



# Patent Assertion Entities and Standard Essential Patents in the United States

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U.S. Federal Trade Commission

Fourth China Competition Policy Forum and International  
Symposium on Intellectual Property and Antitrust

Beijing, China

October 22-23, 2015

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# Patent Assertion Entities

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- Patent assertion entities (PAEs) are firms that have a business model of buying patents and asserting those patents against those practicing the patented technology
  - More narrow definition than non-practicing entity (NPE), which may include companies and other inventors that innovate and develop technology but do not practice the technology in their own products

# Patent Assertion Entities

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- Possible ways in which PAEs promote innovation and efficiency
  - May provide inventors with money for their patents, rewarding that innovation
  - May help facilitate broader market for patent transactions and improved monetization opportunities

# Patent Assertion Entities

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- Possible ways in which PAEs may harm consumers
  - PAEs may threaten or engage in litigation that allows them to collect licensing fees above the value of the technology
  - PAEs may take advantage of opaque information about patent ownership to impose costs on manufacturers

# Patent Assertion Entities

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- Important to identify the problem with precision
  - For example, are there types of PAE conduct that antitrust enforcers should be concerned about?
    - Certain patent acquisitions?
  - Or, do the issues arise from aspects of the patent system?
    - Can legislative reforms make patent litigation more efficient?
    - Does the issuance of low quality patents contribute to the problem?
- Both the benefits and the concerns are not well understood

# Patent Assertion Entities

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- The FTC is conducting a study to gather empirical information about PAE conduct
  - FTC has statutory authority to gather information to conduct studies like this
- Seeking information from 25 PAEs:
  - Do they hold SEPs
  - Patent acquisition costs
  - Sharing of revenues with third parties
  - Information about demand letters and licenses
- Also seeking similar information from 15 NPEs and manufacturing firms in wireless communications sector
- We hope the research and report will better inform antitrust enforcers and other policy makers about the market for PAE activity in the United States

# Benefits of Standards

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- Industry standards are widely acknowledged as vital, and enable interoperability among many products, particularly high-technology products, and can promote innovation
  - Standards can facilitate entry, make products less costly for firms to produce and more valuable to consumers
- Standards make networks, such as the Internet and telecommunications, more valuable to consumers by allowing products to interoperate consistently and predictably
  - Standards development allows market participants to share technical solutions to complex problems
- Standards can eliminate switching costs for consumers who want to switch to products made by different companies

# Standard Essential Patents

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- Standards can include technology covered by hundreds or thousands of patents held by dozens of patent holders
- Inclusion of patented technologies in a standard can benefit consumers because it allows SSOs and their members to choose from a broader set of available technologies
- Industry participants also can obtain significant advantages when an SSO chooses to adopt their technology
- Patents essential to practice a standard are known as standard essential patents (SEPs)



# Patent Hold-Up

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- Including patented technologies in standards has the potential to distort competition
- SEP holders may use the leverage that they may acquire as a result of the standard setting process to negotiate higher royalty rates or other favorable terms after the standard is adopted than they could have credibly demanded beforehand
  - Implementers of the standard incur sunk costs of investment developing products that meet the standard
  - Implementers may face substantial switching costs
  - They, and entire industry, may become locked in to the technology
- This is known as patent hold-up

# Mitigating Patent Hold-Up

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- Market-based factors may mitigate patent hold-up
  - Frequent participants in SSO activities may not want to incur reputational/business costs
  - SEP holders may find it more profitable to promote adoption of the standardized technology
  - Broad cross-licensing agreements may protect against hold-up
- Hold-up has the potential for significant effects

# Mitigating Patent Hold-Up

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- SSOs can mitigate the threat of patent hold-up
  - Patent disclosure policies that require participants to reveal their IP rights to SSO
  - Patent disclosure policies that require participants to commit to license on fair, reasonable, and non-discriminatory (FRAND) terms
    - Both are designed to promote access on known terms to the technology needed to implement the standard
- A SEP holder's decision not to make a FRAND commitment does not, itself, create antitrust liability
  - However, the SSO may decide not to include the technology in the standard

# When May Hold-Up Be Actionable?

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- Non-disclosure
  1. An SSO requires patent holders to disclose information about IP that may be involved in a standardized technology under consideration.
  2. A patent holder fails to disclose the information as required.
  3. After a standard is adopted, the patent holder asserts patent claims against companies using the standard.
- Reneging on Licensing Commitments
  1. A patent holder commits to license on FRAND terms to implementers of standard
  2. Patent holder refuses to license and pursues injunctions against willing licensees
- Facts important, and either type of conduct must harm competition

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Thank you!

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