

**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 PUBLIC KNOWLEDGE

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June 18, 2014

Public Knowledge¹ respectfully submits the following comments on the proposed Patent Assertion Entity study, in response to the Notice and Comment Request dated May 19, 2014 (hereinafter “Notice”).² Public Knowledge previously submitted comments on this subject matter in response to an earlier request for comments.³

In brief, Public Knowledge supports the proposed study, which will appropriately benefit the public and advance the mission of the Federal Trade Commission while minimizing the paperwork burden on those from whom information is being collected. The proposed study thus both

¹Public Knowledge is a nonprofit public interest organization whose primary mission is to promote technological innovation, protect the rights of all users of technology, and ensure that emerging issues of technology law, including patent law, serve the public interest.

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

³See 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>.

complies with the purposes of the Paperwork Reduction Act and advances valuable policy goals.⁴ This is so for at least three reasons, explained in detail below. First, the estimated cost burden is minimal and reasonable, particularly in comparison with other approved FTC studies. Second, the data to be collected will create a substantial public benefit by revealing information on a significant but secretive industry of patent assertion. Third, the proposed study would advance the mission of the FTC in protecting consumers from unfair and deceptive trade practices.

Accordingly, we commend the FTC in continuing to move forward with the proposed study on patent assertion entities, and urge OMB to approve the proposed study.

I. THE PROPOSED DATA COLLECTION IMPOSES A MINIMAL BURDEN ON RESPONDENTS

The cost and time burdens of the proposed study are minimal, particularly in view of the public benefit and importance of the study. The hours and cost estimates set forth in the Notice are well within an acceptable range, as compared with other burden estimates for analogous FTC studies.

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 This is substantially more than the FTC’s original estimate of 90–400 hours.⁶ Nevertheless, the estimated burden hours are still acceptably minimal.

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 Other FTC 6(b) studies have estimated burdens of up to 620 hours, for a study on alcohol marketing,⁸ and 900 hours, for a study on food

⁴See 35 U.S.C. § 3501(1)–(2) (2013).

⁵79 Fed. Reg. 28,715, 28,728 tbl.

⁶78 Fed. Reg. 61,352, 61,357.

⁷See 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).

⁸Alcohol 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).

marketing.⁹

Indeed, the hours estimate for the present study is likely *too high*. This is because the FTC did not account for the fact that much of the requested information has probably already been gathered by the patent assertion entities being investigated, in the course of asserting their patents. For example, the Notice proposes requesting information on patent licensing activities.¹⁰ That information is often gathered and produced in the course of patent litigation as well.¹¹ Patent assertion entities engage in patent litigation almost by definition, so it is likely that they have already gathered and produced much of the patent licensing information that the FTC is soliciting. Thus, the burden of responding to the proposed requests will likely be lower than the FTC's estimate.

The cost burden, estimated by the FTC at \$250 per hour, is in line with the 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 PROPOSED STUDY WOULD BE VALUABLE TO THE PUBLIC INTEREST

Information on the nature of PAEs, their patent portfolios, and their activities currently remains limited. Thus, information that results from the proposed Section 6(b) study would be particularly helpful to everyone, including individual consumers, small businesses, policymakers, and the public.

As Public Knowledge noted in its previous comments,¹² there is a dearth of broad empirical data about patent assertion entities, their activities, and their effect on the economy. What is

⁹Food 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).

¹⁰79 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”).

¹²This section summarizes Section I of Public Knowledge's previously 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.

publicly known largely consists of lawsuits filed in court and anecdotal information from those targeted by PAEs. However, anecdotal evidence does not have the level of rigor or comprehensiveness that this FTC 6(b) study would provide.

Any resulting report or analysis by the FTC would thus benefit a variety of marketplace participants and stakeholders. Lawmakers and other government agencies, who are already actively engaged in considering reforms to the patent system, would be able to make decisions based on facts and statistics gleaned from the study. Small businesses would better understand the practices of patent assertion and thus be better equipped to defend themselves upon receiving a patent demand letter. And, perhaps most importantly, the FTC would have a basis of information for investigating unfair and deceptive practices in the area of patent assertion—an area where the FTC has already expressed concern¹³—and thus American consumers would be better protected from harms caused by improper and abusive patent assertion.

III. THE FTC WILL ADVANCE ITS MISSION BY STUDYING HOW PATENT ASSERTION ENTITIES IMPACT CONSUMERS AND BUSINESSES

Besides conferring a benefit upon the public at large, the proposed study of patent assertion entities will advance the mission of the FTC to protect consumers from unfair and deceptive trade practices. As Public Knowledge explained 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 one such opaque business practice that deserves the FTC's attention. Patent demand letters are widely criticized because they are often vague, misleading, and deceptive in demanding settlement payments. The potential for unfairness and deception is clearly present in the patent assertion industry, placing that industry squarely within the FTC's purview. Indeed,

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

¹⁴This section summarizes Section II of Public Knowledge's 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.

the FTC has previously investigated the patent economy, producing two comprehensive reports on patents and attendant competition-related issues.

Thus, the proposed study is well within the wheelhouse of the FTC, and the agency should be permitted to proceed with this important and timely investigation.

IV. CONCLUSION

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

Public Knowledge thanks the Office of Management and Budget and Federal Trade Commission for providing the opportunity to submit these comments. If there are any remaining questions relating to the matters presented herein, the undersigned would be happy to provide further information as necessary.

Respectfully submitted,

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