



Internet Association to the Federal Trade Commission on Agency Information Collection Activities and Submission for OMB Review

The Internet Association (“IA”) submits these comments in strong support of the Commission’s carefully focused proposed study of the effect of patent assertion entities (“PAEs”) on the American economy and innovation.¹ Informational asymmetries enable PAEs’ patent assertion campaigns, as they use litigation or the threat of litigation to extract information from their targets while conducting their own business entirely in the shadows. Some operating companies also conduct their assertion activities in secret by operating through PAEs. Chairwoman Ramirez has observed that this patent 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.”²

The proposed 6(b) study will shed much needed light on the accumulation and exploitation of patent portfolios PAEs. The scope of the proposed study is carefully focused but still broad enough to lead to a much better understanding of the organizational structure, business practices, and assertion activities of large patent aggregators, patent privateers, and garden-variety patent trolls. As the Commission’s recent Comment Request observes, much of the current discussion of PAE activity focuses on litigation because litigation data is publicly available.³ Although instructive, litigation data alone yields an incomplete picture of PAE activities and the effect of PAEs on innovation and economic growth. The FTC’s targeted inquiry into the “wide range of non-public behavior related to acquisition and licensing practices, together with structural issues related to organization and economic relationships” will foster better-informed policy choices and may also bring a measure of accountability to PAEs that currently insulate themselves from meaningful scrutiny of their practices.

In the IA’s view, the FTC accurately estimated the burdens associated with the information collection in its prior request for comments. Nonetheless, the FTC has responded appropriately to concerns raised by PAEs and others, narrowing its request to substantially reduce any burdens associated with the information requests. For example, rather than asking for all documents in many categories, the revised request now focuses “on agreements and on strategic documents provided to officers and directors or shared with persons outside the firm.”⁴

The FTC also has committed to working with the USPTO to acquire publicly available information before seeking information from respondents. In view of these modifications, PAEs – and, in particular, the patent trolls that conduct no business outside of assertion activities – have no colorable objection to the minimal burdens the information collection imposes on them.

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 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).

³ Agency Information Collection Activities; Submission for OMB Review; Comment Request, 79 Fed. Reg. 28715 (May 19, 2014).

⁴ *Id.* at 28716.



Compared to the burdens that patent assertion places on operating companies targeted by PAEs, the burdens associated with the information collection are minimal.

The IA also strongly supports the FTC’s specific inquiry into patent assertion in the mobile device sector. The 6(b) study offers a unique opportunity for the FTC to examine aggregate royalty burdens on mobile devices and assess whether licensing royalty rates, or damage awards for patent infringement, strike the appropriate balance between the promotion of innovation and the avoidance of royalty stacks that impede consumer access. Given the frequency and scale of patent assertion activity in the mobile device marketplace, and the shadowy organizations through which some of that activity is conducted, the FTC should closely scrutinize non-public information relating to patent acquisition and licensing practices relevant to that marketplace.

Finally, the IA is pleased that Commissioner Brill acknowledged that this study should not interfere with advancement in patent reform legislation by noting that “further reforms to the patent litigation system are clearly warranted” and “Congress should act with deliberate speed to implement those proposed reforms...”⁵ Further, we are pleased that Chairwoman Ramirez and other FTC officials have made clear that the 6(b) study will not prevent or delay the FTC from bringing enforcement actions when warranted. Although the information collection is necessary to piece together a complete picture of PAEs’ assertion activities and their impact, information already available demonstrates clearly that small businesses and consumers are being harmed by the “asymmetric warfare” waged by patent trolls. When PAE assertion activity violates laws intended to protect consumers and competition, the FTC has a clear mandate to act.

Sincerely,

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⁵ Commissioner Julie Brill at the 2014 International CES – CEA Innovation Policy Summit, *Patent Litigation Reform: Who Are You Calling a Troll?*, at 5-6 (Jan. 8, 2014).