Public Policy Forum on the FTC Study on Patent Assertion Entities
Washington, D.C.
October 13, 2016
Opening Remarks of Commissioner Terrell McSweeny

Good afternoon. I would like to thank the Searle Center of Law for sponsoring this forum on the FTC's study on Patent Assertion Entities (PAEs) and for inviting me to provide opening remarks today. It is a pleasure to be here this afternoon with Judge Ginsburg, Mark Lemley, and Anne Layne Farrar. I would also like to commend Suzanne Munck for leading this important project and to thank FTC staff for all their hard work.

While the Commission vote on the FTC's PAE study was unanimous, I should note that the views I am expressing today are my own and do necessarily reflect the views of the Commission or of any other Commissioner.

The PAE Study

Let me start with a scoping exercise. The FTC's PAE study did not collect data about every single PAE in the United States – in fact, I'm not even sure we would know where to start if that had been our goal. Instead, our focus was on studying a variety of PAEs in great detail.

We analyzed 22 PAEs, hundreds of affiliates that also asserted patents, and more than 2,000 related entities that held patents but did not assert them – covering approximately 75 percent of PAE patents held during the six year period (January 2009 – September 2014) that we studied.[1]

Our goal was to shed light on activity that was virtually opaque save publicly available litigation data – and to help inform the policy debate over the impact on innovation of PAE activity. I believe we achieved those goals.

Key Observations

First, as described in the report, the FTC observed two types of PAE business models: Portfolio PAEs and Litigation PAEs.

Portfolio PAEs negotiate licenses covering large portfolios, frequently without first suing the alleged infringer. They account for 9 percent of the reported licenses in the study – and generated 80 percent of the reported revenue ($3.2 billion).[2]

[1] *See* FED. TRADE COMM'N, PATENT ASSERTION ENTITY ACTIVITY, AN FTC STUDY 2 (Oct. 2016), https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study.pdf

[2] *See id* at 3.

Litigation PAEs typically have small portfolios (often containing fewer than 10 patents) and sue licensees before entering into license agreements. These agreements are typically small – usually less than $300,000 – or, probably not coincidentally, the lower bound of early-stage litigation costs. They accounted for 96 percent of the cases, 91 percent of the reported licenses, and just 20 percent of the reported revenue (about $800 million).[3]

The PAEs observed in the study were focused on acquiring and asserting information and communications technology patents – more than 75 percent of which were software-related. They asserted these patents against firms in a broad range of industries including not just product manufacturers but also the end-users of the products.[4]

Litigation PAEs also behaved differently than the wireless manufacturers in the study. They were much more likely to assert their patents through litigation, bringing 2.5 times more patent infringement cases involving wireless patents than all other studied groups (Wireless Manufacturers, NPEs, Portfolio PAEs) combined.[5]

Implications of Report for Policy Makers

So what are the implications of these findings for policy makers? First, an important note about what we didn't track down as a part of our study: the revenue PAEs share with inventors and the costs of assertion activity. While we attempted to evaluate the effect of PAE activity in promoting patent monetization for inventors and innovation, we found that the data keeping practices of the entities made it impossible to make any meaningful comparisons.

However, a number of our findings suggest, in my view, that the value of PAE conduct to innovation is relatively low.

While many PAEs share revenue with named inventors, the data was not reliable enough to draw conclusions about the about of revenue shared – so there was really no way to test PAE efficiency.

Moreover, 93 percent of Litigation PAE licenses followed suit against the licensee. These licenses typically yielded total royalties of less than $300,000, the approximate lower bound of early stage-litigation cases – basically consistent with nuisance value threshold.[6] They also settled relatively early in litigation – generally within the first six months to a year. This looks like a sue-and-settle model.

Importantly, the FTC did not observe massive demand letter campaigns, where demand letters were sent to thousands of targets. As I've noted, assertion behavior tended to take the form of infringement litigation.

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[3] *See id* at 4.

[4] *See id* at 57.

[5] *See id* at 142.

[6] *See id* at 120.

This suggests, as the report points out, that litigation reforms may be helpful if they: address discovery burden and cost asymmetries in PAE litigation; provide the courts and defendants with more information about the plaintiffs filing the suits; streamline multiple cases; and provide sufficient notice of infringement theories as courts continue to develop heightened pleading requirements for patent cases.[7]

Since a significant portion of PAE targets appear to be end-users, policy makers should also consider encouraging stays of PAE actions against customers and end-users.

Conclusion

While this report does not purport to answer all the questions raised by PAE activity, my hope is that policy makers and courts will find the information in it helpful as they continue to consider the impact of PAE activity on competition and innovation. Thank you.

[7] *See id* at 9.