

**Comments of the Consumer Electronics Association
to the
United States Federal Trade Commission
Patent Assertion Entity Reports: Paperwork Comment**
Project No. P13203
December 16, 2013

I. Introduction

The Consumer Electronics Association (“CEA”) is pleased to submit comments to the Federal Trade Commission (“FTC”) regarding the FTC’s proposed information requests to Patent Assertion Entities (“PAEs”) and other entities asserting patents in the wireless communications sector.¹ As the principal U.S. trade association of the consumer electronics and information technologies industries, with more than 2,000 member companies, CEA’s members are among the most innovative and creative in the world, and many of their remarkable repertoire of products use the patent protections afforded by U.S. law.² With increasing frequency, however, the PAEs that exist only to acquire patents, have twisted patent law and exploited imperfections in the patent system causing great damage to innovators and entrepreneurs. The routine filing of frivolous patent lawsuits by PAEs has diverted critical resources away from new product development and into costly litigation expenses; ultimately, this cold reality works to discourage the very same risk-taking that led to the development of so many of our most beloved consumer electronics products.

The FTC’s information requests are a necessary first step into quantifying the costs and benefits of PAE activity and only through the considered examination of PAEs’ and others’ data can the true negative effects of many PAEs’ activities be understood properly.³ The FTC – with its unique statutory mandate and authority under Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. §46(b) to conduct such a Study⁴ – is well positioned to gather and analyze the broad array of data and information that will demonstrate this fact and lead to the necessary conclusion that status quo is untenable.

¹ Fed. Trade Comm’n, *Federal Register Notice Soliciting Public Comments On Proposed Information Requests To Patent Assertion Entities and Other Entities Asserting Patents In the Wireless Communications Sector, Including Manufacturers and Other Non-Practicing Entities and Organizations Engaged In Licensing*, available at <http://www.ftc.gov/os/fedreg/2013/09/130926paefrn.pdf> (visited Dec. 4, 2013) (hereinafter “Federal Register Notice”).

² See generally, Consumer Electronics Association, *About CEA*, available at <http://www.ce.org/About-CEA.aspx> (visited Dec. 4, 2013).

³ Chairwoman Edith Ramirez, *Remarks of Chairwoman Edith Ramirez, Fall Networking Event*, ABA Antitrust Section’s Intellectual Property Committee, Washington, DC, November 12, 2013, available at <http://ftc.gov/speeches/ramirez/131112eripcommittee.pdf>, at 3 (visited Dec. 4, 2013) (“Our aim is to use that authority to expand the empirical evidence on PAE activity and shed light on its likely costs and benefits.”)

⁴ Press Release, *FTC Seeks to Examine Patent Assertion Entities and Their Impact on Innovation, Competition* (Sept. 26, 2013), available at <http://www.ftc.gov/opa/2013/09/paestudy.shtm>.

The FTC has invited comment on four topics. CEA will limit its comments to the single topic on which CEA, as a trade association, is in best position to explore, “whether the proposed collection of information is necessary for the proper performance of the functions of the FTC, including whether the information will have practical utility.”⁵

II. The Proposed Collection of Information is Necessary for the Proper Performance of the Functions of the FTC, and this Information Will Have Practical Utility

a. The Proposed Collection of Information is Necessary for the Proper Performance of Functions of the FTC

The FTC is a law enforcement agency with authority to determine whether anticompetitive conduct is occurring in violation of the Sherman, Clayton, and Federal Trade Commission Acts.⁶ Each of these statutes, while distinct in verbiage and scope, share the same purpose: to ensure that conduct harmful to the proper functioning of competitive markets is prevented. It is unlikely that the drafters of those statutes could have imagined commerce like we see today, marked by rapid technological innovation and constant change. Yet the core competencies of these statutes still provide the FTC with the necessary flexibility to examine even modern-day developments like PAEs’ ability to abuse the patent system to anticompetitive ends.

This is not to suggest that all PAE activity is presumptively unlawful. Yet because PAEs’ activity can be uniquely and dramatically harmful, empirical study and close scrutiny is required. Thus, without sufficient detail, the FTC 6(b) Study cannot serve to explore and explain the actual anticompetitive consequences resulting from PAEs’ actions. The list of data the FTC must gather must be necessarily broad and incredibly detailed. Only by requesting quantification from PAEs regarding demand letters, litigation costs, and license information, among other items, as the information requests do, will provide the necessarily depth to assess meaningfully PAEs’ overall anticompetitive effect.

The FTC’s 6(b) Study will enable the FTC (and other stakeholders, like Congress) to assess the ramifications of PAE conduct on competition as a whole. This analysis will result in better informed enforcement decisions by the FTC, private parties, and others. And, as a result, this will undoubtedly help the FTC in performance of its core function to enforce the antitrust and competition laws.

⁵ Federal Register Notice at 16.

⁶ See generally, Fed. Trade Comm’n Office of the General Counsel, *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, Revised July 2008, available at http://www.ftc.gov/ogc/brfovrwv.shtm#N_1_.

b. There is Practical Utility in Gathering this Information Because It May Quantify the Negative Effect PAEs' Conduct Has on Competition

In law review articles, speeches, and previous public forums, including a 2012 FTC and Department of Justice Antitrust Division Workshop on PAEs,⁷ many elaborated on the anticompetitive effects resulting from PAEs' conduct. We need not repeat those adverse effects in detail here. What bears repeating is that without the benefit of the detailed information in the 6(b) Study, the true depth of harm caused by the PAEs' activity cannot be confirmed and accurately quantified. For example, the instances where PAEs have improperly targeted small businesses or individuals who provide WiFi services or use a scanner and threatened to file suit could be far greater than what has been reported in the press.⁸ These small businesses and individuals may not have the wherewithal to determine whether the PAEs' claim is valid and may have chosen to settle under draconian non-disclosure agreements demanded by the PAEs, rather than enter into a costly litigation posture. Understanding the scope of these kinds of potentially unwarranted settlements is absolutely essential to assessing the effect of PAEs' conduct on the market.

Medium and large-sized businesses with more sophisticated understandings of the patent laws may be equally compelled to settle rather than litigate. As has been explained by others, the cost of discovery in a patent suit disproportionately falls on the defendant and not the plaintiff-PAE.⁹ This asymmetry in litigation costs creates perverse incentives on both sides and divorces the dispute from its substantive underpinnings, a result that benefits only the PAE. Moreover, some entities are choosing to outsource patent warfare by assigning rights to "patent privateers," or PAEs who will sue on their behalf and who structure the sales such that it is an end-around mechanism to target the original owner's downstream competitive rivals. Here, the original owner benefits indirectly if the PAE raises its rivals costs.¹⁰ This adds an additional layer of uncertainty and expense and is certainly worthy of detailed study. Understanding the cost – to the cent – of defending these patent suits will provide a sound basis on which to compute the monetary loss that defending unjustified PAE suits requires.

Perhaps more importantly, with the constant threat of PAE litigation, the incentives for individuals and companies to create new products are reduced. As has been explained by others

⁷ Fed. Trade Comm'n & U.S. Dep't of Justice, Patent Assertion Entity Activities Workshop (Dec. 10, 2012), materials available at <http://www.ftc.gov/opp/workshops/pae/>.

⁸ This unfortunate phenomenon has been reported widely in the press. See, e.g., Joe Mullin, *Patent Trolls Want \$1,000—For Using Scanners* (Jan. 2, 2013), available at <http://arstechnica.com/tech-policy/2013/01/patent-trolls-want-1000-for-using-scanners/> (visited Dec. 4, 2013).

⁹ See, generally, e.g., U.S. Gov't Accountability Office, GAO-13-465, *Intellectual Property: Assessing Factors that Affect Patent Infringement Litigation Could Help Improve Patent Quality* (2013), available at <http://www.gao.gov/products/GAO-13-465>; and Sara Jeruss, Robin Feldman & Joshua Walker, *The America Invents Act 500: Effects of Patent Monetization Entities on US Litigation*, 11 DUKE TECH. L. REV. 357, 361 (2012).

¹⁰ Chairwoman Edith Ramirez, *Opening Remarks of Chairwoman Edith Ramirez, Competition Law & Patent Assertion Entities: What Antitrust Enforcers Can Do*, Computer & Communications Industry Association and American Antitrust Institute Program, Washington, DC (June 20, 2013), available at <http://www.ftc.gov/speeches/ramirez/130620paespeech.pdf> (visited Dec. 4, 2013).

and as we commented during the 2012 Workshop, this will lead to less creativity, less innovation and ultimately, less competition across products.¹¹

III. Conclusion

CEA applauds the FTC's efforts to assess the anticompetitive harms that PAEs cause on our economy as a whole. The information requests are necessarily broad and will illuminate the many dimensions of PAEs' conduct in a way that no other entity is capable. Only through the careful study of PAEs conduct can appropriate future policy positions be taken to remedy the harm. At the same time, given the established harm to our economy from frivolous patent assertion, completion of this FTC study should not stay or halt other actions by the administrative, legislative or judicial branches to address this serious issue.

Respectfully submitted,

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¹¹ Consumer Electronics Association, Comments of the Consumer Electronics Association to the Federal Trade Commission and Department of Justice Antitrust Division Patent Assertion Entity Activities Workshop (April 5, 2013), available at <http://www.ftc.gov/os/comments/pae/pae-0040.pdf> (visited Dec. 4, 2013).