

IN THE OFFICE OF MANAGEMENT AND BUDGET AND THE FEDERAL TRADE COMMISSION

In the Matter of:
Agency Information Collection Activities; Submission for OMB Review; Comment Request

PAE Reports: Paperwork Comment; Project No. P131203
ICR Reference No. 201405-3084-002

COMMENTS OF ENGINE ADVOCACY

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Engine Advocacy¹ respectfully submits the following comments on the proposed Patent Assertion Entity study, in response to the FTC and OMB Notice and Comment Request dated May 19, 2014 (hereinafter “Notice”).² Engine Advocacy previously submitted joint comments on this subject along with Electronic Frontier Foundation and Public Knowledge in response to an earlier request for comments.³

Engine Advocacy strongly supports the proposed FTC study on patent assertion entities (PAEs) because such a study will serve the public interest by generating substantive and critical information on the structure and conduct of NPEs. Because NPEs play such a central role in patent litigation abuse, it is especially important that the FTC use its authority under Section 6(b) to generate information that would otherwise be largely unavailable to the public and to policy makers.

¹ Engine Advocacy is a nonprofit organization that has built a coalition of over 500 startups, pioneers, innovators, investors and technologists, and supports the growth of technology entrepreneurship through research, policy analysis and advocacy.

² See PAE Study Notice, 79 Fed. Reg. 28,715 (Fed. Trade Comm’n May 19, 2014).

³ See PAE Study Notice, 78 Fed. Reg. 61,352 (Fed. Trade Comm’n Oct. 3, 2013); *Comments of Public Knowledge, the Electronic Frontier Foundation, and Engine Advocacy before the Federal Trade Commission on Agency Information Collection Activities* (Dec. 16, 2013) [hereinafter *Comments of Public Knowledge*], available at <http://www.ftc.gov/policy/public-comments/comment-00039-19>.

The proposed PAE study clearly furthers the mission of the Federal Trade Commission in protecting consumers from unfair and deceptive trade practices. It does so in a manner that is reasonably tailored to the study's stated goals, and is designed to ensure that the burden on those from whom information is being collected is minimal. As such it complies with the purposes of the Paperwork Reduction Act and clearly serves the FTC's mandate by generating important information that can be employed to advance better public policy.⁴

That estimated burden associated with this proposed study is both reasonable and minimal, particularly in comparison with other approved FTC studies. Moreover, the data to be collected will create a substantial public benefit by generating otherwise very difficult, if not impossible, to obtain information on patent assertion entities and their role in patent litigation abuse.

Engine applauds the FTC's initiative surrounding its proposed study on patent assertion entities, and strongly urges OMB to approve that study.

I. THE PROPOSED DATA COLLECTION COST BURDENS ON RESPONDENTS ARE REASONABLE AND MINIMAL

The burdens of the proposed study on respondents measured in monetary cost as well as in time expenditure that is necessary for compliance are minimal. The hours and cost estimates set forth in the Notice and Request for Comments are well within an acceptable range as compared with other burden estimates for analogous FTC studies. In addition, the FTC's revised time estimates may be overly high given that many PAEs will already have amassed this information in the course of litigation.

⁴ See 35 U.S.C. § 3501(1)–(2) (2013).

In the present Notice, the FTC “conservatively” estimates between 425 and 845 hours for a single patent assertion entity to gather the required information and prepare a response.⁵ Although these revised estimates are in fact higher than the FTC’s original estimate of 90–400 hours (numbers we believe are probably inflated for reasons that will be more fully set forth below⁶), even these more generous numerical estimates are nonetheless reasonable and not overly burdensome in light of the very real threat that PAEs present to consumers.

As the FTC noted in the present Notice, similar patent-related FTC studies on generic drugs estimated burdens of about 100–500 hours per company.⁷ Also, as Public Knowledge observed previously, other FTC 6(b) studies have estimated burdens of 620 hours, for a study on alcohol marketing⁸, and 900 hours, for a study on food marketing.⁹

Moreover, Engine believes that the revised estimate for the present study is likely *too high because* the FTC may not have accounted for the fact that much of the requested information is likely to have already been amassed by patent assertion entities whether in connection with pending investigations, or in the course of litigation wherein they are asserting their patents. For example, the Notice proposes requesting information on patent licensing information.¹⁰ That information is typically produced in the course of patent litigation.¹¹ Because patent assertion entities engage in patent litigation as a business model, they are very likely to have already generated the patent licensing data required by the study. Hence, Engine believes that the FTC’s revised estimates likely overstate the actual burden of responding to the proposed requests.

⁵ 79 Fed. Reg. 28,715, 28,728 tbl.

⁶ 78 Fed. Reg. 61,352, 61,357.

⁷ See Generic Drugs Study Notice, 66 Fed. Reg. 12,512, 12,522–23 (Fed. Trade Comm’n Feb. 27, 2001) (approved without change, OMB Control No. 3084-0122); Authorized Generic Drugs Study Notice, 72 Fed. Reg. 25,304, 25,314 (Fed. Trade Comm’n May 4, 2007) (approved without change, OMB Control No. 3084-0140).

⁸ Alcohol Marketing Study Notice, 76 Fed. Reg. 73,640, 73,643 (Fed. Trade Comm’n Nov. 29, 2011) (approved without change, OMB Control No. 3084-0160).

⁹ Food Marketing Study Notice, 75 Fed. Reg. 29,340, 29,345 (Fed. Trade Comm’n May 25, 2010) (approved without change, OMB Control No. 3084-0139).

¹⁰ 79 Fed. Reg. 28,715, 28,722–23.

¹¹ See, e.g., Irfan A. Lateef, Sean Murray, David Tait & Marko R. Zoretic, *An Overview of U.S. Patent Litigation for Canadians*, 28 CANADIAN INTELL. PROP. REV. 159, 170 tbl.3 (2012) (recommending document requests for “license agreements related to the patent-in-suit”).

Second, the FTC's cost burden estimate of \$250 per hour is well within the range of cost burdens in other approved studies cited above. Accordingly, OMB should find that the burden of the proposed information collection is minimal and appropriate.

II. THE INFORMATION GENERATED BY THE PROPOSED STUDY WOULD SERVE THE PUBLIC INTEREST

As Engine has indicated, available information on the structure and operations of PAEs and their patent portfolios is very limited. Therefore, Engine believes that the information that will be generated by the proposed Section 6(b) study would be invaluable for both consumers and small businesses, as well as for policymakers and the general public.

As Engine Advocacy noted in its previous comments,¹² there is very little broad empirical data about the structure and conduct of patent assertion entities, and their effect on the economy. The available data largely consists of data obtained from lawsuits filed in court and anecdotal information from those targeted by PAEs.

The FTC's proposed 6(b) study calls for robust and rigorous information gathering, and the data it would yield would greatly benefit stakeholders, policymakers, and the general public. It would further enable lawmakers and other government agencies, who are already actively engaged in considering much-needed reforms to the patent system, to make more informed decisions based on solid data and statistics. Individual investors, startups, and small businesses would obtain important information about the practices of patent assertion and, as a consequence, be in a position to make more informed decisions and to more effectively defend themselves against PAEs. Perhaps most importantly, the FTC would have much better information for investigating unfair and deceptive practices in the area of patent assertion—an area about which the FTC has expressed longstanding concern.¹³ This will

¹²This section summarizes Section I of filed comments. See *Comments of Public Knowledge*, *supra* note 3, at 2–4. Please see those comments for a fuller explanation of the material below.

¹³ See FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 58 (2011), *available at*

undoubtedly better equip the FTC to protect consumers from abusive patent assertion practices, *infra*.

III. THE FTC’S PROPOSED STUDY OF PATENT ASSERTION ENTITIES WILL ENABLE THE FTC TO BETTER PROTECT CONSUMERS AND BUSINESSES

The proposed FTC study of patent assertion entities will advance the mission of the FTC to protect consumers from unfair and deceptive trade practices. As has been noted in previous comments,¹⁴ the FTC has frequently used its Section 6(b) power to investigate opaque and hidden business practices that harm consumers.

Patent assertion is an opaque and pernicious business practice that harms innovators, consumers, startups and the broader economy, and as such it certainly merits the FTC’s attention.

The potential for unfairness and deception is clearly present in the patent assertion industry, placing that industry squarely within the FTC’s purview. Indeed, the FTC has previously investigated the patent economy, producing two comprehensive reports on patents and attendant competition-related issues.

The proposed study is squarely within the FTC’s jurisdiction and mandate, and the agency should move forward expeditiously with this important inquiry.

<http://www.ftc.gov/os/2011/03/110307patentreport.pdf> (indicating FTC concern about the impact of PAE activity “on innovation and competition and the implications for antitrust and enforcement policy”).

¹⁴ This section summarizes Section II of previously filed comments. See *Comments of Public Knowledge*, *supra* note 3, at 4–6. Please see those comments for a fuller explanation of the material below.

IV. CONCLUSION

For the foregoing reasons, OMB should approve of the proposed study of patent assertion entities so that the FTC can proceed with the study as expediently as practicable. The information collection burden imposed by the proposed study will be minimal, and the benefit of the study to the public and to policymakers will be substantial. The study thus comports both with the Paperwork Reduction Act and admirable policy goals.

Engine Advocacy is grateful to the agency for providing the opportunity to submit these comments. Should the Office of Management and Budget and the Federal Trade Commission have any further questions relating to any matter presented herein, the undersigned would be happy to provide any further information that the agency may find useful.

Respectfully submitted,

ENGINE ADVOCACY

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