



December 8, 2014

**MPHJ Technology Investments, LLC, et al—Consent Agreement;  
File No. 142 3003**

The Federal Trade Commission’s (hereinafter “FTC” or “the Commission”) mission includes protecting consumers and businesses from predatory or abusive behavior that distorts markets and cause economic harm. A core FTC mandate is enforcing against unfair or deceptive acts or practices, and doing so in a way that is likely to deter future deceptive behavior. MPHJ Technology Investments, LLC (“MPHJ”) engaged in per se deceptive and unfair actions by abusing the patents it purchased in a manner that materially distorted the market and injured tens of thousands of individuals and businesses.

The FTC is authorized to bind parties through settlement, thereby changing future behavior. While the Commission’s specific authority with regard to patents is not clearly delineated, the FTC could and should have done more to punish MPHJ and thereby deter all patent trolls from extorting businesses. Unfortunately, the FTC’s proposed consent decree falls way short. It does not fine MPHJ for its bad acts, meaningfully alter MPHJ’s business model, or deter future unfair or deceptive acts by other abusive Patent Assertion Entities (“patent trolls”).

For these reasons, the Application Developers Alliance (the “Alliance”) on behalf of our nearly 200 corporate members and more than 35,000 individual app developer members urges the Federal Trade Commission to withdraw the proposed consent agreement with MPHJ Technology Investments, LLC; Jay Mac Rust; and Farney Daniels, P.C. and seek appropriate redress, including substantial fines and more robust conduct limitations.

The proposed consent decree should be withdrawn and reformulated because it fails in the following respects:

- **Suggests the FTC’s Authority is Weak**– The FTC has the authority to punish MPHJ, but the consent decree signals that the FTC’s enforcement powers are essentially toothless, thereby encouraging similar abuses by patent trolls;
- **Fails to Clearly Define Illegal Patent Troll Conduct**– The illegal conduct identified by the FTC is vague, overbroad, and fails to clearly identify and establish conduct that will subsequently be interpreted as per se abusive;
- **Permits MPHJ to Continue Operations Without a Promise of Meaningful Change to MPHJ’s Behavior** – MPHJ is neither a manufacturer nor a service provider; its only business model is abusing patents. The agreement fails to dramatically alter its business operations and does not put MPHJ out of business;



- **Leaves the Patent In the Troll's Hands** – It does not require MPHJ to abandon or lose the right to assert the patent in question. Nor, does it prevent the patent troll from selling the abused patent to another troll outright or through a scheme where a subsequent troll re-engages the same extortion scheme while sharing profits with the original troll;
- **Lacks Monetary Penalties** – It does not include fines to deter MPHJ or countless other patent trolls from abusing patents and extorting businesses; and
- **Provides Zero Redress to Victims** – It fails to provide redress to make whole those individuals and corporations that received MPHJ's abusive demand communications and took actions – at substantial cost of time and monetary resources – to assess those claims or respond to those claims.

**Suggests the FTC's Authority is Weak.** As currently constituted, the consent decree establishes the unfortunate precedent that even if the FTC catches a patent troll red-handed in the act of defrauding other companies, the worst that will happen is that the troll may eventually sign an agreement preventing it from lying in the future to other potential victims. This shows other trolls that they can get away with their nefarious business practices, and that even if they are caught the consequences are negligible.

The FTC's failure to sanction such behavior encourages rather than discourages subsequent malfeasance by patent trolls. The proposed consent decree lacks the sort of biting sanctions required to warn trolls that they cannot continue to engage in abusive demand letter schemes. The proposed consent decree is a lost opportunity for the FTC to magnify the effects of this ground breaking enforcement action and to discourage countless other patent trolls engaged in similar practices.

**Fails to Clearly Define Illegal Troll Conduct.** The proposed consent decree should be withdrawn and reconstituted because the behaviors the FTC has identified are vague, overbroad, and do not provide clear guidance to other trolls about what specific conduct is illegal. The order leaves gray zones where patent trolls can credibly raise a defense of vagueness in response to future FTC complaints. Even those closely scrutinizing the proposed order will have trouble articulating what, specific conduct, cannot be done by Patent Assertion Entities in the future lest they be labeled trolls. As a result, this proposed consent decree fails to distinguish illegal acts from those deemed acceptable. Without greater clarity, victims will not know when to notify the FTC of potential abuses.

Additionally, the proposed decree is ineffective because it fails to create options for subsequent victims of MPHJ to immediately prevent and halt MPHJ's behavior. Such an outcome will only exacerbate the patent troll demand letter abuse problem rather than take a step towards its resolution.



**Permits MPHJ to Continue Operations Without a Promise of Meaningful Change to MPHJ's Behavior.** The FTC has broad settlement authority allowing them to effectively alter and deter illegal conduct through meaningful punishment. Unfortunately, the agreement fails to significantly alter MPHJ's business tactics or put them out of business.

MPHJ's only business – it does not make any products or provide any services – is the abuse of the patent system by extorting unmerited licenses from individuals and businesses it alleges are infringing patents it purchased. At best, the FTC should expect MPHJ to simply shift tactics to engage in other fraudulent extortion schemes to achieve the same fraudulent ends, i.e., unjustly obtaining nuisance settlement payments in the form of licensing agreements from future predation schemes it hatches.

**Leaves the Patent in the Troll's Hands.** The proposed consent decree should be rejected because it fails to take the abused patent away from MPHJ. When a patent is so obviously abused either by causing injury to a particular company or damaging numerous companies through threats, the FTC should – as a matter of course – foreclose the subsequent use of that patent by the patent troll. By effectively impounding the patent in question, the FTC can establish precedent for future FTC patent abuse enforcement actions. Such an action will also deter future trolls by raising the cost of doing business – an essential requirement to eliminate the troll business model.

Furthermore, the FTC should prevent the sale of the abused patent to another entity that might resume the campaign of abuse (i.e., a patent privateering scheme). The FTC should prevent a patent troll from further unjustly profiting due to sale to another patent troll or through licensing agreements that enrich the original troll when another entity acts as its proxy to extort unfair settlements. Consider the number of shell companies MPHJ used to conduct its "business." If MPHJ is willing to create 101 subsidiary companies, there is little to stop them from selling to or creating other companies to work on their behalf.

**Lacks Monetary Penalties.** Finally, the proposed consent agreement fails to protect consumers and app developers in that it does not sufficiently deter either MPHJ or other patent trolls from engaging in abusive, predatory and anti-consumer behaviors. The FTC has failed to fine MPHJ for each of the more than 16,000 known abusive demand letters sent to its victims. Each recipient of MPHJ's demand letter was injured immediately upon receipt of these demonstrably unfair and deceptive communications. Each recipient was forced to divert time and resources to address the claims and analyze their potential exposure. A substantial number also sought consult with counsel on the potential costs and outcomes of prolonged litigation.

**Provides Zero Redress to Victims.** As the FTC found, a handful of companies actually paid "licensing" fees to avoid millions of dollars of litigation costs to prove the allegations of patent abuse alleged in those communications were meritless. Each of the recipients of these abusive letters, including several individuals, were victimized, yet the FTC's failure to



fine MPHJ allows MPHJ to profit from their victimization. The FTC could and should force MPHJ to disgorge any ill-gotten license fees and pay a substantial fine for each and every communication it sent that was per se unfair or deceptive.

Fortunately, the Commission has time to make this right. MPHJ, Mac Rust, and Farney Daniels took money, resources, and thwarted the creation of beneficial inventions – deserving of patent protection – from American businesses and the public. The FTC has the power to rectify the deplorable actions of one troll and should not waste this critical opportunity.

Respectfully submitted,

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