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The Stop Patent Abuse Now ("SPAN") Coalition is comprised of five trade associations including the American Association of Advertising Agencies, the Association of National Advertisers, the Direct Marketing Association, the National Retail Federation, the Mobile Marketing Association, and several of their member companies. The Coalition strongly supports the Commission's decision to conduct a 6(b) study of patent trolls. The proposed specification and the plan to send it to both trolls and other entities asserting patent rights should lead to new information that will help the Commission understand the issues faced by firms that are threatened and sued by patent trolls. Further, we believe that the scope of the study, both in terms of the number of recipients and the time period of the study, is necessary if the Commission hopes to understand both the business models of patent trolls and the effect they have on innovation and the economy. However, the SPAN Coalition does have some concerns regarding the current structure of the study and would propose additional questions that might help the Commission understand some of the challenges that businesses, particularly as end-users of technology, face when they receive unfair or deceptive patent infringement demand letters.

The represented trade associations' members, as end-users of technology, generally do not file for or enforce patents themselves, and therefore often have little experience with the patent system prior to receiving demand letters. As a result, the cost to do even basic due diligence to assess the validity of the alleged infringement claims are often large relative to the value of the activity the troll claims to cover with its patent. This is a particularly acute concern for small to mid-size businesses that have limited (if any) legal budgets and do not typically have in-house patent teams. So when confronted with a demand letter, many of the businesses represented by the SPAN coalition rarely see any viable option, regardless of the merits of the claims, other than to capitulate and settle with the patent troll or stop the activity that is the subject of the threat if the demands are too high. Patent trolls rely on these perverse incentives and often make demands indiscriminately, knowing that they can cash-in without having to worry that the recipient of the letter will litigate.[1]

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[1] Recent congressional hearings have demonstrated these issues in a variety of industries. *See, e.g.,* Testimony of Jamie Richardson, VP, Government and Shareholder Relations, White Castle System, Inc., Before the House Energy and Commerce Committee Subcommittee on Oversight and Investigations at 4-5 (November 14, 2013) ("Many of the PAE demands we receive negatively impact our business decision-making processes, and stifle innovation by limiting our ability to employ emerging technologies in everyday aspects of our business"); Testimony of Larry Sinewitz, Executive VP, Brandsmart USA, Before the Senate Committee on Commerce, Science, and Transportation, Subcommittee on Consumer Protection, Product Safety, and Insurance (November 7, 2013) ("A business like mine either ignores the letter at our own peril (and hope the harassment goes away) or we begrudgingly try to settle for as little money as possible. In every case, we have chosen the later approach and paid."); Testimony of Jon Potter, President, Applications Developers Alliance, Before the Senate Committee on Commerce, Science, and Transportation, Subcommittee on Consumer Protection, Product Safety, and Insurance, 2-4 (November 7, 2013)

But a company that alters its service in order to avoid the demands of a troll, or that pays off a troll to get it to go away, may find itself facing even more demands from patent trolls. Many companies who choose to abandon or alter their products or services to avoid paying a troll receive another demand letter from the same troll making new allegations and demanding similar licensing fees in spite of the change. In addition, we have heard reports that once an end-user business settles with a troll, it finds itself confronted with additional letters from other trolls. This pattern of proliferation has given rise to the concern that information sharing between troll entities (perhaps related troll entities) makes demand letters even more common and onerous once a target company gains the reputation of paying off trolls.

The current structure of the study, which involves sending subpoenas to patent holders and enforcers in the "wireless communications sector," seems well-suited to evaluating many of the details of patent enforcement by patent trolls in that sector. However, depending on how narrowly drawn the set of recipients of the subpoenas is, it is possible that the selection of the wireless sector could limit the study in a way that does not allow the Commission to understand the problems our members face. Our members have faced claims from patent trolls in the areas of online software, mobile apps, wireless networking, and in the application of technology for common business tasks such as point of sale terminals, credit card mag stripe readers, and barcodes. We are concerned that the Commission's focus on the "wireless communication sector" may create blind spots in the Commission's study that would prevent it from observing problems faced by our member companies and others in the end-user community (e.g., hotels, restaurants, grocery stores, applications developers, etc.). Therefore, SPAN proposes that the Commission structure its study to ensure that it encompasses a sufficient variety of experiences with trolls, including the addition of at least one additional category of patent to help ensure that the special conditions in one industry do not bias the results. Given the experiences that end user businesses are reporting, it appears to us that web technology-related patents or wireless networking would be good candidates in this regard. Web technology-related patents seem like a particularly good candidate given that, according to Patent Freedom, 45% of all business method patents held by non-practicing entities are ecommerce-related patents, a number that has been growing rapidly in recent years.[2]

One aspect of the patent troll problem that may also affect our members is the tendency of some, otherwise legitimate companies to transfer patents to patent trolls, including trolls created for the purpose of receiving those patents. A number of technology companies have been concerned about this practice—sometimes referred to as "privateering"—as it may be a way for patent holders to ensure that their patents are asserted against rivals without subjecting themselves to counterclaims. However, we also are concerned that some of these transactions create patent trolls that engage in the abusive demand letter practices described above, which is the principle

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(Giving examples of applications developers that either pay unjustified licensing fees or pull features out of applications rather than pay patent counsel to evaluate patents and demand letters). *See generally,* http://energycommerce.house.gov/hearing/impact-patent-assertion-entities-innovation-and-economy and 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 .

[2] See Patent Freedom, "Investigations into NPE Litigation involving Business Method Patents" at 14-15 (September 4, 2013), *available at* https://www.patentfreedom.com/about-npes/blog/the-growing-use-of-business-method-patents-in-npe-litigation/.

concern of our members. In particular, we are concerned that “privateering” may allow a patent holder to profit from this kind of behavior without having its reputation stained by this unfair and deceptive, albeit highly profitable, conduct.[3] SPAN hopes that the study pays sufficient attention to the privateering problem, particularly to the extent that these transactions could lead to even more abusive behavior.

Additional Questions:

There are also some additional questions that might be useful to determine the impact of patent troll activity on other businesses, including:

1) How do patent trolls identify potential targets?

2) Do patent trolls share information about targeted business among themselves or with common parent entities? What sort of information do they share, and do they share information regarding competing technologies?

3) What do patent trolls do to ensure that they are not seeking licensing fees from users that are already licensed to use their patents or are beneficiaries of RAND commitments made at standard setting bodies or other similar commitments made in the marketplace?

4) How do patent trolls develop the royalty demands that they make in their demand letters?

5) How much do patent trolls do to discover whether a business is actually infringing, and to quantify the extent of any alleged infringement, before they send out demand letters?

6) How much specificity is provided in each demand letter; including information about the patent troll, the nature of the infringement, examples of the alleged infringing activity, and the specifics of the patent in question?

7) Do patent trolls commonly use form letters in the demand letters that they send to a potential target?

8) Do demand letters provide information that documents or otherwise substantiates that: (i) the functionality covered by the patent(s) are identical to the functionality used by the alleged infringer and (ii) the patent(s) are the sole/exclusive patent(s) that can result in the alleged infringing functionality.

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[3] The Commission has seen this sort of effect before in other circumstances. *See, e.g.,* Concurring Statement of J. Thomas Rosch, Federal Trade Commission v. Ovation Pharmaceuticals, Inc., *available at* http://www.ftc.gov/sites/default/files/documents/cases/2008/12/081216ovationroschstmt.pdf (December 16, 2008) (arguing that Merck’s transfer of the drug Indocin to Ovation led to large price increases, even though it did not increase the market power of the owner of the drug, because Ovation was willing to raise prices in a way that Merck allegedly couldn’t because Merck wanted to protect its reputation). *See also,* Concurring Statement of Commissioner Jon Leibowitz, Federal Trade Commission v. Ovation Pharmaceuticals, Inc., *available at* http://www.ftc.gov/os/caselist/0810156/081216ovationleibowitzstmt.pdf (December 16, 2008) (“For many years, Indocin IV was the only FDA-approved product to treat this serious heart condition. Merck, which owned Indocin, had kept prices low – perhaps because it was worried that a significant price increase would have harmed its reputation.”).