December 16, 2013

FTC Office of the Secretary
Room H-113
600 Pennsylvania Ave., N.W.
Washington, DC 20580

Comments of the Direct Marketing Association
On the Proposed 6(b) Information Requests To Patent Assertion Entities

The Direct Marketing Association (DMA) (www.thedma.org) is the leading global trade association of businesses and nonprofit organizations using and supporting multichannel data-driven marketing tools and techniques. DMA advocates standards for responsible data-driven marketing, promotes relevance as the key to reaching consumers with desirable offers, and provides cutting-edge research, education, and networking opportunities to improve results throughout the end-to-end direct marketing process. Founded in 1917, DMA today represents companies from dozens of vertical industries in the US and 48 other nations, including nearly half of the Fortune 100 companies, as well as many nonprofit organizations.

The Direct Marketing Association applauds the Commission's decision to conduct a 6(b) study in to the practices of Patent Assertion Entities ("PAEs"). We have noticed a proliferation of patent infringement lawsuits and, in particular, patent troll demand letters, in the direct marketing community over the past several years. These letters are particularly troubling to our small and mid-sized members – as well as the hundreds of nonprofits that comprise the DMA membership.

These demand letters seem to come out of nowhere, and often make allegations that the use of everyday technology, such as an online shopping cart, imbedded hyperlink in an email, QR code, or use of a postal service Intelligent Mail bar code ("IMb") is in violation of a patent holders' rights. Many marketers and nonprofits often simply settle these nuisance claims rather than run the risk of complicated, expensive, and protracted discovery and litigation in federal court. Put simply, it is often much more expensive to hire a lawyer to review or defend against a suspect infringement claim than it is to pay the "licensing fee."

The DMA is particularly concerned about a PAE making assertions involving the Intelligent Mail barcode technology. QR codes and IMb are now embedded in billions of pieces of U.S. mail. In fact, Mailers are required by the USPS to use these technologies in order to use mail tracking services and to qualify for certain bulk mail pricing. Further, both mailers and the US Postal Service have made large investments in both the technology in question and the equipment capable of handling IMb. The situation is even more indefensible given the fact that the U.S. Postal Service itself owns many of the patents in this space.

As a trade association, we have heard first hand from our member companies about the difficulty in getting patent trolls to simply go away. First, there is the daunting cost of discovery and litigation in these cases, no matter how meritless the troll's assertion may be – a fact that is often

flaunted in the demand letters themselves to incentivize a quick cash settlement. We have also seen that companies who chose to abandon or alter the technologies in question in lieu of a monetary settlement often receive a *second* demand letter from the same troll making new allegations or demanding similar (or even higher) licensing fees in spite of the change. Finally, we have heard disturbing reports from our members that, once they do capitulate and settle with a troll, the business quite often finds itself confronted with additional letters from other patent trolls. This pattern has given rise to the concern that troll entities have developed what some would call a "sucker list" – a list of targets that have paid, and will likely pay again.

While we appreciate the Commission's commitment to looking very closely at the business practices in question, we would welcome a broadening of the study beyond the wireless telecommunications sector, given that many of the patents that are the subject of the demand letters and litigation that our members are experiencing do not fall in to this category. We believe that web technology-related patents also merit inclusion since, 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.[1] As you know, DMA members rely heavily on this type of technology to provide their products and services to client businesses as well as to interface directly with consumers. An investigation of the IMb patent assertions discussed above would also be very welcome given the disruption they could cause for the U.S. Postal Service and its customers.

Overall, we believe that the Commission has done an excellent job of compiling lists of questions to ask the entities that will receive the 6(b) order. However, there are also some additional questions that we believe should be asked of PAEs regarding the tactics they use in sending out demand letters to marketers:

1) How do PAEs identify potential targets for patent infringement claims?

2) How much do they do to investigate whether a business is actually infringing before they send out demand letters?

3) How much specificity is provided in each demand letter; including information about the patent assertion entity, the nature of the infringement, and the specifics of the patent in question?

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

5) Do PAEs commonly rely on form letters when they send out demands to a potential target?

6) What do PAEs 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?

7) Do PAEs share information about targeted business among themselves or with their common parent entities?

[1] See Patent Freedom, "Investigations into NPE Litigation involving Business Method Patents" at 14-15 (September 4, 2013).

Sincerely,

Peggy Hudson
Senior Vice President, Government Affairs
The Direct Marketing Association, Inc.
1615 L St. NW, Suite 1100
Washington, DC 20036
(202) 955-5030