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Office of Information and Regulatory Affairs
Office of Management and Budget

Attention: Desk Officer for the Federal Trade Commission,
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Federal Trade Commission
Office of the Secretary
600 Pennsylvania Ave., N.W.
Washington, DC 20580

Re: PAE Reports: Paperwork Comment; Project No.
P131203

The Stop Patent Abuse Now (“SPAN”) Coalition is comprised of five trade associations including the American Association of Advertising Agencies, the Association of National Advertisers, the Direct Marketing Association, the National Retail Federation, the Mobile Marketing Association, and several of their member companies. The Coalition strongly supports the Commission’s decision to conduct a 6(b) study of patent trolls. The proposed specification and the plan to send it to both trolls and other entities asserting patent rights should lead to new information that will help the Commission understand the issues faced by firms that are threatened and sued by patent trolls. Further, we believe that the scope of the study, although comprehensive, is properly aimed at the practices of patent trolls and is neither overly broad nor burdensome to the targets of the subpoenas. Finally, although SPAN recognizes that the study has a number of important goals relating to the competitive impact of the patent system on our economy, including the impact of various patent troll business models and troll patent acquisition and litigation strategies, we believe that it is critical that the Commission also focus on the impact of unfair and deceptive demand letters on American Main Street businesses.

Most SPAN members, as users rather than inventors of technology, do not file for or enforce patents themselves, and therefore often have little experience with the patent system prior to receiving demand letters. As a result, the cost to do even basic due diligence to assess the validity of the alleged infringement claims are often large relative to the value of the activity the troll claims to cover with its patent. This is a particularly acute concern for small to mid-size businesses that have limited legal

budgets and do not typically have in-house patent teams. So when confronted with a demand letter, many of the businesses represented by the SPAN coalition rarely see any viable option, regardless of the merits of the claims, other than to capitulate and settle with the patent troll or stop the activity that is the subject of the threat if the demands are too high. Patent trolls rely on these perverse incentives and often make demands indiscriminately, knowing that they can cash-in without having to worry that the recipient of the letter will litigate.¹

As a result of these incentives, our members like many other main street businesses are principally harmed by demand letters that “smash-and-grab” trolls use to extort money out of businesses for whom a patent litigator is an otherwise unnecessary expense. Too often these letters make vague and deceptive allegations about infringement and imply that the sender has investigated the recipient’s business and found it infringing even though it becomes clear – once the troll’s entire campaign has come into full view and it is discovered that the troll has sent out thousands of such letters – that no such investigation could have occurred. Other deceptive representations include that other businesses in the industry have agreed to licenses, that the troll either has filed suit based on the patent, or is imminently expecting to file suit.

SPAN recognizes that the patent troll problem extends beyond the problems they create for our member businesses. Whereas the trolls that plague our businesses appear to be interested largely in cashing in on the relative lack of patent-sophistication of businesses like many of our members, there are other trolls that acquire broad – often ancient – patents and seek to use those patents to generate revenues from innovative companies in the high tech industry. In those cases, the trolls are likely to face litigation from companies that have significantly more experience with patents than our members do. Consequently, SPAN recognizes that the Commission’s 6(b) study will have to examine issues beyond those created for our businesses by patent trolls, including information that might be potentially relevant to patent quality and patent litigation reforms.

However, it is important to our members that the Commission keep in mind, as this study progresses, the high costs that patent trolls impose on innovation and

¹ Recent congressional hearings have demonstrated these issues in a variety of industries. *See, e.g.*, Testimony of Jamie Richardson, VP, Government and Shareholder Relations, White Castle System, Inc., Before the House Energy and Commerce Committee Subcommittee on Oversight and Investigations at 4-5 (November 14, 2013) (“Many of the PAE demands we receive negatively impact our business decision-making processes, and stifle innovation by limiting our ability to employ emerging technologies in everyday aspects of our business”); Testimony of Larry Sinewitz, Executive VP, Brandsmart USA, Before the Senate Committee on Commerce, Science, and Transportation, Subcommittee on Consumer Protection, Product Safety, and Insurance (November 7, 2013) (“A business like mine either ignores the letter at our own peril (and hope the harassment goes away) or we begrudgingly try to settle for as little money as possible. In every case, we have chosen the later approach and paid.”); Testimony of Jon Potter, President, Applications Developers Alliance, Before the Senate Committee on Commerce, Science, and Transportation, Subcommittee on Consumer Protection, Product Safety, and Insurance, 2-4 (November 7, 2013) (Giving examples of applications developers that either pay unjustified licensing fees or pull features out of applications rather than pay patent counsel to evaluate patents and demand letters). *See generally*, <http://energycommerce.house.gov/hearing/impact-patent-assertion-entities-innovation-and-economy>.

economic growth when they send unfair or deceptive demand letters to Main Street businesses. A study that focuses exclusively on patent litigation and acquisition issues is unlikely to uncover the facts relevant to the impact that patent trolls have on our businesses. SPAN is confident that the Commission will properly focus its study on all of the harm caused to the economy by patent trolls, including the patent assertion information called for in Section H. of the information requests sent to the PAE firms and Section O. of the requests sent to the manufacturing firms and non-practicing entities asserting patents in the wireless sector. Consequently, SPAN supports the Commission's proposed 6(b) study as it is described in the federal register notice.