The Internet Association

Public Comments of The Internet Association to the Federal Trade Commission on Agency Information Collection Activities and the Commission's Proposed Collection

The Internet Association ("IA") appreciates the Commission's ongoing efforts to study the effect of patent assertion entities ("PAEs") on the American economy and innovation.[1] The Commission's 2011 Report, *The Evolving IP Marketplace*,[2] and its December 2012 joint workshop with the Department of Justice,[3] both marked important steps in improving our understanding of PAE conduct and its consequences. The proposed 6(b) study is a logical, even essential, next step in those efforts. Operating companies targeted by PAEs have been willing in the name of reform, or forced by litigation, to disclose confidential information about their businesses, patent portfolios and experiences with PAEs. PAEs, however, operate largely in secret. As a result, operating companies, regulators, Congress and academics work with imperfect information and are therefore unable to most effectively assess how best to address the impact of PAE activity on our economy. A thorough examination of the different business models and economic consequences of PAE behavior – from conventional patent trolls to large patent aggregators and operating company privateering – would go far to improve our understanding of a problem of great national urgency and import.

Thus, in the IA's view, the scope of the Commission's proposed 6(b) investigation, and the particular types of information the Commission seeks to obtain, are essential to the Commission's mission of protecting competition and consumers. To ensure that the Commission obtains a full understanding of some of the most potentially damaging PAE conduct, including patent privateering and RAND commitment evasion, the Commission should clarify certain requests and direct its 6(b) orders to firms most likely to have information relevant to those topics.

1. The Commission's Proposed Order is commensurate with the scope of PAE abuses.

The Commission's Proposed Order[4] is appropriately focused on obtaining information critical for the Commission to analyze the impact of PAEs on competition and innovation. Current research, many claim, is insufficient to permit firm conclusions about the ultimate impact of PAEs.[5] Responses to the Commission's Proposed Order are necessary to fill this gap. In the IA's view, information that the Commission seeks – which includes, among other things,

[1] *See* Agency Information Collection Activities; Proposed Collection; Comment Request, 78 Fed. Reg. 61352 (Oct. 3, 2013), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-10-03/pdf/2013-24230.pdf.

[2] Federal Trade Commission, The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition (Mar. 2011), *available at* http://www.ftc.gov/os/2011/03/110307patentreport.pdf.

[3] Federal Trade Commission, *Patent Assertion Entity Activities Workshop*, FTC.gov, http://ftc.gov/opp/workshops/pae/ (Dec. 10, 2012).

[4] *See* Comment Request, 78 Fed. Reg. at 61353, 61353-57 (Description of the Collection and Proposed Use).

[5] David Schwartz & Jay Kesan, *Essay: Analyzing the Role of Non-Practicing Entities in the Patent System*, at 18, 99 Cornell L. Rev. (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117421.

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patent holdings, acquisitions, transfers, financing and compensation schemes, arrangements with named inventors, and enforcement strategies – all are critical to enabling a well-informed understanding of the impact of PAEs. The following examples illustrate the point:

As the IA explained in comments submitted in connection with the Commission and Department of Justice's joint workshop on PAEs,[6] PAEs exploit the patent system to parlay inefficiencies into profits unrelated to the purpose of the patent laws – the promotion of innovation. PAEs can game the system because they do not market goods and services and lack a relationship with consumers. Rather, a PAE's value is determined by its ability to extract royalties through litigation-induced licensing schemes targeted at firms that have invested large sums in (and thus have incurred large sunk costs developing) their own technology independent of any knowledge of, or technical contribution by, a PAE's patents.

Thus, the Commission's requests for information concerning individual patents and patent portfolios (*see* Proposed Order items C and D) and the Commission's request for patent assertion information (*see* Proposed Order item F) are important to the Commission's study of PAEs. To evaluate whether the activities do indeed promote the progress of science and the useful arts – justifying the royalties they seek and obtain – the Commission needs to know precisely what patents PAEs own and precisely how PAEs assert them. Diluting the Commission's proposed requests on these topics would only hinder the Commission's analysis, and limit the utility of the Commission's ultimate conclusions.

The IA's previous comments also highlighted the serious concerns posed by "hybrid PAEs," otherwise known as patent privateers.[7] Patent privateering – employing PAE patent enforcement agents – is a collusive tactic used by certain manufacturing firms to burden rivals and restrain competition. Chairwoman Ramirez has observed that privateering "allows operating companies to exploit the lack of transparency in patent ownership to win a tactical advantage in the marketplace that could not be gained with a direct attack" and can "increas[e] licensing fees and further burden[] rivals."[8] Similarly, Commissioner Wright has noted that "PAEs force asymmetric warfare upon practicing entities" and foist "royalty rates above the underlying value of the patents" on assertion targets.[9] By employing PAE privateers, manufacturing firms can increase rivals' costs, hinder new innovation, and in certain circumstances protect – or establish -- dominant market positions.

The Commission's requests for patent acquisition and transfer information (s*ee* Proposed Order item E) between manufacturing firms and PAEs will help the Commission to assess the

[6] Comments of the Internet Association to the U.S. Department of Justice, Antitrust Division & Federal Trade Commission, Workshop on Patent Assertion Entities (Apr. 5, 2013), *available at* http://www.justice.gov/atr/public/workshops/pae/comments/paew-0045.pdf.

[7] *Id.* at 4.

[8] Chairwoman Edith Ramirez at the Computer & Communications Industry Association & American Antitrust Institute Program, *Competition Law & Patent Assertion Entities: What Antitrust Enforcers Can Do*, at 7 (June 20, 2013).

[9] Commissioner Joshua Wright at the Dechert Client Annual Antitrust Spring Seminar, *What Role Should Antitrust Play in Regulating the Activities of Patent Assertion Entities?*, at 10 (Apr. 17, 2013).

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motivations and expected impact of privateering. The Proposed Order seeks comprehensive information relating to the acquisition and sale of patents, including financing or related agreements among the PAE and manufacturing firms and financial projections. The requests may also garner communications between manufacturing firms and PAES, or among manufacturing firms that collaborate to transfer patents to one or more PAEs. Each of these sources is necessary to assess fully the mechanisms by which manufacturing firms ensure that PAE transferees target particular rivals, and the ways in which privateering transactions change the incentives and ability to assert the transferred patents. These requests are thus appropriately tailored to the Commission's goals.

The Commission's requests for patent cost and revenue information (*see* Proposed Order items F and G) are important for assessing the impact of PAEs, including privateering transactions, on innovation. Responses to these requests will also reveal how PAE patent acquisitions are financed, as well as the circumstances concerning ongoing payments from PAEs to manufacturing firm transferors. Some well-known privateering transactions involve revenue sharing arrangements among the PAE privateer and manufacturing firm transferors. The Commission's requests for information concerning shared acquisition costs and shared assertion revenues will provide the Commission with important information for understanding the structure and financial incentives that motivate and support various PAE models and transactions, such as privateering and other patent transfers where firms "rent" patents for the purpose of assertion or coordinated patent assertion efforts.

Also, to understand and prevent the anticompetitive consequences of privateering or other possibly harmful interactions among PAEs and manufacturing firms, the Commission ought to direct its Proposed Order to a variety of both PAEs and other manufacturing firms that sell or transfer patents to them. Unless the Commission seeks information from manufacturing firms, especially those firms reported to have engaged in privateering transactions, it will be unable to assess the consequences of privateering arrangements.

In sum, the scope of the Commission's Proposed Order is justified by the Commission's need to obtain information to understand the structure and operation of PAEs and the impact of their conduct. Moreover, the Commission is fully justified in sending the Proposed Order to both PAEs and other entities/manufacturing firms that actively assert patents covered by this study. The Proposed Order should be issued in its entirety—and broadly—without restrictive modifications.

2. Recipients of the Commission's Order should not be excused from full compliance.

Nothing in the Proposed Order subjects its recipients to undue compliance burdens. The Commission's Proposed Order seeks information principally about the ownership, acquisition and assertion of patents – conduct at the heart of PAEs' businesses. Although the Proposed Order seeks detailed information about individual patents, PAE recipients will be able to provide relevant information without incurring excessive compliance costs. Because patents are PAEs' primary assets, PAEs, whatever the size of their portfolios, likely have well-organized files relating to individual patents and patent portfolios. Similarly, most PAEs likely have the information related to patent transfers and assertions the Proposed Order seeks in readily

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available forms. PAEs often organize their operations around patent management, acquisition, sale and enforcement functions. To the extent the Proposed Order's requests apply to a variety of document types, these documents likely exist in the possession of a small number of easily identifiable custodians who routinely deal with these activities. And because the value of a patent to a PAE is entirely dependent on the PAE's ability to enforce the patent, PAEs most likely will have information about its patents' assignment and licensing history readily available.

To the extent manufacturing firms may have disparate teams responsible for varying technologies or otherwise have more custodians of information responsive to the Proposed Order's requests for particular categories of documents than PAEs, the IA expects that commonplace modifications can allow for agreement upon search terms and custodians, and can efficiently identify relevant documents. Common document production practices also can minimize the burden of compliance with the Commission's Proposed Order. Major patent transactions are often referred to by project code names, which can be used to identify documents relevant to these transactions. Other search terms (e.g., the name of PAE transferees) similarly can be used to identify likely responsive documents. The IA expects that most if not all manufacturing firm recipients will have significant experience responding to requests similar to those in the Commission's Proposed Order and should be able to respond to this Order efficiently and effectively.

3. The Commission should issue the Proposed Order to the firms most likely to possess relevant information concerning abusive PAE practices.

The Commission has indicated that approximately 25 PAEs and 15 other entities, including manufacturing firms, will receive the Proposed Order.[10] The IA commends the Commission for including manufacturing firms among the intended recipients of the Proposed Order. By doing so, the Commission will be able to obtain important information about these firms and the various relationships manufacturing firms have with PAEs. Indeed, interactions between PAEs and manufacturing firms are at the heart of the question about the effect that PAE activities can have on competition and innovation.

When selecting recipients for the Proposed Order, in the IA's view, the Commission should focus on manufacturing firms that (i) engage in privateering transactions; (ii) frequently engage in other financing, licensing, or transfer activity with PAEs; or (iii) have largely abandoned their prior manufacturing lines and turned to patent enforcement as a significant component of their current business model. Moreover, manufacturing firm recipients should not be limited to those with wireless standards-essential patents ("SEPs"),[11] but rather also should include those firms that have a relationship with PAEs and a prior history of asserting patents relevant to wireless communication.

PAE recipients should include firms that (i) have amassed massive patent portfolios and have active licensing and litigation programs; (ii) have acquired significant portions of their

[10] Comment Request, 78 Fed. Reg. at 61353.

[11] The Commission intends to send requests to "approximately 15 other entities asserting patents in the wireless communications sector, including manufacturing firms." *Id.*

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patent portfolios from operating companies; and (iii) are notorious for aggressive monetization and litigation.

The Commission also should include in its focus the largest patent aggregators whose members and/or investors represent horizontal competitors who otherwise would be prohibited by our competition laws from engaging in coordinated patent acquisition and enforcement activities, especially against non-member competitors.

4. The Commission should clarify the Proposed Order to improve its ability to collect information in a consistent manner.

To ensure that the Commission gathers information consistently from recipients, the IA believes that the Commission should make certain limited clarifications to the Proposed Order.

First, the Commission should clarify that its specification requesting information concerning licensing commitments is not limited to SEPs. The Proposed Order's specification C.1.o seeks information concerning patents that are "subject to a licensing commitment made to a Standard-Setting Organization." Although this specification seeks information regarding "all encumbrances" on these patents, and thus on its face includes licensing commitments made outside of the standard-setting process, recipients may interpret this specification narrowly to limit disclosures about non-SSO licensing commitments. Whether made to SSOs or to the public at large, the enforcement of licensing commitments is important for preventing patent holdup. PAEs that breach encumbrances – whether created by a commitment made to SSOs or otherwise – can harm innovation and competition. And PAEs asserting patents subject to licensing commitments have a heightened probability of issuing deceptive demand letters that mislead recipients about the availability of the asserted patents. The Commission accordingly should clarify that specification C.1.o applies to all licensing commitments and encumbrances whether or not the commitment or encumbrance was made to a SSO.

Second, the Commission should define frequently used terms that could be subject to narrowing interpretations. For example, the Proposed Order makes frequent use of the term "held," but does not define it. The IA suggests that the Commission define "Held" (and capitalize the term throughout the Proposed Order) to mean "owned or possessed, in whole or in part, and in any capacity, including but not limited to total ownership, partial ownership, entitlement to royalties or other payments, assignment, recoveries, or exclusive license." This definition will prevent a recipient from interpreting "held" to mean only those patents for which it possessed and owned all rights.

Third, the Commission should clarify that its requests for patent acquisition, transfer and assertion information include requests for non-disclosure agreements and other documents ancillary to interactions between PAEs and manufacturing firms, as well as interactions between PAEs and original assignees and inventors. Many PAEs take significant steps to limit the disclosure of communications with their manufacturing firm partners or patent assertion targets. The Commission should include specifications in its Proposed Order to seek documents reflecting these efforts, including seeking any and all non-disclosure agreements or other

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agreements that limit a firms' ability to communicate about its interaction with a PAE or any other firm concerning a relationship with a PAE.

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In conclusion, the IA strongly supports the Commission's 6(b) study. Understanding the operations of PAEs and their impact on competition and innovation is critical to the Commission's mission of safeguarding the welfare of American consumers. The Commission's Proposed Order seeks important information necessary for the study's important mission. The IA urges the Commission to move swiftly to undertake its important work, so that both the antitrust enforcement agencies and the public may benefit from the Commission's special ability to gather information for, and to conduct studies of, matters important to American commerce.

Chairwoman Ramirez has stated that the Commission's efforts "should be part of a much broader response to flaws in the patent system that fuel inefficient behavior by PAEs and other firms."[12] The IA agrees. The Proposed Order will do much to explain how PAEs and firms engaged in privateering use patent assertion activities to realize profits unrelated to innovation and to harm competitors. As to flaws in the patent system that are already known, meaningful legislation to "improve patent quality, and reduce the costs of challenging weak IP and defending against frivolous lawsuits"[13] is a broadly supported and essential undertaking. The efforts of Congress and those of the Commission are necessary complements, not substitutes.

Sincerely,

/s/Gina G. Woodworth
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[12] Remarks of Chairwoman Edith Ramirez before the American Bar Association Antitrust Section's Intellectual Property Committee (Nov. 12, 2013), *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.

[13] *Id.*

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