



December 16, 2013

Filed Electronically

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue N.W.
Washington, DC 20580

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

Enclosed are Intel's comments on the above referenced matter. We support the Federal Trade Commission's decision to investigate the patent acquisition, licensing and litigation practices of patent assertion entities. We believe the Commission's inquiry will help advance public policy by developing a better understanding of the impact of PAE activities on consumers, innovation, and the patent system.

Should you have any questions regarding Intel's comments, please do not hesitate to contact me.

Sincerely,

✓ ,

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Comments of Intel Corporation

On the

Federal Trade Commission's Proposed Section 6(b) Information Requests to Patent Assertion Entities And Other Entities Asserting Patents

December 16, 2013

Intel Corporation appreciates the opportunity to submit these observations in response to the Commission's request for comments on its proposed information requests to patent assertion entities ("PAEs")¹ pursuant to section 6(b) of the Federal Trade Commission Act.² Intel welcomes the Commission's decision to investigate the activities of PAEs, and believes that the Commission's inquiry will help to advance public policy by developing a better understanding of PAEs and the effects of their increasing activities on consumers, innovation, and the patent system.

General Comments

As the Commission is aware, the number of patent infringement cases filed by PAEs has increased dramatically in recent years. In 2012, PAEs filed nearly two-thirds of patent infringement suits.³ The available information suggests that most PAE suits lack any merit and, instead, are designed to impose litigation transaction costs on defendants to extract payments on claims that are, at best, dubious. According to one estimate, PAEs win only 8% of the infringement cases that they

¹ To maintain consistency with the Commission's terminology, and for clarity, Intel uses the term "PAE" throughout its comments as that term is defined by the FTC. Some of the statistical data that are cited in these comments relate to non-practicing entities (or "NPEs") more generally, which is a somewhat broader category than PAEs. The minor difference between the two categories, however, does not affect the data materially. See James Bessen and Michael Meurer, *The Direct Costs from NPE Disputes*, Boston Univ. School of Law, Law and Economics Research Paper No. 12-34, at 11-12, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2091210 (forthcoming in Cornell Law Review).

² Federal Trade Commission, *Agency Information Collection Activities; Proposed Collection; Comment Request*, 78 Fed. Reg. 61352 (Oct. 3, 2013) (Hereinafter, "PAE 6(b) Notice").

³ RPX Corp., *2012 NPE Activity Report*, at 12, available at <http://www.rpxcorp.com/siteFiles/SiteManager/0BF995E82CFF591EE80EFE8AC69259E7.pdf> ("2012 NPE Activity Report").

litigate to judgment.⁴ PAEs nevertheless inflict enormous costs on the economy. It has been estimated that suits brought by PAEs inflict \$29 billion in direct costs on defendants annually, and as much as \$80 billion in direct and indirect costs each year.⁵

Very little of the costs that PAEs impose benefit inventors, however. Despite claims by PAEs that they are vindicating the rights of inventors and thereby promoting innovation, the vast majority of the funds that PAEs collect from practicing entities and their customers flow into the pockets of the PAEs' investors and lawyers. It has been estimated, based on publicly available information, that independent inventors receive only about 5% of the direct costs that NPE suits impose on defendants.⁶

PAEs regularly demand payments from and sue a wide range of companies, and not just companies that produce allegedly infringing products. In 2012, PAEs sued more companies outside the technology sector than technology companies.⁷ One PAE, for example, has sued numerous coffee shops, hotels, restaurants, supermarkets, retailers, transportation companies, and other commercial users of wireless internet technology.⁸

Although private organizations and researchers have attempted to gather data regarding PAE demands and lawsuits, their ability to compile such data is constrained by their access to only publicly available information. While the available research sheds some light on PAE activity, a great deal about PAE activities is unknown and unknowable to researchers who must rely on

⁴ John R. Allison, Mark A. Lemley, & Joshua Walker, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 Geo. L. J. 677, 694 (2011).

⁵ Bessen and Meurer at 3-4; *see also* James Bessen, Jennifer Ford, & Michael J. Meurer, *The Private and Social Costs of Patent Trolls*, Regulation 31 (2011-12).

⁶ Bessen & Meurer at 26.

⁷ Colleen Chien, *Patent Trolls by the Numbers*, Santa Clara Univ. Legal Studies Research Paper No. 08-13 (Mar. 13, 2013) (citing data compiled by Patent Freedom), *available at* <http://www.patentlyo.com/patent/2013/03/chien-patent-trolls.html>.

⁸ *In re Innovatio IP Ventures, LLC*, 2013 WL 5593609 (N.D. Ill. Oct. 3, 2013).

information in the public domain. The FTC's use of its compulsory process powers to obtain information about PAEs therefore will provide sorely needed answers to important questions about PAEs to guide U.S. public policy. In particular, Intel encourages the Commission to use its investigative powers to discover the truth about how much money PAEs return to inventors, as opposed to lawyers and investors.

Intel believes that the Commission's information requests are reasonable and are necessary to inform public policy regarding PAE activity. Because of the limitations of publicly available data and the studies that are based on them, the Commission is uniquely situated to obtain information that is vital to the proper understanding of PAEs. Intel believes that any burden that the Commission's information requests will impose on PAEs is insignificant in relation to the burdens that PAEs impose on the economy and on companies that develop and produce the innovative products that are critical to economic progress. Intel agrees with the joint comments of Adobe Systems, Inc., Canon U.S.A. Inc., Cisco Systems, Inc., Dell Inc., Ford Motor Company, Google, Inc., Hewlett-Packard Company, Limelight Networks, Inc., Rackspace Hosting, Inc. and SAP Americas, Inc. that the Commission's information requests are appropriately tailored to elicit relevant information regarding the PAE problem.

Data collected by the Commission on PAE activities will be invaluable information for judges and policy makers as they seek to reduce abusive litigation practices and abusive threats of litigation. Much of the PAE patent litigation in the U.S. is too expensive and unpredictable. For example, in nearly all cases brought by PAEs, legal costs exceed the settlement amounts.⁹ Moreover, as the Commission recognized in its PAE 6(b) Notice, studies focused on publicly available data have concluded that "PAE litigation activity is on the rise."¹⁰ As the Commission has further noted, its

⁹ RPX Corp., *2012 NPE Cost Study: High-Level Findings*, at 9, available at <http://www.rpxcorp.com/siteFiles/SiteManager/2A01E1CD29DA06AB8C95399AE5D04919pdf>.

¹⁰ PAE 6(b) Notice, 78 Fed. Reg. at 61353.

broad authority to collect nonpublic information on PAE litigation, licensing and other practices “will enhance the quality of the policy debate surrounding PAE activity.”¹¹

Ironically, as an alternative to litigation that they have initiated, some PAEs are now promoting arbitration and claiming that it is a more efficient way to solve patent licensing disputes. However, judges generally are in the best position to evaluate complex patent issues. More importantly, court proceedings typically are publicly accessible and available. Such judicial transparency helps set precedent that prevents repeated patent abuses, whereas arbitration proceedings often are shrouded in secrecy that would allow patent abuses to continue undetected. Again, the Commission’s analysis of the Section 6(b) data should help inform the ongoing debate on how to curb abusive litigation practices.¹²

Comments on Specific Information Requests

The Commission’s questionnaire covers many of the important questions raised by PAEs and, more broadly, NPE activity. In these comments, Intel identifies a few important questions that are not currently addressed by the proposed information requests, which could be answered without materially affecting the burden of compliance with the existing requests. Intel urges the Commission to consider the subjects discussed below in crafting its final questionnaire. We believe that the additional questions raised below will “enhance the quality, utility, and clarity of the information to be collected.”¹³

¹¹ *Id.*

¹² As a secondary benefit from the Section 6(b) study, the information collected on PAE patent acquisition, licensing and litigation practices should be quite valuable to the Commission in connection with its outreach to antitrust enforcers overseas. Newer antitrust agencies have struggled in defining the parameters of patent abuse and in determining reasonable royalties. The data from the section 6(b) study, especially data compilations based on nonpublic information, could assist the Commission in its cooperation with foreign antitrust enforcers. *See* 15 U.S.C. § 46(f)(2).

¹³ 78 Fed. Reg. at 61357.

1. PAEs' Acquisition of Standard Essential Patents

One important issue relating to PAEs concerns their acquisition and assertion of standard essential patents (“SEPs”) that are encumbered by commitments to license on fair, reasonable, and nondiscriminatory (“FRAND”) terms. The Commission has been at the forefront of addressing harms to competition, innovation, and consumers from patent hold-up by FRAND abusers. The agency’s actions in this area include bringing enforcement actions,¹⁴ publishing reports,¹⁵ filing public interest statements before the International Trade Commission,¹⁶ and providing Congressional testimony.¹⁷ One of the enforcement actions brought by the Commission, *Negotiated Data*, concerned a PAE’s renunciation of a licensing commitment made by the original owner of its SEPs.¹⁸

As the Commission has observed, FRAND abuse amounts to patent hold-up—coercion of locked-in standard implementers to pay significantly higher royalties than they would have had to pay for the same patents before the adoption of a standard. The Commission has stated that “the threat of an injunction or exclusion order, combined with high switching costs, could allow a patent holder to obtain unreasonable licensing terms that reflect the hold-up value of its patent despite its RAND commitment.... [T]his can raise prices to consumers, distort incentives to innovate, and undermine the standard setting process.”¹⁹ In a similar vein, the Department of Justice and the Patent

¹⁴ See *Robert Bosch GmbH*, Dkt. No. C-4377 (Apr. 24, 2013) (consent order); *Motorola Mobility LLC*, Dkt. No. C-4410 (July 24, 2013) (consent order).

¹⁵ See, e.g., Federal Trade Commission, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* (2011).

¹⁶ See, e.g., Third Party United States Federal Trade Commission’s Statement on the Public Interest, *In the Matter of Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752 (June 6, 2012).

¹⁷ See, e.g., *Standard Essential Patent Disputes and Antitrust Law*, Prepared Statement of the FTC Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of S. Comm. on the Judiciary 113th Cong., at 8, fn.26 (July 30, 2013).

¹⁸ *Negotiated Data Solutions LLC*, No. C-4234 (Sep. 23, 2008) (consent order).

¹⁹ *Standard Essential Patent Disputes and Antitrust Law*, Prepared Statement of the FTC Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of S. Comm. on the Judiciary, 113th Cong.,

and Trademark Office have observed that the standard-setting process is vulnerable to “patent hold-up, which entails asserting the patent to exclude a competitor from a market or obtain a higher price for its use than would have been possible before the standard was set, when alternative technologies could have been chosen.”²⁰

The acquisition of SEPs by PAEs raises serious concerns. Most notably, PAEs face different incentives than do practicing entities. Because practicing entities also practice SEPs, they may be constrained in their royalty demands by the need to obtain licenses to other companies’ SEPs and preserve business relationships. PAEs, on the other hand, face no such constraint because they do not develop, manufacture, or sell any products. And sometimes PAEs assert patents transferred to them by practicing entities against competitors of those practicing entities. As a result, the acquisition of SEPs by PAEs may lead to increased demands for unreasonable licensing terms that contravene the FRAND commitments attached to the patents.²¹ For example, in *Negotiated Data*, the respondent did not honor its predecessor’s commitment to license the SEPs at issue for a one-time fee of \$1,000; instead, it threatened to initiate, and in some cases prosecuted, legal actions against companies that refused to meet its demands for royalties far in excess of that amount.²²

The Commission’s proposed study seeks some information relating to the assertion of SEPs by PAEs. For example, for each patent held by a firm receiving the information request, Specification C.1.o asks whether the patent “is subject to a licensing commitment made to a Standard-Setting Organization,” and for details regarding that commitment, including the organization to which it was made. The information request also generally asks for demands made

at 8 (Jul. 30, 2013). *See also* Statement of the Federal Trade Commission, *In the Matter of Google Inc.*, File No. 121-0120, at 2, fn.6 (Jan. 3, 2013).

²⁰ US Dep’t of Justice and US Patent and Trademark Office, *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments*, at 4 (Jan. 8, 2013), available at <http://www.justice.gov/atr/public/guidelines/290994.pdf>.

²¹ *See id.* at 26.

²² *See Negotiated Data*, Analysis of Proposed Consent Order to Aid Public Comment, at 4.

by the Firm in connection with any patents (Specification F.1) and for information regarding the acquisition of patents (Specification E.1). It would, however, be useful for the Commission to request a limited amount of additional information that would shed light on whether the transfer of SEPs from practicing entities to PAEs has led to higher royalty demands and higher royalty payments. This can be done by adding a few specification subparts to the questionnaire.

First, the information request should ask PAEs to describe all steps that they have taken to identify SEPs that are subject to FRAND, royalty-free, or similar licensing commitments, such as a commitment to grant a license for a specified dollar amount (“encumbered SEPs”). This information will help in understanding whether PAEs are taking FRAND and similar licensing commitments into account before making royalty demands.

Second, the Commission also should ask PAEs to specifically and separately identify royalties that they have demanded for any such encumbered SEPs, and whether they have made demands for payments for alleged infringement of such SEPs as part of a larger royalty demand, without differentiating between encumbered SEPs and other patents. The Commission should require PAEs to provide information sufficient to show whether they have conditioned licenses to SEPs for any standard on licensees’ agreements to accept licenses to patents that are not SEPs or licenses for SEPs that are essential to different standards. This will shed light on whether PAEs are tying SEPs to other patents as a means of evading FRAND or similar commitments.

Third, the Commission should separately obtain from predecessor practicing entities that owned encumbered SEPs information sufficient to show the demands for royalties that they had made with respect to those encumbered SEPs prior to transferring them to PAEs, and the terms of the licenses that they had concluded for those SEPs. Such information is not covered by the information requests regarding Patent Acquisition and Transfer Information in Specification E.1, because those relate only to the terms of the patent sale, and do not provide information regarding pre-transfer royalty demands.

The Commission should also ask predecessor owners of encumbered SEPs to provide information sufficient to show the royalty demands that they have made for encumbered SEPs that remain in their portfolios and that are essential for the same standard(s) as the SEPs they transferred, and the terms of the licenses that they have concluded for those SEPs. This latter inquiry will help the Commission ascertain the extent to which a practicing entity's sale of some of its encumbered SEPs to a PAE increases the total royalty that is originally demanded from companies practicing the patented technology. For example, if the transferring SEP holder either did not reduce its royalty demand for its remaining SEPs, or reduced it by less than the amount that the PAE is demanding for the transferred SEPs, the total royalty demand for the same set of SEPs will have increased as a result of the PAE's acquisition of the SEPs.

2. Privateering

The assessment of PAE activity would not be complete without a detailed examination of “privateering,” or the transfer of patents by practicing entities to PAEs to promote the assertion of the practicing entities' patents against rivals. As Chairwoman Ramirez has noted, these transfers often benefit the practicing entities by raising rivals' costs.²³ Specifically, privateering enables practicing entities to use PAEs to impose costs on their rivals without facing patent retaliation. In other words, unlike practicing entities, PAEs are invulnerable to countersuits for infringement and can thus freely assert claims without that risk.

Privateering also enables a practicing entity to raise rivals' costs by exposing rivals to additional patent infringement claims. A practicing entity may do so by (i) spinning off some of its patents to a PAE on condition that the PAE use those patents against its competitor, while retaining other patents it can directly assert against the same competitor; or (ii) encouraging the PAE to place

²³ Opening Remarks of Chairwoman Edith Ramirez, *Competition Law & Patent Assertion Entities: What Antitrust Enforcers Can Do*, at 6, June 20, 2013), available at http://www.ftc.gov/sites/default/files/documents/public_statements/competition-law-patent-assertion-entities-what-antitrust-enforcers-can-do/130620paespeech.pdf.

the transferred patents in multiple sub-entities so that it can settle one case with a “portfolio” license to the patents held by one such sub-entity while remaining in position to assert the remaining patents against the alleged infringer through other sub-entities.

To analyze the privateering problem effectively, the Commission must acquire relevant information not only from PAEs but also from practicing entities that transfer patents to PAEs. Among other items, the Commission should expand Specification E to require both PAEs and transferring entities to identify any agreements between PAEs and practicing entities to (i) assert specified patents or patents belonging to identified categories (such as LTE patents), (ii) make assertions against specified companies or companies belonging to identified categories (such as smartphone manufacturers), and/or (iii) make payments to the patent transferor(s) from proceeds derived from assertions by the PAEs.²⁴ In this regard, the Commission should require PAEs to reveal all reversionary interests, termination rights, and any other rights that give transferring entities any degree of control over assertion of patents. In addition, the Commission should require practicing entities that transferred patents to PAEs to identify every assertion of transferred patents by PAEs, to the extent they have such information available. The transferring entities also should be required to identify all payments that they have received from PAEs resulting from such assertions. These additional requests would enable the Commission to obtain more comprehensive information about the assertion of patents transferred by companies engaged in privateering, which may not otherwise be available if the questionnaire is addressed only to a select number of PAEs.

3. Royalty Base and Royalty Stacking

Another area that lends itself to examination by the Commission relates to the royalty base on which PAEs base their license demands and execute license agreements. The Commission’s *Evolving IP Marketplace* report concluded that the most appropriate royalty base in patent licenses is

²⁴ Some of this financial information may be covered by existing information requests, including Specifications C.1.n, E.4.b and H.1.a.

“the smallest priceable component that incorporates the inventive feature.”²⁵ As the Federal Circuit has observed, “[w]here small elements of multi-component products are accused of infringement, calculating a royalty on the entire product carries a considerable risk that the patentee will be improperly compensated for non-infringing components of that product.”²⁶ Although the Federal Circuit has circumscribed patentees’ ability to tax entire products when infringement is at the component level, the Commission has criticized the court for not going far enough, because its standard allows the value of the entire product to serve as the royalty base when a patented feature is the basis for customer demand for the product.²⁷ The Commission took note of the view that, under the Federal Circuit’s standard, “damages were too frequently based on a complex product when only a component was patented.”²⁸

Some patent holders have adopted a policy of avoiding dealings with manufacturers of standard-compliant components, such as semiconductor chips, and suing system manufacturers to seek royalties on the basis of the price of a complete system for patents that read on an individual component. For example, rather than license the manufacturer of a Wi-Fi chipset, these patentees sue manufacturers of computers or other complex systems and demand royalties based on the price of the entire value of the systems. The Commission recognized this phenomenon in its *Evolving IP Marketplace* report, where it observed that some “patentees’ hopes of establishing a large royalty base in order to garner large damage awards led patentees to sue manufacturers of complex consumer products, like personal computers and cell phones, rather than manufacturers of the components.”²⁹

²⁵ *Evolving IP Marketplace* at 212.

²⁶ *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012).

²⁷ *Evolving IP Marketplace* at 210-11.

²⁸ *Id.* at 209.

²⁹ *Id.*

The Commission’s report noted another negative impact from targeting system manufacturers for alleged infringements that are attributable to components, such as Wi-Fi chips: “Patent suits threatened ‘up the value chain’ in order to obtain a larger base present[] a practical problem for accused infringers that may have insufficient knowledge of the technical issues surrounding infringement by a component manufactured elsewhere.”³⁰

Intel’s experience confirms the validity of both of the concerns expressed in the Commission’s report, as patentees have targeted Intel’s customers, PC manufacturers, for infringement of asserted SEPs that are practiced at the level of the components manufactured by Intel.³¹ The effect on negotiated settlements of patent threats or lawsuits targeted at system manufacturers is not known other than anecdotally. Intel suggests that the Commission augment Specification F.1 by requesting PAEs to (i) identify the royalty base used to support any royalty demand (if they in fact specified a royalty base in connection with any demand), and (ii) broaden Specification F.2 by requesting PAEs to identify the royalty base used to support any damages claim in litigation.

In addition, the Commission should ask PAEs to produce documents, such as reports to investors, which describe the PAEs’ strategies for selecting targets in the value chain for their demand letters and law suits. Such information will provide an empirical basis for evaluating the extent to which the relative positions of the PAEs’ targets within the value chain affect the royalty demands and the royalties that PAEs collect. This inquiry will provide useful data in gauging whether PAEs are extracting excessive damages by targeting companies “up the value chain” and successfully using entire products as the royalty base. The data would also be useful for the

³⁰ *Id.* at 209-10.

³¹ For example, in the recent trial in *Ericsson Inc. v. D-Link Systems, Inc.*, Case No. 6:10–CV–00473 (LED) (E.D. Tex.), witnesses for Ericsson Inc. testified that Ericsson maintains a policy of not licensing component manufacturers because the company could obtain larger royalties from their downstream customers based on prices of their computer systems. The testimony is available to the Commission upon request.

Commission in its outreach programs to foreign competition enforcement agencies to guide them on the consequences of allowing royalties to be imposed on entire products for infringements at the component level.

The Commission should also obtain data that would allow it to assess how PAEs contribute to the problem of royalty stacking in relation to SEPs. The “royalty stack” is the cumulative royalty burden that applies to particular products as a result of the respective royalty demands made by different patentees. As one U.S. district court recently described it, the royalty stacking problem “arises because most standards implicate hundreds, if not thousands of patents, and the cumulative royalty payments to all standard-essential patent holders can quickly become excessive and discourage adoption of the standard.”³² This problem arises both with SEPs and with other patents.

The royalty stacking problem is particularly acute when royalties are imposed on entire products rather than the components that practice licensed patents. According to one estimate, the aggregate royalty rate in the wireless telephony area is in the range of 25-30% of the price of a mobile phone.³³ This means that the cumulative royalty burden on a smartphone can exceed \$100. Some patent holders claim nevertheless that “[t]here is little empirical evidence of royalty stacking in general and in the 3G [telecommunications] industry in particular.”³⁴ The Commission’s 6(b) study presents an opportunity to examine the cumulative royalty burden imposed on mobile phone manufacturers, and in particular in relation to SEPs that are subject to FRAND or other licensing

³² *In re Innovatio IP Ventures*, 2013 WL 5593609 at *9.

³³ Eric Stasik, *Royalty Rates And Licensing Strategies For Essential Patents On LTE (4G) Telecommunication Standards*, les Nouvelles, at 117 (Sept. 2010), available at <http://www.investorvillage.com/uploads/82827/files/LESI-Royalty-Rates.pdf>.

³⁴ Michael D. Hartogs, Senior Vice President, Division Counsel, QUALCOMM Technology Licensing, *Presentation to FTC/DOJ Joint Hearings on Single Firm Conduct* at 11, available at <http://www.ftc.gov/os/sectiontwohearings/docs/070131Michael%20Hartogspresentation.pdf>.

commitments. Intel urges the Commission to use this opportunity to probe the question of royalty stacking, which is of vital importance to the communication and information technology industries.³⁵

One of the ways in which PAEs contribute to the royalty stacking problem is through the use of shell companies for purchasing, holding, and asserting patents.³⁶ By holding patents through multiple entities, the existence of which they take great care to conceal, PAEs seek to extract multiple sets of royalties for patent “portfolios” from practicing entities. The effect is that concluding a license agreement with a PAE, or one of its sub-entities, does not buy a product company patent peace but, rather, serves as an invitation for additional demands for royalty payments to different sub-entities. Information request B.2, and the associated requirement that all information requests must be addressed by both the PAE and all related entities, is of vital importance in examining this aspect of PAE activity. The Commission should clarify in the final questionnaire that the information required in response to Specifications A-H must be answered both for the Firm and *separately* for each of the entities identified in Specification B.2, so that a PAE cannot evade the purpose of this requirement by providing aggregate information for such entities.

4. Reaching Certain NPEs That Are Not PAEs

As the Commission recognizes, not all non-practicing entities are PAEs.³⁷ Some NPEs are product companies that have failed in the marketplace and have either withdrawn from product markets or have seen their product businesses shrivel. Intel’s experience indicates that companies in that position operate much like PAEs, as their focus shifts from competing through their previously successful product business to monetizing patents associated with that business. Some of these companies monetize their patents by auctioning them to the highest bidder, as Nortel and Kodak have

³⁵ For example, the Commission may seek information designed to ascertain the total royalty burden that smartphone manufacturers bear for SEPs and, separately, for non-SEPs.

³⁶ See, e.g., Tom Ewing & Robin Feldman, *The Giants Among Us*, 2012 Stan. Tech. L. Rev. 1, 6 (noting the existence of “1276 shell companies and related entities that appear to be associated with Intellectual Ventures.”).

³⁷ PAE 6(b) Notice, 78 Fed. Reg. at 61352, fn.1.

done in the recent past. But others become have elected to monetize their patents by threatening and initiating litigation. The patent assertion activities of the latter group merits scrutiny.

The strategies of companies that have either exited their product businesses, or have seen those businesses decline to a small fraction of what they had been, tend to parallel those of PAEs. For example, a decade ago, Intergraph, a failed computer company that had exited the computer business, conducted a campaign of lawsuits against computer manufacturers based on their use of Intel microprocessors. Similarly, Wi-LAN, a failed Canadian wireless product company, disposed of its products business to focus on the acquisition and assertion of patents in a wide variety of areas, including its own technical area of focus and other areas. Before exiting, these companies had product businesses that were vulnerable to countersuits by their litigation targets. Upon exiting, these companies were in the same position as NPEs—without a product business that could be sued for infringing patents in the same technological area.

The activities of these companies are properly classified as “Other Firms”³⁸ (i.e., not PAEs or “Manufacturing Firms”) for purposes of the Commission’s information requests, as they are non-practicing entities in the relevant product markets and are engaging in patent licensing. Because of the similarity of patent assertion activities of companies with failed product businesses, their assertion activities merit similar scrutiny to that given to PAEs. The Commission should direct the full section 6(b) questionnaire at companies of this type by including some of them as “Other Firms” among the “15 other entities asserting patents” referenced in the Commission’s Notice.³⁹ This will assist the Commission in identifying the similarities and differences between the patent assertion activities of these types of NPEs, PAEs, and Manufacturing Firms, which will be of immense value in informing public policy in this area.

³⁸ *Id.* at 61353.

³⁹ *Id.*

In addition, some companies in the wireless communications industry actively manufacture and thus are practicing entities, but also have significant stand-alone licensing subsidiaries or divisions. We assume these are the types of “organizations engaged in licensing” that the Commission refers to which are not NPEs but are meant to also be included in the “Other Firms.”⁴⁰ As such, some of these types of entities also should be included among the 15 entities to which the FTC proposes sending information requests and, like any Other Firms responding to the Commission’s 6(b) subpoenas, they would need to respond to all of the information requests.⁴¹

5. The Impact of Venue on Outcomes of PAE Infringement Cases

According to one estimate, 56% of infringement cases brought by PAEs are filed in the Eastern District of Texas or the District of Delaware. Another 10% are filed in the Central District of California.⁴² This means that two-thirds of all PAE-initiated actions are brought in just three out of the 94 federal judicial districts. Although information about the judicial districts in which cases are brought is available from public sources, publicly available information on case outcomes is frequently limited to cases that are litigated to judgment. Thus, information on the impact of PAEs’ choice of venue on their settlements with alleged infringers is unavailable.

Specification F.2 of the Commission’s information request seeks data on infringement actions--for example their venues and their outcomes, including settlements. Intel suggests that the Commission specifically analyze this data and determine whether PAEs, and more broadly Other Firms, are repeatedly filing in certain districts because they expect to obtain more favorable outcomes in those venues than in other venues. The data that the Commission will obtain through its questionnaire should enable it to perform two useful analyses. First, because many PAEs and some

⁴⁰ *See id.*

⁴¹ The Commission’s PAE 6(b) Notice states: “The FTC will have PAE Firms and Other Firms respond to Information Requests A-H. The FTC will have Manufacturing Firms respond to Information Requests A-B and E-H.” *Id.* at 61353-54. The Commission defined “Other Firms” as including NPEs other than PAEs, and other “organizations engaged in licensing.” *Id.* at 61353.

⁴² 2012 NPE Activity Report, at 15.

Other Firms often file multiple suits in many judicial districts on the same patent, the Commission should analyze the results (whether judgments or settlements) to assess if PAEs obtain higher judgments or settlements in some districts. Second, because the most active PAEs file hundreds of suits a year and thus have significantly more experience than other less active PAEs, the Commission should analyze the jurisdictional choices of the most active filers separately to analyze the effect of venue on outcomes.⁴³ By comparing this type of litigation information between PAEs, Other Firms, and Manufacturing Firms, the Commission should be able to draw conclusions as to whether certain procedural rules used in select venues favor PAE litigation strategies to the detriment of innovation and competition. This would be useful information to those government officials currently engaged in judicial and legislative patent reform.

Conclusion

Intel appreciates the opportunity to submit these comments on the Commission's proposed inquiry into PAE behavior. Intel respectfully asks the Commission to take these comments into account in revising its proposed questionnaire and to consider the need for a similar inquiry into abuses of FRAND commitments.

⁴³ For example, in 2012, IP Navigation Group LLC filed 305 cases against 357 defendants; Acacia Research Corporation filed 222 cases against 317 defendants; and Empire IP filed 102 cases against 239 defendants. *2012 NPE Activity Report* at 29.