

Before the
FEDERAL TRADE COMMISSION
Washington, DC 20580

In the Matter of)
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PAE Reports: Paperwork Comment) Project No. P131203
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COMMENTS OF THE CONSUMER ELECTRONICS ASSOCIATION

The Consumer Electronics Association (“CEA”)¹ supports the Federal Trade Commission’s (“FTC” or “Commission”) collection of specific business information pursuant to its Section 6(b) authority² to conduct investigations potentially leading to both published findings and enforcement action by the Commission.³ CEA believes that the Commission’s revisions to its Patent Assertion Entity (“PAE”) information requests are well tailored to the FTC’s reporting and enforcement responsibilities.

As CEA commented on the public information adduced at the December 10, 2012 FTC–DOJ Workshop on PAEs, it appears that much of the harm attributable to the business models and practices of PAEs is occurring most critically to the smaller firms that have been our most

¹ CEA is the principal U.S. trade association of the consumer electronics and information technologies industries. CEA’s more than 2,000 member companies lead the consumer electronics industry in the development, manufacturing and distribution of audio, video, mobile electronics, communications, information technology, multimedia, and accessory products, as well as related services, that are sold through consumer channels. Ranging from giant multi-national corporations to specialty niche companies, CEA members cumulatively generate more than \$208 billion in annual factory sales and employ tens of thousands of people in the United States.

² 15 U.S.C. § 46(b).

³ Agency Information Collection Activities; Submission for OMB Review; Comment Request, 79 Fed. Reg. 28,715 (May 19, 2014).

efficient and productive innovators and job creators.⁴ Business models based on the misuse of patent law and practice are hurting innovators and entrepreneurs, thus diverting resources and discouraging risk-taking. The December 10 panelists demonstrated that the informational and resource allocation harms of PAE litigation and threats were attributable in large part to marketplace and litigation asymmetries. Specifically, PAEs find it efficient to aggregate, threaten, and sue on masses of patents, without any potential responsibility for the defense costs that they engender.

The Commission's revised questionnaires for PAEs and non-practicing entities ("NPE") focus the FTC's analysis on the abusive tactics of bad actors. Not only will the expected report provide much needed insight into the elusive operation of trolls and their shell companies, but, importantly, it will shed light on operating companies that take advantage of the NPE model. It has been suggested that trolls have entered into privateering agreements with operating companies that have anticompetitive motives, hoping to raise the costs of their competitors' products.⁵

The data from this study will also give the Commission the opportunity to examine the related issue of royalty-stacking and how it has burdened the mobile space. Specifically, the Commission could use collected data to understand whether patent damages and royalty rates are

⁴ See Patent Assertion Entity Activities Workshop, Comments of the Consumer Electronics Association (Apr. 5, 2013), <http://www.justice.gov/atr/public/workshops/pae/comments/paew-0039.pdf>; *Patent Assertion Entity Activities Workshop*, FTC, <http://www.ftc.gov/news-events/events-calendar/2012/12/patent-assertion-entity-activities-workshop>. See also Patent Assertion Entity Reports: Paperwork Comment, Comments of the Consumer Electronics Association, Project No. P131203 (Dec. 16, 2013), http://www.ftc.gov/sites/default/files/documents/public_comments/2013/12/00066-87874.pdf.

⁵ See generally, Tom Matikainen, "Privateering: Should Companies Embrace the Patent Troll System?" Intellectual Property Brief, American University Washington College of Law, <http://www.ipbrief.net/2013/04/22/privateering-should-companies-embrace-the-patent-troll-system/>.

being applied appropriately. Patent damages and royalty rates must incentivize innovation; at the same time, the burden that royalty stacking may have on the consumer should be limited.

By narrowing the scope and bulk of the documents sought, the FTC will appropriately reduce the burden on responding entities. Thus, the Commission will ensure that PAE and NPE survey recipients will be able to respond on a timely basis. Chairwoman Ramirez has emphasized the importance of hard and specific empirical data as a foundation for making policy as well as for any enforcement activity by the Commission.⁶ Collection of this data thus will aid the Commission in addressing conduct, in both the policy and enforcement spheres, of those whose practices are found through data analysis to be anticompetitive or otherwise harmful to consumers.

Finally, while FTC action is helpful and constructive, CEA agrees with Chairwoman Ramirez⁷ that what the agency does cannot substitute for Congressional action. Provisions such as those contained in the Innovation Act⁸ passed last year by the House of Representatives are necessary if we are to effectively curb patent abuse and disincentivize frivolous lawsuits.

If America is to continue to be an economic leader, we must protect innovators, and discourage those who exploit our patent system while creating nothing of value. This investigation is an important next step to redress abuses.

⁶ See Edith Ramirez, Chairwoman, Federal Trade Commission, Remarks of Chairwoman Edith Ramirez, Fall Networking Event, ABA Antitrust Section's Intellectual Property Committee (Nov. 12, 2013).

⁷ *Id.*

⁸ Innovation Act, H.R. 3309, 113th Cong. (2013).

Respectfully submitted,

Consumer Electronics Association

By: _____
Michael Petricone
Senior Vice President, Government Affairs

Consumer Electronics Association
1919 S. Eads Street
Arlington, VA 22202
(703) 907-7544

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