MICROSOFT CORPORATION'S COMMENTS
ON PROPOSED INFORMATION COLLECTION

PAE Reports: Paperwork Comment; Project No. P131203

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INTRODUCTION

Microsoft Corporation ("Microsoft") submits the following comments on the proposed information requests issued by the Federal Trade Commission ("FTC") for a potential Section 6(b) study to analyze the competitive effects of patent assertion entities ("PAEs").[1] Microsoft is a strong supporter of a well-functioning patent system. With the proliferation of PAEs in recent years it is well known—but not well documented—that some PAEs exploit inefficiencies in litigation and the patent system to obtain settlements and judgments in excess of the value of the underlying technology of a patent. The increase in frivolous PAE litigation is a serious and growing problem for many industries. Having participated in the FTC and Department of Justice December 2012 joint workshop exploring the impact of PAE activities, Microsoft also recognizes that limited empirical data exists concerning PAEs.[2] It therefore supports the FTC's efforts to gather additional information to both supplement current knowledge of PAEs and to better understand the costs and benefits of their behavior.

The proposed study seeks important nonpublic information from PAEs about their acquisition, transfer and enforcement activity, as well as benchmark data from operating companies and other patent holders in the wireless communications sector—referred to in the study as "Manufacturing Firms"[3]—to determine how patent assertion activity by PAEs affects technology markets and innovation. Microsoft is just one of many operating companies in the wireless communications sector that fall within the FTC's definition of Manufacturing Firms.

The FTC's stated purpose of the study is to examine PAE behavior and its effect on competition. To better achieve that purpose, Microsoft suggests two ways to obtain a more

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[1] Fed. Trade Comm'n Notice, Request for Comments on Information Requests for Proposed Section 6(b) Study Patent Assertion Entities, 78 Fed. Reg. 61352 (Oct. 3, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/federal_register_notices/2013/09/130926paefrn.pdf.

[2] Albert, Jason, Comments of Microsoft Corporation on the Impact of Patent Assertion Entity Activities on Innovation and Competition (Apr. 8, 2013), http://www.justice.gov/atr/public/workshops/pae/comments/paew-0042.pdf.

[3] The FTC proposes "sending information requests to approximately 15 other entities asserting patents in the wireless communications sector, including manufacturing firms (Manufacturing Firms)." FTC Notice, *supra* note 1, at 3. Manufacturing Firms refers to organizations that manufacture products or supply services in addition to the licensing of intellectual property.

complete picture of PAE activity and the effect on downstream product markets. *First*, the study should more closely examine PAE practices that involve asserting patent(s) or patent portfolios for amounts far greater than the acquisition cost of those patents, with a particular focus on assertions that exceed pre-merger reporting thresholds. *Second*, the study should include other participants in the secondary patent market that currently are not included in the proposed requests. Both suggestions will enable the FTC to understand better the effect of PAEs on innovation and competition, as well as provide a more complete picture of the secondary marketplace in which PAEs operate.

Microsoft also has significant concerns, however, about the proposed requests to Manufacturing Firms:

1. As currently drafted, the requests will prove counterproductive. The many non-price terms contained in licenses granted by Manufacturing Firms, each of which affect the license's scope and valuation, make those licenses a poor benchmark against which to compare PAE assertion activity. Additionally, the overly broad nature of the proposed requests to Manufacturing Firms—which are not the ultimate focus of the study—will result in the production of documents that will significantly outnumber the materials that shed real light on issues concerning PAEs.

2. The proposed requests to Manufacturing Firms significantly underestimate the burden of compliance. Microsoft, for instance, has over 35,000 patents and has entered into 557 licensing agreements since 2008. As a result, the production of materials responsive to the current draft will take thousands of man-hours and several millions of dollars.

3. Microsoft's experience in a recent litigation concerning just a fraction of what the FTC seeks here confirms that the FTC's time and cost estimates are substantially understated.

4. The proposed requests will generate a deluge of materials that will offer little, if any, practical utility.

The information requests to Manufacturing Firms should therefore be reconsidered and revised by narrowing their scope as outlined below. Doing so will enable the FTC to focus on the most pertinent data that will help achieve the stated objective of the study, while simultaneously reducing the burden on Manufacturing Firms. Indeed, these revisions can be

made while ensuring that the FTC receives the critical baseline information it needs to more accurately assess PAE behavior and its impact on competition and innovation.

I. THE INFORMATION REQUESTS SHOULD SEEK TO OBTAIN A COMPLETE PICTURE OF PAE ACTIVITY

A. The Purpose of the Study Is to Examine PAE Behavior and Its Impact on Competition

In accordance with the Paperwork Reduction Act ("PRA"),[4] the FTC has invited comments on the proposed information requests taking into account: (1) the necessity of the information requested; (2) the accuracy of the FTC's estimate of the burden imposed by the information requests; (3) ways to enhance the quality, utility, and clarity of the information requested; and (4) ways to minimize the burden of collecting information.[5] In evaluating these factors, close consideration should be paid to the stated purpose of the study.

That purpose is to collect information regarding PAEs. Specifically, Senator Amy Klobuchar and Representative Daniel Lipinski requested that the FTC employ its authority under Section 6(b) "to collect information on PAE acquisition, litigation, and licensing practices" in order to analyze the potential harms and efficiencies of PAE activity.[6] FTC Chairwoman Edith Ramirez has also recognized "the need for more evidence to inform appropriate policy responses [to PAEs]" and noted that a Section 6(b) study "can contribute to a broad policy response to PAEs … by collect[ing] more comprehensive information on the variety of PAE business models and the scope of their activities."[7]

The FTC's proposed study aims to enhance public understanding of the PAE business model, which is a worthwhile goal. As the Commission itself has stated, "[t]he proposed study

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[4] 44 U.S.C. §§ 3501-3521.

[5] FTC Notice, *supra* note 1, at 16.

[6] *Id.* at 2 (emphasis added) (citing letters from Senator Klobuchar and Representative Lipinski).

[7] Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Competition Law & Patent Assertion Entities: What Antitrust Enforcers Can Do (June 20, 2013) (emphasis added), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/competition-law-patent-assertion-entities-what-antitrust-enforcers-can-do/130620paespeech.pdf.

will add significantly to the existing literature and evidence on PAE behavior"[8] and will provide "a more complete picture of PAE activity" through "nonpublic information, such as licensing agreements, patent acquisition information, and cost and revenue data."[9]

B. The 6(b) Study Should Focus on Comparing PAE Patent Acquisition and Assertion

Consistent with the purpose of the study, the proposed information requests should be revised to more closely examine PAE practices that involve asserting patent(s) or patent portfolios for amounts far greater than the acquisition cost of those patents. Such an inquiry will allow the FTC to examine efficiencies and inefficiencies, if any, that result from the collection of royalties by PAEs. As drafted, the existing requests would collect general information regarding PAE patent acquisition and assertion activity.[10] But by focusing on the disparity between the dollar amounts at which PAEs acquire patents versus the dollar amounts at which PAEs assert those same patents, the FTC might better be able to assess the effect of certain PAE behavior and its ultimate impact on innovation.

For example, a specific area of inquiry would be to ask PAEs to identify patent acquisitions that were below the reporting obligations under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act"),[11] but then later asserted—either individually against a single company or collectively against multiple companies—at amounts greater than HSR reporting thresholds. Examining this issue could shed light on whether PAEs are extracting royalties commensurate with their pre-acquisition assessments of the value of the underlying patented technology, as opposed to exploiting post-acquisition inefficiencies within the patent litigation system.

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[8] FTC Notice, *supra* note 1, at 2 (emphasis added).

[9] *Id.* (emphasis added).

[10] *See* FTC Notice, *supra* note 1, at 2 (citing Requests E and F).

[11] 15 U.S.C. § 18a.

C. The Proposed Information Requests Overlook Other Patent-Related Activity that Might Hamper Innovation

In addition to focusing on certain types of PAE conduct, the FTC should consider examining other secondary market participants that impact PAE behavior. In particular, PAEs, operating companies, and non-practicing entities are not the only participants in the secondary market for intellectual property. A complete picture of PAE activity, and the effect of that activity on innovation, requires examination of other entities that participate in that market and which do not currently appear to be included in the proposed study.

So-called "non-assertion pacts" are one example. These pacts are arrangements (comprised of multiple operating companies) that transfer, sell, and/or license patents to accomplish "defensive patent licensing"—*i.e.*, royalty-free cross licenses *provided that* pact members engage in, or refrain from, particular sets of activity.[12] Such pacts, which also have developed in recent years, take various forms.[13] While often touted as a method to "protect [members] from non-practicing entities,"[14] non-assertion pacts can involve agreements by groups of competitors to forego patent rights against favored products (*e.g.*, Linux)[15] or effectively boycott particular purchasers of technology (*e.g.*, PAEs).[16]

Because non-assertion pacts could lower the value of patents, they may influence the secondary market for intellectual property and have the potential to distort downstream product

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[12] An example of a non-assertion pact is the Open Invention Network © (OIN). Open Invention Network, Press Room, http://www.openinventionnetwork.com/pressroom.php (last visited Dec. 16, 2013) ("Patents owned by Open Invention Network are available royalty-free to any company, institution or individual that agrees not to assert its patents against the Linux System.").

[13] For example, there are license on transfer agreements (LOTs), non-sticky defensive patent license agreements (Non-Sticky DPLs), sticky defensive patent license agreements (Sticky DPLs), and field-of-use agreements. *See* www.google.com/patents/licensing/ (last visited Dec. 16, 2013).

[14] Royalty-Free Patent Licensing, Non-Sticky Defensive Patent License, http://www.google.com/patents/licensing/dpl/non-sticky/ (last visited Dec. 16, 2013).

[15] *See supra* note 12.

[16] *See, e.g.*, Royalty-Free Patent Licensing, License on Transfer Agreement, http://www.google.com/patents/licensing/lot/ (last visited Dec. 16, 2013) ("Advantages – Reduces patents available to patent assertion entities").

markets.[17] For example, collective agreements not to assert patents against downstream products that infringe those patents provide the favored downstream products a relative cost advantage vis-à-vis their competitors, and thus impact competition in the downstream market. Accordingly, the FTC cannot fully understand the benefits and costs of PAE activity on downstream products without also examining the activity of other licensing arrangements that affect the patent input costs for those products.

II. THE PROPOSED INFORMATION REQUESTS TO MANUFACTURING FIRMS WILL NOT HELP THE STUDY MEET ITS STATED OBJECTIVE

The proposed information requests are not limited to PAEs. Rather, the case study is designed to "complement the broader analysis by comparing PAE assertion activity in the wireless sector to conduct by other patent holders in the same sector."[18] However, that comparison is designed simply to "help [the FTC] interpret the wide-ranging information [the FTC will] collect on the PAE business model."[19]

A. Manufacturing Firms Are a Poor Benchmark for Comparison to PAE Assertion Behavior

Neither the concerns leading up to the study, nor the stated reasons for initiating the study, are focused on standalone enforcement of patents by non-PAEs. While Microsoft understands the FTC's desire to find a benchmark against which to compare PAE behavior, operating companies' patent licensing practices are in the main inappropriate benchmarks for comparing PAE patent assertion. There are numerous differences in business models between PAEs and operating companies that influence when patents are—and are not—acquired, sold, and asserted. And when operating companies do assert their patents, the resulting licenses

[17] *Id.* ("The LOT agreement may reduce the value of patents you sell in certain circumstances . . . .").

[18] Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Remarks at ABA Antitrust Section's Intellectual Property Committee Fall Networking Event, Washington, DC (Nov, 12, 2013) (emphasis added), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/remarks-chairwoman-edith-ramirez-fall-networking-event-aba-antitrust-sections-intellectual-property/131112er-ip-committee.pdf.

[19] *Id.* (emphasis added).

contain many terms and conditions not present in PAE licenses, each of which influence the resulting revenues.

PAEs take various forms. Some PAEs contribute to the secondary market for patents generally, while others acquire patents for the purpose of exploiting inefficiencies in the patent and judicial systems to capitalize upon poor patent quality, lack of transparency in patent ownership, the high cost of discovery, and the unpredictability of patent damages.[20] The FTC has recognized that PAEs "by definition, are not typically vulnerable to countersuit, and do not engage in meaningful technology transfer."[21] This, in turn, enables some PAEs to obtain settlements and judgments driven by litigation cost avoidance rather than the value of the underlying technology.[22]

In contrast to PAEs, operating companies typically invest in research and development (R&D) to create new and useful products and, as a byproduct, significant patent portfolios. For example, Microsoft spends nearly $10 billion annually in R&D, and holds a patent portfolio that contains over 35,000 patents.[23] Instead of reserving all of these patents solely for themselves, operating companies sometimes make portions of their patented technology available to other practicing entities through licensing. Indeed, since 2008, Microsoft has entered into 557 outbound licenses for its patents. Microsoft also sells certain patents that are not crucial to its most important products or services, so that Microsoft can obtain a return on its R&D investment and the market can benefit from this technology.

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[20] The FTC itself has explained: "The business model of PAEs focuses on purchasing and asserting patents against manufacturers already using the technology, rather than developing and transferring technology." Fed. Trade Comm'n, The Evolving Marketplace Aligning Patent Notice and Remedies with Competition 8 (2011), *available at* http://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf.

[21] Ramirez Remarks, *supra* note 18, at 4.

[22] *Id.* ("Participants at [the FTC's] December [2012] workshop claimed that as a result, PAEs tend to assert patents more aggressively, and may demand relatively higher royalty rates."). The patent reforms in various pending legislative initiatives would, if enacted, eliminate many of these inefficiencies.

[23] Microsoft Corp., Annual Report 2013, at 15-16 (Sept. 27, 2013), *available at* http://www.microsoft.com/investor/reports/ar13/index.html.

Thus, there are a variety of important differences in the patent activity of PAEs and operating companies. Due to these differences, it is not clear what, if anything, would be learned by comparing the acquisition, transfer, and assertion activity of one business model to the other.

Should the FTC nonetheless believe something would be gained from using Manufacturing Firms as a benchmark for PAEs, the licenses that would be evaluated are not comparable. PAE licenses generally are straightforward license grants for the underlying technology, with little variation of non-price terms between licensees. In contrast, when operating companies license their patents to others, they often contain cross-licenses, technology transfers, or broader business transactions that are not present in PAE licenses.

Even when operating companies enter into one-way patent licenses containing none of these conditions, those licenses contain other non-price terms and conditions markedly different than PAE patent licenses—many of which differ by licensee—and each of which affects the scope and overall value of the license. For example, patent licenses granted by operating companies routinely incorporate many of the following terms:

- "no product clone" provisions to prevent the licensee from using the licensed patents to simply copy a Manufacturing Firm's product(s);
- patent "carve-outs" within larger portfolio licenses, which hold back key differentiating patented technologies that a Manufacturing Firm elects to reserve for itself;
- "field of use" restrictions to limit some of the ways in which licensees can use the licensed patents; and
- "defensive suspension" provisions to suspend the license grant upon a later assertion of the licensee's patents against the licensor.

Due to these important differences, comparing the patent licenses of PAEs to those of Manufacturing Firms would be like comparing apples to oranges. The FTC should therefore reconsider the purpose and value of using Manufacturing Firms as a benchmark to compare PAE assertion behavior.

B. The Proposed Information Requests to Manufacturing Firms Are Overbroad

If the FTC nonetheless proceeds with using operating companies as a benchmark for PAE activity, it should keep in mind that Manufacturing Firms in the wireless communications sector are not the focus of the FTC's proposed study, but rather a means to an end—*i.e.*, to help the FTC better understand PAEs.

Nevertheless, the proposed requests treat all of its recipients essentially the same. For instance, despite key differences between PAEs and non-PAEs, Manufacturing Firms are exempt from only *two out of eight* information requests—those relating to patent and patent portfolio information.[24] Many operating companies, however, already make that information publicly available. Microsoft's "Patent Tracker" tool, for example, is a publicly accessible online resource that provides a list of all of the patents Microsoft owns.[25] As such, the requests only exempt Microsoft from providing information that it already makes public.

Because the proposed study's focus is on PAEs, the information requests should largely center on PAEs. Documents and information provided by PAEs—such as patent acquisition terms, demand letters, business plans, and revenue data—will allow the FTC to examine PAE behavior and practices and the resulting effect on innovation.

Due to Microsoft's large investments in R&D and involvement in the secondary market for patented technology, however, responding to the proposed requests would require greater effort from it and other "benchmark" companies than it would for most PAEs. This result would not be consistent with the study's stated objectives: to collect, study, and determine the appropriate policy responses to PAEs.

III. THE COMMISSION'S BURDEN ESTIMATE IS INACCURATE

In calculating the burden associated with proposed information collection requirements, the PRA requires that the FTC consider the "time, effort, or financial resources expended by

[24] FTC Notice, *supra* note 1, at 4-6.

[25] *See* http://www.microsoft.com/en-us/legal/intellectualproperty/Patents/default.aspx.

persons to generate, maintain or provide [the] information."[26] The FTC's current estimates of respondents' time and cost underestimate the burdens associated with the proposed requests.

A. The FTC's Time Estimates for Manufacturing Firms Are Substantially Understated

The FTC estimates that the time required to respond to the proposed information collection requirements will be between 90-400 hours per company.[27] The actual time burden that would be associated with the information requests, however, far exceeds the FTC's estimate, and is disproportionate to the benefit to be gained by gathering this information from Manufacturing Firms.

First, compliance with the proposed information requests will require large operating companies to undertake a series of steps to identify, review, and produce responsive documents and information. Unlike PAEs—which exist only to monetize patent assets—the patent acquisition, transfer and licensing efforts of operating companies are spread out over large numbers of personnel, many of whom have additional responsibilities unrelated to the proposed requests. These functions are often integrated with other aspects of the business as well. Thus, for a sophisticated operating company like Microsoft, the process of responding to the proposed information requests would include:

- identifying custodians from multiple business units that may possess responsive information or documents;
- identifying file repositories that may possess responsive information or documents;
- generating search terms tailored to the information requests;
- collecting responsive documents;
- conducting a relevancy review of the collected documents;
- conducting a privilege and work product review of the collected documents;
- creating a privilege log;

[26] 44 U.S.C. § 3502(2).

[27] FTC Notice, *supra* note 1, at 15.

- producing responsive documents;
- interviewing personnel involved in outbound licensing and litigation; and
- drafting written responses to accompany the production.

Given the broad nature of the requests relating to *each* patent owned or licensed by a Manufacturing Firm over the past five years, the response process would be a massive undertaking, involving considerable manpower as well as involvement from outside counsel. In particular, reviewing and cataloging privileged documents alone will create a significant burden because documents relating to licensing negotiations usually involve the resolution of a potential legal dispute, and are often bound up in both attorney-client privileged and attorney work product issues that would have to be determined. The FTC's time and expense estimates are therefore dramatically lower than what would likely be incurred by large Manufacturing Firms in responding to the proposed information requests.

The FTC's time and expense estimates also fail to include additional steps that will be required as a result of compliance with its requests. For example, most of Microsoft's 557 outbound licenses include notice provisions that require notification when terms of the license agreement are disclosed to a third party. That means notifying and following up with hundreds of individual licensees before disclosing confidential licensing terms to the FTC.

Further, any benefits that Manufacturing Firms' documents might add to the study are far outweighed by the associated burdens. For instance, the FTC asks Manufacturing Firms to identify asserted licensing demands related to each and every patent owned by the respondent since January 1, 2008.[28] This would be an enormous and burdensome task for Microsoft, whose patent portfolio includes over 35,000 patents. The problem is compounded by requests for certain information that Microsoft does not keep track of in the ordinary course of business, such as the total time spent and costs incurred for any research related to licensing demands.

[28] FTC Notice, *supra* note 1, at 9.

Comparing the FTC's time estimates against the size of Manufacturing Firms' intellectual property and licensing portfolios illustrates the inaccuracy of those estimates. Using the FTC's 400 hour upper-bound time estimate (and allocating all of that time to just one category of the FTC's proposed information requests), Microsoft would have to spend no more than *43 minutes per license* executed since January 2008 to search for, collect, analyze, produce, and describe the information contained in documents responsive to those requests.[29] This single statistic speaks for itself. In contrast to the FTC's time estimate, and as explained further in Section IV below, Microsoft expects that it will take *thousands of hours* to comply with the FTC's proposed requests.

B. The FTC's Cost Estimates for Manufacturing Firms Are Substantially Understated

Similarly, the FTC severely underestimates the costs that its proposed information requests would impose. While the FTC estimates that the labor and non-labor costs required to respond to the information collection requirements will be between $4,484.80 and $19,597 per operating company,[30] this cost is based on the erroneous time estimates discussed above.

Moreover, the Commission's notion that the information collection can be accomplished by mid-management level personnel and clerical employees is over-simplistic. Preparing the required reports to respond to the proposed requests will require Manufacturing Firms to deploy attorneys, paralegals, project managers, and support staff familiar with the requested documents and internal intellectual property policies. In Microsoft's case, this would require deep involvement by Microsoft's Intellectual Property Group, a team that includes dozens of professionals. And as discussed above, it would be necessary to review potential documents for responsiveness, attorney-client privilege and/or attorney work product. That document production alone would require multiple levels of review by outside counsel to review and tag documents, prepare redactions, and create a privilege log.

[29] 400 hours / 557 licenses = 43 minutes / license.

[30] *Id.* at 15.

In contrast to the FTC's total cost approximation of $4,484.80-$19,597, Microsoft believes it will cost *several millions* of dollars to comply with the FTC's proposed requests. As explained in the next section below, Microsoft's cost estimate is based on its experience in responding to discovery seeking just a part of what the FTC has requested in a recent litigation involving patent licensing issues.

IV. MICROSOFT'S OVER BREADTH AND COST CONCERNS ARE BORNE OUT BY STATISTICS FROM PRIOR LITIGATION REGARDING PATENT LICENSING

Microsoft's concerns about the overly broad nature of the FTC's proposed information requests are not theoretical. Rather, they are confirmed based on Microsoft's experience in responding to discovery—seeking just a fraction of what the FTC has included in its proposed information requests— in a recent litigation involving patent licensing issues.

In 2011, Microsoft was involved in litigation that included discovery into Microsoft's patent licensing efforts.[31] During discovery, Microsoft responded to broad document requests and similarly broad interrogatories seeking details about its patent licensing program, but relating to just ten patents and ten executed licenses. In contrast, the proposed 6(b) study information requests involve approximately 35,000 patents (*i.e.*, Microsoft's portfolio as of today) and 557 licenses (*i.e.*, the number of outbound licenses Microsoft has entered into since 2008).

Two of the interrogatories from the litigation are uniquely similar to two of the document requests in the FTC's proposed study:

[31] *In the Matter of Certain Handheld Elec. Computing Devices, Related Software, and Components Thereof*, Inv. No. 337-TA-769 (I.T.C.).

Litigation	Proposed 6(b) Study
". . . [I]dentify all documents that reflect, refer or relate to the licenses [for the ten Patents-in-Suit].	"For each license agreement identified in Response to Request F.3, submit a copy of the agreement and all documents Relating to the agreement, including but not limited to, documents reflecting communications Relating to the license, documents summarizing sales made by the licensee, and documents reflecting arrangements to share revenue generated by the license." **(Request F.4)**
"Identify all parties that Microsoft has approached regarding the possibility of licensing the [ten] Patents-in-Suit . . . and explain in detail the negotiations with each party . . . ."	"[S]ubmit a copy of each Demand identified in response to F.1, and all documents reflecting communications Relating the Demand." **(Request F.1.d)**

In response to those two interrogatories for just ten patents, Microsoft identified and produced 2,738 non-privileged documents totaling 33,864 pages. As this direct evidence indicates, the FTC has substantially underestimated the burden of compliance. For instance, Microsoft spent *more than 10,000 hours* searching for, collecting, reviewing for responsiveness, reviewing for privilege and work product, redacting, and producing those 2,738 non-privileged documents. *And the price tag for those efforts approached one million dollars.*

Not every patent licensing dispute involves such broad document requests and interrogatories. But this particular litigation provides insight into the cost of compliance here. And while the time and cost of that litigation far exceed the FTC's estimate for the proposed information requests, they include only a subset of the patents and licenses relevant here. Those interrogatories addressed only 0.03% of the patents and 1.8% of the licenses that are relevant to the FTC's proposed requests.

For comparison purposes, extrapolating the data from that limited litigation to the larger proposed study makes clear that millions of pages of Microsoft documents would be responsive to the FTC's requests. For example, Microsoft estimates that tens of thousands of documents

and over one million pages—if not more[32]—would be responsive to just ***one*** of the document requests:

Proposed Request	Prior Litigation (10 relevant Microsoft licenses)		Proposed Study (557 relevant Microsoft licenses)	
	Responsive Documents	Responsive Pages	Responsive Documents	Responsive Pages
F.4	1,083	22,269	60,323	1,240,383

As these litigation statistics demonstrate, Microsoft estimates that it would takes tens of thousands of hours to comply with the FTC's proposed information requests.[33] Similarly, Microsoft estimates the cost of compliance would be several million dollars.[34] Both figures, which are based on real statistics, far exceed the FTC's proposed estimates and would place a disproportionate burden on large operating companies like Microsoft, which are not the focus of the proposed 6(b) study.

V. THE PROPOSED INFORMATION COLLECTION FROM MANUFACTURING FIRMS WILL HAVE LITTLE TO NO PRACTICAL UTILITY

With the goal of the proposed study primarily aimed at getting a more complete picture of PAE activity, overbroad requests to Manufacturing Firms will provide little to no benefit. The sheer volume of material that Microsoft anticipates would be produced by Manufacturing Firms would make it nearly impossible for the FTC to effectively compare PAE behavior to that of assertion activity by other patent owners.[35]

[32] These estimates are likely low, since the relevant custodians have amassed 67% more data in the intervening years since the data collection in that litigation.

[33] For Microsoft to respond to proposed request F.4 within the FTC's proposed time estimate for retrieving responsive information (80 hours), Microsoft estimates that it would need to review and analyze 46 documents per minute.

[34] For example, using the FTC's $19,597 cost estimate, Microsoft could only produce 57 documents (or 726 pages) in response to the FTC's entire proposed request.

[35] *See supra* Section IV.

The PRA defines "practical utility" as "the ability of an agency to use information, particularly the capability to process such information in a timely and useful fashion."[36] It remains unclear if the FTC has a plan to—or even could—review, analyze, and digest in a timely manner the millions of pages of documents that are likely to be produced by Manufacturing Firms, in any meaningful, useful or timely fashion.[37]

VI. INFORMATION REQUESTS DIRECTED AT MANUFACTURING FIRMS SHOULD BE NARROWED

Microsoft believes the FTC's proposed study will assist in better understanding PAEs and their business practices. While Microsoft agrees that certain information from operating companies could provide a useful framework against which to analyze PAEs, the proposed requests, as drafted, are too broad and place too heavy of a burden on Manufacturing Firms that are not the focus of the inquiry. The proposed requests can and should be narrowed to both enable the FTC to focus on the most pertinent data while reducing the corresponding burden.

The best way to accomplish that objective is to limit requests to readily accessible data and documentation concerning licenses that would prove most useful for purposes of comparison to PAEs. Limiting the proposed requests directed towards Manufacturing Firms to the following materials addresses many of the concerns in Sections II-V above, while providing the FTC with much, if not all, of the benchmark information it seeks from Manufacturing Firms:

- a list of all patents purchased or transferred since 2008;
- final patent acquisition/transfer agreements for those patents;
- final outbound patent license agreements entered into since 2008 that: (a) do not include patent cross-licenses; (b) lack any corresponding technology transfer; or (c) are not part of a broader business transaction;
- a list of patent litigations initiated by Manufacturing Firms since 2008, and all corresponding appealable orders;

[36] 44 U.S.C. § 3502(11).

[37] *See supra* Section IV.

- a list of revenue sharing agreements, if any, for patents not within its portfolio; and

- final versions of any such revenue sharing agreements.

Narrowing the proposed information requests to these materials will reduce the burden to Manufacturing Firms. At the same time it will provide targeted information that would enhance the utility of the produced materials, thus enabling the FTC to meet its stated objective of analyzing PAE activity within a meaningful timeframe.

CONCLUSION

Microsoft urges the FTC to consider these comments, and especially its recent experience in producing a tiny fraction of the information requested by the FTC in litigation, before serving any special orders. For the foregoing reasons, the FTC should modify the proposed information requests to reduce the burden upon Manufacturing Firms while enabling it to conduct a robust empirical study of patent assertion activity by PAEs.