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VIA ONLINE SUBMISSION

December 16, 2013

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex J)
600 Pennsylvania Avenue NW
Washington, DC 20580

RE: **Proposed information requests to Patent Assertion Entities and other entities asserting patents in the wireless communications sector (Agency Information Collection Activities; Proposed Collection; Comment Request, Project No. P131203, FR Doc. 2013-24230)**

Overview

The Application Developers Alliance (“ADA”) commends the Federal Trade Commission (“FTC”) for beginning the process of investigating Patent Assertion Entity (“PAE”) activity. ADA urges the FTC to move forward with this process quickly, and in a manner that shares as much information with the public as possible.

PAEs are victimizing countless ADA members through a variety of unfair, deceptive, anticompetitive, and frustratingly opaque business practices. PAE holdup has become so common that PAEs now represent the principal threat to the continued growth and success of the app economy. But while app developers and many others have repeatedly been the targets of these business practices, which they believe to be widespread, there is no way to expose or examine them on a systemic basis. An FTC investigation, made pursuant to its § 6(b) authority, is the best and perhaps only way to obtain empirical data about PAE activity across the entire patent ecosystem.¹

¹ ADA has voiced its concerns about PAEs on numerous occasions and in numerous fora. We respectfully refer the Commission to our previous work on this problem. See Jon Potter, Editorial, *Software patent trolls can be stopped by U.S. Patent Office and Congress*, SAN JOSE MERCURY NEWS (Feb. 11, 2013), http://www.mercurynews.com/ci_22565075/jon-potter-software-patent-trolls-can-be-stopped; *Demand Letters and Consumer Protection: Examining Deceptive Practices by Patent Assertion Entities*, Hearing Before the U.S. Senate Comm. on Commerce, Science and Transp. Subcomm. on Consumer Protection, Product Safety, and Insurance, 112th Cong. (2013) (statement of Jon Potter, President, Application Developers Alliance); Brief of Amici Curiae Application Developers Alliance And Electronic Frontier

In this comment, we discuss two particular areas in which a lack of basic information about PAE activity is significantly harming app developers. First, PAEs use shell companies and other entities to obscure the nature and extent of their activities, and to hide ultimate financial ownership of their patents, leaving app developers and others in the dark as to who is threatening them and even whom they are litigating against. Second, PAEs routinely abuse demand letters: they knowingly overstate the scope of a patent's coverage; they accuse targets of infringement without knowledge as to whether infringement has actually taken place; they refuse to explain to their targets how they are infringing; and they threaten suit even when they have zero intention of making good on those threats.

With these practices, and by exploiting flaws in the patent system such as a raft of overly broad software patents, PAE activity has been devastating small app developers. We applaud the FTC for moving to unmask and study PAEs.

About the Application Developers Alliance

The Application Developers Alliance is an industry association comprising more than 30,000 individual developers and more than 145 companies. ADA is dedicated to meeting the needs of app developers as creators, innovators, and entrepreneurs, by delivering essential information and resources and by advocating for public policies that promote the app ecosystem. App developers represent an increasingly robust force in the economy; the app economy is now globally valued at over \$53 billion² and has created approximately 466,000 jobs in the United States since 2007³.

Foundation In Support Of Apple Inc.'s Opposition To Lodsys, LLC's Motion To Dismiss The Intervention Of Apple Inc, Lodsys, LLC v. Bro. Int'l Corp., No. 2:11-cv-00090-JRG (E.D. Tex. filed Sep. 18, 2013); Brief of Application Developers Alliance as Amicus Curiae In Support of Petition for Certiorari, WildTangent, Inc. v. Ultramercial LLC, et al., No. 13-255 (S. Ct. filed Sep. 23, 2013).

² Andreas Pappas, App Economy Forecasts 2013-2016, DEVELOPER ECONOMICS, July 22, 2013.

³ Michael Mandel, WHERE THE JOBS ARE: THE APP ECONOMY 13 (2012); *Demand Letters and Consumer Protection*, (statement of Jon Potter) *supra* note 1.

I. Basic Information About PAE Activities Is Unavailable Or Difficult to Obtain

App developers and many others have had great difficulty obtaining basic information about PAE activities, whether on a case-by-case or a system-wide basis. The FTC is uniquely suited to uncover and examine these activities through its § 6(b) investigation powers.

Academics, journalists, and policymakers have all taken note of problems with PAEs⁴. Moreover, Congress,⁵ the White House,⁶ and several federal agencies⁷ have begun to examine PAE activities. Through a series of ADA events this year, app developers also came forward to share a litany of stories about PAE abuses.⁸ The reports from these events and studies are deeply troubling. Academics studying the issue found that PAE litigation disproportionately targets small companies—rather than larger companies that

⁴ See, e.g., John R. Allison, Mark A. Lemley, and Joshua Walker, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO. L.J. 677, 677 (2011); Colleen V. Chien, *Startups and Patent Trolls 1* (Santa Clara Univ. Legal Studies Research Paper Series 2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2146251; Daniel Nazer, *EFF Urges FTC to Take Action Against Patent Trolls*, ELEC. FRONTIER FOUND. (Apr. 5, 2013), <https://www.eff.org/deeplinks/2013/04/eff-urges-ftc-take-action-against-patent-trolls>; Caitlin Kenney, *President Obama Wants to Tackle the Patent Problem*, NAT'L PUB. RADIO (June 4, 2013, 3:00 PM), <http://www.npr.org/blogs/money/2013/06/04/188663009/president-obama-wants-to-tackle-the-patent-problem>; Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Opening Remarks on Competition Law & Patent Assertion Entities (June 20, 2013), http://www.ftc.gov/sites/default/files/documents/public_statements/competition-law-patent-assertion-entities-what-antitrust-enforcers-can-do/130620paespeech.pdf.

⁵ See, e.g., Sen. Patrick Leahy & Sen. Mike Lee, *America's Patent Problem*, POLITICO (Sept. 15, 2013), <http://www.politico.com/story/2013/09/patrickleahy-war-on-patent-trolls-96822.html>; News Release, U.S. Senator Amy Klobuchar, *Klobuchar Calls on Administration to Address Concerns Over "Patent Trolls" that Stifle Innovation and Hurt the Economy* (June 26, 2013), <http://www.klobuchar.senate.gov/public/news-releases?ID=7c37a72e-24fa-44b0-996c-0202b5126a1a>; Diane Bartz, *House panel passes bill targeting 'patent trolls'*, Reuters (Nov. 20, 2014), <http://www.reuters.com/article/2013/11/21/us-congress-patent-goodlatte-idUSBRE9AK06620131121>.

⁶ See, e.g., EXEC. OFFICE OF THE PRESIDENT, *PATENT ASSERTION AND U.S. INNOVATION 1-2* (2013).

⁷ See, e.g., FED. TRADE COMM'N, *THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 1* (2006); U.S. PATENT AND TRADEMARK OFFICE, *ROUNDTABLE ON REAL-PARTY-IN-INTEREST INFORMATION*, Transcript (Jan. 11, 2013), http://www.uspto.gov/ip/officechiefecon/rpi_transcript_130111.pdf

⁸ See *Developers on Patents: Five Employees, Six Lawyers*, DEVSBUILD.IT (Apr. 26, 2013), <http://devsbuild.it/resources/type/interview/podcast-developers-patents-five-employees-six-lawyers>; *Developers on Patents: Suing People Who Do Cool Things*, DEVSBUILD.IT (Sept. 19, 2013), <http://devsbuild.it/resources/type/video/developers-patents-suing-people-who-do-cool-things>; *Developers on Patents: We Decided to Fight*, DEVSBUILD.IT (Sept. 19, 2013), <http://devsbuild.it/resources/type/video/developers-patents-we-decided-fight>; *Developers on Patents: We Said "Screw That"*, DEVSBUILD.IT (Sept. 19, 2013), <http://devsbuild.it/resources/type/video/developers-patents-we-said-screw>; *Developers on Patents: We Were Forced to Defend Ourselves*, DEVSBUILD.IT (Aug. 1, 2013), <http://devsbuild.it/resources/type/video/developers-patents-we-were-forced-defend-ourselves>.

are better able to defend themselves—and often creates substantial operational consequences.⁹ These academics further found that the vast majority of PAEs are repeat litigants, often asserting the same patents against many parties; alarmingly, as many as 92% of the patents used by these repeat litigants are found to be invalid when challenged in trial.¹⁰

However, comprehensive information about PAE activity is hard to come by. In order to study PAEs, one must rely on publicly available materials, or information that is voluntarily provided. As a result, it has been exceedingly difficult to obtain accurate, comprehensive information about many common PAE activities.¹¹ ADA's members need more information about this activity so that they can better defend themselves and focus on their businesses. Policymakers also need to understand how PAE activities hurt competition and innovation. And should the FTC undertake enforcement action against PAEs, this investigation will serve as an important component of that action.

In our view, two categories of PAE activities need particularly close examination: first, how often PAEs use shell companies, affiliates, or other entities to make threats and engage in litigation; and second, the amount of research PAEs perform before sending demand letters.

A. Obscuring The True Financial Owner

We are deeply concerned about PAEs' widespread use of shell companies and other entities in patent litigation to conceal the actual owner of the patent being asserted. Such practices enable a range of unfair and anticompetitive activity, and they are more than merely harmful to the patent system: they are antithetical to core principles of our adversarial legal system.¹²

In a comprehensive story about the PAE problem, the radio program *This American Life* illustrated how PAEs use the shell company strategy to conceal the true parties driving the litigation. *TAL* reported that Oasis Research sued sixteen tech companies in 2010, alleging that the companies infringed a 1998 patent initially obtained by Chris Crawford. Between the time of Oasis's lawsuit and the initial grant of the patent, three other parties owned it: Enhanced Software LLC, Kwon Holdings, and Intellectual Ventures. All three

⁹ Colleen V. Chien, *supra* note 4, at 1 (40% of small companies that received a demand... reported a "significant operational impact...").

¹⁰ See John R. Allison et al., *supra* note 4, at 694 (NPEs only win 8% of their patent infringement cases on the merits).

¹¹ Fed. Trade Comm'n, Patent Assertion Entity Activities Workshop, Transcript (Dec. 10, 2012) 24, available at <http://www.ftc.gov/video-library/transcripts/121210paapt2.pdf> (remarks of Mallun Yun, RPX Corp.).

¹² See Fed. R. Civ. P. 17(a); Wright, Miller, et al., 6A FED. PRAC. & PROC. § 1542 (3d ed.).

companies have the same address, and Enhanced Software LLC and Kwon Holdings are confirmed shell companies of Intellectual Ventures (IV). Although IV ultimately sold the patent to Oasis Research a month before the suit, IV is listed in the court documents as an entity who has a financial stake in the outcome of Oasis's case. Additionally, John Desmarais, who had repeatedly represented IV over the course of ten years, represented Oasis in the 2010 suits.¹³ The clear implication is that complex shell company structures make it difficult to know who is really making the demand—and who is ultimately profiting from it.

The shell company strategy gives PAEs a deeply unfair advantage, based on obfuscation at best and outright fraud at worst. Targeted companies cannot consider the identities, reputations, or prior histories of the litigating parties.¹⁴ They therefore cannot consider the merits of infringement claims, or distinguish them from nuisance-based claims, without going through a lengthy and costly discovery process. In addition, companies cannot make informed decisions about whether to seek a license, ignore the request, engage in litigation, or instead consider designing around the technology in question.¹⁵

Worse, targeted developers may not know if they have previously obtained a license from the suing party, or from an affiliated party, and thus may effectively be deceived into paying for a license they have already lawfully obtained.¹⁶ Or, PAEs may be using large shell company networks to conceal their patent portfolios, perhaps in an effort to hide the extent of their activities from the public, or at least from the companies they target.

We have the strong sense that these tactics are widespread. Intellectual Ventures, for example, famously uses over 1200 shell companies to purchase patents and initiate demands and lawsuits.¹⁷ Indeed, this is a problem that permeates the entire patent system. Earlier this year, the US Patent and Trademark Office held a roundtable regarding Real Party in Interest Information. Over the course of the event, various experts from government agencies, universities and the private sector discussed the problems that obscuring real parties in interest can create, and called for greater transparency in the patent litigation system.¹⁸

¹³ *This American Life: When Patents Attack!*, CHICAGO PUBLIC RADIO (July 22, 2011), available at: <http://www.thisamericanlife.org/radio-archives/episode/441/when-patents-attack>.

¹⁴ Kal Raustiala & Christopher Jon Sprigman, *How to Know a Patent Troll When You See One? You Can't*, TIME (July 08, 2013), <http://business.time.com/2013/07/08/how-to-know-a-patent-troll-when-you-see-one-you-cant>.

¹⁵ U.S. PATENT AND TRADEMARK OFFICE ROUNDTABLE, *supra* note 7, at 23-25 (testimony of Marian Underweiser, IBM Corp., discussing how increased transparency will benefit innovators and Patent Trademark Office examiners).

¹⁶ Ramirez, *supra* note 4, at 7

¹⁷ Robin Feldman & Tom Ewing, *The Giants Among Us*, 2012 STAN. TECH. L. REV. 1, 26 (2012)

¹⁸ As David Kappos, then-Director of the U.S. Patent and Trademark Office, explained,

Ultimately, this tactic means that even if app developers and other targeted companies do not end up purchasing a license, they still must incur excessive licensing fees and legal expenses simply because of uncertainty about the nature of the party in interest, rather than the merits of the PAE's claim.¹⁹ We commend the FTC for the thoroughness of the proposed questions in the information request, and urge the agency to ensure that the answers are as comprehensive as possible. Regardless of the final form of the questions, they should be sufficient to uncover the following questions: (1) How often are shell companies and complex ownership arrangements used to obscure the true financial owner of the patent? (2) To what extent are such arrangements used to obscure PAEs' overall patent holdings? And finally, (3) to what extent have such arrangements been used for unfair or anticompetitive purposes, such as to obtain licenses from companies that already have already entered into an agreement with the real party in interest?

B. Demand Letter Abuse

As ADA President Jon Potter stated in November 2013, during his testimony before the U.S. Senate Committee on Commerce, Science and Transportation, abuse of the demand letter process has become a routine PAE practice:

In the last few years, a new business model has emerged. Patent trolls send demand letters that knowingly overstate the breadth of a patent's coverage, or alternatively do not disclose the patent or claim being infringed. The letters accuse businesses of infringement without the sender having any knowledge of whether infringement has actually occurred, and they menacingly threaten litigation when they have no intention of following through.²⁰

For instance, in January 2012, Steve Vicinanza, the CEO of BlueWave Computing LLC, received a demand letter accusing his company of violating a patent for the technology

[T]he marketplace cannot work effectively unless innovators know what a patented invention covers and know some reasonable amount about who owns it. We need as much transparency as possible in order to get intellectual property rights into the hands of those who are best able to make the investments and create the jobs and drive growth and generate economic activity that, after all, is the purpose of the patent system.

U.S. PATENT AND TRADEMARK OFFICE ROUNDTABLE, *supra* note 7, at 6-7.

¹⁹ Tom Ewing, *Indirect Exploitation of IP Rights by Corporations and Investors*, 4 HASTINGS SCI. & TECH. L.J. 1, 96 (2012) ("This lack of transparency may possibly cause greater amounts to be spent in licensing and litigation costs due to the surprise element rather than technical merit and may also contribute to speculation in the IP markets... It would be helpful to have a better understanding of the costs of this intransparency to commercial actors and the innovation system.").

²⁰ *Demand Letters and Consumer Protection* (statement of Jon Potter) *supra* note 1.

involved in scanning documents into emails. This is, of course, a business practice that countless companies use. When Vicinanza inquired further, the accusing company responded that if BlueWave was using a scanner on its network, then it would need to pay a license fee of \$1,000 per employee. When BlueWave refused to pay for a license, and found prior art likely to invalidate the patent in question, the accusing company dismissed the suit.²¹ This story is typical of PAE harassment stories that ADA members regularly encounter. Most ADA members, however, lack the resources to undertake the research BlueWave completed, which underscores the need for the FTC to study this practice.

The limited research that has been done on this question suggests that the experience of app developers is far from unique. A 2011 study, for example, revealed that the most frequently litigated patents are also the ones most likely to be found invalid.²² The study also noted a rapid increase in patent infringement over the last few years, and attributed most of this to PAEs; 61% of patent defendants from 2011-2012 were sued by PAEs who had brought the case eight or more times.²³ In addition, many app developers believe that once a company becomes the target of one PAE, it is more likely to be the target of additional PAEs who surmise that it is substantially weakened with each new demand letter.²⁴

These findings suggest that PAEs are sending demand letters and threatening litigation in a frivolous manner, without seriously considering whether parties are actually infringing. Instead, they may simply intend to monetize patent portfolios via sham litigation and sham demands. The dearth of information about this activity harms app developers who cannot properly develop their defenses, make a decision about whether to engage with the PAE, or obtain an early dismissal.

II. The Proposed Information Requests Are An Important First Step Toward Remediating Unfair, Deceptive, and Anticompetitive PAE Practices

The lack of comprehensive information about PAE activity creates significant harms in and of itself. But the lack of information may also obscure a wider range of unfair, deceptive, and anticompetitive practices—all of which are within the FTC's power to

²¹ *Developers On Patents: We Were Forced to Defend Ourselves*, DEVSBUILD.IT (Dec. 15, 2013), <http://devsbuild.it/resources/type/video/developers-patents-we-were-forced-defend-ourselves>.

²² John R. Allison et al., *supra* note 4, at 694 (finding that NPEs only win 8% of their patent infringement cases on the merits).

²³ Colleen Chien, *Patent Assertion Entities*, Presentation to the Dec 10, 2012 DOJ/FTC Hearing on PAEs, 33 (Dec. 10, 2012), <http://ssrn.com/abstract=2187314>.

²⁴ See, e.g., *Developers on Patents: Five Employees, Six Lawyers*, DEVSBUILD.IT (Apr. 26, 2013), <http://devsbuild.it/resources/type/interview/podcastdeveloperspatentsfiveemployeeessixlawyers>.

remedy.²⁵ This investigation is critically important in at least three ways. First, the FTC can add desperately needed sunlight that is likely to have an immediate effect in the market. Second, the results of the investigation will help policymakers and the FTC assess what policy changes might be necessary. Third, the investigation will be an important component of any enforcement actions that the FTC decides to bring.

As an advocate for consumers, the FTC has often challenged business practices that threaten consumer access to quality goods and services. The agency's actions have helped promote an economy where businesses compete on the merits of their work²⁶ and consumers can have a variety of affordable, innovative, quality products in the market.²⁷ The FTC may be the only entity that can take PAE activities out of the "shadow of the law,"²⁸ and we strongly suspect this investigation will reveal widespread unfair and anticompetitive practices. If we are correct, the FTC is also uniquely positioned to use its enforcement power to put a stop to them.²⁹

A. Lack of Information About PAE Behavior Is Harming App Developers and Small Innovators Everywhere

The dearth of information about PAE practices affects the entire app developer system because it is impossible to get an expansive picture of how PAEs operate or whom they target. Without such a broad view, structural flaws may not be readily apparent, the true costs of PAE activity may be obscured, and PAEs may continue to exercise unfair market advantages.

Because PAEs are able to obscure their identities, litigation history, patent portfolios, and why they think a target is infringing, app developers may be settling claims that have no merit, or paying too much for licenses. This asymmetry is creating economic

²⁵ FED. TRADE COMM'N, COMPETITION COUNTS – HOW CONSUMERS WIN WHEN BUSINESSES COMPETE 1 (2011).

²⁶ *Id.* at 2.

²⁷ Chien, *supra* note 4, at 1 ("How patent demands impact startups is critical because they are a vital source of innovation and new jobs . . ."); *see also* Catherine Tucker, Patent Trolls and Technology Diffusion (Mass. Inst. of Tech., Working Paper 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1976593.

²⁸ Edith Ramirez, *supra* note 4, at 4 ("And because licenses are always negotiated in the shadow of the law, the problems the Commission has previously identified with the framework for patent remedies – including the uncertainty associated with damage awards and the threat of an injunction or exclusion order – add to the risk of hold-up associated with PAE activities").

²⁹ FED. TRADE COMM'N, *supra* note 25, at 3 ("Business strategies that reduce competition may be illegal if they lack a reasonable business justification."); Chien, *supra* note 4, at 24 ("Better dissemination of best practices about resolving patent disputes could also go a long way... Economies of scale have not yet been meaningfully captured in patent defense, but by spreading information, the risks and costs, the transaction costs and thus the return on trolling, can be reduced.").

inefficiencies in the IP market³⁰ and chilling innovation, particularly where developers decide not to release products or enter certain lines of business for fear of litigation. The lack of information effectively creates a tax on production that decreases research, development, and production.³¹

In addition, the lack of information allows large PAEs to manipulate the market in a variety of ways. Currently, PAEs can:

- Engage in hybrid PAE activities such as “patent privateering,” which occurs when an operating company quietly transfers patents to a PAE so that the PAE can serve as the operating company’s enforcement proxy.³² Sometimes the operating company and its PAE partner may even agree to share in the proceeds from the PAE’s enforcement efforts.³³
 - Operating companies and their PAE partners use such arrangements to raise their rivals’ costs and drive low-cost competitors out of the market
 - Because PAEs are immune from countersuit and have no reason to enter into procompetitive cross-license agreements, such hybrid arrangements shield operating companies from the counterclaims and reputational damage to which they would normally be subject if they engaged in such activity in their own name.³⁴
- Intentionally target young companies, in their early and emerging growth stages, gambling that companies will settle before the patent can be litigated.³⁵
- Aggregate and price patent licenses based on the value and size of the portfolio rather than the individual patent—information available only to the PAE. The

³⁰ Comment on Notice of Roundtable on Proposed Requirements for Recordation of Real-Party-in-Interest Information Throughout Application Pendency and Patent Term from Hewlett-Packard Co. to Saurabh Vishnubhakat, Attorney Advisor, Office of Chief Econ., U.S. Patent and Trade Office (Jan. 25, 2013) 1, available at http://www.uspto.gov/patents/law/comments/rpii-e_hp_130125.pdf (“Requiring a patent owner to disclose its identity would help maintain the balance between these competing interests by ensuring that the marketplace remains as ‘free and open’ as possible.”).

³¹ Feldman & Ewing, *supra* note 17, at 26.

³² Mark S. Popofsky & Michael D. Laufert, *Patent Assertion Entities and Antitrust: Operating Company Patent Transfers*, The Antitrust Source, American Bar Association (Apr. 2013), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr13_popofsky.authcheckdam.pdf; Comment on Patent Assertion Entities from Am. Antitrust Inst. to Fed. Trade Comm’n and Antitrust Div. of U.S. Dep’t of Justice (Feb. 21, 2013) 7-10, available at <http://antitrustinstitute.org/content/aai-comments-ftc-and-doj-patent-assertion-entities-paes>.

³³ *Id.* at 9.

³⁴ *Id.* (“In this way, the patents can be asserted by the PAE against the operating company’s competitors without concern about counterclaims or reputation effects on the operating company’s side For example, Nokia and Microsoft have transferred many of their patents to Mosaid, a well-known patent holding company, to enforce those patents and then share proceeds with the prior owners.”)

³⁵ Colleen V. Chien, *Startups and Patent Trolls* 4, 13 (Santa Clara Univ. Legal Studies Research Paper Series 2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2146251.

PAE can then use this imbalance to obtain exorbitant fees from targeted companies.³⁶

- Send an infringement letter to small innovators that already licensed a particular patent. App developers may be repeating license payments, unaware that the patent they previously licensed has been sold to another PAE that is aggressively asserting its newly obtained patents³⁷.
- Coerce small innovators to settle by refusing even to discuss allegations mentioned in the infringement letter. With this tactic, targets cannot ascertain the consequences of their possible responses to patent infringement letters—pressuring them to settle with little bargaining power as to the price.
- Make it difficult for advance licensing negotiations or pre-litigation research to take place, by using shell companies with no office, employees, websites or points of contact.³⁸

The information gathered in the FTC request should help confirm what academics, government officials, attorneys, and other constituent groups suspect—unfair business practices such as these are widespread, and not limited to a few instances. It is true that the request is only directed to twenty-five PAEs, but the information and documents requested will be an important step toward substantiating the concerns about PAEs' unfair business practices.

B. The Information in the Proposed Information Requests, If Shared With The Public, Could Immediately Begin to Remedy the Harms that PAEs Are Causing

We suspect that simply by gathering the information detailed in the request and publicizing the findings in a report, the FTC can immediately help to remedy the PAE problem. With more information, app developers and other small innovators would be able to develop better litigation strategies against PAEs, among other things. If detailed results of the investigation are shared with the public, app developers could match PAEs with their shell companies and affiliates, and know which patents PAEs own and assert. They could also see which parties the PAEs previously litigated against and the outcomes of those actions.

As another example, if a PAE sends out hundreds of letters but has rarely brought actions against large companies, it may signal that the PAE is using predatory tactics to extract

³⁶ Am. Antitrust Inst. Comment, *supra* note 32, at 7-8.

³⁷ *Id.* at 8.

³⁸ Matthew Rappaport & Lily Li, *How Hidden IP Assets Hurt the Entire Patent Community*, Law360, Nov. 28, 2012, <http://www.law360.com/articles/393963/how-hidden-ip-assets-hurt-the-entire-patent-community>.

licenses from small companies that cannot fight back—perhaps even relying on weak patents that can be overturned in trial. App developers could then take this into consideration when receiving a demand letter from such a PAE.

In addition, if the information gathered by the FTC remains confidential, but the findings are shared in a report or white paper, app developers and others would nevertheless still learn important information that will help them decide how to respond to litigation threats. The proposed information requests could also immediately aid efforts by state agencies or private parties that have acted to address anticompetitive PAE behavior.³⁹

Finally, this investigation will put PAEs on notice that their activities are under scrutiny. Indeed, the very fact of this scrutiny may cause some PAEs to become more transparent or to stop engaging in anticompetitive activity. We further suspect that requests will unmask large patent-portfolio-generating companies who have intentionally sold overbroad patents to PAEs in order to facilitate anti-competitive patent targeting.

C. The Proposed Information Requests Will Be Important To Further FTC Activity In This Area

In order to determine the extent of the problem with PAE business practices, the FTC needs to find out specific details on PAE activity. If the investigation uncovers widespread unfair, deceptive, and anticompetitive conduct, the results will put the FTC in a much better position to determine whether it should engage in enforcement action, and if so, what action is appropriate.

The FTC has the authority to correct PAE behavior through many avenues. It can hold bad actors accountable under its statutory powers including cease and desist letters,⁴⁰ fines⁴¹, and litigation. It can also create a report that helps app developers and small innovators better strategize in the early stages of litigation, by providing information on how PAEs operate, and how to identify unfair or deceptive practices.

³⁹ For instance, the Attorney General of Vermont brought litigation against a PAE that had sued non-profit companies for allegedly violating a patent for using document scanners, for violating the state's consumer protection laws. Raustiala & Sprigman, *supra* note 14. And in September of this year, FindTheBest.com, Inc. filed a lawsuit against a PAE under the Racketeer Influenced and Corrupt Organizations (RICO) Act, claiming that the PAE had effectively engaged in extortion when targeting FindTheBest in patent litigation. Amit Chowdry, *Judge Rules In Favor of FindTheBest by Invalidating 'Matchmaking' Patent*, FORBES (Nov. 24, 2013), <http://www.forbes.com/sites/amitchowdhry/2013/11/24/judge-rules-in-favor-of-findthebest-by-invalidating-matchmaking-patent/>.

⁴⁰ 15 U.S.C. §46(b)(2006).

⁴¹ 15 U.S.C. §45 (l) (2006).

Finally, the proposed information requests can propel the collaborative effort needed to enact policy changes that curb unfair PAE practices. The results of the investigation could contribute to legislative reforms, PTO amendments, or FTC rulemaking pursuant to § 18 of the FTC Act. As Chairwoman Ramirez observed in her June call for an investigation, problems with PAEs are “tough competition policy and enforcement issues that defy a one-dimensional answer.”⁴² We agree, and we urge the FTC to continue to be a leader on this issue.

D. The Proposed Information Requests May Show That *Noerr-Pennington* Immunity Is Not Appropriate In Many Instances

The *Noerr-Pennington* doctrine ordinarily shields parties from antitrust liability based merely on petitioning the government, including litigation. However, if the parties are engaged in “sham” litigation, then they are not entitled to immunity under *Noerr*,⁴³ and if there is substantial harm to consumers, the FTC has the authority to bring lawsuits against PAEs for litigation activity.⁴⁴ Acting solely to interfere with the business relationships of a competitor would be considered a “sham,” and not protected under *Noerr*.⁴⁵

In any event, the FTC should not consider *Noerr* immunity to apply to pre-litigation activities such as frivolous or anticompetitive demand letters, because these activities are not petitioning the government⁴⁶. In particular, letters between private parties do not implicate the right to petition—“a mere threat directed at one's competitor to sue or to seek administrative relief does not involve or ‘petition’ the government”⁴⁷ If the FTC does uncover anticompetitive or unfair pre-litigation practices on the part of PAEs, it should feel free to use its enforcement powers to sanction PAEs for these activities.

⁴² Edith Ramirez, *supra* note 4, at 2.

⁴³ *Teva Pharm. USA, Inc. v. Abbott Lab.*, 580 F. Supp. 2d 345, 364 (D. Del. 2008) (“Based upon the foregoing, the court finds that a jury could find defendants' infringement allegations objectively baseless, such as to render the capsule litigation a sham.”).

⁴⁴ See FTC Policy Statement on Unfairness, Appended to *In the Matter of Int'l. Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

⁴⁵ *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961) (explaining that *Noerr-Pennington* immunity is not available for actions that are “actually nothing more than an attempt to interfere directly with the business relationships of a competitor”). In our view, substantial consumer harm is clearly already occurring; for example, “a flurry of PAE lawsuits and demands against application developers [have] led some to leave the US market entirely.” Julie Samuels, *Patent Trolls Drive App Developers from U.S. Market*, ELECTRONIC FRONTIER FOUNDATION (July 19, 2011), <https://www.eff.org/deeplinks/2011/07/patent-trolls-drive-app-developers-s-market>

⁴⁶ See *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 892 (10th Cir. 2000)

⁴⁷ Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, § 205e at 237.

E. The FTC Should Construe Trade Secret Claims Narrowly and Make Public As Much of The Information Gathered As Possible

The FTC has substantial discretion in deciding how much of the information gathered from PAEs will be accessible by the public, and we urge the Commission to make as much information about PAE activity public as possible. This is particularly true where the available evidence—such as the creation of multiple shell companies—strongly suggests a deliberate effort to obscure PAE practices and ultimate financial ownership.

Thus, when considering which parts of the PAE responses to make public, we urge the FTC to construe the § 46(f) disclosure exemption⁴⁸ narrowly, so that the public can know as much as possible about PAE activity. And to the extent the FTC cannot publish the responses, we urge the FTC to issue a comprehensive report on its findings as soon as is practicable, so that innovators can use that generalized information to better understand PAE practices and so that the report can inform policy reform processes.

Trade secrets and other confidential information, including financial statements, are not protected from FTC information requests themselves.⁴⁹ The FTC Act authorizes the FTC to move forward with these kinds of information requests because they are critical to the FTC's role as an advocate for consumers. Nevertheless, we anticipate that PAEs will seek to avoid answering questions about corporate structures, shell companies, and related entities. We urge the FTC to be wary of overbroad claims of trade secret protection.

In any event, while trade secret protection might be available for management information and confidential business plans in certain instances, it is unlikely that such protection would apply to publicly available information. One of the fundamental requirements of trade secret protection is that the information in question not be readily ascertainable by proper means. Because any party can access corporate charters and bylaws at the secretary of state's office in the state of incorporation—which includes information about the companies' ownership structures—PAEs' ownership structures should not be protected against disclosure to the public. If, however, the FTC does determine that some of this information is found to be protectable, we urge it to limit that protection to specific pieces of information, and to disclose all remaining responses and findings.

Of course, if the information requests reveal illegal or fraudulent conduct on the part of PAEs, such information simply cannot qualify as a trade secret, and should be made

⁴⁸ 15 U.S.C. § 46(f)(2006).

⁴⁹ Fed. Trade Comm'n Operating Manual, Chapter Three ("trade secrets and confidential commercial or financial information are not privileged and their production may be compelled").

public immediately.⁵⁰

Conclusion

The FTC's proposed information request is critically important because its investigatory powers put it in a unique position to uncover basic information about how PAEs use alternate entities and conduct pre-demand research. Only the FTC can provide desperately needed transparency about abusive, market-distorting PAE business practices that are causing so much havoc for app developers and small innovators.

Responses to these information requests could begin to remedy major harms that PAEs are causing. The FTC can publish critical information about PAEs such as their litigation histories and patent portfolios, which could level the playing field and allow small innovators to prepare defenses before incurring millions in legal fees. If the FTC finds that PAEs' business practices are unfair or anti-competitive, it can initiate litigation and other enforcement actions against them. Finally, the FTC can propose legislative or executive action against PAEs, or provide leadership on reforms that will promote competition, innovation, and consumer protection.

We stress, however, that a §6(b) investigation should not be a prerequisite for action by other entities or in other contexts, and we do not believe the FTC should limit its activity in this area to the problems with lack of information about PAE activity. There are many other important PAE-related problems that we have not addressed in this comment, such as fee shifting and the scope of patentable subject matter. These problems “defy a one-dimensional answer,”⁵¹ and the solution will require a multi-pronged approach that will involve a variety of stakeholders and sectors.⁵²

⁵⁰ *Goodman v. Genworth Fin. Wealth Mgmt.*, 881 F. Supp. 2d 347, 355 (E.D.N.Y. 2012). See Restatement (3d) of Unfair Competition, § 40, comment c (recognizing privilege to disclose another's trade secret “in connection with the disclosure of information that is relevant to public health or safety, or to the commission of a crime or tort, or to other matters of substantial public concern”); *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (citing comment c with approval).

⁵¹ Edith Ramirez, *supra* note 4, at 2.

⁵² PATENT ASSERTION AND U.S. INNOVATION, *supra* note 6 (recommending an array of legislative and executive actions); David Balto, *Using The Full Powers of The FTC to Combat Patent Trolls*, Patent Progress (Apr. 5, 2013), <http://www.patentprogress.org/2013/04/05/using-the-full-powers-of-the-ftc-to-combat-patent-trolls> (proposing that the FTC “tak[e] a multi-faceted approach” to addressing the patent troll problem, including a § 6(b) investigation).

We believe that this information request is an important step in the right direction. We commend the FTC for initiating it, and we urge the Commission to move forward with it as quickly as possible.

Respectfully submitted on behalf of the Application
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