

June 18, 2014

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Office of the Secretary
Room H-113 (Annex J)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Office of Information and Regulatory Affairs
Office of Management and Budget
Attn: Desk Officer for the Federal Trade Commission
New Executive Office Building
Docket Library, Room 10102
725 17th Street NW
Washington, DC 20503

**Re: PAE Reports: Paperwork Comment; Project No. P131203
79 Federal Register 28715, May 19, 2014**

Dear Secretary Clark:

The American Intellectual Property Law Association (AIPLA) respectfully submits this letter in response to the Federal Trade Commission's second Federal Register notice ("the Second Notice"), dated May 13, 2014, regarding proposed information requests to so-called "patent assertion entities" (PAEs) and other entities asserting patents in the wireless communications sector. 79 Fed. Reg. 28715.

AIPLA is a national bar association with approximately 15,000 members who are primarily lawyers in private and corporate practice, in government service, and in the academic community. AIPLA represents a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property, as well as those who litigate and prosecute before patent and trademark offices, giving AIPLA a unique perspective on patent litigation practices.

AIPLA understands that the proposed information requests are to be used in preparation for a study under Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. §46(b) ("Section 6(b) Study") on patent acquisition, litigation, and licensing practice, with the aim of examining how PAEs do business and to develop a better understanding of how they impact innovation and competition. AIPLA agrees with the FTC that there is a need for more information to ensure that policy decisions are appropriately grounded and commends the FTC in devoting time and resources to gathering such data.

AIPLA acknowledges the various amendments to the proposed information requests in the Second Notice, many of which reflect points raised in our letter dated December 16, 2013. AIPLA notes in particular the revised estimates of the financial burdens of the FTC's questionnaire; the change to the operative time period; and the replacement of the "all documents" request with the request for agreements and strategic documents provided to officers, directors, or outsiders. We also appreciate that the investigation has been divided into two parts: (a) descriptive examination of the PAE business model, and (b) comparative study of PAE activity, with separate questions to be addressed to PAEs and to manufacturers or NPEs. We further note the clarification of the request regarding commitments to SSOs and third parties and the exclusion from the scope of required responses of public information from the U.S. Patent and Trademark Office. We believe that these changes result in a significant improvement to the proposed information requests.

However, AIPLA notes that the Second Notice does not address certain comments contained in our letter of December 16, 2013 (attached), and respectfully requests that the FTC reconsider these points. In particular, the Second Notice appears to have retained the same definition of PAE respondents. As indicated in our first letter, AIPLA is concerned that requiring responses to information requests from "firms whose business primarily involves purchasing patents and attempting to generate revenue by asserting them against persons already practicing the technology," may be over-inclusive. AIPLA believes that the information requests should be more specifically directed to entities that most tend to bear some indicia of the alleged misconduct that has given rise to the policy concerns of both the FTC and Congress. That conduct involves abusive practices during infringement litigation as well as demand notices from patent owners.

Although AIPLA recognizes that it may be difficult to identify such entities in advance of receiving responses to questions that are the subject of this investigation, the proposal to target PAEs involves the use of a label which can be a broad brush that sweeps in independent inventors, universities, technology licensing organizations and some operating companies. The over-inclusive targeting of potentially bad actors may cast an unjustifiable cloud on their legitimate activities as patent owners and reduce the value of their rights. Therefore, AIPLA recommends that the information requests for the Section 6(b) Study be narrowly directed to those patent owners that appear to be abusing the system, and that the proposed questions be revised to eliminate ambiguity and reduce the burden of response.

Thank you for considering AIPLA's views on these important issues. We would welcome the opportunity to continue working with the FTC to find solutions to abuses to the patent system.

Sincerely

Q. Todd Dickinson
Executive Director
American Intellectual Property Law Association

December 16, 2013

Attachment to 6/18/2014 letter to FTC and OMB on
FTC Section 6(b) Study of patent assertion entities.

Mr. Donald S. Clark
Secretary
Federal Trade Commission
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Washington, DC 20580

**Re: PAE Reports: Paperwork Comments; Project No. P131203
78 Federal Register 61352, October 3, 2013**

Dear Secretary Clark:

The American Intellectual Property Law Association (“AIPLA”) appreciates the opportunity to respond to the October 3, 2013 Federal Register notice (“Notice”) with its views on the Federal Trade Commission’s (“FTC”) proposed information requests to so-called “patent assertion entities” (“PAEs”) and other entities asserting patents in the wireless communications sector. 78 Fed. Reg. 61352. We understand that the information requests are in preparation for a study under Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. §46(b) (“Section 6(b) Study”) on patent acquisition, litigation, and licensing practice. We further understand that these comments will be considered before the FTC submits the compulsory process orders described in the notice to the Office of Management and Budget for review under the Paperwork Reduction Act.

AIPLA is a national bar association with approximately 15,000 members who are primarily lawyers in private and corporate practice, in government service, and in the academic community. AIPLA represents a wide and diverse spectrum of individuals, companies and institutions involved directly or indirectly in the practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property, as well as those who litigate and prosecute before patent and trademark offices, giving AIPLA a unique perspective on patent litigation practices.

The aim of the Section 6(b) Study, according to the Notice, is to examine how PAEs do business and to develop a better understanding of how they impact innovation and competition. The Notice observed that the joint FTC and Justice Department Workshop,¹ conducted last April on this subject, highlighted a significant lack of empirical data on PAEs.

¹ “Patent Assertion Entity Activities Workshop” (“Workshop”) jointly conducted on December 10, 2012, by the FTC and the Department of Justice (“DOJ”).

AIPLA agrees with the FTC that there is a dearth of reliable data on this subject in general, which is surprising when one considers how much “conventional wisdom” appears to drive media and policy discussions.² Consequently, AIPLA congratulates the FTC for attempting to gather such data. There is an urgent need for more information to ensure that policy decisions are appropriately grounded, and the Notice provides an extensive list of questions that could well be relevant to such an investigation. However, we offer the following concerns about the design of the study.

Identification of Respondents

The Notice proposes to require responses to its study question from “PAEs,” defined as “firms whose business primarily involves purchasing patents and attempting to generate revenue by asserting them against persons already practicing the technology.”³

We are concerned that this identification of respondents may be over-inclusive. Instead, the Notice should carefully direct its questions to entities that most tend to bear some indicia of the alleged misconduct that has given rise to the policy concerns of both the FTC and Congress. That conduct involves abusive practices during infringement litigation as well as demand notices from patent owners.

We recognize the “chicken and egg” difficulty of identifying such entities in advance of receiving responses to questions that are the subject of this investigation. Nevertheless, the proposal to target “PAEs” involves the use of a label which, as pointed out in AIPLA’s April 5, 2013 comments for the Workshop,⁴ can be a broad brush that sweeps in independent inventors, universities, technology licensing organizations and some operating companies. The over-inclusive targeting of potentially bad actors may cast an unjustifiable cloud on their legitimate activities as patent owners and reduce the value of their rights.

Intrusive and Burdensome Questions

We are also concerned about the substance and complexity of the questions posed in the Notice. Some questions encompass legitimate business activities, and others are quite broad, requiring responses that are far more burdensome than might be appreciated. In addition, many of the questions would require considerable legal analysis that will far exceed the estimated burden of response. Finally, we note the highly sensitive nature of the information requested, including entire agreements and financial information.

² A study conducted by the Government Accountability Office (GAO) attributed the increase in patent litigation from 2007-2011 not to a rise in PAE activity, but instead to other unrelated factors. “Intellectual Property: Assessing Factors that Affect Patent Infringement Litigation Could Help Improve Patent Quality,” August 2013, at pg. 14-15. As the GAO noted in their review of several of the most widely-quoted studies, the data sets in these reports were difficult to rely on, being “nonrandom, nongeneralizable.” *Id.* at p. 26.

³ 78 Fed. Reg. 61352.

⁴ See AIPLA Comments on the FTC/DOJ Patent Assertion Entity Activities Workshop (Apr. 5, 2013), available at <http://www.ftc.gov/os/comments/pae/pae-0050.pdf>.

We list below some additional comments on particular information requests, using for reference the section letters in the Notice:

B. The company information requested (business structure and identification and nature of those having financial interests) is beyond the knowledge of clerical personnel or even mid-level management.

C1. We question the need for much of the information requested since most of the patent information is public knowledge once the relevant patent numbers are identified. In addition, the requested details of the R&D relevant to each patent are not necessarily recorded and will frequently require considerable investigation on an invention-by-invention basis. Also, licensing commitments to Standard Setting Organizations are often made by a generic reference to all patents one owns which are essential. The requests related to standard setting organizations should be limited to patents specifically enumerated as essential.

C2. The nature of some questions fails to recognize that licenses sometimes extend to one's entire portfolio of patents. Furthermore, the license characteristics sought may not be recorded in databases – generation of such information will require legal analysis of each license.

C3. We point out the potential attorney-client privilege and third party confidentiality obligation issues raised by a requirement to disclose all communications with investors about patents. This concern pertains to a number of the other requests, and in each case, requires significant time and expense for review, far beyond the estimates in the Notice.

D. The questions concerning how a firm “organizes” its patent portfolio require clarification as to what information is actually sought. The questions also presume that valuations are performed on patents, which is not necessarily the case.

E. Information about the way patents were acquired may require considerable investigation of the relevant agreements by legal personnel. In addition, since patents may be acquired as part of a larger transaction, such as the acquisition of a business, the precise amount paid for the patents might not be easily identifiable. Here again issues concerning privilege and confidentiality are raised by the requirement at E5 to disclose all documents relating to acquisitions of patents.

F. The patent assertion information sought may not be recorded in databases. Generation of such information may require gathering information from different sources supplemented with considerable legal analysis. Some information, such as royalty bases, might only be available from licensees.

Generally, the larger the size of the respondent, the greater the burden and complexity of responding. We suggest, at a minimum, providing a contact at the FTC who can help

respondents navigate unanticipated ambiguities and determine whether extensions of time are appropriate. We also suggest that consideration be given to requesting information in stages to allow for a more deliberate and potentially more tailored and less burdensome approach – analysis of early stage information may eliminate the need for or alter the nature of later requests.

Conclusion

AIPLA respectfully recommends that the questions for the Section 6(b) Study be narrowly directed at those patent owners that appear to be abusing the system, and that the proposed questions be revised to eliminate ambiguity and reduce the burden of response.

AIPLA is very grateful for the opportunity to comment on this important matter, and we would be pleased to be available in the future if we can be of further assistance.

Sincerely,

Q. Todd Dickinson
Executive Director
American Intellectual Property Law Association