, Report from the New America Foundation's Open Technology Institute, available at http://ssrn.com/abstract=2146251

[8] James E. Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 CORNELL L. REV. (forthcoming 2014), *available at, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2091210; see also* Fiona Scott Morton & Carl Shapiro, *Strategic Patent Acquisitions, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2288911.*

particular, provides the only effective approach for comprehensively analyzing the problem.[9]

Even with litigation activity, which is subject to public reporting, accurate assessment is difficult. Courts frequently are willing to seal documents, making it difficult for regulators to understand the details of the problem and to see patterns emerging. Public sources themselves are difficult to sort through and far from complete. For example, in trying to determine an entity's core activity, my co-authors and I have encountered remarkably confusing entity websites, in which it is difficult to determine whether an entity is currently producing products, and public databases that are less than complete.[10] It can take extraordinary digging for dedicated researchers to find even pieces of the problem from available information.

Difficulties such as these, and the complications of extensive shell companies and webs of beneficial interests, make it nearly impossible to fully understand the phenomenon in all its many manifestations. The questions identified by the Federal Trade Commission in its proposed inquiry are not unduly burdensome and are reasonably related to finding essential information. In particular, I encourage the Federal Trade Commission to consider not only the patents that an entity may own but also the patents in which the entity holds licensing rights sufficient that the firm would be able to assert the patent, either through an exclusive license or other licensing arrangement.

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[9] *See*, Intellectual Property Wrongs 18 Stanford Journal of Law, Business & Finance 250, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2127558 (including 30 pages of examples of troubling behavior in intellectual property assertion and encouraging an FTC Section 6(b) investigation).

[10] *See* Feldman, Ewing, Jeruss, *AIA 500 Expanded, supra* note 1 (noting that with two-thirds of the patents that have been asserted in lawsuits in the relevant period, one would not be able to tell that from the Patent and Trademark Office's primary information location related to that patent).

We cannot solve what we cannot see, and the actions of the Federal Trade Commission are a necessary component of providing, not just immediate stopgap measures, but long-term, rational, comprehensive solutions to the full range of problems. Federal Trade Commission Section 6(b) inquiries historically have helped lawmakers craft important legislation, as well as leading to voluntary industry restraints.[11] The questions in the propose inquiry are a rational and reasonable approach to understanding a complex problem—a problem that must be managed carefully to avoid damaging the patent system and the flourishing innovation ecosystem that it supports.

[11] *See* Feldman, *Intellectual Property Wrongs, supra* note 9, at pp. 312-317.