

Remarks of Chairwoman Edith Ramirez
Fall Networking Event
ABA Antitrust Section's Intellectual Property Committee
Washington, DC
November 12, 2013

Good evening, everyone. I want to start by thanking Crowell & Moring for hosting us tonight. I also want to thank the Antitrust Section's IP Committee for organizing this event. I am pleased to be here with Department of Justice Deputy Assistant Attorney General Renata Hesse, addressing a topic on which there is significant collaboration between our two agencies.

Tonight I want to provide you with an update on the Commission's work on patent assertion entities, or PAEs. On September 30, the Commission voted unanimously to issue a Federal Register Notice seeking comment on a proposed study.¹ I know there is a great deal of interest in that proposal within this Committee so I would like to take a few minutes to describe the study and the questions we hope to answer.

Let me start with some background. We have all read the stories about PAE activity: thousands of patent demand letters sent to small businesses using ordinary office equipment; allegations of technology companies using patent intermediaries to conduct surreptitious attacks on rivals; and aggregation firms building portfolios comprising tens of thousands of patents dispersed across a maze of shell companies.

These are troubling stories. But they don't tell us that much about the competitive costs and benefits of PAE activity. As a competition agency with a long history of policy work on the patent system, that's the broad question we are interested in addressing at the FTC. But the information necessary to tackle this broader question is limited. So, for example, how common

¹ 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>.

are mass demand letter campaigns, and what's the typical payoff to the sender? What's inside these mass portfolios, and what are the strategies that drive aggregation? What kind of costs do PAEs incur and how much revenue flows back to inventors? If we want to understand the competitive implications of PAE activity, these are the kinds of questions we need to answer.

The study we announced will build on the Commission's prior work in this area. The Commission took its first serious look at PAE activity in its 2011 Report on the IP Marketplace.² In that report, we described two competing narratives of PAE activity. Supporters claim that PAEs are efficient middlemen that increase the return to invention, especially for small inventors. Critics argue that PAEs exploit flaws in the patent system and add to a growing tax on innovation, particularly in the IT sector. We heard these same narratives at the joint workshop that we co-hosted with the Department of Justice last December.³ But we also saw that empirical evidence supporting or contradicting these narratives is very thin.

Here is what we do know. Research presented at the December workshop showed that the share of infringement lawsuits filed by PAEs increased by over 30% between 2007 and 2012.⁴ More recent research confirms the trend, but suggests a smaller increase in litigation activity by PAEs. As part of the American Invents Act, Congress directed the General Accountability Office to study PAEs.⁵ That study was released last August. The GAO finds that the share of patent litigation filed by what they call "patent monetization entities" increased a

² Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* (2011), available at <http://www.ftc.gov/os/2011/03/110307patentreport.pdf>.

³ 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/>.

⁴ Colleen Chien, "Patent Assertion Entities," PowerPoint Presentation at the Fed. Trade Comm'n & U.S. Dep't of Justice Patent Assertion Entity Workshop (Dec. 10, 2012) at 23, available at <http://www.ftc.gov/opp/workshops/pae/docs/cchien.pdf>.

⁵ Pub. L. No. 112-29 § 34 (2011).

more modest 7% between 2007 and 2011.⁶ Meanwhile, academics associated with the GAO study find that the PAE share of litigation rose by 18% during the same time period.⁷ The different methodologies used produced different estimates, but all of the studies to date confirm that PAEs are playing a larger role in patent litigation.

Of course, litigation is only a part of the picture. Understanding what happens outside the courtroom, and inside PAEs, would add substantially to the empirical picture.

That takes me to our study. Under Section 6(b) of the FTC Act, we have authority to collect nonpublic information to conduct industry studies that do not have a specific law enforcement purpose. Our aim is to use that authority to expand the empirical evidence on PAE activity and shed light on its likely costs and benefits. To meet those related goals, the proposed study has two parts. The first and main part of the study will be a broad examination of the PAE business model. The second will be a more tailored case study of PAE activity in the wireless industry sector.

For the broad analysis, we plan to send requests for information to 25 PAEs. The proposed requests cover a broad range of patent acquisition and assertion activity across a range of industry sectors. For instance, the proposed requests seek information on the composition of PAE portfolios (information such as the age and type of patents); whether the patents are essential to any standards or encumbered by other licensing obligations; the costs of acquiring patents, as well as whether the PAEs share an economic interest in its portfolio with other entities. We are also seeking information on assertion activity, particularly licensing terms and

⁶ U.S. Gov't Accountability Office, GAO-13-465, Intellectual Property: Assessing Factors that Affect Patent Infringement Litigation Could Help Improve Patent Quality (2013) at 17, *available at* <http://www.gao.gov/products/GAO-13-465>.

⁷ 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).

assertion costs. This is all information that is not currently available for research or policy analysis.

The second part will be a narrower case study focusing on the wireless sector that we hope will help us understand what drives the PAE business model, and what growing activity by PAEs may mean for innovation and consumers. In particular, we want to learn more about the relationship between the business model and assertion activity. PAEs, by definition, are not typically vulnerable to countersuit, and do not engage in meaningful technology transfer. Participants at our December workshop claimed that as a result, PAEs tend to assert patents more aggressively, and may demand relatively higher royalty rates. We want to test this, among other issues.

The case study will complement the broader analysis by comparing PAE assertion activity in the wireless sector to conduct by other patent holders in this same sector. We selected wireless communications because it is a relatively well-defined sector, with a significant amount of assertion activity by manufacturing firms, PAEs, traditional non-practicing entities, as well as firms with hybrid business models.

For this part of the study, we propose to request information from other types of licensors active in the wireless sector, such as manufacturers. To be clear (because I think there may be some misunderstanding here), the information requests to PAEs are not limited to patents and activity in the wireless industry. The wireless sector will serve as the basis for comparison that will help us interpret the wide-ranging information we collect on the PAE business model.

The Federal Register Notice is currently posted on the Commission's website, and the comment period expires December 2.⁸ I think the study will provide a valuable window on an

⁸ 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

important subject. We welcome comments from academics, stakeholders and all interested persons on the goals of the study, and how we can improve the study design and the information requests.

But before I conclude, I want to emphasize that Commission activity, on both the policy and enforcement side, should be part of a much broader response to flaws in the patent system that fuel inefficient behavior by PAEs and other firms. Reforms that improve patent quality, and reduce the costs of challenging weak IP and defending against frivolous lawsuits, are crucial to providing an environment that fosters innovation and promotes consumer welfare.

Understanding more about the PAE business model will inform the policy dialogue. But it will not change the pressing need for additional progress on patent reform. I urge continued effort on that front.

Thanks again for the chance to speak with you tonight.