



June 18, 2014

Filed Electronically

Suzanne Munck
Chief Counsel for Intellectual Property and Deputy Director
Office of Policy Planning
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue N.W.
Washington, DC 20580

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

Dear Ms. Munck:

Intel Corporation (“Intel”) appreciates the opportunity to submit these comments in response to the Federal Trade Commission’s Federal Register Notice about Patent Assertion Entities (“PAEs”). We believe the FTC’s inquiry will help advance a more data-based understanding of the impact of PAE behavior on consumers, innovation, and the patent system and appreciate the FTC’s consideration of these issues.

If you have any questions regarding Intel’s comments, please do not hesitate to contact me.

Sincerely,

Tina M. Chappell
Director of Intellectual Property Policy
Intel Corporation

Tina.M.Chappell@intel.com
(202) 626-4388

Additional Comments of Intel Corporation
On The
Federal Trade Commission’s Revised Proposed Section 6(b)
Information Requests About Patent Assertion Entities
And Other Entities Asserting Patents

June 18, 2014

Intel Corporation appreciates the opportunity to submit additional comments in response to the Commission’s revised proposed information requests about patent assertion entities (“PAEs”) pursuant to section 6(b) of the Federal Trade Commission Act. Intel focuses these additional comments solely on a new question included in the revised information requests: “How does PAE patent assertion behavior compare to that of other entities that assert patents?”

Specific Recommendations

The ability of private researchers to gather data on PAE, and more broadly on NPE, patent assertion behavior, has been constrained by their access to only publicly-available information. The FTC’s use of its compulsory process powers to obtain information about PAEs¹ will provide valuable analysis about patent assertion behavior to guide U.S. public policy. In support of the FTC’s information request, Intel recommends attention to the following three areas, which Intel believes will assist the FTC in determining how the patent assertion behavior of PAEs differs from the more traditional behavior of practicing entities.

¹ Innovation-harming behaviors are not limited to PAEs; other NPEs and increasingly some practicing entities have engaged in similar behaviors as well. We refer predominately to PAEs in these comments for simplicity only, but the comments apply equally to all entities who engage in such behaviors. See Yoon Ja-young, [K]FTC to Monitor Patent Rights Abusers, Korean Times (April 22, 2014) available at http://www.koreatimes.co.kr/www/news/biz/2014/04/123_155896.html (noting a trend for some practicing companies to “withdraw[] from the market [and] transform[] into NPEs”).

1. PAEs' Overreaching Licensing Demands

PAEs often seek and obtain licenses that far exceed the value of the underlying patented technology. The most recent study of patent litigation by PwC concluded that over the last 12 years, median damage awards for NPEs (which includes PAEs) have “significantly outpaced those of practicing entities.”² In fact, NPEs obtain nearly double the median damages awarded to practicing entities.³ This difference cannot be explained by any material difference in the value of the patented technology asserted by NPEs and practicing entities. Rather, it evidences the (highly lucrative) impact of NPEs' willingness to “swing for the fences” in their litigation demands, knowing that the higher their demand before a jury, the higher the award they get from a jury that tries to split the difference between parties.⁴

This ploy of claiming value far in excess of the technical merit of a patent often results in demands in PAE damages expert reports being multiple orders of magnitude higher than any truly “comparable” patent licenses that are entered into between willing parties without the threat of litigation overshadowing. Indeed, in Intel's experience, the damages demanded by many PAEs in litigation rarely bear any resemblance to the non-litigation patent licenses relied upon in the expert reports. A careful review of royalty demands in litigation (or demand letters) as compared to royalties in non-litigation contexts is important to determine whether PAEs are overreaching in their licensing demands to the detriment of innovation and consumers.

² 2013 Patent Litigation Study at 7, PricewaterhouseCooper LLP (2013), available at http://www.pwc.com/en_us/us/forensic-services/publications/assets/2013-patent-litigation-study.pdf.

³ *Id.*

⁴ Additionally, PAEs often capitalize on the vast expense of patent litigation, which can cost more than \$5 million for a single litigation, to obtain settlements that far exceed the true value of the patent.

To allow the FTC to determine whether PAEs overreach in their royalty demands, Intel recommends that the FTC request and analyze the following information: (1) for patents that were asserted by practicing entities before being transferred to a PAE, any differences in the licensing rates and damages obtained on those patents before and after the transfer; (2) any differences between licensing rates obtained outside of litigation and licensing rates demanded in litigation; and (3) any differences between royalty demands asserted in damages expert reports and the non-litigation “comparable” licenses relied upon in those reports. This information should reveal whether PAEs demand royalties that are unjustified by the value of the underlying technology, using the threat of costly litigation to extract an unreasonable “patent tax” from producing entities.

2. PAEs’ Exploitation of Standard Essential Patents

The assertion of standard essential patents (“SEPs”) in litigation is a growing trend, one driven by patent holders who are attracted to the idea that they do not have to prove infringement by each implementing product. Instead, they need only show the patent is essential to the standard and then all standard implementers are “locked in” as infringers, because SEPs are, by definition, necessary to manufacture and sell products that practice industry standards.

Practicing entities voluntarily join together in Standard Setting Organizations (“SSOs”) to develop and adopt industry standards because doing so enhances interoperability and encourages innovation. These benefits can be facilitated by the pooling of SEPs, which allows all of the patented technology necessary to practice a technology standard to be obtained through a single, standard license. When SEPs are, conversely, disseminated among PAEs who do not share the goal of interoperability, the benefits of standard-setting and its resulting innovation can suffer. Further, because practicing entities that participate in SSOs rely on the patented technology of the other SSO participants to make standard-compliant products, these practicing entities have a

vested interest in the availability of fair and reasonable royalties. Because NPEs do not make any products, they do not share this interest, and instead, only have an incentive to maximize their own royalties.

To allow the FTC to determine whether the patent assertion behavior of PAEs is reducing the availability of fair and reasonable royalties for SEPs, Intel recommends that the FTC request and analyze information detailing: (1) any SEPs asserted by the NPEs that were previously owned by a practicing entity; and (2) any differences between the licensing demands made and the royalty awards obtained before and those made and obtained after the SEP was transferred to the PAE. Further, we encourage the FTC to request information to allow it to analyze the total royalty burden for a single standard, such as the IEEE 802.11 standard, and the impact of PAE assertions and enforcement as compared to practicing entity assertions and enforcements to determine the impact of PAE behavior in the SEPs context.

Intel also believes that PAEs use shell companies to break-up SEP ownership and to artificially multiply the number of entities to which licenses must be paid to practice an industry standard. PAEs accomplish this by purchasing, holding, and asserting SEPs through multiple legal entities while simultaneously concealing the ownership relationship between those entities. The result is that executing a license agreement with one entity controlled by the PAE does not buy a practicing entity patent peace but, rather, serves as an invitation for additional demands for royalty payments from the PAE's other sub-entities. In the end, the PAE extracts multiple royalties for a single SEP portfolio from practicing entities. To explore this aspect of PAE assertion behavior, the FTC should require that all information requests must be addressed by both the PAE and all related legal entities.

3. PAEs' Assertion of Patents Against System-Level Products

PAEs also often assert their component-level patents against manufacturers of complete systems (such as wireless routers or personal computers) instead of manufacturers of individual components (such as Wi-Fi chips) in order to grab a disproportionate share of the profits from the system-level products. Although theoretically the basis of the royalty demand should make no difference—because the value of the underlying patented technology should be the same in either case—the Federal Circuit has recognized that this is often not the case in the real world.⁵ Practical experience has shown that PAEs asserting patents for a specific technology have been awarded greater royalties by targeting more expensive, downstream products than by targeting less expensive, upstream components—even when the asserted patents are predominately embodied in the components. The FTC should ask PAEs to produce documents that describe the PAEs' strategies for selecting targets for their demand letters and litigations. This inquiry will allow the FTC to gauge whether PAEs are specifically targeting downstream manufacturers to extract excessive damages by seeking royalties on the basis of a complete system for patents that actually read on a much less expensive individual component.

Conclusion

Intel believes that the FTC's information requests are both reasonable and necessary to inform public policy regarding PAE patent assertion behavior. The FTC is uniquely situated to obtain information that is vital to the proper understanding of PAEs, and Intel appreciates the opportunity to submit these additional comments on the FTC's revised proposed inquiry into PAE behavior.

⁵ See, e.g., *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012) (“Where small elements of multi-component products are accused of infringement, calculating a royalty on the entire product carries a considerable risk that the patentee will be improperly compensated for non-infringing components of that product.”)