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Via https://ftcpublic.commentworks.com/ftc/paestudypra

December 16, 2013

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: PAE Reports: Paperwork Comment; Project No. P131203

Dear Chairwoman Ramirez:

The Retail Industry Leaders Association ("RILA") appreciates the opportunity to respond to the Federal Trade Commission's ("FTC's") request for comments on proposed information requests to Patent Assertion Entities ("PAEs") or "patent trolls" and, specifically, whether the FTC should use its authority under Section 6(b) of the Federal Trade Commission Act to collect information on PAE acquisition, litigation, and licensing practices. 78 Fed. Reg. 61532 (Oct. 3, 2013). As discussed more fully below, the information the FTC proposes to collect is critical to the FTC's core mission and functions and will increase transparency concerning patent assertion activities, which are imposing extraordinary economic burdens, particularly on end users such as retailers. The proposed Section 6(b) request strikes the appropriate balance between the benefits of the information to be obtained, which the FTC should use to curb abusive practices, and the potential burdens imposed.

I. Interest and Experience of RILA

RILA is the trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, as well as product manufacturers and service companies, which together account for more than $1.5 trillion in annual sales and millions of American jobs. RILA members have more than 100,000 stores, manufacturing facilities, and distribution centers in the U.S. and other countries.

Much of the analysis and discussion concerning PAE activities has focused on technology companies. While this is to some extent understandable, it overlooks the ongoing outpouring of PAE litigation and litigation threats against technology ***users***, such as RILA's members. As technology users, RILA's members become front-line combatants in the patent-troll wars.

Patented technology is essential to modern retailing. It is found not only at store level, in applications well-known and visible to consumers, but throughout the supply chain in countless

unseen (to consumers) but critical functions. For example, patented technology plays an important role in payments, data transmission and security, transportation and logistics, warehousing, supply and demand forecasting, inventory control, and ordering. It is a key enabler of retailers' in-store innovation as well as their adoption of cloud computing, e-commerce, and social media.

II. The Information the FTC Seeks Is Critical for It To Fulfill Its Important Role in Curbing Abusive PAE Practices

The recent PAE activity workshop, jointly sponsored by the FTC and the United States Department of Justice (DOJ), noted the lack of empirical data related to potential harms and efficiencies of PAE activity. Correcting this lack of information and data is critical for the FTC's core mission and responsibility to oversee and control anticompetitive behavior. RILA is confident that the proposed study will help to redress the current absence of information and confirm the frivolous nature of patent trolls.

The Commission should use the information that it receives to employ all appropriate investigative and enforcement tools. Existing legislative authority under the Sherman Act and the Federal Trade Commission Act provide sufficient authority for the FTC to identify and challenge, through administrative proceedings or federal court actions, many forms of anticompetitive abuses by patent trolls. Areas for potential investigation and enforcement include, for example, instances in which PAEs have frustrated technology users' ability to evaluate the scope of the PAE's patents, by un-pooling IP stacks and playing "hide and seek" among groups of ostensibly distinct entities. Misuses and abuses of administrative and legal processes, beyond the scope of *Noerr-Pennington* immunity, could be another fruitful area of inquiry. The FTC may also use this information to advocate against abusive PAE practices through comments, amicus filings, and other appropriate means. Again, such activities are squarely within the FTC's core competencies and will be greatly facilitated by the information sought in the proposed Section 6(b) request.[1]

III. The Need for Increased Information Is Especially Acute for PAE Demand Letters Sent to End Users

RILA supports the FTC's efforts to obtain additional data on patent assertion activity and encourages the Commission to inquire specifically about the use of demand letters by PAEs. Demand letters sent to end users provide two clear advantages to PAEs, while imposing tremendous costs on the recipients. First, PAEs are not required to prove the validity of the patent being asserted in the demand letter or support any allegations of infringement. Second, fear of expensive litigation coerces many recipients to agree to costly settlements often wholly disproportionate to the questionable patent claims being asserted. While PAEs clearly gain from

[1] In addition to the FTC's critical role, RILA recognizes the need for legislative changes to make important modifications outside the ambit of the FTC's authority, such as heightening pleading requirements, improving transparency, and limiting the asymmetrical discovery burdens imposed under the current system. We are encouraged by the bipartisan support in Congress to achieve these goals, although we believe that some of the current proposed legislative solutions should be improved. We continue to work with members of the United States Senate and House of Representatives as bills move through the legislative process.

this strategy, the significant costs to business mean less capital to hire new workers or to expand. In addition, for end users such as RILA's members, the threat of patent troll litigation also serves as a powerful disincentive to invest in new technologies, particularly those offered by small businesses that lack the resources to defend themselves or an end user facing patent litigation involving its product.

Congress is increasingly concerned about anticompetitive PAE behavior and the use of demand letters to intimidate parties into settlements. Robin Feldman, Professor of Law and Director of the Institute for Innovation Law at the University of California, Hastings, who has studied patent assertion behavior both in the litigation context and in the pre-litigation context, recently testified before the House Committee on Energy and Commerce Subcommittee on Oversight and Investigations, and cited an example of a PAE's demand letter strategy of bombarding "thousands of small businesses," calling the practice the "assault rifle approach." [2]

End users cannot get the information that they need to effectively evaluate or respond to this so-called "assault rifle approach" because demand letters and any resulting settlements are generally restricted from disclosure prior to the costly litigation discovery process. Companies that have tried to obtain information about the validity and scope of asserted patents or details as to claims of infringement from PAEs have been stonewalled. Given the large number of active PAEs and the multitude of patent claims asserted, it is exceedingly difficult – not to mention costly – for one or even a group of defendant companies to obtain this information. As a result, businesses are subjected to repeated patent troll demands with no effective way to defend themselves. Accordingly, it is critical that the FTC use its Section 6(b) authority to require PAEs to disclose information that will shed light on these abusive practices and that will allow the FTC to properly use its authority to prohibit anticompetitive patent troll activity.

IV. The Benefits of Curbing the Costs of Patent Troll Activity with the Information Obtained from the Questionnaire Far Outweigh Any Response Burden Imposed on PAEs

RILA agrees with the FTC's calculation of the burden that may be imposed on PAEs by the proposed Section 6(b) request for information. We find the factors considered and estimated costs to be reasonable. However, even if PAE costs are ultimately recalculated in response to comments submitted in this docket, the benefits of using the information to control abusive patent troll litigation are still much greater than any response burden imposed on PAEs.

Indeed, any burden imposed on PAEs to respond to the FTC's Section 6(b) request pales in comparison to the costs and burdens these trolls place on retailers. Among the answers the FTC seeks is information on the costs of and rewards to PAEs from assertion activity - a disparity that RILA contends exacerbates the number of frivolous law suits brought. Approximately 90% of patent cases end without a judgment on the merits below; however, the high rate of settlement

[2] Robin Feldman, "Prepared statement for U.S. House of Representatives Energy and Commerce Committee, Subcommittee on Oversight and Investigations" (November 14, 2013).

does not mean that most suits are well-founded. Rather, the rate of settlement is more properly attributed to the outsized costs of patent litigation, which leave end user defendants with little choice but to settle. For example, a recent study reported that the median cost of litigating a patent case through trial is between $650,000 and $5 million, and the discovery phase alone costs $350,000 to $3 million.[3] Critically important, the patent troll, unlike the retailer defendant, often has little or no discovery costs -- it simply purchased the patent and is not the inventor and has never practiced the claimed invention, so possesses few documents and no employees with meaningful information about the patent. Thus, patent trolls exploit the high and asymmetric costs of defense to force settlements. According to a study by Boston University, every year businesses spend $29 billion fighting abusive patent suits. The cost to the economy is estimated to be a staggering $80 billion, while the cost to the troll who files thousands of dubious claims is miniscule in comparison.[4]

This profit margin has led to an increase in cases brought by PAEs against retailers and other end users. As RILA member JCPenney said in recent testimony to Congress, "[i]n 2012 the number of patent cases increased over the 3,600 cases filed in 2011. And for the first time a majority of the cases filed were by patent trolls. A recent study concluded that in 2007, 22% of patent cases filed were by patent trolls. In 2011 that number had risen to 40%."[5] And, according to Professor Colleen Chien of Santa Clara University Law School, by 2012, fully 60% of all patent suits filed were by patent trolls.[6] Citing research by RPX Corporation, Professor Chien recently reported that "PAEs initiated 62% of all patent litigation or 2,921 of 4,701 suits in 2012."[7]

Thus, the pressure on retailers to settle, often with no appreciable evidence of infringement and for amounts well in excess of the incremental value of the claimed invention, is enormous. Unlike the companies who developed the technologies, retailer end users rarely possess the technical expertise to defend themselves effectively. Moreover, the patent trolls' strategy of acquiring and attempting to enforce patents many years after issuance makes it impossible, for all practical purposes, for technology end users like retailers to predict, and if possible avoid or protect themselves against, the next wave of demands. In this climate, all technology may appear fraught with legal danger and not worth the risk to users or would-be users. The disincentive for companies to use and invest in new technologies discourages innovation and hurts companies, shareholders, employees, potential technology suppliers and consumers.

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3 Intellectual Property Law Association, Report of the Economic Survey (2011).

4 James E Bessen & Michael J. Meurer, "The Direct Costs from NPE Disputes" (June 28, 2012). Boston University School of Law, Law and Economics Research Paper No. 12-24 (Cornell Law Review, Vol. 99, 2014, forthcoming)

5 Janet L. Dhillon, Executive Vice President, General Counsel and Corporate Secretary, JCPenney, "Abusive Patent Litigation: The Impact on American Innovation & Jobs, and Potential Solutions," prepared statement for U.S. House of Representatives Committee on Judiciary, Subcommittee on Courts, Intellectual Property and the Internet, at 3 (citing Sara Jeruss, Robin Feldman & Joshua Walker, "The America Invents Act 500: Effects of Patent Monetization Entities on U.S. Litigation," at 5 & 43-47, Duke Law & Tech Review, forthcoming).

6 Colleen V. Chien, "Patent Trolls by the Numbers" (March 13, 2013). Santa Clara Univ. Legal Studies Research Paper No. 08-13, available at SSRN: http://ssrn.com/abstract=2233041.

7 *Id.*

Given the numerous lucrative settlements that exploitative PAE activity has engendered, the minimal burden imposed on PAEs to respond to the FTC's proposed Section 6(b) questionnaire is reasonable and outweighed by the benefits of the information that will be obtained and that can be used to control anticompetitive patent assertion activity.

V. The FTC's Proposal To Collect Critical Information from PAEs Strikes the Right Balance

In conclusion, RILA supports the FTC's efforts to use the Section 6(b) process to enhance transparency related to PAE activity and RILA concurs with the FTC's approach in the proposed questionnaire. As noted above, recent public and congressional concern has focused on the potential anticompetitive activities of patent trolls. The FTC is in a unique position to gather the comprehensive patent assertion data necessary to review and curb these activities. In our opinion, the approach taken by the FTC strikes the right balance between obtaining the necessary relevant information while minimizing the response burden. The FTC should reject any effort to limit or restrict the information to be collected.

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RILA welcomes the opportunity to provide the FTC with input on this matter of great importance to the retail community and appreciates the Commission's consideration of our views. Please do not hesitate to contact me directly at deborah.white@rila.org or 703.600.2067 if we may provide any additional information.

Respectfully submitted,

Deborah White
Executive Vice President
& General Counsel