COMMENTS OF FOOD MARKETING INSTITUTE TO THE FEDERAL TRADE COMMISSION

on

Paperwork Comment; Project No. P131203
PROPOSED 6(b) STUDY OF PATENT ASSERTION ENTITIES

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Donald Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Public Comments on PAE Reports: Paperwork Comment; Project No. P131203 for Food Marketing Institute

Dear Secretary Clark,

We respectfully submit the following public comments to the Federal Trade Commission on behalf of Food Marketing Institute ("FMI") for the request for comments on Paperwork Comment; Project No. P131203, also known as the proposed 6(b) study on patent assertion entities.

FMI proudly advocates on behalf of the food retail industry. FMI's U.S. members operate nearly 40,000 retail food stores and 25,000 pharmacies, representing a combined annual sales volume of almost $770 billion. Through programs in public affairs, food safety, research, education and industry relations, FMI offers resources and provides valuable benefits to more than 1,225 food retail and wholesale member companies in the United States and around the world. FMI membership covers the spectrum of diverse venues where food is sold, including single owner grocery stores, large multi-store supermarket chains and mixed retail stores. For more information, visit www.fmi.org and for information regarding the FMI foundation, visit www.fmifoundation.org.

FMI applauds the FTC's decision to conduct a 6(b) study regarding the impact of patent assertion entities ("PAE") on competition and the economy. FMI represents thousands of food retailers which lack the resources to battle intellectual property disputes and patent litigation. Food retailers are in highly competitive markets in which our members' resources are dedicated to providing the best goods and services to the consumer at the lowest cost. These goods and services do not traditionally involve the patent system. Therefore, PAEs can substantially increase a food retailers costs because they have to seek outside counsel or hire expensive in-house patent counsel to deal with predatory patent litigation. PAEs have increasingly targeted retailers because they recognize how vulnerable they are to predatory litigation.

Food retailers operate in a traditionally low-margin industry which curtails their ability to absorb additional and unnecessary costs. This means the harm caused by meritless PAE demands and litigation is ultimately passed on to consumers. PAE demands and litigation drain necessary time and money from these retailers resulting in higher prices and a lower degree of service than the retailer could have otherwise provided. As egregious as the monetary costs, these demands also stifle the ability of retailers to utilize and consider the new forms of technology consumers demand and deserve. Ultimately, the conduct of PAEs harms everyone in higher prices and less innovation.

The impact on innovation and small business is critical. Suppliers of new services who are threatened by these types of dubious litigation cannot shed the shadow of doubt cast upon their enterprise. This stifles the growth of enterprises that are trying to gain a foothold in the industry, and pushes the conservative (or fearful) retailer to only do business with those vendors who can display immunity because they have settled with the PAEs, often at a high cost. And in the worst case, retailers may completely abandon the adoption of new technology because of the threat of PAE litigation. All of this results in the stifling of profitability, ingenuity, and growth, three things that we desperately need in an economy that is straining to grow.

The lack of information on patent assertion activities has been a barrier to both governmental and market actions to stop these predatory practices. PAEs commonly hide behind a multitude of shell companies and force non-disclosure agreements on their licensees. This creates a deficit of publicly available information that PAEs leverage to charge high licensing fees and stall governmental action. Studies, including the recent study by the Government Accountability Office[1], often have to rely on proprietary data and no reliable data exists on patent assertion outside of the court system. Market participants do not have access to any low cost sources of information that could help defend them from improper assertions. The FTC's proposed 6(b) study will generate reliable data from which to fashion appropriate reforms, implement currently proposed legislation, and establish a framework for further information gathering and dissemination that will be vital to stop predatory PAE behaviors.

FMI writes to answer questions "(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;" and "(3) ways to enhance the quality, utility, and clarity of the information to be collected" of the FTC's request for comment. The attached comments are structured as follows:

- Section I highlights how predatory patent assertions by PAEs pose a significant threat to competition and properly-functioning markets. End-users such as retailers have traditionally played almost no role in patent law and patent litigation. However, there has been an increasing trend of PAEs targeting end-users for quick and relatively small pay-outs coerced due to the end users lack of experience and the high costs of litigation. PAEs seem to be targeting small retailers in particular. These PAEs send demand letters that are often obscure and are based on outdated and broadly asserted patents. These demands

[1] Government Accountability Office, Intellectual Property: Assessing Factors that Affect Patent Infringement Litigation Could Help Improve Patent Quality (Aug. 2013), http://www.gao.gov/assets/660/657103.pdf

seem to be tied more to the potential costs of information gathering and litigation than the merits of the underlying patent infringement claim. This litigation is costly and time-consuming and end users often have little choice but to settle.

- Section II discusses how the lack of publicly available information on PAE activities impairs research, retards governmental reform, and harms market participants. Studies of PAEs often rely on proprietary data that are nonrandom and nongeneralizable. There are also no reliable data sources for PAE activities outside the court system. The lack of public information on PAE activities prevents researchers from estimating the total harm of such activity, stops government actors from making informed actions, and increases the information costs for market participants hit with patent infringement claims.
- Section III states that the proposed collection of information will have practical utility and is necessary for the proper performance of the functions of the FTC. When Congress created the FTC almost a century ago, it was given the responsibility and power to conduct studies and issue reports to better inform businesses, Congress, Courts and regulators about the impact of practices that could threaten competition and harm consumers. The FTC's proposed 6(b) study will bring to light information which remains difficult to collect through public sources. This information will prove vital for Congress and other agencies working to establish reforms to prevent predatory patent assertions. The proposed 6(b) study will collect data that is important for the protection of end users and will allow Congress to comprehensively address predatory patent assertions across all sectors of the economy.
- Section IV provides suggestions to enhance the utility of the information to be collected. The FTC's proposed 6(b) study will be conducted alongside many reform efforts by Congress and other agencies. Therefore, the study must be timely to be useful. The study should be designed to be iterative with data collection and analysis broken up into interim reports rather than delayed until a final report can be issued. The FTC should prioritize the most important data for reform efforts and end user protection. The FTC should also use the data to guide the FTC's own actions in promoting competition and consumer welfare as soon as the data becomes available.

We applaud the FTC efforts to address the PAE issue. The predatory litigation by PAEs is causing significant harm in retail markets that ultimately harms consumers. The FTC's proposed 6(b) study on patent assertion entities will be an important step in addressing these harms.

Date: December 13, 2013

Respectfully Submitted,

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I. Predatory Conduct by Patent Assertion Entities is a Significant Threat to Competition and Properly-Functioning Markets

A. Patent Assertion Entities Have Developed a Predatory Strategy That Abuses the Patent System to Obtain Settlement Licensing Fees Regardless of the Merits of the Underlying Patent Assertion

PAEs entire business model depends on successfully asserting patent claims through demand letters or litigation. PAEs do not manufacture, produce, collaborate, or facilitate the introduction of new products or services to the market in any way. Unscrupulous PAEs exploit endemic flaws in the patent and litigation system to deploy patents as a tax on innovation. These flaws begin with the United States Patent and Trademark Office ("USPTO"), which grants too many patents with opaque, non-specific, and often obvious claims that purport to cover entire business models or abstract concepts.[2] The USPTO cannot actually reject a patent application, allowing a patent applicant to wear down an examiner through endless responses and continuations.[3] It is estimated that 27% of all patents and 59% of all patents owned by PAEs have at least one invalid claim.[4]

This deluge of poor quality patents renders the notice function of patents inconsequential, and leads to a secondary patent market that is oversaturated and unregulated. The patent litigation framework leaves it far too easy for a holder of any patent to bring a lawsuit against entire industries, regardless of the strength of their patent or merits of their claim. The PAE faces little or no costs to litigation since it does not produce any products, but market participants have enormous information costs in producing product information during discovery, researching the patents validity, determining the scope of the patent, and discovering whether their products actually infringe. These costs encourage quick and easy settlements regardless of the chances of a successful defense.

The availability of poor quality patents with ill-defined claim boundaries has led to a successful predatory patent assertion strategy. A rational patent holder considers the probability of successful litigation times the anticipated damages (expected value) and compares it with the cost of litigation.[5] The rational patent holder will not pursue litigation when they expect to spend more money than they will get in return. An accused infringer should be able to rely on this calculation when deciding whether to settle and at what price to settle. However, a predatory

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[2] For an in-depth discussion on the patent quality problem, *see* John R. Allison, Mark A. Lemley, & Joshua Walker Patent Quality and Settlement Among Repeat Patent Litigants, 99 GEORGETOWN LAW J. 677 (2010); Peter Menell, It's Time to Make Software Patents More Clear, WIRED, Feb. 7, 2013, *available at* http://www.wired.com/opinion/2013/02/its-time-to-make-vague-software-patents-more-clear/.

[3] James Besson, The Power of No, SLATE, Dec. 4, 2013, *available at* http://www.slate.com/articles/technology/future_tense/2013/12/the_simple_fix_that_could_heal_the_patent_system.html

[4] Shawn P. Miller, Where's the Innovation? An Analysis of the Quantity and Qualities of Anticipated and Obvious Patents (Feb. 10, 2012) (unpublished paper, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029263)

[5] Hovenkamp, Erik N., Predatory Patent Litigation (August 5, 2013) (unpublished paper, *available at* SSRN: http://ssrn.com/abstract=2308115)

patent holder develops a reputation for pursuing all litigation no matter what their expected outcome is.[6] An accused infringer of a predatory demand can no longer rely on the patent holder to drop cases when the patent is likely not infringed, invalid, or is worth far less than the offered settlement. This predatory litigation strategy changes the formula. Now an accused infringer would rationally have to accept all offers below their cost of litigation plus the patent holder's expected value.[7] This creates a situation where patent holders can extort money based largely on the high costs of litigation, rather than the value of their patent.

Predatory patent litigation is compounded by the difficulty of ascertaining the real parties in interest, or who the holders of a specific patent are. Patents are bought, sold, assigned, transferred, and pooled at a staggering pace, leaving putative defendants incapable of even identifying the party with whom they should negotiate. PAEs combine these systemic flaws with an endless supply of patents and an untraceable network of shell corporations to create a perpetual motion machine of patent extortion.

This predatory strategy by PAEs harms the innovation infrastructure. Nearly all firms find themselves straying from their preferred business model in order to address PAE litigation, such as stockpiling money for outside counsel, hiring additional in-house counsel, or foregoing new technology to avoid future litigation. These attempts by firms to protect themselves are impeded by high information costs or a complete lack of information that increases expenses and lowers the opportunities for government agencies to protect against abusive PAE practices that rise to the level of extortion.[8]

B. Predatory PAEs Harm End Users, Such as Retailers, Which Increases Costs and Lowers the Quality of Services Retailers Can Provide to Customers

In his presentation at the PAE hearing Carl Shapiro explained that "PAEs appear to target small companies more than practicing entities" and "PAEs typically initiate litigation after [the] target has incorporated the patented technology in its products."[9] This is only part of the story. The truth is that PAEs are not only targeting smaller companies, but are also targeting companies far removed from the traditional patent litigation ecosystem such as retailers, restaurants, and non-technical Internet-based services.[10]

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[6] *Id.*
[7] *Id.*
[8] These more abusive PAE activities were the subject of hearings in both the House and Senate. *Demand Letters and Consumer Protection: Examining Deceptive Practices by Patent Assertion Entities: Hearing Before Sen. Comm. on Commerce, Science, & Transportation*, 113th Cong. 1 (2013) *available at* http://www.commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=8d56ac21-3494-451e-85ad-6ff36888a167; *The Impact of Patent Assertion Entities on Innovation and the Economy: Hearing Before H. Comm. on Energy & Commerce*, 113th Cong. 1 (2013) *available at* http://energycommerce house.gov/hearing/impact-patent-assertion-entities-innovation-and-economy
[9] Professor and former Deputy Assistant Attorney General for Economics Carl Shapiro, Patent Assertion Entities: Effective Monetizers, Tax on Innovation, or Both?, presentation to the PAE Workshop, *available at* http://www.ftc.gov/opp/workshops/pae/docs/cshapiro.pdf.
[10] *See, e.g.*, Personal Audio, LLC v. Ace Broadcasting Network, LLC, Civil Action No. 2:13-cv-00014, Eastern District of Texas.

Retailers and other end users are particularly vulnerable to the predatory conduct of PAEs. Retailers are not well-versed in the complex world of patent litigation. As entities that deal with millions of consumers and have large sales they appear to be particularly attractive "victims" in the eyes of PAEs. Colleen Chien recently published an article in which she concluded that PAEs now target more non-tech companies than tech companies.[11]

In a typical example, Executive Vice President Lary Sinewitz of BrandsMart USA explained in testimony before the Senate Commerce, Science, & Transportation Committee Subcommittee on Consumer Protection, Product Safety, and Insurance that over the past several years his company has received six patent demand letters.[12] In one demand letter a PAE asserted that a ubiquitous technology used by virtually every retailer to read debit and credit cards was infringing the PAE's patent. Based on Sinewitz conversations with the PAE it appeared that the PAE did no due diligence on whether the patent was actually being infringed.[13] The PAE simply picked the 150 largest retailers in the Atlanta metropolitan area and sent a demand letter to each of them.[14] BrandsMart has no in-house patent lawyers or patent lawyers on retainer. When BrandsMart consulted with a patent attorney they found that they used different technology than that claimed by the PAE. When informed of this, the PAE still demanded a licensing fee but reduced the amount. BrandsMart had to take the offer. BrandsMart is not unique in this circumstance – these are the types of lawsuits many retailers across the country are facing, many even further removed from high-tech products than BrandsMart.

The effect of PAE conduct on retailers is threefold. First, as explained above, litigation and unwarranted cease and desist letters drive up costs for these businesses. These costs include not only the cost of litigation and settlement, but also the time and effort by the retailer's staff. Second, this litigation threatens to drive up costs for the legitimate provider of products or services that are subject to the infringement claim. For instance, many retailers have been sued for providing WiFi in their stores, which they usually do with a valid license from a WiFi manufacturer. In exchange, the manufacturer traditionally offers indemnification against patent infringement lawsuits. Having to fight a PAE for every customer threatens to make providing this indemnification either cripplingly expensive or completely impossible. In fact, a recent article highlights that PAE practices cost advertising agencies over $10M per year because of indemnification agreements in their contracts.[15] Finally, PAE tactics disincentivize future investment in technology, meaning that today's innovators will not have as robust a customer base as they should. Consumers benefit from continued investment in new technologies and new services, and offering these services allows firms in industries such as retail to compete in ways beyond traditional price and marketing.

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[11] Colleen Chien, Patent Trolls by the Numbers, Patently O, March 14, 2013, *available at* http://www.patentlyo.com/patent/2013/03/chien-patent-trolls html.

[12] Testimony of Professor Lary Sinewitz before the United States Senate Committee on Commerce, Science, & Transportation Subcommittee on Consumer Protection, Product Safety, and Insurance, Demand Letters and Consumer Protection: Examining Deceptive Practices by Patent Assertion Entities, Nov. 7, 2013, *available at* http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=61a08a32-2d43-45b7-9556-fd13d38e445d

[13] Id.

[14] Id.

[15] Nancy Hill, Patent Trolls Are a Big Headache for Ad Agencies, Too, Ad Age Digital, March 14, 2013, *available at* http://adage.com/article/digital/threat-patent-troll-litigation-looms-large-agencies/240313/.

II. There is a Significant Lack of Publically Available Information on Patent Assertion Entity Activities

A. Scholars and Research Institutions Have Limited Resources to Demonstrate the Extent of the Harm

It has been difficult to assemble a complete profile of PAEs because of the lack of public information and the sophistication of PAE efforts to keep their practices hidden. Public studies have to rely on proprietary data, surveys of companies targeted with infringement suits, and public information from court dockets. These studies are weakened by their limitations and often rely on nonrandom and nongeneralizable data that is imperfect for statistical analysis. Even the Government Accountability Office's (GAO) study had to rely on proprietary data obtained from RPX and Lex Machina.[16] The GAO also could not find "reliable data on patent assertion outside of the court system."[17] Data of PAE activities outside of the courthouse is crucial because most patent assertion claims take place through demand letters and are settled before ever reaching court.[18]

Notwithstanding this difficulty, several important pieces of research have begun to uncover the details of the business model and the impact on the economy. For instance, the PricewaterhouseCoopers, 2011 Patent Litigation Study shows that PAEs are successful in just 23% of litigation, and even less successful in certain industries including business/consumer services, software, and telecommunications.[19] Sarah Jeruss, Robin Feldman, & Joshua Walker build on this research in The America Invents Act 500: Effects of Patent Monetization Entities on US Litigation,[20] in which they detail the meteoric rise in the propensity of PAE lawsuits, and show that the most litigious companies are in fact PAEs. James Bessen and Michael J. Meurer discuss the macroeconomic financial implications of PAE lawsuits in The Direct Costs from NPE Disputes,[21] where they conclude that PAE litigation has cost the country over $29 billion.

Professor Colleen Chien of the University of Santa Clara has several studies out in which she highlights the impact of PAEs on startups and small tech companies, and in which she explains how the mechanisms of the patent system have led to the current PAE situation. In From Arms

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[16] Government Accountability Office, Intellectual Property: Assessing Factors That Affect Patent Infringement Litigation Could Help Improve Patent Quality 49-50 (Aug. 2013), http://www.gao.gov/assets/660/657103.pdf

[17] Id. at 49.

[18] *See,e.g.* Testimony of Professor Robin Feldman before the United States House of Representatives Committee on Energy and Commerce Subcommittee on Oversight and investigations, The Impact of Patent Assertion Entities on Innovation and the Economy, Nov. 14, 2013, *available at* http://docs.house.gov/meetings/IF/IF02/20131114/101483/HHRG-113-IF02-Wstate-FeldmanR-20131114.pdf

[19] Chris Barry, Ted Martens, Larry Ranallo & Chel Tanger, 2011 Patent Litigation Study: Patent litigation trends as the "America Invents Act" becomes law, 2011 by PricewaterhouseCoopers, LLP, *available at* http://www.pwc.com/us/en/forensic-services/publications/2011-patent-litigation-study.jhtml.

[20] Jeruss, Sara, Feldman, Robin & Walker, Joshua H.., The America Invents Act 500: Effects of Patent Monetization Entities on US Litigation 11 DUKE LAW & TECH. REV. 357, 2012, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2158455.

[21] Bessen, James E. and Meurer, Michael J., The Direct Costs from NPE Disputes (June 28, 2012), Boston Univ. School of Law, Law and Economics Research Paper No. 12-34, *available at* http://ssrn.com/abstract=2091210 or http://dx.doi.org/10.2139/ssrn.2091210.

Race to Marketplace[22] Professor Chien describes the evolution of the current patent ecosystem, including the transition from defensive patenting to offensive patent assertion by high-technology companies, the birth of intermediaries in the patent arbitrage system, and the origin of asymmetric patent warfare. Then in Startups and Patent Trolls[23] she evaluates the precise impact PAEs have on the innovation economy, particularly in Silicon Valley and the high-technology community. This research looks at a comprehensive database of patent litigation and features interviews from 223 high-tech startups regarding their experiences with patent infringement lawsuits, demand letters, and licensing relationships with patent aggregators.

These studies point to a significant emerging problem in patent assertion activities. Efforts to undercut these studies methodologies[24] only serve to show that there is a need for reliable data that cannot be obtained by public research or even the GAO. This data can only be produced by the FTC through its special powers to investigate.

B. PAEs Take Advantage of the Lack of Public Information to Harm Market Participants

Predatory PAE practices rely primarily on a lack of information. The process often starts when vague demand letters are sent out to numerous companies that often do not have a clear indication of what patent is infringed, what product is infringing, which claims are alleged to cover the product, and who even owns the patent. Companies who receive a demand letter do not know who else has received the demand letters. When litigation is filed the defendant company often does not know what the boundaries of the patent are or whether they are already covered by a license from an upstream manufacturer. Companies that settle are often forced to sign non-disclosure agreements that prevent other companies faced with lawsuits to discover useful information. End users face an even greater information deficit because they often have no experience with the patent system and may not even know a patent attorney.

Predatory PAEs generate huge informational costs that coerce companies to settle rather than determine if their claims have merit. The American Intellectual Property Law Association estimates that the cost of litigation ranges from $350,000 to $3,000,000 to reach the end of discovery and from $650,000 to $5,000,000 to fully complete litigation.[25] The costs of a patent trial are already high when the plaintiff's claims have merit and the plaintiff pursues its case in good faith. An unscrupulous PAE can increase these substantial costs, especially in the beginning stages of negotiation or a lawsuit, in order to make settling a more sound business

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[22] Colleen Chien, From Arms Race to Marketplace: The Complex Patent Ecosystem and Its Implications for the Patent System, 62 HASTINGS LAW J. 297 (2010), *available at* http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1119&context=facpubs.

[23] Colleen Chien, Startups and Patent Trolls, (September 28, 2012), Santa Clara Univ. Legal Studies Research Paper No. 09-12, *available at* SSRN: http://ssrn.com/abstract=2146251 or http://dx.doi.org/10.2139/ssrn.2146251.

[24] *See, e.g.*, Testimony of Professor Adam Mossoff before the United States Senate Committee on Commerce, Science, & Transportation Subcommittee on Consumer Protection, Product Safety, and Insurance, Demand Letters and Consumer Protection: Examining Deceptive Practices by Patent Assertion Entities, Nov. 7, 2013, *available at* http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=c5cc328a-af61-4f12-bea7-e2ae6fb42ce3

[25] Comments of American Intellectual Property Law Association to the United States Patent and Trademark Office, Request for Comments on a Patent Small Claims Proceeding in the United States, April 30, 2013, *available at* http://www.uspto.gov/ip/global/patents/comments/aipla_comment_letter_on_small_patent_claims_4-30-2013.pdf

decision regardless of the merits of the infringement allegation. For example, when FindTheBest.com was delivered a demand letter by Lumen View Technologies it arrived with a notice of a lawsuit that limited their response to 21 days.[26] Neither the demand letter nor the complaint explained which claim of Lumen View's patent infringed, which of FindTheBest's technologies was infringing, or how it infringed.[27] FindTheBest was left with the informational burden to answer these questions to determine whether they were infringing and also whether the patent was valid within a short time frame and with no inside counsel. Lumen View also made clear that they would make mounting a defense as expensive as possible.[28] The information costs of simply determining whether a patent is valid and infringed is often greater than the settlements offered by many PAEs. FindTheBest chose to fight and has already incurred $160,000 in costs since the case was filed in May of this year – over 3 times Lumen View's settlement offer of $50,000.[29]

The proposed 6(b) study will provide the necessary framework and data to establish reforms and policies to ease these informational burdens that allow bad faith patent assertions. The proposed study will not only uncover vital information that will help stop predatory patent assertions but the very act of collecting and analyzing large volumes of industry data will help develop efficient and low cost methods of information gathering that could be used in some of the proposed reforms.[30]

III. The Proposed 6(b) Study Will Provide the Information Necessary to Properly Analyze the Problem

When Congress created the FTC almost a century ago, it gave it unique powers to conduct studies and issue reports to better inform businesses, Congress, Courts and regulators about the nature of certain competitive practices. Unlike other agencies, the FTC has the power to use subpoenas to secure information from companies to conduct studies.[31] As the FTC Office of General Counsel explains, "Section 6(b) [of the FTC Act] empowers the Commission to require the filing of 'annual or special * * * [sic] reports or answers in writing to specific questions' for the purpose of obtaining information about 'the organization, business, conduct, practices,

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[26] Testimony of Director of Operations for FindTheBest.com Danny Seigle before the United States House of Representatives Committee on Energy and Commerce Subcommittee on Oversight and investigations, The Impact of Patent Assertion Entities on Innovation and the Economy, Nov. 14, 2013, *available at* http://docs.house.gov/meetings/IF/IF02/20131114/101483/HHRG-113-IF02-Wstate-SeigleD-20131114.pdf

[27] Id.

[28] Id.

[29] Id.

[30] An example of a reform with an information gathering component is a proposed demand letter registry under consideration by the Senate Commerce, Science, & Transportation Committee. *See* Statements made by Senator Claire McCaskill et al during the Senate Commerce, Science, & Transportation Committee Hearing on Demand Letters and Consumer Protection: Examining Deceptive Practices by Patent Assertion Entities, *available at* http://www.commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=8d56ac21-3494-451e-85ad-6ff36888a167&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39af-e033-4cba-9221-de668ca1978a

[31] The FTC most recently exercised this power to initiate a study into the business practices of the data broker industry. *See* http://www ftc.gov/opa/2012/12/databrokers.shtm.

management, and relation to other corporations, partnerships, and individuals.'"[32] Congress gave the FTC this power 98 years ago because it hoped the FTC would serve as a key investigator to illuminate potentially anticompetitive practices.

A. The Questions Asked by the 6(b) Study Will Uncover the Information Important for End-Users

The 6(b) study as proposed is comprehensive and will provide information vital to end-users suffering from predatory PAE practices. The patent information request (Section C) will reveal real party in interest information to discover how shell companies are used and whether their use has a negative impact. The Patent Acquisition request (Section E) will give an indication on the quality of patents entering PAE markets and whether the patents asserted were created to cover the technologies later sued as infringing.[33] The Patent Assertion request (Section F) will demonstrate whether PAEs adequately research their claims before sending demand letters or filing complaints and whether demands and complaints are pursued in good faith. These sections are the most likely to uncover unfair and deceptive patent assertion practices that are subject to § 5 of the FTC Act. The FTC can then use this data to pursue investigations that promise to provide immediate relief for end users.

B. The Questions Asked Will Provide the Information Necessary to Inform Current and Future Governmental Efforts to Stop Predatory Patent Assertion

The FTC's 6(b) power is an important and potent tool, and historically has been used as a launching point to draft legislation curbing industry abuse. A 6(b) study led to the Packers and Stockyards Act of 1921[34] and, more recently, to the Medicare Modernization Act of 2003.[35]

Both the House and the Senate are conducting hearings to examine predatory patent behaviors and many bills have been introduced to combat these behaviors.[36] The proposed 6(b) study will provide much needed information to shape these bills as long as the study is designed to be iterative and timely. The FTC's proposed 6(b) study will not only unveil the business practices and negotiating techniques of PAEs, but will determine – once and for all – whether PAEs do in fact provide an efficient market function as many of them contend.[37] This information is instrumental for government efforts to draft reforms targeted at preventing patent system abuses without punishing good actors.

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[32] Federal Trade Commission Office of the General Counsel, A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority, *available at* http://www ftc.gov/ogc/brfovrvw.shtm.

[33] For example, if a patent was acquired from a failed business and that patent was later asserted against companies in a completely unrelated industry with unrelated technologies it would be a strong indication of predatory patent assertions.

[34] 7 U.S.C. §§ 181-229b.

[35] Public Law 108-173-DEC. 9, 2003.

[36] There are currently 10 bills before Congress that deal with predatory patent assertions. *See* Matt Levy, Patent Progress' Guide to Patent Reform Litigation, PATENT PROGRESS, Nov. 19, 2013, *available at* http://www.patentprogress.org/2013/11/19/patent-progresss-guide-to-patent-reform-legislation/

[37] For a discussion of possible PAE efficiencies, *see* Timothy Simcoe, Patent Assertion Entities: Potential Efficiencies, presentation at the FTC/DOJ PAE Workshop, *available at* http://www.ftc.gov/opp/workshops/pae/docs/tsimcoe.pdf.

The information provided in the FTC's 6(b) study will also be necessary to implement any legislation that is passed. For example, the Innovation Act,[38] which passed the House on Dec. 5, 2013, has several provisions where the 6(b) study can provide guidance. The 6(b) study could aid the USPTO in implementing a provision in the bill that would require patent holders to file real party in interest information by determining the best way to organize and disseminate such information. The 6(b) study could also assist the Judicial Conference, which under the Act would have to develop new rules and procedures related to discovery. Finally, the 6(b) study will guide the future studies required by the Act.

Much of the concern over PAEs in these comments and others focuses on the lack of transparency into their businesses. This very lack of transparency is at the root of many predatory PAE practices. The FTC's 6(b) study will remedy this lack of information with an independent, unbiased study.

IV. The 6(b) Study Should be Designed to be Iterative and the Data Uncovered Should be Used by the FTC as it Becomes Available

For the study to be useful it must be completed in time to be a part of the necessary debate on patent reform. This debate is happening now because many Americans need action now. Small businesses are getting hit with bogus demand letters and patent claims now because it is cheaper to settle than litigate. Unfortunately FTC 6(b) studies can often get bogged down. A recent study of authorized generic drugs took over 5 years to complete.[39]

The FTC should design the study so that there are logical checkpoints when information can be disseminated to the public. It is vital that there is a constant flow of accurate information informing the debate. The FTC should share the information they learn in many forms – through speeches, Congressional testimony and advocacy to regulators.

A. The FTC Should Issue Regular Reports and Advise Congress as Data Becomes Available

The FTC's proposed 6(b) study will be conducted alongside legislative reform efforts by Congress and will produce information that will undoubtedly be helpful for drafting legislation. The information gathered by the FTC's proposed 6(b) study will also benefit other agencies as they consider policy reforms to reduce opportunities for predatory patent assertions. Any delay in the issuance of information will create a difficult choice for Congress and other agencies working to prepare comprehensive and thoughtful reforms. They will either have to delay these reforms knowing that more economic harm will be suffered, or finalize reforms with incomplete and imperfect information. Therefore, the FTC should not delay the dissemination of collected and analyzed information until a final report can be prepared. Instead, the FTC should issue regular reports as the information and analysis is completed. The FTC needs to carefully design this 6(b) study so that it provides necessary information as it is needed by Congress, governmental agencies, and the public.

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[38] H.R. 3309, 113th Congress (2013)
[39] Authorized Generic Drug Study: FTC Project No. P062105

B. The FTC Should Prioritize the Collection of Data Most Pertinent to Ongoing Harms

The order in which data is collected and analyzed should not be arbitrary but based on need. The FTC should work closely with Congress as well as affected market participants to determine the most important information that needs to be delivered as soon as possible. Then the FTC can design a study that occurs in steps with a report on each topic delivered on time to be useful to Congressional reform efforts.

The information most vital to end-users and victims of predatory patent assertions is information related to demand letters and patent assertion. Specifically, the information most helpful to examine the abuses experienced by end users are demand letter information and information about the process by which a PAE researches a potential licensee before making a demand or filing a complaint.[40]

C. The Study Should Guide the FTC's Actions in Promoting Competition and Consumer Welfare

The data the FTC collects is not only vital to the public, but also to guiding the FTC's own actions. This requires regular dissemination of information not only externally, but internally as well. The FTC should use the study data when filing amicus briefs, comments, testifying before Congress, or any other activity it regularly engages in to promote its core functions. The FTC should also initiate investigations as it uncovers abusive practices that violate consumer protection and competition laws. The proposed 6(b) study will provide information on consumer protection and competition in the patent exchange and assertion industry. These areas are core to the FTC's purpose and the study data should not be wasted but utilized as results are produced.

Conclusion

The proposed FTC 6(b) study is an important tool in providing necessary information about PAE industry practices that cannot be discovered through public sources. The FTC study will fill a research gap in information and help Congressional and other agency efforts to address patent abuse without harming legitimate patent transfers and assertions. The study will also help guide FTC action and investigations into deceptive and unfair practices to protect end users, including small businesses, retailers, and consumers. The study is of particular importance to end users because they are increasingly targeted by predatory PAE assertions. These end users are ill-equipped to deal with patent demands and are coerced into quick settlements for amounts lower than the price of litigation. Predatory PAEs prey on the lack of information and the expense of litigation. The FTC's proposed 6(b) study will lay the groundwork for corrective measures that will put an end to these abuses.

[40] These requests are found in sections F(1) and F(5) of the proposed 6(b) study questions.