

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex J)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Commissioners:

On behalf of the undersigned, we submit this letter to strongly support the FTC's proposed Section 6(b) study of PAE activity. The FTC should subpoena nonpublic information to help it gain a better understanding of PAE activities as outlined in the Notice and Request for Public Comment dated October 3, 2013 ("the Notice").

As requested by the FTC in the Notice, we offer comments in each of the four areas outlined below.

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the FTC, including whether the information will have practical utility

The FTC seeks to prevent anticompetitive and unfair business practices while furthering public understanding of the competitive process. By performing the proposed Section 6(b) study, the FTC would take a prudent and important step to further these goals as they relate to PAE activity. As recognized in the Notice, PAE litigation has become more prevalent in recent years and has created a tremendous imprint on the competitive marketplace. But, as the FTC also recognized, a lack of empirical data undermines efforts to fully understand the costs and benefits of PAE activity.

Any activity playing such a large a role in the marketplace should be understood at a level commensurate with its impact. PAE activity is no exception, and the FTC is uniquely situated to help fill the knowledge gap. Armed with the information it collects and the conclusions it draws as part of the Section 6(b) study, the FTC can make invaluable practical contributions to the policy debate regarding PAEs.

(2) The accuracy of the FTC's estimate of the burden of the proposed collection of information

The FTC's estimates of the number of hours required to respond appear reasonable. Any entity in the business of asserting patents should have most of the requested information reasonably available to it. Moreover, the requested information overlaps significantly with what a PAE would have to prepare in connection with asserting and litigating a patent. For patents that have already been litigated, the PAE most likely would have already produced much of the requested information to its opponent during discovery, and it should be readily available. And for patents that have not yet been litigated, the burden placed on PAEs by this study should be evaluated in light of the likelihood the PAE will have to prepare much of the same information if it asserts those patents in the future.

If a PAE does not have much of the requested information reasonably available to it, that in itself is concerning because it suggests the PAE does not adequately track its only area of business. Those situations would only highlight the importance of the FTC's investigation.

(3) Ways to enhance the quality, utility, and clarity of the information to be collected

In addition to the areas identified in the Notice, the FTC should consider requesting additional information about how PAEs initiate their acquisition activities. While the requested information already covers the contractual and financial details of the acquisitions, the FTC should investigate whether the patents are acquired from patent owners already looking to sell, or whether the PAEs are creating their own opportunities by making uninvited offers to holders of inactive portfolios.

Further, the FTC should investigate how PAEs form a reasonable belief of infringement before initiating an assertion activity. For example, in Request F.1.a.(c), the FTC should also ask what proportion of the total investigative effort corresponds to activities before the PAE asserted its patent. The FTC should also inquire into the professional qualifications of PAE personnel doing the infringement research, including whether this work is performed by lawyers or non-lawyers, and whether and how this work is outsourced.

The FTC should request additional information about how PAEs fund their activities. For both publicly-traded and privately-held PAEs, the FTC should ensure that the information it collects accurately identifies the parties actually controlling the activities, taking the risks, and reaping the rewards.

Finally, PAEs should be encouraged to volunteer specific evidence showing their activities promote the constitutional purposes of the patent system, if that evidence exists, to aid the FTC in making policy recommendations.

(4) Ways to minimize the burden of collecting information

While the scale and importance of the issue proposed for study makes the estimated burden reasonable, the FTC could minimize the burden of collecting information in several ways. First, because PAEs are in the litigation business, the demands on their time are likely unpredictable and varied. The FTC should give the PAEs a reasonable amount of time to respond to its requests, and grant reasonable extensions of time available, especially where its demands conflict with litigation-related demands. Second, the FTC should consider preparing a response template and including it with the subpoenas. Using a common template for responses would both help the respondents by saving them some preparation time, and help the FTC by making it easier to collect, compare, and analyze responses.

In conclusion, we fully support the FTC's important research on PAE activity and believe it is well worth the burdens it may impose.

Respectfully submitted,

SAS Institute Inc.
Timothy K. Wilson
Senior IP Counsel

Limelight Networks, Inc.
Dion Messer
Senior Intellectual Property Corporate Counsel

VIZIO, Inc.
Jerry C. Huang
VP – Legal Affairs

Newegg Inc.
Lee Cheng
Chief Legal Officer and Senior Vice President of Corporate Development

Citrix Systems, Inc.
Antonio Gomes
Vice President and Deputy General Counsel

Xilinx, Inc.
Justin Liu
Senior Director, Intellectual Property

ABBYY USA Software House, Inc.
Peter J. Kirk
Associate General Counsel / Director of Litigation

Altera Corporation
Brian H. Way
Director of Intellectual Property