**COMMENTS OF INTERDIGITAL, INC.
ON THE FEDERAL TRADE COMMISSION'S PROPOSED INFORMATION
REQUESTS FOR A STUDY OF PATENT ASSSERTION ENTITIES**

InterDigital, Inc. ("InterDigital") appreciates the opportunity to provide comments to the Federal Trade Commission ("FTC") on its proposed information requests to entities asserting patents in the wireless communications sector as a part of the FTC's Section 6(b) study of patent assertion entities ("PAEs"). InterDigital is not a PAE as defined in the FTC's release, but, as a wireless technology research and development firm that engages in licensing and a potential "Other Firm" recipient of the FTC's information requests, InterDigital submits these comments to help the FTC ensure that its study is properly focused and its information requests are narrowly targeted to produce information most relevant to the articulated needs of the study.

1. About InterDigital

Founded in 1972, InterDigital is a pioneer in the digital cellular field and for over four decades has developed fundamental wireless technologies that are at the core of mobile devices, networks and services worldwide. It employs hundreds of engineers at six research and development ("R&D") facilities located in the United States, Canada and the United Kingdom to solve the wireless industry's most critical and complex technical challenges, inventing solutions for more efficient broadband networks and a richer multimedia experience for consumers. InterDigital contributes innovations *ex ante* to organizations involved in creating wireless communications standards, including the 2G, 3G, 4G and IEEE 802 suite of standards. During the past decade, InterDigital has invested more than $650 million in R&D and recoups such costs primarily through patent licensing, technology solutions licensing, and engineering services. Although the company currently does not manufacture, it has offered products in the past,

including the UltraPhone™ system in the 1980s and its SlimChip® mobile broadband products in the 2000s.

As a repeat player in standards-setting efforts, and as a company that partners with practicing entities to develop and test new technologies, InterDigital has strong reputational incentives not to act opportunistically in asserting its patent rights. Accordingly, the concerns that some have expressed about the incentives and patent assertion practices of PAEs are not applicable to InterDigital. Similarly, as a non-practicing entity ("NPE"), InterDigital is motivated to license its technologies broadly and does not benefit from excluding downstream competition in the manufacture or sale of devices using InterDigital's innovations. Accordingly, the concerns that some have expressed about the incentives and patent assertion activities of practicing entities are also inapplicable to InterDigital.

InterDigital has a long history of negotiating mutually beneficial agreements with counterparties. Indeed, of the more than 60 licenses and amendments that InterDigital has signed in the past ten years, approximately 90% have been achieved on friendly, mutually beneficial terms without the need for patent infringement litigation. In asserting its patent rights, InterDigital merely seeks to be fairly compensated for its R&D efforts and contributions to the wireless industry.

2. Scope of the Study

The FTC specifically invites comments on "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." InterDigital is concerned that the scope of the study is far broader than necessary to serve the proper performance of the functions of the

FTC. While there could be value in a study that more narrowly focuses on particular practices that might harm competition, the study described in the release and reflected in the proposed information requests is too broad and unfocused. Consequently, it is unlikely to yield data that policy makers can manage efficiently to assess the competitive harms associated with specific practices. Moreover, due to the scope and breadth of the study, it risks imposing extremely heavy burdens, especially on firms like InterDigital, which, for the reasons discussed above, should not be the focus of the study.

The FTC release states that the purpose of the study is to develop a "better understanding of PAE activity and its costs and benefits."[1] The FTC should clarify that it is interested in the costs and benefits of PAE activity to *innovation and competition*. Many comments about PAE activity have focused only on the costs that PAEs may impose on practicing entities, and not on the ultimate impact of such activity on innovation or competition. A study that focuses on how PAE activity affects the distribution of costs and benefits among participants within the patent system, as opposed to the ultimate impact of such activity on innovation and competition, would not be useful or practical.[2]

Similarly, when studying the "costs and benefits" of PAE activity, the FTC should recognize that many of the benefits derived from patent assertion activities are not price-related. For example, many patented innovations improve product performance and capabilities or allow for the introduction of entirely new products. Such innovations, however, may not be developed

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[1] 78 FR 61352, 61353.

[2] *See* Joshua D. Wright, Commissioner, Federal Trade Commission, What Role Should Antitrust Play in Regulating the Activities of Patent Assertion Entities? at 12 (Apr. 17, 2013) ("It is not immediately obvious why business conduct that lowers costs in one part of the economic system would give rise to antitrust concerns merely because it increases the costs of other firms.")

or disclosed if patent holders are unable to assert their patent rights against companies that take the innovation without compensating the patent holder.

Other benefits of patent assertion activity do affect price, but these beneficial price effects are not so easily recognized or measured. For example, some patented innovations reduce a manufacturer's production costs or create other efficiencies that are passed on to consumers in the form of lower prices, but these saving are not so readily apparent unless one knows the prices that consumers would have paid absent the availability of the patented innovation.

Many who have commented on the effect of PAE activity have focused on the question of whether the licensing and litigation costs incurred by practicing entities as a result of patent assertions might result in higher prices to consumers. These comments rarely, if ever, take into account the costs avoided by consumers and the quality benefits enjoyed by consumers as a result of the practicing entities being able to incorporate the patented innovations into their products. InterDigital thus encourages the FTC to recognize the role of patent assertion in encouraging innovators to develop and disclose innovations and cautions against an overly narrow and price-based view of the "costs and benefits" of PAE activity.

Finally, the study should focus on *particular types of PAE patent assertion practices* and not on the costs and benefits of patent assertion generally. Whether patent rights and the operation of the patent system have the net effect of promoting or discouraging innovation or competition implicates policy questions that have far-reaching implications beyond the activities of PAEs. As Commissioner Wright recognized in his April 2013 speech on PAEs, "antitrust law should not be used to micro-manage the economy, to correct perceived problems in legal regimes

or to correct inefficiencies in the marketplace."[3] Consistent with its mission, the FTC study should focus on whether any particular PAE practices are anticompetitive, unfair or deceptive.

3. The FTC's Burden Estimates

The FTC invites comments on "the accuracy of the FTC's estimate of the burden of the proposed collection of information." InterDigital is concerned that the FTC has grossly underestimated the burden of complying with its information requests.

The FTC estimates that each recipient will spend a total of 90 to 400 hours at a cost of $3,984.80 to $19,097 in preparing a response to the request. The breakdown of that estimate is as follows:

> Organize document and information retrieval: 15-50 hours
> Identify requested information: 15-150 hours
> Retrieve responsive information: 20-80 hours
> Copy requested information: 20-40 hours
> Prepare response: 20-80 hours
> Mean hourly wages: $52.20 for mid-level management (90% of the work)
> $16.54 for labor or clerical (10% of the work)

These figures significantly underestimate the amount of work required to comply with the requests. The volume of documents that would be responsive to the FTC's requests as currently drafted is enormous, especially for entities like InterDigital that have large patent holdings. To collect and review these expected volumes of documents would consume an unreasonable amount of time from key management personnel, which could disrupt the efficiency and performance of the recipients' businesses. Recipients will thus likely have to hire outside consultants to comply with the FTC's requests.

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3 *Id*. at 26.

For several reasons, most recipients will likely hire attorneys to perform these tasks. The FTC's requests seek documents relating to the recipient's patent assertion demand, licensing and litigation activities. Documents responsive to these requests are likely to contain communications with attorneys, many of which will be privileged. Patents, after all, are rights defined by law for which regular consultation with attorneys is required. Therefore, at a minimum, the documents collected in response to the FTC's requests would necessitate a costly review to identify and protect privileged communications. Such a review must be performed by attorneys.

Likewise, because patents are legal rights, determining how to respond to a particular request for information or documents may require a legal conclusion. For example, determining which patents are or are not subject to licensing commitments and other encumbrances is not just a factual determination but a legal one that requires consultation with counsel. Other responses may require a legal interpretation of the terms of the recipient's licensing agreements. None of these legal costs is factored into the FTC's estimate. In short, the FTC's estimate that a company can comply with the proposed requests by employing fewer than 400 hours of mid-level management time and without consulting attorneys is not realistic.

4. Ways to Minimize Burdens of Collecting Information

The notice also invites comments on "ways to minimize the burden of collecting information." There are several aspects of the information requests that should be modified to reduce burden. Suggestions are organized below by the categories used in the draft information requests.

C. Patent Information

Section C of the proposed information requests seeks information for a six-year period dating back to January 1, 2008 for every U.S. patent and every U.S. patent application ("patents") held by the recipient. These requests place an unreasonable burden on InterDigital and companies like it that have spent decades developing and patenting innovations. InterDigital holds more than 2,900 U.S. patents and patent applications. Compiling the R&D history, costs and assertion history for each of these patents would be enormously burdensome.

In addition, there does not appear to be any reason why the FTC seeks the information in Section C of the proposed information requests from "Other Firms." The release states that the Commission is issuing its requests to Other Firms and Manufacturing Firms to "understand how PAE behavior compares with patent assertion activity by other patent owners." Section C, however, does not seek information about patent assertion activity, and does not apply to Manufacturing Firms. There is no justification for requiring Other Firms to respond to Section C.

If the FTC nonetheless insists on obtaining such information from Other Firms, it should modify its requests to reduce the burden on recipients. First, the prosecution history for each U.S. patent is already publicly available on the United States Patent and Trademark Office's ("USPTO") Patent Application Information Retrieval ("PAIR") website.[4] If the recipients provide bibliographic information for their U.S. patents, including the patent number and title, the FTC can obtain other information about each patent from PAIR as needed. In addition, the

[4] *See* PAIR website, *available at* http://www.uspto.gov/patents/process/search/public_pair/

USPTO may be able to provide the FTC with information about the patents more efficiently and more accurately than the recipients could.

Second, there is no reason to require information about patent applications, but the definition of "Patent" as currently drafted includes a U.S. "patent application." The stated purpose of the study is to understand the effects of patent assertion activities. A patent application cannot be asserted in litigation, and therefore patent application information is irrelevant. Excluding "patent applications" from the definition of "Patent" will significantly reduce the burdens on recipients without depriving the FTC of relevant information.

Third, InterDigital recommends that the FTC shorten the time period for its requests. While a six-year time period might be suitable for some 6(b) studies, it is unlikely to produce useful information for this study given the evolution of wireless technology standards. For example, documents relating to patent assertion practices for 2G patents are unlikely to inform the FTC about more recent patent assertion practices relating to 3G and 4G patents. A time period dating back to January 1, 2011 should provide the FTC sufficient information to conduct its study.

Several of the FTC's specific requests in Section C raise other concerns. For example, specification C.1.o. asks "whether the patent or any claims therein is subject to a licensing commitment made to a Standard-Setting Organization." The sub-parts to this specification include a request to specify all such licensing commitments. To provide this information, the recipients must reach a legal conclusion about what licensing commitment applies to each of the claims in the entity's patents, and this task requires legal analysis. The burdens associated with

conducting this legal analysis for every claim in every patent held by the recipient are enormous. Moreover, such legal conclusions are privileged.

Specification C.1.r asks recipients to specify, for each patent, "whether the Firm has licensed the Patent to any Person(s)." To answer this question requires a review of license agreements to assess whether specific patents are included within a license. Many agreements do not list the licensed patents by number, but instead often contain a definition of "Licensed Patents." Identifying the specific patents that meet the definition in each such agreement will thus entail legal analysis and opinion, which likely will be privileged. InterDigital thus suggests that the FTC permit recipients to satisfy this request by producing copies of the license agreements that are already requested in Specification F.4.

D. Patent Portfolio Information

Section D asks for information on the recipients' patent portfolios. Again, there does not appear to be any reason why the FTC seeks this information from Other Firms. Section D does not apply to patent assertion activity and does not apply to Manufacturing Firms, and thus cannot be used to compare PAE patent assertion practices with "patent assertion practices of other patent owners." There is no justification for requiring Other Firms to respond to Section D.

In addition, the requests in Section D appear to assume that companies neatly segregate their patents into a list of defined portfolios. This is often not the case. License agreements are individually negotiated and a particular patent portfolio can vary from one licensing agreement to the next. For example, a portfolio of 3G wireless patents can include different patents depending on a number of factors, including whether the licensee seeks a license for infrastructure or user equipment, the patents that are captured during the term of a license, and

other variables that may come into play based on uniquely situated licensees. The definition of a portfolio is thus determined by each licensing agreement and not by a neatly segregated list that the company keeps in the ordinary course of business. To comply with this request, as currently drafted, would require a significant expenditure of time and money, and it is not apparent that the results would be germane to the study.

Thus, if "Other Firms" are not entirely exempted from the requirements of Section D, InterDigital recommends that the FTC permit recipients to satisfy this request by producing copies of the license agreements that are already requested in Specification F.4. Alternatively, the recipients could provide a list of patents held by each of the company's subsidiaries.

Section D.1.c asks the recipients to provide a valuation for each patent portfolio. Again, it is difficult to respond to this request because many companies do not neatly divide their patent holdings into segregated portfolios. In addition, valuing a portfolio is a burdensome task, there are multiple ways to value a portfolio and the FTC's request does not specify the methodology to apply. InterDigital suggests that the FTC clarify that this request does not require recipients to conduct any *de novo* valuations.

E. Patent Acquisition and Transfer Information

Of InterDigital's current worldwide patent portfolio, the vast majority (approximately 92%) of its patents are the result of InterDigital's in-house, organic R&D efforts. Section E, however, would likely be burdensome for many recipients due to the scope of the document requests, which request all documents relating to patent acquisitions, sales, and transfers. InterDigital thus suggests that the FTC streamline the document requests in Specifications E.5

and E.6 or require only high level presentations or “documents sufficient to show” instead of “all documents.”

F. Patent Assertion Information

The document requests in Section F, which cover all documents related to demands, litigation and licensing aspects of patent assertions, are extremely onerous. The requests call for virtually every document relating to every assertion a recipient has made, including all email communications regarding those assertions. In addition, these requests seek documents discussing the recipient’s efforts to exercise and protect its legal rights and thus are highly likely to involve communications with counsel that will be subject to the attorney-client privilege or the attorney work product doctrine, thus burdening the recipients with extensive and costly reviews to identify and preserve privileged communications.

Rather than demanding every document relating to patent assertion, the FTC should identify the specific types of PAE patent assertion practices it seeks to study and more narrowly tailor its requests to analyze those specific practices. At the very least, InterDigital suggests that the FTC limit the document requests in specifications F.4, F.5, and F.6 to high level presentations or other “documents sufficient to show” as opposed to “all documents.”

Specification F.2.a. requires recipients to identify all litigation that involves a patent held by the firm to which the recipient is a party. Given the focus of the FTC’s study on patent assertion, InterDigital suggests that the FTC limit this request to litigation involving patent infringement claims. Recipients should not have to provide information about litigation or claims that are not based on infringement of the recipient’s patents, such as Lanham Act claims, declaratory judgment claims unrelated to the infringement, validity or enforceability of a specific

patent, or other non-patent-infringement claims that arise in litigation related to the company's patents.

G.-H. Aggregate Cost and Revenue Information

The document requests in these sections, G.2. and H.2., which cover all documents relating to all costs and revenue relating to the recipient's patent acquisitions, patent transfers, patent assertions, litigation and license agreements, are overbroad and burdensome. For companies that earn a substantial portion of their revenue through patent licensing, the company will likely have an enormous volume of documents that are technically responsive to this request. InterDigital suggests that the FTC reconsider whether it needs such documents in light of the data that will be provided in response to information requests G.1. and H.1. in these sections. At the very least, the FTC should limit this request to high-level documents and regularly prepared budgets sufficient to show costs and revenues for the recipient's patent acquisitions, patent transfers, patent assertions, litigation, and license agreements.

5. Conclusion

InterDigital appreciates that the FTC wishes to better understand PAE activity, and commends the FTC for proceeding cautiously before applying antitrust law to such practices and for insisting that any policy decisions be based on rigorous empirical analysis. The FTC, however, should reconsider whether the draft information requests appropriately serve the objectives of the study. Consistent with the FTC's mission, the FTC's focus should be on specific practices that might be anticompetitive, unfair or deceptive and not on the costs and benefits of the broader patent system or patent assertion generally. In addition, when considering the costs and benefits of particular practices, the FTC should focus on the ultimate impact of

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such practices on innovation and competition and not on the distribution of costs and benefits among entities acting within the patent system, and should consider both the price and non-price benefits of the activity. Finally, the FTC should narrowly tailor its document and information requests to its specific articulated objectives and should remain flexible with recipients in negotiating obligations to reduce the amount of legal costs required to answer the requests or required to protect privileged communications.

Dated: December 16, 2013

Sincerely,

INTERDIGITAL, INC.

By: ______________________________
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