BEFORE THE FEDERAL TRADE COMMISSION
WASHINGTON, D.C.

In the Matter of **AGENCY INFORMATION COLLECTION ACTIVITIES; PROPOSED COLLECTION; COMMENT REQUEST**	**PAE Reports: Paperwork Comment; Project No. P131203**

COMMENTS OF PUBLIC KNOWLEDGE, THE ELECTRONIC FRONTIER FOUNDATION, AND ENGINE ADVOCACY

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December 16, 2013

**COMMENTS OF PUBLIC KNOWLEDGE,
THE ELECTRONIC FRONTIER FOUNDATION,
AND ENGINE ADVOCACY**

Public Knowledge, the Electronic Frontier Foundation, and Engine Advocacy[1] support the proposal of the Federal Trade Commission (FTC) to use its authority under Section 6(b) of the Federal Trade Commission Act[2] to collect information regarding the business practices of patent assertion entities (PAEs) and other entities asserting patents.

In brief, Public Knowledge, EFF, and Engine encourage the FTC to conduct this study as expediently as is practical, in the manner set forth in its Notice and Request for Public Comment dated October 3, 2013.[3] Public Knowledge, EFF, and Engine support the proposed study for at least the following three reasons. First, the Section 6(b) study would generate substantial empirical data particularly useful not only to the FTC for carrying out its mission of protecting consumers, but also to businesses, researchers, and policymakers.[4] Second, the FTC is well suited to conduct its proposed study under Section 6(b), as demonstrated by previous related studies. Third, the study would impose a minimal, reasonable burden on the entities being studied, a burden that is greatly outweighed by the information to be gleaned from them.

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[1] Public Knowledge is a nonprofit public interest organization whose primary mission is to promote technological innovation, protect the rights of all users of technology, and ensure that emerging issues of technology law serve the public interest. The Electronic Frontier Foundation (EFF), a nonprofit civil liberties organization with over 24,000 active members, has worked for more than 20 years to protect consumer interests, innovation, and free expression in the digital world and to promote a proper balance between rights holders and the public interest. Engine Advocacy is a nonprofit organization, which has built a coalition of more than 500 businesses and associations, pioneers, innovators, investors, and technologists, and supports the growth of technology entrepreneurship through economic research, policy analysis, and advocacy.

[2] Section 6(b) is codified at 15 U.S.C. § 46(b).

[3] *See* 78 Fed. Reg. 61,352 (Oct. 3, 2013) ("*PAE Notice*").

[4] This of course does not mean that legislative efforts should be stalled in view of the proposed study. Many of the harms of PAE activity are well known and already amenable to legislative reform. As Chairwoman Ramirez has noted, "Commission activity, on both the policy and enforcement side, should be part of a much broader response to flaws in the patent system that fuel inefficient behavior by PAEs and other firms." Edith Ramirez, Remarks at ABA Antitrust Section's Intellectual Property Committee 5 (Nov. 12, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/remarks-chairwoman-edith-ramirez-fall-networking-event-aba-antitrust-sections-intellectual-property/131112er-ip-committee.pdf. Thus, with regard to the many PAE activities that are already clearly abusive, Congress can and should act now.

I. Because Current Information Is Limited, the Understanding Gained from the Proposed Section 6(b) Study Would Be Valuable for the FTC and the Broader Public

Because information on the nature of PAEs, their patent portfolios, and their activities currently remains limited, information gained from the proposed Section 6(b) study would be particularly helpful for everyone, including individual consumers, small businesses, policymakers, and the public.

What is publicly known largely consists of lawsuits filed in court and anecdotal information from those targeted by PAEs.[5] Broad empirical data often remains lacking, as noted by stakeholders as diverse as the Retail Industry Leaders Association[6] and the Innovation Alliance.[7] Thus, while we know a problem exists, we have reason to believe the scope is even larger than what has already been reported. Panelists at the Patent Assertion Entity Activities Workshop accordingly recommended that the FTC use its Section 6(b) authority to gather empirical data. Section 6(b) requests have been previously used to gain a much better understanding of potential problems by gathering important data,[8] and this

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[5] *See, e.g., Trolling Effects, available at* http://trollingeffects.org (last visited Dec. 4, 2013). *Trolling Effects*, a project of Public Knowledge and EFF, among others, serves as a useful collection of what demand letters look like but remains far from comprehensive. Likewise, scholars have produced notable research on PAE practices and their impact, but the public record is still incomplete. *See, e.g.*, Colleen V. Chien, *Patent Assertion and Startup Innovation*, Open Technology Institute (Sept. 2013), http://newamerica.net/sites/ newamerica.net/files/policydocs/Patent%20 Assertion%20and%20Startup%20Innovation.pdf; Colleen V. Chien, *Startups and Patent Trolls*, 16 Stan. Tech. L. Rev. (forthcoming 2013), *available at* http:// papers. ssrn. com/ sol3/ papers.cfm? abstract_id= 2146251; Sara Jeruss, Robin Feldman & Joshua Walker, *The America Invents Act 500: Effects of Patent Monetization Entities on US Litigation*, 11 Duke L. & Tech. Rev. 357 (2012); Robin Feldman, Thomas Ewing & Sara Jeruss, *The AIA 500 Expanded: Effects of Patent Monetization Entities*, 17 UCLA J.L. & Tech. (forthcoming 2013), *available at* http :// papers. ssrn. com/ sol3/ papers.cfm?abstract_id=2247195.

[6] Comments of Retail Industry Leaders Association in Patent Assertion Entity Activities Workshop, at 3 (Apr. 5, 2013), *available at* http://www.ftc.gov/os/comments/pae/pae-0053.pdf ("[L]ack of transparency is a key enabler of patent trolls' strategies.").

[7] Comments of Innovation Alliance in Patent Assertion Entity Activities Workshop, at 2 (Apr. 5, 2013), *available at* http://www.ftc.gov/os/comments/pae/pae-0052.pdf ("We believe that policymaking should be based upon evidence and data, and that there is a lack of sufficient evidence and data to support making the major changes to the law that some are proposing.").

[8] *See, e.g.*, Fed. Trade Comm'n, *A Review of Food Marketing to Children and Adolescents: Follow-Up Report* 1-2 (2012), *available at* http://ftc.gov/os/2012/12/ 121221foodmarketingreport.pdf (*"2012 Food Marketing Report"*); Fed. Trade Comm'n, *Generic Drug Entry Prior to Patent Expiration:*

proposed Section 6(b) study should likewise improve the public's understanding of PAEs and *ex post* transactions.[9]

Individuals and small businesses would benefit from the research produced by the FTC by being able to understand much more fully what they actually face when presented with a demand letter alleging patent infringement and threatening legal action. For example, negotiations between demand letter senders and recipients would occur on a more level playing field. Those not targeted by demand letters would also better understand how to identify and work around patents and, thus, potentially avoid unnecessary and costly lawsuits. Finally, the FTC's interest in abusive demand letter practices may induce PAEs send fewer abusive demand letters to the economically vulnerable on the weakest of claims. PAEs that are currently taking a shotgun approach of "demand first and investigate later" might select their cases more judiciously, thus, reducing the prevalence of abusive demand letters.

Those interested in patent, competition, and consumer protection policy would likewise find the information useful. As the FTC noted in its request for comments, panelists and commenters for the Patent Assertion Entity Activities Workshop last year identified potential harms but lacked empirical data that could enrich the debate regarding PAE activities.[10] Quality empirical data, even in the aggregate, would empower various parts of the government, including the FTC, United States Patent and Trademark Office (USPTO), the International Trade Commission, and the Executive Office of the President, to formulate sounder policies to preserve competition and protect consumers.[11] Groups

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An FTC Study 3 (2002), *available at* http:// www. ftc. gov/ os/ 2002/ 07/ genericdrugstudy. pdf ("*Generic Drug Report*"); Fed. Trade Comm'n, *Self-Regulation in the Alcohol Industry* 1 (2008), *available at* http://ftc.gov/os/2008/06/080626alcoholreport.pdf.

[9] This will be so even if the FTC does not publish the particular demand letters and other specific information collected from the proposed study, as it probably should do. Reporting of the aggregate information would certainly prove widely useful.

[10] *PAE Notice* at 61,353 ("While workshop panelists and commenters identified potential harms and efficiencies of PAE activity, they noted a lack of empirical data in this area, and recommended that the Federal Trade Commission use its authority under Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. 46(b), to collect information on PAE acquisition, litigation, and licensing practices.").

[11] *Cf.* John "Jay" Jurata Jr., *Guest: FTC Should Avoid 'Caddyshack' Approach with Patent Trolls*, THE SEATTLE TIMES (July 8, 2013, 10:53 AM), *available at* http://seattletimes.com/html/opinion/

outside of government, too, would be more able to pinpoint accurately the problems with demand letter campaigns and suggest solutions tailored to protecting consumers while preserving a competitive and vibrant innovation economy.

Accordingly, this data will be valuable to numerous parties, ranging from individual businesses to national policymakers. As the FTC is certainly aware, Congress, the Administration, and the courts are all currently considering patent reform. This attention to patent reform is likely to continue into the foreseeable future. Accordingly, the FTC's information will have immediate value, and the FTC should aim to produce this information as soon as possible in order to contribute to this ongoing discussion.[12]

II. The FTC Is Well-Suited to Discover Exactly How Patent Assertion Entities Impact Consumers and Businesses

The FTC is the ideal body to conduct a study of patent assertion entities as it has proposed. First, the FTC's authority under Section 6(b) would be well applied to the practices of the PAE industry, just as the FTC has applied it to other opaque business practices substantially affecting consumers. Second, the FTC's work has previously addressed patents and particularly PAEs.

With both broad statutory authority through Section 6(b) of the Federal Trade Commission Act and ample experience in patent and competition policy, the FTC is well equipped to study and collect detailed information from PAEs. Section 6(b) provides the FTC extensive authority to compel companies to produce answers for specific questions. Ultimately, the statute grants broad use of an "investigative tool, . . . available in both competition and consumer protection matters,"[13] and the FTC has accordingly used Section

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2021338547_jayjurataopedxml.html, which notes that the FTC's proposed investigation of PAE practices would be especially helpful for tailoring a remedy that curbs specifically those "imperfections in our patent system that trolls exploit."

[12] As discussed above, *see supra* note 4, this does not mean that current legislative efforts should be delayed in view of the study. The value of the study would be to identify further, possibly unexpected or unknown, issues of the patent system to be corrected.

[13] Office of the Gen. Counsel, Fed. Trade Comm'n, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority* (2008), *available at* http://www.ftc.gov/ogc/brfovrvw.shtm.

6(b) to request data for reports on a variety of industries' practices. This type of transparency information has been largely lacking from the PAE debate, despite efforts by policymakers and stakeholders to uncover PAE practices. The FTC has the tools to bring that information to light.

The FTC has frequently used this authority to investigate opaque business practices that could potentially harm unwitting consumers due to this lack of information. For example, alarmed by increasing childhood obesity rates, the FTC has asked manufacturers of food products and fast food companies to provide specific answers to questions about their marketing practices targeted towards children and adolescents.[14] The Commission subsequently published reports documenting these practices and assessing the industry's progress in "marketing food responsibly to children."[15] Likewise, to prevent hidden anticompetitive behavior that potentially eliminates benefits to consumers, the FTC has compelled both brand-name manufacturers and generic drug manufacturers to provide information for its Generic Drug Study.[16] Finally, concerned about teen exposure to alcohol marketing, the FTC has also asked the alcohol industry multiple times for information on self-regulation of advertising.

Here, the FTC similarly proposes to use its Section 6(b) authority to unveil the hidden practices of the PAE industry and potential abuses on technology consumers. The Commission has expressed much concern about the impact of PAE activity "on innovation and competition and the implications for antitrust and enforcement policy."[17] Targeting unsuspecting businesses and individuals, PAEs send abusive demand letters alleging patent infringement and demanding settlements. This is particularly problematic because these letters are frequently vague, misleading, and deceptive. Sometimes demand letters even

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[14] *See* 74 Fed. Reg. 48,072, 48,072-73 (Sep. 21, 2009) ("*Food Marketing Notice*").

[15] *See, e.g., Food Marketing Report* at ES-2.

[16] *Generic Drug Report* at 3.

[17] See Fed. Trade Comm'n, *Federal Trade Commission, Department of Justice to Hold Workshop on Patent Assertion Entity Activities* (Nov. 19, 2012), *available at* http://www.ftc.gov/opa/2012/11/paeworkshop.shtm; Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* 58 (2011), *available at* http://www.ftc.gov/os/2011/03/110307patentreport.pdf ("*The Evolving IP Marketplace*") (discussing specifically how ex post patent transactions may impact innovation).

allege infringement of a patent already invalidated by a court. Moreover, small businesses and individuals often lack the resources to defend themselves against even illegitimate demand letters. This secretive and potentially harmful industry requires FTC scrutiny.

As part of its mandate to prevent unfair competition and protect consumers,[18] the FTC has previously addressed ex post patent transactions within a broader report on the patent system.[19] Likewise, the current proposed collection of information on PAEs and PAE activities under Section 6(b) would serve as the latest avenue for fulfilling the Commission's mandate. Indeed, because patent assertion directly affects consumers' access to technology and competition in the technology marketplace, the FTC is ideally equipped to consider this issue.

Turning to the question of experience in the patent arena, the FTC is additionally well poised to conduct this proposed Section 6(b) study because of its vast history of dealing with the intersection of patents and competition. The FTC has published reports on intellectual property policy.[20] In one such extensive report, the FTC found that "some of the asserted benefits of PAE activity appear, on closer inspection, ambiguous at best," and that in particularly troubling situations "the effect of this activity on innovation can be detrimental."[21] Additionally, the FTC has dealt with patent policy under a previous Section 6(b) study. In the Generic Drug Study, the FTC explored the generic drug market in view of the Hatch-Waxman Amendments, which allowed generic entry prior to the expiration of brand-name drugs' relevant patents.[22]

By asking PAEs to answer certain questions, the FTC's proposed study would continue its established practice of collecting information under Section 6(b), as well as its ongoing analysis of patents and competition policy.

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[18] *See* 15 U.S.C. § 45.

[19] *See The Evolving IP Marketplace* at 58 ("Such ex post transactions form a secondary market for patents that has a very different impact on innovation than does the market for technology . . .").

[20] *See, e.g., The Evolving IP Marketplace*; Federal Trade Commission, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (2007), *available at* http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf.

[21] *The Evolving IP Marketplace* at 68.

[22] *Generic Drug Report* at 1-3.

III. The Proposed Data Collection Requires Little from Patent Assertion Entities and Other Respondents

The public value of the information to be retrieved vastly outweighs the minimal burden of producing information on the part of PAEs and other entities (as well as the burden on the FTC). In terms of both time and cost, the proposal requires little from respondents, especially when compared to other Section 6(b) proposals' estimates. In every instance cited above, the different proposals estimated a comparable or greater number of burden hours, as well as a much greater financial cost, than the current proposal regarding PAEs. Moreover, the proposed questions appear straightforward for the respondents to answer.

Compared to other 6(b) studies, the current proposal requires a comparable amount of time and a fraction of the expenditures on the part of those entities questioned. The current proposal estimates that respondents would each spend 90 to 400 hours on producing documents and preparing responses.[23] Other Section 6(b) study proposals have estimated burden hours for companies as between 90 and 400 hours, which is the same range as the current proposal;[24] 140 and 600 hours, a fairly similar range;[25] and 300 and 620 hours, a much higher range.[26] Likewise, in terms of financial burden, each respondent in the current study would expect to pay approximately up to $19,597,[27] whereas, in other proposals, the FTC estimated that respondents would require up to $53,500,[28] $120,000,[29] and even $186,000[30] to comply with the Section 6(b) request.[31] Compared to the estimated

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[23] *PAE Notice* at 61,357.

[24] 65 Fed. Reg. 61,334, 61,336 (Oct. 17, 2000) ("*Generic Drug Notice*").

[25] *Food Marketing Notice* at 48,073-74 (Sep. 21, 2009).

[26] 76 Fed. Reg. 73,640, 73,643 (Nov. 29, 2011) ("*Alcohol Marketing Notice*").

[27] *PAE Notice* at 61,357.

[28] *Generic Drug Notice* at 61,336.

[29] Food Marketing Notice at 48,074.

[30] *Alcohol Marketing Notice* at 73,643.

[31] These figures include both estimated labor and non-labor costs where both are provided.

$29 billion a year[32] that patent assertion entities cost businesses directly, the burden here is minimal.

Additionally, the kinds of information that the FTC intends to collect should not be difficult for entities to produce. For example, information on an entity's corporate structure and patent holdings (Requests B-D) should be easily obtained through USPTO assignment records and corporate governance records ordinarily required. Respondents should also easily gather the necessary information on patent acquisition and assertion activities (Requests E-F) by simply reviewing typical records of contracts and litigation as well as other internal memoranda. Finally, producing the necessary financial data (Requests G-H) only requires everyday financial accounting.

Thus, the information to be collected ought to be kept in the ordinary course of business by reasonable companies. Indeed, particularly with respect to PAEs, the burden of production cannot be significantly greater than the burden of production they expect to face during the discovery phase of the litigation that they presumably intend to initiate.

Accordingly, the information requested will not burden the parties required to produce that information as part of the study. This minimal burden is heavily outweighed by the value of the data to be collected.

IV. Conclusion

The proposed Section 6(b) study would significantly advance the quantity and quality of public information regarding patent assertion entities. The study would, thus, both directly help the diverse targets of PAE activity and enable the FTC and other policymakers to better serve consumers and preserve competition. The FTC is also particularly well suited to make these requests; it has the necessary statutory authority and experience in consumer protection and patent policy to conduct this particular study. Finally, the Section 6(b) study's proposed respondents would find complying with the

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[32] Brian T. Yeh, Cong. Research Serv., *An Overview of the "Patent Trolls" Debate* 2 (2012) (citing James Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 Cornell L. Rev. (forthcoming 2014) (manuscript at 2, 18–19), *available at* http://www.fas.org/sgp/crs/misc/R42668.pdf.

questions manageable and straightforward. Because the public understanding of PAEs remains limited by PAEs' covert practices, the FTC should proceed in asking these entities to provide basic answers that would serve consumers, small businesses, policymakers, and the general public.

Respectfully submitted,

Date: December 16, 2013

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